

## AI and product design

In the world of design and innovation, the use of artificial intelligence (AI) is playing an increasing role. Advanced AI tools are more and more used in the process of designing products.

With that, questions also arise about protection of AI-generated designs and possible infringement of third-party rights when an AI tool is used in the design process.

In this newsletter, I answer the question about possible copyright and design protection when using AI tools, and I end with some practical tips for designers and manufacturers. First, a brief introduction on the creation of AI tools.

### Creation of AI tools

On 8 April 2024, I gave a talk at De Woonindustrie on AI in the interior design industry. Of the 85 attendees, 80% were already working with AI tools, such as ChatGPT, DALL-E, Midjourney and other tools. The use of AI tools has boomed in a short period of time.

To develop AI tools, texts, photos, films, music, design etc. (hereinafter "works") are used that are on the internet. Those works are often copyright protected, or protected by other intellectual property rights, such as design rights.

The creators of the protected works used for AI training purposes have not granted permission to do so and receive no remuneration. Reason why lawsuits have been launched in several countries to get a ruling from the courts on this. After all, to use advanced AI tools, you have to pay. It feels unfair that the creators of the works used to develop and train the tools are not paid themselves.

The first court ruling on the issue is therefore awaited with interest worldwide.

Tech companies are already becoming more cautious in anticipation, though, and licence deals have been struck with news media publishers, for example, obtaining retrospective permission.

Besides the above question of whether the AI tool itself was lawfully created, the question is whether a design created using an AI tool is or can be protected.

### Product design created with an AI tool protected?

Can a product design made with an AI tool be protected by copyright?

#### Copyright

To qualify for copyright protection, it is required that a design has been made by a human being, through making creative choices in the design process.

When you create a design using an AI tool, you give the tool an instruction, called a prompt, in which you specify what the tool should do. For example, "Design a chair in the style of Marcel Wanders". Or an even more specific prompt, or several consecutive prompts, for the desired external design. The AI tool then generates one or more designs.

Courts in several countries have already ruled on whether a work generated purely by an AI tool, without any human creativity involved, can be protected by copyright. In the US and in the EU, the answer is no. Copyright protection requires human input, and creating the prompt(s) and thereby controlling the AI tool is insufficient for that.

#### Design right

Obtaining design right protection requires an object manufactured in an industrial or artisanal manner (a design) that is new and has an individual character. The design must then be registered for maximum protection.

The question is whether 'object manufactured in an industrial and artisanal manner' also means the contribution of a human being, as in copyright law. The EU law says nothing about this.

It could well be that a design only generated by an AI tool could be protected with design rights. As long as it is novel and has an individual character. No court ruling on this is yet known.

### Risk of infringement of third-party rights

When creating a design using an AI tool, you do not know whether the design generated is identical to, or too similar to, a design that already exists. After all, the tool is trained with existing work.

There is therefore a chance that the design that rolls out after giving the prompt will be too similar to already existing products. How big that chance is is hard to say. It depends on what data were used to develop the tool.

Using a design generated only by the AI tool therefore carries the risk of infringing third-party rights.

### Tips

Finally, some practical tips to maximise the protection of a design created using AI tools.

- Use human creative input when creating the design and add that to the design generated by the AI tool.
- Keep a detailed log of the design process and the AI tools used so that you can demonstrate how the design was created.
- Check the terms of use of the AI tool. Can you use the product that is generated commercially and are there any conditions attached?

If you have any questions about the use of AI tools, intellectual property rights or infringement of these rights, please contact me. I will be happy to help you.

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