District Court Rules that AI-Generated Works Cannot Be Copyrighted

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Client Alert

The D.C. district court recently affirmed the U.S. Copyright Office's position that a work generated entirely by artificial intelligence (AI) technology is not eligible for copyright protection. The case is *Stephen Thaler v. Shira Perlmutter and The United States Copyright Office* (1:22-cv-01564) (June 2, 2022).

Dr. Stephen Thaler had challenged the U.S. Copyright Office (USCO) over its denial of his copyright registration application for an image known as "A Recent Entrance to Paradise." The image, Thaler told the USCO, was created solely by an AI tool called the "Creativity Machine" without any human authorship.

The *Thaler* decision is unlikely to have direct impact on a significant number of applications for copyright registration. There are not many applicants trying to register works "autonomously created by a computer algorithm running on a machine" without any human authorship. But the decision does raise the question of how much human input is necessary to qualify the user of an AI system as the "author" of a generated work. While that question was not before the court, the court's *dicta* suggests that *some* amount of human input into a generative AI tool could render the relevant human an author of the resulting output.

Key Takeaways

- A work generated *entirely* by AI is *not* eligible for copyright. The court stated that "human authorship is a bedrock requirement of copyright."
- Other than the *dicta* in *Thaler* noted above, no court has yet addressed whether (and if so, when) a human's use of generative AI tools to create content will result in a copyrightable work. This raises the question of whether works created using AI tools can be protected against infringement at all. Looking into the future, defendants accused of infringing works created using AI tools are bound to argue that the works are not protected by copyrights at all. We discussed the copyrightability of outputs from generative AI tools in a previous **client alert**.
- The Copyright Act's "work made for hire" doctrine is not an exception to the human authorship requirement. Thaler unsuccessfully asserted that non-human authorship is already recognized in the work made for hire context (since in the work made for hire context, copyright can vest in a (non-human) company in the first instance and not in the (human) author). Creativity Machine was, Thaler argued, like his employee, and any copyrights in the Creativity Machine's works should vest immediately in him. Neither the USCO nor district court were convinced.

The Impact of the "How Much Human Input" Issue

Thaler did not address how much human authorship is necessary to make a work generated using AI tools copyrightable. The impact of this unaddressed issue is worth underscoring.

In the software industry, for example, coding assistants such as GitHub Copilot, which can auto-complete code, are widely used to generate very large amounts of code. Microsoft's CEO, Satya Nadella, **said last month** that *27,000 companies* are paying for a GitHub Copilot enterprise license. In addition, many engineers use coding assistants *without* their employers paying for it (or even knowing about it). As of February 2023, GitHub announced that, for developers using Copilot, Copilot is behind 46% of the "developer" code across all programming languages and 61% of all code written in Java. Those percentages will only increase as these tools get better, and companies are currently competing to provide the go-to coding assistant tool that developers will use.

But if a company's developers are not the "authors" of the code they create using coding assistants, then that code will not be protected by copyright. Given the volume of code generated through the use of such tools as noted above, some companies may find themselves in the position of having no copyright protection for a significant portion of what they consider to

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be proprietary code. Regardless of one's views on the extent to which copyright *should* protect software code, the fact that a significant amount of code created in the future may not be protected by copyright is important and underappreciated.

Thaler Court Analysis: "Works of (Human) Authorship"

The Progress Clause of the Constitution gives Congress the power to "promote the Progress of Science . . . by securing for limited Times to Authors . . . the exclusive Right to their . . . Writings[.]" U.S. Const. art. I § 8, cl. 8. Pursuant to this authorization, the Copyright Act extends copyrights to "original works of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a). The Copyright Act neither defines "authorship" nor "works of authorship." That said, something cannot be a work of authorship without being the work of at least one author, if for no other reason than the work must be "fixed" in a tangible medium of expression "by or under the authority of the author." 17 U.S.C. § 101.

The district court in *Thaler* reviewed the Copyright Office's refusal to register the work under the Administrative Procedure Act's arbitrary and capricious standard. The court then gave four main reasons why only humans can be authors, and why summary judgment for the Copyright Office was appropriate.

1. Precedent

Courts have never recognized copyright protection in works or elements of works that were not authored by humans, but there are a handful of cases where courts affirmatively *refused* to do so on the grounds that copyright only protects works of human authorship. As one example of this, the district court pointed to *Urantia Found. v. Kristen Maaherra*, 114 F.3d 955 (9th Cir. 1997). In *Urantia*, the Ninth Circuit found a collection of "revelations" purportedly authored by divine beings copyrightable, but only as a compilation. While the selection and arrangement of the "revelations" by humans met the "'extremely low' threshold level of creativity required for copyright protection," the individual "revelations" themselves were not "original" to any human author and thus were not copyrightable.

