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AI-Generated Artwork and Copyright Ownership

By Catherine Nyarady and Crystal Parker
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On Aug. 18, 2023, the U.S. District Court for the District of Columbia granted summary judgment for the United States Copyright Office (Copyright Office) in *Thaler* v. *Perlmutter*, 1:22-cv-1564 (D.D.C.), affirming the Copyright Office's denial of copyright registration for artwork created by a generative artificial intelligence (generative AI) system.

The district court, in line with the Copyright Office's determination, found that the generative AI-created artwork at issue did not satisfy the Copyright Act's "human authorship" requirements.

The Copyright Act

The Copyright Act provides copyright protection to "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. §102(a).

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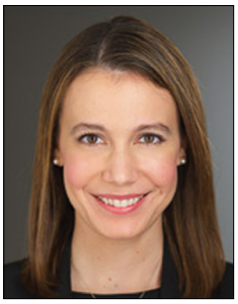

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The act further provides that the work must be "fixed" in the relevant medium "by or under the authority of the author." It does not explicitly define the term "author."

Case Background and the Copyright Office's Decision

The plaintiff, Stephen Thaler, developed a generative AI system called the "Creativity Machine," purportedly capable of generating original artwork. *Thaler* v. *Perlmutter*, 2023 WL 5333236, at *1 (D.D.C. Aug. 18, 2023).

Thaler used his generative AI system to produce the piece "A Recent Entrance to Paradise," subsequently filing an application with the Copyright Office for registration of the work. On that application, Thaler listed his generative AI system as the author of "A Recent Entrance to Paradise,"

explaining that the artwork had been "autonomously created by a computer algorithm running on a machine." However, Thaler claimed the copyright for himself, as a work-for-hire.

The Copyright Office rejected Thaler's registration application as "lack[ing] the human authorship necessary to support a copyright claim."

Thaler twice sought reconsideration of the Copyright Office's decision, with the Copyright Office Review Board ultimately upholding the denial of Thaler's application, refusing to "register a claim if [the Copyright Office] determines that a human being did not create the work."

The District Court's Decision

Thaler then challenged the Copyright Office's denial in U.S. district court, with both parties moving for summary judgment. The specific question facing the court was whether "a work generated autonomously by a computer falls under the protection of the copyright law upon its creation."

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In granting the Copyright Office's motion and holding that it did not err in rejecting Thaler's registration, the court relied on the factual administrative record that had been before the Copyright Office but engaged in an extended discussion of the legal basis for denying registration to artwork created solely by a generative AI system.

The court described Thaler's arguments that copyright in the relevant artwork should transfer to him via the work-for-hire doctrine as an "attempt[] to complicate the issues presented," because that doctrine addresses *who* should receive the copyright registration, not whether the work is copyrightable in the first place—the decision addressed by the Copyright Office in denying Thaler's application. In the court's words, Thaler's argument therefore "put the cart before the horse."

Thaler nevertheless argued that copyright protection should attach to artwork produced by generative AI given the malleable application of copyright law. The district court acknowledged copyright law's flexibility to adapt to new mediums and technology, noting that the Copyright Act covers "original works of authorship fixed in any tangible medium, *now known or later developed*" (quoting 17 U.S.C.§102(a)) (emphasis in original).

It discussed, as an example of that malleability, 19th century Supreme Court precedent, invoked by Thaler, upholding the extension of copyright protections to photographs. In doing so, the district court explained that human involvement and ultimate creative control were essential to the Supreme Court's decision that copyright could properly extend to the then-new medium.

In particular, the court noted that in upholding the grant of copyright protection to photographs, the Supreme Court had explained that while a camera mechanically reproduces the image before it, a photograph is nevertheless the "original intellectual conception[] of the author" and thus copyrightable (quoting *Burrow-Giles Lithographic* v. *Sarony*, 11 U.S. 53, 59 (1884)).

However, here, the district court held that Thaler's work—by his own admission that it was generated entirely by his AI system—did not meet this "bedrock requirement" of copyright, human authorship. Though the Copyright Act does not define the term "author," the court noted that the concept of human authorship stems from "centuries of settled understanding," reaching all the way back to the Federalist Papers.

In addition, the Copyright Act's previous iteration, the Copyright Act of 1909, specifically limited registration to a "person," and Congress made clear that it did not intend to alter this standard when enacting the modern version of the Act in 1976.

The court also invoked a number of unsuccessful registrations to further illustrate principles of human authorship, such as *Naruto* v. *Slater*, 888 F.3d 418, 420 (9th Circuit 2018), in which the U.S. Court of Appeals for the Ninth Circuit held that a monkey, as a non-human, did not have standing under the Copyright Act to sue for infringement of photos taken by the monkey, as well as *Kelley* v. *Chicago Park District*, 635 F.3d 290, 304-06 (7th Cir. 2011), in which the U.S. Court of Appeals for the Seventh Circuit rejected copyright protection in a cultivated garden, given that the garden's form stemmed from "the forces of nature." *Thaler*, 2023 WL 5333236, at *5.

Accordingly, the district court concluded that Thaler could not point to any authority where copyright registration was granted for a work created by a non-human.

Accordingly, the district court concluded that Thaler could not point to any authority where copyright registration was granted for a work created by a non-human. It explained that "[c]opyright has never stretched so far, however, as to protect works generated by new forms of technology operating absent any guiding human hand, as plaintiff here urges."

Whereas photographs depend on human creativity in using a camera to capture an image, Thaler had represented to the Copyright Office that the artwork at issue was "autonomously created by a computer algorithm," and that his personal claim stemmed only from ownership of the generative AI system. As a result, the work lacked human authorship.

Conclusion

Thaler has since noticed an appeal to the D.C. Circuit. Notice of Appeal at 1, *Thaler* v. *Perlmutter*, 1:22-cv-1564 (D.D.C. Oct. 11, 2023), ECF No. 25. As of the time of writing, the appeal has not been briefed.

While the district court found the issues presented in *Thaler* to be relatively straightforward, it appeared to recognize that other instances may be more complex to resolve.

The court was limited to the administrative record before it, and therefore could not consider Thaler's statements raised on summary judgment that he "provided instructions and directed" the generative AI to produce the artwork, that the generative AI was "entirely controlled" by Thaler, and that it only operated at his direction. 2023 WL 5333236, at *6.

Thaler never made similar assertions in filing his application with the Copyright Office or in twice requesting reconsideration.

Future registration applications and challenges along these lines could be forthcoming. Given the widespread interest—from legislators, creators, developers, and others—in the intersection of generative AI and copyright law, this is not the last the courts will see of this issue.