

COPYRIGHT LAW

Thaler v. Perlmutter: AI Output is Not Copyrightable

By Robert W. Clarida and Thomas Kjellberg

On August 18, 2023 D.C. District Court Judge Beryl A. Howell upheld a final refusal by the U.S. Copyright Office (“USCO”) to register a visual work entitled “A Recent Entrance to Paradise,” shown here:



According to the application filed with the USCO by plaintiff Stephen Thaler, the image was not the product of human authorship but was instead “autonomously created by a computer algorithm running on a machine,” which plaintiff called the “Creativity Machine” and which plaintiff identified as the “author” of the work. Plaintiff named himself as the copyright claimant, however, on the basis that he was the “owner of the machine.”

The USCO refused to register the work in August 2019 because it “lack[ed] the human authorship necessary to support a copyright claim,” and this refusal was affirmed, on the same reasoning, through the internal appeals process within USCO. A final refusal by the Copyright Review Board on Feb. 14, 2022 led plaintiff to file an action in D.C. District Court under the

Administrative Procedure Act, 5 U.S.C. 706(2)(“APA”), claiming that the USCO’s actions were “arbitrary, capricious, an abuse of discretion and not in accordance with the law, unsupported by substantial evidence and in excess of [USCO’s] statutory authority.” On cross-motions for summary judgment, the Court upheld the refusal to register in *Thaler v. Perlmutter*, 1:22-cv-01564-BAH (ECF #24), D.D.C. (Aug. 18, 2023). Under black-letter APA law, the District Court’s ruling was limited to the administrative record that was before the Copyright Office, and the Court thus rejected Plaintiff’s belated efforts to introduce evidence of his own human involvement in the creative process. Such evidence was not present in the record, and in fact contradicted Plaintiff’s own claims that the work was “autonomously created” by the Creativity Machine.

The Requirement of Human Authorship

The Court began by noting that the parties agreed on the “key facts,” and therefore the “sole legal issue is whether a work autonomously generated by an AI system is copyrightable.” *Id.* at *4. The Court found that USCO’s reasoning for refusing registration – *i.e.* the lack of any claim to human authorship – was consistent with the statute and with Supreme Court precedent regarding the definition of the term “authors” as set forth in Article I, Section 8, clause 8 of the U.S. Constitution (authorizing Congress to create copyright laws to protect the writings of “authors”): “The [USCO] did not err in denying the copyright application presented by plaintiff. United States copyright law protects only works of human creation.”

The term “author” is not defined in the Copyright Act, nor in the Constitution, but the Court found support in dictionary definitions and in the Constitutional purpose of “incentivizing individuals to create and invent.” It continued, “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.” The 1909 Copyright Act provided explicitly that only a “person” could “secure copyright for his work,” noted the Court, and the legislative history of the 1976 Copyright Act indicates that Congress intended to incorporate the “original work of authorship” standard “without change” from the 1909 Act.

Since at least the Supreme Court’s 1884 decision in *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884), the courts have also recognized 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.” *Thaler* at *8. *Burrow-Giles* established that photographs could be considered original works of authorship and were thus eligible for copyright protection, similar to other forms of creative expression. The case affirmed the importance of recognizing and protecting the intellectual property rights of photographers and their works.

After *Burrow-Giles*, other Supreme Court rulings consistently spoke in terms of the “author’s tangible expression of *his* ideas,” *Mazer v. Stein*, 347 U.S. 201 (1954), and defined an author as “*he* to whom anything owes its origin,” *Goldstein v. California* 412 U.S. 546 (1973).

The lower courts have followed suit in cases involving works allegedly authored by spiritual beings, *Urantia Fdn. v. Maaherra*, 114 F.3d 955 (9th Cir. 1997); *Penguin Books USA v. New Christian Church of Full Endeavor*, 2000 WL 1028634 (S.D.N.Y. 2000); *Oliver v. St. Germain Fdn.*, 41 F. Supp. 296 (S.D. Cal. 1941); a work consisting of a garden of wildflowers, *Kelley v. Chicago Park Distr.*, 635 F.3d 290 (7th Cir. 2011); and most recently, a photographic “selfie” allegedly taken by a crested macaque monkey, *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018). The Plaintiff in *Thaler*, by contrast, “can point to no case in which a court has recognized copyright in a work originating with a non-human.”

The *Thaler* court recognized that A.I. poses many “challenging questions” such as “how much human input is necessary to qualify the user of an AI system as an ‘author’ of a generated work,” and how to “assess the originality of AI-generated works when the systems may have been trained on unknown pre-existing works,” but “this case, however, is not nearly so complex.” The Court also declined to address Plaintiff’s “myriad theories” about how he was vested with ownership of the alleged copyright, whether under common-law or the work-made-for-hire provisions of the Copyright Act. Here, the AI-generated image “was never eligible for copyright, so none of the doctrines invoked by plaintiff conjure up a copyright over which ownership may be claimed.”

CONCLUSION

Plaintiff’s counsel has indicated that Plaintiff will appeal the District Court’s ruling, and if past is prologue, that is probably true: in a previous similar action against the U.S. Patent and Trademark Office – challenging the PTO’s refusal of Plaintiff’s patent application for an AI-created invention – the same Plaintiff took his appeal all the way to the Supreme Court, which denied *certiorari* on April 24, 2023 (*Thaler v. Vidal*, No. 22-919). The result here is likely to be the same, but it must be noted that even a modicum of human involvement in the creative process could be enough to clear the very low bar for copyrightability established by *Feist v. Rural Telephone*, 499 U.S. 340 (1991).

Any applicant who genuinely wishes to register copyright in a work, rather than simply to create a pretext for a test case, can still presumably do so quite easily under the ruling in *Thaler*, even if significant aspects of the work may be AI-created. In March 2023, the Copyright Office issued guidance in the Federal Register which instructed applicants seeking to register works containing more than *de minimis* AI-generated material to disclose that the work contains such

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material and provide a brief explanation of the human author's contributions. Any application to register this column, for example, should disclose that the description of *Burrow-Giles* in the sixth paragraph was written by ChatGPT, and the remaining verbiage was the work of the named human authors.

On August 30, 2023, the Copyright Office issued a notice of inquiry and request for comments, addressing a range of issues at the intersection of AI and copyright law. See <https://www.federalregister.gov/documents/2023/08/30/2023-18624/artificial-intelligence-and-copyright>. Comments must be submitted no later than 11:59 p.m. Eastern Time on Wednesday, October 18, 2023.

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