

Copyright Office Review Board Reaffirms that Human Authorship is a Prerequisite for Copyright Protection

03.22.2022 by [Sarah Sue Landau](#)

The Copyright Act protects “original works of *authorship*.” 17 U.S.C. § 102(a) (emphasis added). Courts have uniformly understood “authorship” to refer to a quality that is uniquely “human,” often alluding to the nexus between the human mind and creative expression. For example, some of the earliest copyright cases defined copyright as “the exclusive right of man to the production of his own genius or intellect.” *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 56 (1884). See also *Trade-Mark Cases*, 100 U.S. 82, 94 (1879) (explaining that copyright law only protects “the fruits of intellectual labor” that are “founded in the creative powers of the mind”).

In accordance with this understanding, the U.S. Copyright Office has made it its policy to register only works created by human beings. The Copyright Office Compendium, which serves as a guide to policies and procedures of the Copyright Office, explicitly states that works created by nature, animals or plants cannot be registered. U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.2 (giving the following examples of works not eligible for copyright protection: a photograph taken by a monkey; a mural painted by an elephant; a claim based on the appearance of actual animal skin; a claim based on driftwood that has been shaped and smoothed by the ocean; a claim based on cut marks, defects, and other qualities found in natural stone; and an application for a song naming the Holy Spirit as the author of the work).

The Compendium adds that the Office will not “register works produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author.”

Despite this clear policy, in 2018, Steven Thaler, applied to register a two-dimensional image created by Artificial Intelligence (“AI”) entitled “A Recent Entrance to Paradise.” Thaler identified the author of the work as “Creativity Machine” and stated that the work was “autonomously created by a computer algorithm running on a machine” and was made “without any creative contribution from a human actor.” Consistent with its longstanding policy, the



Copyright Office rejected the application. As is permitted under 37 C.F.R. § 202.5(b)(1), Thaler submitted a written first request for reconsideration arguing that his registration was improperly refused. Thaler’s request was reviewed *de novo* by a different Examining Attorney and was once again refused. Thaler subsequently requested reconsideration a second time, inviting that the Copyright Office Review Board (which consists of the Register of Copyrights, the General Counsel of the U.S. Copyright Office, and a third individual designated by the Register) to review his case.

On February 14, 2022, [U.S. Copyright Office Review Board affirmed the Copyright Office’s denial](#), finding once again that the work “lacked the required human authorship necessary to support a copyright claim.” Thaler had argued that the human authorship requirement is unconstitutional, but the Board was unconvinced since he provided no case law or other precedent to support his argument. Additionally, Thaler made policy arguments that registering copyrights in machine-generated works would be beneficial to society at large since it would further the underlying goals of copyright law to incentivize the creation of artistic works. However, this argument was not enough to persuade the Board to “depart from a century of copyright jurisprudence.”

The Review Board’s decision was unsurprising, as it was consistent with clearly stated law. However, the Board did leave open the possibility that a work created with AI could be protectable if it was created with “sufficient creative input or inventions by a human author.” Exactly what level of human intervention is necessary is a question for another day.

Sarah Sue Landau



Associate

[Email](#) | 212.790.9246

Sarah Sue's practice focuses on trademark and copyright clearance, prosecution, enforcement, litigation, and transactions.