The Logic Behind the US Copyright Office's 'Strong View' on Thaler's AI
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The office is not backing down over Stephen Thaler's appeal to copyright an AI-generated landscape image. Ron Dreben, Meaghan Kent and Matthew Julyan of Morgan Lewis explain why.

The threshold issue of human authorship as a prerequisite to obtain copyright registration at the US Copyright Office continues to be the subject of debate.

In essence, the Copyright Office has recently reaffirmed its position that human authorship is required for copyright registration in the US, following Stephen Thaler's 2018 application to register the AI-generated visual work, *A Recent Entrance to Paradise* (pictured).

In August 2023, the US District Court for the District of Columbia in Washington, DC upheld the Copyright Office's refusal to register the image, on the ground of a lack of human authorship.

In January 2024, Thaler appealed the decision to the US Court of Appeals, District of Columbia Circuit. He argued that the district court erred when it found that content generated by AI was not eligible for US copyright protection upon its creation.

Specifically, Thaler's opening appeal brief asks the court to issue an order compelling the Copyright Office to set aside its refusal to register *A Recent Entrance to Paradise* and, in effect, to eliminate the human authorship requirement.

Textual support of the human authorship requirement

In its reply brief filed at the Court of Appeal in March, the Copyright Office maintains that both the ordinary meaning of the text and the structure of the Copyright Act itself demonstrate Congress' intent to limit authorship of protected works to humans, not machines.

For example, the office argues that the Copyright Act itself "presumes" the existence of the human authorship requirement because "[t]he Copyright Act provisions governing a copyright's lifecycle—including its creation, conveyance, duration, and renewal—show that a human must be involved in authoring the work."

The brief cites a myriad of language from the Copyright Act that the office argues would be rendered "empty" without a human-authorship requirement, including terms such as "widow or widower", "surviving children", "grandchildren", "[a] person's children", as well as "life" and "death".

The brief also argues that "[a]ccepting a machine as the 'author' of a copyrighted work would twist the statute into knots" and that "the [Copyright Act] is replete with provisions that make no sense unless authors are human."

The Copyright Office describes as "circular and meritless" Thaler's efforts to redefine the statutory authorship requirement by, in part, quoting a 2023 dictionary that says "under a certain definition", an "author" includes a "person or thing".

On this point, the office argues in its brief: "It is entirely unclear what bearing a 2023 dictionary would have on the interpretation of the Copyright Act of 1976, much less how the dictionary's definition would account for all the statutory indications that authors must be human for purposes of the Copyright Act."

Further, the office's reply brief maintains that even to the extent a work made-for-hire may grant certain rights to corporations, Congress "enacted provisions requiring that the person who created the work have capacity to enter employment arrangements and binding agreements."

The Copyright Office argues that "[e]mployees are human," that Thaler's attempts to categorise the generative AI machine as his employee is "unnatural," and that his work-for-hire argument must fail given that he "admits that his machine is not (and cannot be) his employee, and that it did not (and cannot) execute a written contract for commission".

He "concedes [that] a machine lacks legal rights; has no family, birth, or death; and cannot execute contracts."

With regard to the Copyright Act's allowance of anonymous and pseudonymous works under Section 302(c), the reply brief argues that this "establishes only the unremarkable point that a work need not have an identified human author", and not that human authorship is not required.

Historical support of the human authorship requirement

In addition to its textual arguments, the Copyright Office argues that the human authorship requirement aligns with precedent dating back to the 19th century, with numerous watershed case holdings that "hinged on human authorship".

This includes the US Supreme Court's decision in ***Burrow-Giles Lithographic Co. v Sarony***, 111 U.S. 53 (1884), in which "human input in (and creative control over) [works captured by photograph] drove the Court's conclusion that copyright could attach."

The brief cites various appellate decisions from the Seventh, Ninth, and Tenth Circuits that have "consistently rejected efforts to obtain copyright in works allegedly authored by nonhumans."

Among these is the famous Naruto monkey selfie photograph case, where a photograph captured by a monkey could not be protected by copyright for lack of human authorship. ***Naruto v Slater***, 888 F.3d 418 (9th Cir. 2018).

The Copyright Office argues that Congress has been consistent in its position requiring human authorship, noting that Congress has "not amended the Copyright Act's authorship requirement despite amending other aspects of the statute[.]"

The office further maintains that Congress granted it "broad authority to administer the copyright registration system" and that it too has been consistent in terms of its views on human authorship, citing back to the second edition of the Compendium, published in 1984, in which the Copyright Office instructed that "the term 'authorship' implies that, for a work to be copyrightable, it must owe its origin to a human being."

Copyright office argues that policy arguments are "inapposite"

The Copyright Office also rejected Thaler's policy-based arguments that the creation and distribution of AI-generated works should be encouraged, characterising this stance as "inapposite" and pointing to Federal Circuit case law that has rejected similar arguments in the patent context.

Even still, according to the office, "[i]t is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives" and that Thaler's policy views "supply no basis to set aside" the "settled meaning" of the authorship requirement.

Copyright Office's application of the human authorship requirement

In the context of AI-generated works, the office considers whether "AI contributions are the result of 'mechanical reproduction' or instead of an author's 'own original mental conception, to which the author gave visible form.'"

On this point, the office claims that Thaler has been inconsistent with regards to his level of control versus the autonomy of the machine in creating **A Recent Entrance to Paradise**, citing disclaimers provided in his original application that stated, "the present submission lacks traditional human authorship" and instead "was autonomously generated by AI."

In light of these disclaimers, any later alleged human contributions were unpersuasive to the Copyright Office. The office also argues that Thaler failed to present any evidence of human contributions at the District Court.

Disclosure of AI authorship is required

Given the strong view of the Copyright Office on this issue, unless Thaler or others are successful in changing the human-authorship requirement for US copyright registration, applicants for copyright registration of works created in part with AI systems must disclose the use of AI to the Copyright Office and explain the nature of human authorship.

This type of disclosure should also be provided with regard to prior registrations obtained with the use of AI to avoid arguments in the future that registrations issued for works created in part with AI tools are invalid and unenforceable.

Thaler's reply brief is expected to be filed on April 10, and no oral argument date has yet been set.

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