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LEGAL ALERT | ARTIFICIAL INTELLIGENCE

AI's Artistry Denied: No Copyright for AI Author

by Jonathan P. Hummel and Jonathon A. Talcott

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Summary

The U.S. District Court for the District of Columbia upheld last week, in a first-of-its-kind case, the U.S. Copyright Office's denial of an application to register an image purportedly generated entirely autonomously by an artificial intelligence system. While the opinion rejects copyright protection for works created solely by AI, there may still be room for protection of works generated by AI with a certain level of human involvement.

The Upshot

- The plaintiff sought to claim copyright for a work authored solely by an artificial intelligence system.
- The Copyright Office denied the application on the basis that the work "lack[ed] the human authorship necessary to support a copyright claim," and noted that copyright law only extends to works created by human beings.

The Bottom Line

A District Court ruled that U.S. copyright law does not afford protections to works created solely by artificial intelligence. An open question remains as to copyrightability when the work is authored by AI and humans. Businesses seeking copyright protection should, when applying for copyright protection, consider indicating human and non-human contributions and perhaps highlight the human creative contribution to the work.

On Friday, August 18, 2023, in *Stephen Thaler v. Shira Perlmutter and The United States Copyright Office*, Judge Beryl A. Howell of the U.S. District Court for the District of Columbia upheld the U.S. Copyright Office's denial of an application to register an image purportedly generated entirely autonomously by an artificial intelligence (AI) system. The opinion rejected copyright protection for works authored solely by AI. However, there may still be room for such protection depending on the level of human involvement in the authorship of the work.

Plaintiff Dr. Stephen Thaler owns an AI system that he calls the "Creativity Machine." He claims that Creativity Machine generated a piece of visual art of its own accord. The work is below:

A Recent Entrance to Paradise – Creativity Machine

When Mr. Thaler sought to register the work for copyright, the Copyright Office denied his application, asserting the work lacked human authorship, a prerequisite for a valid copyright to issue. This is not Mr. Thaler's first foray into testing the waters of IP protection for AI-generated works. Earlier this year, the U.S. Supreme Court rejected Mr. Thaler's request to review the U.S. Court of Appeals for the Federal Circuit's holding that his same AI "Creativity Machine" could be named an "inventor" on a patent application.

In this case, the District Court sided with the Copyright Office, holding that "human authorship is an essential part of a valid copyright claim, and therefore plaintiff's pending motion for summary judgment is denied…" In the application for copyright, Mr. Thaler identified his "Creativity Machine" as the only author, and explained the work had been "autonomously created by a computer algorithm running on a machine." Mr. Thaler sought to claim the copyright "as a work-for-hire to the owner of the Creativity Machine."

As noted, the Copyright Office denied the application on the basis that the work "lack[ed] the human authorship necessary to support a copyright claim," and noted that copyright law only extends to works created by human beings. Mr. Thaler made several requests for reconsideration, all of which were denied, and ultimately sued arguing the Copyright Office's refusal was "arbitrary, capricious, an abuse of discretion, and not in accordance with the law," in violation of the Administrative Procedure Act (APA), 5 U.S.C. § 706(s).

Under the Copyright Act of 1976, copyright protection attaches "immediately" upon the creation of "original works of authorship fixed in any tangible medium of expression," provided the works meet certain requirements. *Fourth Estate v. Public Benefit Corporation v. Wall-Street.com, LLC*. Judge Howell notes, "[b]y denying the registration, the Register concluded that no valid copyright had ever existed in a work generated absent human involvement, leaving nothing at all to register and thus no question as to whom that registration belonged to." To be sure, copyright law is adaptable to incorporate works generated using new technologies (*e.g.*, cameras, computer software) with human input, but "underlying that adaptability, however, has been a consistent understanding that human creativity is the *sine qua non* at the core of copyrightability, even as that human creativity is

channeled through new tools or into new media." In summary, Judge Howell concluded, "[c]opyright has never stretched so far, however as to protect works generated by new forms of technology ***operating absent any guiding human hand*** …Human authorship is a bedrock requirement of copyright."

It is important to note the limited administrative record that the court reviewed here showed only that the work at issue was generated "absent" human involvement, and an open question remains as to the threshold of copyrightability when both humans and AI contribute. That is, the Copyright Office (and the District Court for the District of Columbia) currently interprets U.S. copyright law to *not* afford protections to works created by AI that have no human authorship. Practically speaking, therefore, businesses seeking copyright protection should identify any contributions to the work attributable to human creativity and avoid submitting applications that list an artificial intelligence system as the sole author of the work.

Contacts

Jonathan P. Hummel
ASSOCIATE
hummelj@ballardspahr.com
678.420.9434

Jonathon A. Talcott
PARTNER
talcottj@ballardspahr.com
602.798.5485