

PUBLICATION

Is AI-Generated Content a Protectible Asset?

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March 12, 2026

1. Background

Recent widespread adoption of generative artificial intelligence (GAI) tools has introduced a fundamental legal question: what cognizable right, if any, attaches to content produced by an AI system? As AI-generated text, images, music, source code, and other outputs become embedded in commercial workflows, the absence of a settled framework for ownership presents material risk for those who rely on such content as a commercial product or creative asset.

Because AI-generated outputs are embodied as text, audio, or other visual elements, many have turned to copyright law for resolution as to how ownership should be accorded to these outputs. The existing framework in copyright law, however, presents significant obstacles to the protection of AI-generated outputs: an AI-generated work is only eligible for copyright protection where there is meaningful, substantial input from a human author.

In the absence of certain protection for AI-generated works under copyright law, other legal theories, including contractual rights and common-law property torts, may offer partial alternatives. Even so, these other legal theories often fall short of providing the robust, nationwide exclusivity that copyright law affords. Consequently, many are left wondering how to best protect AI-generated content – at least until new guidance emerges on the protection of these assets.

2. Copyright Law and AI-Generated Content

Human Authorship: Copyright protection subsists in "original works of authorship fixed in any tangible medium of expression" under 17 U.S.C. § 102(a). Through decades of judicial construction and administrative practice, courts and the U.S. Copyright Office (**USCO**) have consistently held that "author" means a human being. A machine, algorithm, or AI system cannot be an author for purposes of the Copyright Act.

The Copyright Office's 2023 Policy Guidance: In March 2023, the USCO published a Statement of Policy entitled "Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence." In this statement, [the USCO confirmed](#) that works produced entirely by AI systems, without sufficient human creative control over the expressive elements, are not eligible for copyright registration. The USCO recognized, however, that human-AI collaborative works may qualify for limited copyright protection where a human author selects, arranges, or modifies AI-generated material in a sufficiently creative way. In other words, the AI-generated portions themselves remain unprotectable, and it is the applicant's burden to disclose and disclaim each of these AI-generated elements.

The D.C. Circuit's Decision in *Thaler v. Perlmutter*: On the heels of the USCO's issuance of the Statement of Policy, [the U.S. District Court for the District of Columbia affirmed the USCO's decision](#) to deny a claimant's copyright application for visual art generated by an AI system. On appeal, in March 2025, the Court of Appeals

for the D.C. Circuit sided with the district court, holding that the Copyright Act requires all works to be authored by a human being.

The D.C. Circuit pointed to a number of provisions in the Copyright Act that frame various requirements in terms of human-only capabilities and make clear that authors must be human, including: the ownership provision, which assumes the author can hold property; duration provisions, which measure terms by the author's lifespan; the concept of joint authorship, which requires that multiple authors intend that their contributions be part of a unitary work; and the provision specifying that transferring copyright ownership requires a signature. For now, this decision stands, with the U.S. Supreme Court having denied the copyright claimant's writ of certiorari in March 2026.

3. If AI-Generated Content Is Not Protectible Under Copyright Law, How Is It Protected?

Given the limitations under copyright law, parties have turned to contractual mechanisms to allocate ownership rights. Most commercial AI platforms include terms of service or enterprise license agreements that address ownership of outputs, with many expressly assigning to users all rights in generated outputs, to the extent any exist.

This contractual assignment conveys ownership to the user as between the user and the AI provider. However, this right arises from private agreement, not federal or state statute, and, as such, binds only the contracting parties. A third party who copies AI-generated output is not bound by the user's contractual ownership claim. Accordingly, without any underlying copyright in the original AI-generated output, there is likely no cause of action for infringement, no statutory damages, and no right to injunctive relief against third parties.

4. What Rights of Enforcement Are There in AI-Generated Content?

In the absence of enforceable copyright, remedies for misappropriation are substantially limited. Potentially viable theories may arise under state-based common law or statutory torts.