Some commentators have incorrectly taken *Urantia* to stand for the proposition that works by non-humans can be copyrightable. But the only copyrightable aspect of the work in *Urantia* was the humans' selection and arrangement of non-protected elements. The Copyright Office took a similar approach with respect to its treatment of Kristina Kashtanova's comic *Zarya of the Dawn* when it registered the work as a compilation but refused to find the images that Kashtanova made using Midjourney to be copyrightable. (We discussed the Copyright Office's decision in a previous **client alert**.) (*Disclosure: Morrison Foerster represents Kashtanova in connection with their application to register "Rose Enigma." Read our **cover letter**.*)

2. The District Court's Reading of the Supreme Court

While the Supreme Court has never squarely addressed the question of whether non-humans can be authors (many claims to the contrary notwithstanding), the district court found that "[h]uman involvement in, and ultimate creative control over, the work at issue was key to the [Supreme Court's] conclusion that [photography] fell within the bounds of copyright" in *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884). (We discuss *Sarony* in more depth in this **article**.) The district court also thought that the Supreme Court's decisions in *Mazer v. Stein*, 347 U.S. 201 (1954) and *Goldstein v. California*, 412 U.S. 546 (1973), centered authorship on "acts of human creativity."

The district court's account of why the *Sarony* court concluded that photographs are copyrightable highlights how much lower the bar for photography is today than it was in 1884 and, consequently, hints at the brewing tension between the Copyright Office's treatment of works that artists create using generative AI tools and the treatment of works that artists create using cameras (including camera phones).

As the district court put it:

> In Sarony . . . the Supreme Court reasoned that photographs amounted to copyrightable creations of 'authors' . . . because the photographic result nonetheless 'represent[ed]' the 'original intellectual conception of the author' . . . A camera may generate only a 'mechanical reproduction' of a scene, but does so only after the photographer develops a 'mental conception' of the photograph, which is given its final form by the photographer's decisions like 'posing the [subject] in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject . . . arranging and disposing the

light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation' crafting the overall image. Human involvement in, and ultimate creative control over, the work at issue was key to the conclusion that the new type of work fell within the bounds of copyright.

Indeed, the National Press Photographers Association ("NPPA") recognized that the arguments that the Copyright Office made against the copyrightability of AI-generated works could also be used to cast doubt on the copyrightability of many photographs at the Copyright Office's recent "**listening session**" on generative AI and copyright for visual works. As the NPPA's representative **stated**, "[A] concern that we are monitoring is that journalists, like many photographers, do use technology in some ways that are, in fact, quite ethical, and so we're watching what the Copyright Office is doing as they frame the question of what is copyrightable. We understand that something entirely AI-created might not be copyrightable, but we want to make sure that in making policy we don't risk the copyrightability of photographs that for generations, frankly, have used special timers and triggers, such as the kind of things a sports photographer or a nature photographer might use."

3. The Copyright Act's "Plain" Language

While acknowledging that the Copyright Act does not define "author," the district court cites modern definitions of "author" to support its conclusion that "[b]y its plain text, the [Copyright Act] requires a copyrightable work to have an originator with the capacity for intellectual, creative, or artistic labor." The district court then asserts that an "originator" must be human while also dropping a footnote that, somewhat facetiously, considers the possibility that "non-human sentient beings" may be covered by the term "person" in the Copyright Act. Specifically, citing **Justin Hughes' work**, the court notes "[t]he day sentient refugees from some intergalactic war arrive on Earth and are granted asylum in Iceland, copyright law will be the least of our problems."

Some day in the future, as the technology continues to advance, there may be generative AI that that some people will believe to be sentient, and those people will latch on to this comment. Indeed, in the Hughes article that the court cites, Hughes envisions something along these lines, noting that "once some AI is sentient enough to demand its own civil rights and protection under the Thirteenth Amendment, my guess is that 'person' in copyright law will not be limited to *homo sapiens*." (Of course, an AI tool can *say* that it demands its own civil rights and protection under the Thirteenth Amendment today.)

4. Purpose of Copyright Protection

Referring to the Progress Clause, the district court notes that the purpose of copyright, which it characterizes as the promotion of the public good through incentivizing human individuals to create, are not furthered by extending copyright to works created without any human involvement. "Non-human actors need no incentivization with the promise of exclusive rights under United States law, and copyright was therefore not designed to reach them."

Concluding Thoughts

The result in *Thaler v. Perlmutter* is not surprising. Nonetheless, Thaler's lawyer has stated that Thaler plans to appeal. Thaler's appeal to the Federal Circuit (which we discuss in this **post**) and petition for certiorari in his analogous patent case were both unsuccessful.