Trespass to Chattel; Conversion: The tort of trespass to chattels involves intentional interference with another's possession of personal property. Conversion, on the other hand, is the intentional exercise of dominion over another's property that seriously interferes with the owner's control. While each of these has traditionally been applied to tangible property, some courts have extended these doctrines to electronic assets. Therefore, whether AI-generated content constitutes intangible property subject to conversion claims is an open and jurisdiction-specific question.

Unfair Competition: State unfair competition laws, including both common-law doctrines and statutory frameworks, may provide a basis for challenging a competitor's unauthorized use of AI-generated content. These claims typically require proof that the defendant engaged in conduct that is unfair, deceptive, or otherwise contrary to honest commercial practices – such as passing off AI-generated content as one's own original work or making false representations about the origin of such content.

Unjust Enrichment: A party might pursue a claim for unjust enrichment where another has benefited from the use of AI-generated content under circumstances that make retention of that benefit inequitable. This theory requires showing that the defendant received a benefit, that retention of that benefit without compensation is unjust, and that the plaintiff has no adequate remedy at law.

Trade Secrets: Trade secret law may provide protection for certain AI-generated content, but only where the content derives independent economic value from not being generally known and is subject to reasonable measures to maintain its secrecy. If the AI-generated content is publicly disclosed, broadly disseminated, or easily reproducible by others using similar tools, the content will likely fail to qualify as a trade secret. Moreover, where AI systems generate substantially similar outputs in response to comparable prompts, establishing that any particular output is secret or was misappropriated – rather than independently generated – may be difficult. Accordingly, while trade secret law may protect certain AI-generated materials maintained as confidential internal assets, it offers limited utility for content intended for public-facing or commercial distribution.

State Unfair and Deceptive Trade Practices Acts: Many states have enacted consumer protection statutes prohibiting unfair or deceptive acts or practices in commerce. Depending on the jurisdiction and the specific conduct at issue, a party whose AI-generated content is misappropriated by a competitor might frame a claim under such statutes, particularly if the misappropriation involves false claims of origin or ownership. These statutes vary widely in scope, available remedies, and standing requirements.

Ultimately, property-based claims and the misappropriation-based tort theories are presently a poor substitute for copyright. They require proof of actual damages, lack the procedural benefits of federal copyright law (including statutory damages, attorneys' fees, and nationwide injunctive relief), and vary significantly by jurisdiction. Businesses that treat AI-generated outputs as core commercial assets without securing any underlying legal protection may find themselves with limited recourse against third-party misappropriation.

5. Go-Forward Considerations

In light of the current state of the law, businesses and individuals who create, commission, or rely upon AI-generated content must act deliberately and proactively to protect their interests. The legal landscape is evolving rapidly, and the strategies that prove most effective will depend on the nature of the content. There is no single solution that replicates the comprehensive protection that copyright affords to human-authored works.

Instead, a layered approach – combining contractual safeguards, documentation practices, registration strategies, and ongoing monitoring – offers the best available framework for managing risk and preserving value in AI-generated assets:

1. **Review and negotiate AI platform terms:** Ensure agreements explicitly assign all rights in outputs to your organization and, where possible, negotiate enterprise-level agreements addressing indemnification for third-party IP claims.
2. **Document human creative contribution:** For AI-assisted works involving meaningful human input – selection, arrangement, curation, or modification – maintain contemporaneous records to support copyright registration claims over human-authored elements.
3. **Implement internal contractual allocation:** Ensure employment agreements, contractor agreements, and statements of work expressly allocate ownership of AI-generated outputs and require disclosure of AI tool usage.
4. **Track AI tool usage:** Establish policies requiring documentation of AI tools used, prompts employed, and human modification of outputs.

As generative AI becomes increasingly integrated into commercial workflows, businesses should not assume that AI-generated outputs carry the same ownership and enforcement protections as human-authored works.

Careful planning around tool selection, contractual allocation, documentation of human involvement, and confidentiality practices is essential to managing risk and preserving value in these assets.

For questions regarding AI-generated content, intellectual property strategy, or risk mitigation, please contact [Nicole Berkowitz Riccio](#), [Dominic Rota](#), or any member of Baker Donelson's [Intellectual Property Group](#).