

Human Authorship Is Still Central To Copyright Eligibility

By **Joshua Dalton, Zachary Messick and Megan Kilduff** (April 9, 2026, 5:11 PM EDT)

Last month in *Thaler v. Perlmutter*, the U.S. Supreme Court declined to consider the copyrightability of artwork generated purely autonomously by artificial intelligence, leaving in place the human authorship requirement for copyright protection.

As a result, creators and companies seeking copyright protection for works generated with the assistance of AI should clearly document all the ways humans contributed to the creation of the work.

The Case

Stephen Thaler, a computer scientist, developed the "Creativity Machine," an artificial intelligence system capable of autonomously generating creative works. Thaler submitted an application to the U.S. Copyright Office to register copyright in the artwork titled "A Recent Entrance to Paradise," explicitly identifying the AI system as the author.

The Copyright Office denied registration of the work because it lacked sufficient human authorship to claim copyright protection.[1] Thaler challenged this requirement, arguing that the AI's owner or programmer should own copyright in works created autonomously by artificial intelligence.

The U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia affirmed the Copyright Office's decision to refuse registration, with the courts holding that U.S. copyright law "protects only works of human creation"[2] and the Copyright Act "requires all eligible work to be authored in the first instance by a human being." [3]

The Supreme Court denied certiorari on March 2. This leaves in place the human authorship requirement for copyright protection.

The Human Authorship Requirement

The Copyright Act grants copyright in "original works of authorship fixed in any tangible medium of expression" and vests copyright initially in the "author or authors of the work." The act's provisions regarding copyright duration, transfer and inheritance require a human author able to sign legal instruments, and whose life and death determine copyright terms.



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Consistent with these requirements, Copyright Office policy guidance states that "the Office will refuse to register a claim if it determines that a human being did not create the work" and provides examples of noncopyrightable works, such as those "produced by nature, animals, or plants" or "by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author."^[4]

Thus, compliance with the Copyright Office policy requires human involvement and control over the "machine or ... mechanical process," a requirement rooted in long-established Supreme Court precedent.

In 1884, in *Burrow-Giles Lithographic Co. v. Sarony*, the Supreme Court held that photographs could be protected by copyright even though they are captured by nonhuman mechanical devices. The court's analysis focused on the photographer's control over the lighting, arrangement and disposition of the photograph, suggesting that human selection and arrangement is required for human authorship.^[5]

On the scale of human involvement, Thaler's use of AI to generate art is an extreme. Indeed, Thaler sought to purposely remove human involvement by programming the Creativity Machine autonomously to produce the artwork. With no human prompting or other creative contribution, the Copyright Office refused registration. On judicial review, courts affirmed the office's position, holding that copyright is strictly for human-created works.

Level of Human Involvement

According to the Copyright Office, hundreds of works incorporating AI have been registered when a human author is present and exercises creative input — so some works created using the assistance of AI may be protected by copyright.^[6] The Copyright Office distinguishes between AI as a creative tool assisting humans and AI as a stand-in for human creativity, emphasizing that copyright protection is only available where a human exercises ultimate creative control.

Works created with both human prompting and human editing may be copyright protected. For example, the Copyright Office granted registration for a short film that was created using AI assistance. The authors prompted the DALL-E model to generate 2D images of backgrounds and characters, and then used human 3D animators and voice actors to finalize the work.^[7]

In another instance, the Copyright Office granted copyright protection for a 2D work generated using inpainting on Invoke, an AI-editing tool, where the author subsequently edited 35 times.^[8] But the Copyright Office indicated that protection only extended to the "selection, coordination, and arrangement of material generated by AI."

Prompting an AI tool to render or stylize an image is not sufficient human involvement to claim copyright protection. For example, the Copyright Office rejected an application where the author prompted an AI platform to re-render an original photograph in the style of Vincent VanGogh's "Starry Night," even though the underlying original photograph would be registrable.^[9]

Similarly, an artist, Jason Allen, sought to register a work generated using 600 prompts entered into the Midjourney platform, but did not provide the prompts to the Copyright Office.^[10] Without the prompts, Allen could not show he maintained control over the expressive elements of the work, not the AI tool. The Copyright Office ultimately found the work lacked human authorship because the

"traditional elements of authorship' [were] determined and executed by the technology — not the human user."

Allen sued the Copyright Office last year for violation of the Administrative Procedure Act and moved for summary judgment. In response, the Copyright Office compared prompting AI to a purveyor's instructions to a commissioned artist, arguing that the AI tool exercised creative control over the work, not the applicant.

The Copyright Office provided an example from Midjourney's documentation, demonstrating how the prompt "white bunny with low ears, rainbow background, love, cute, happy" can generate four distinct images.

Because the prompt does not "determine how the idea [is] expressed," the Copyright Office determined that there was not sufficient human involvement. The case is still ongoing in the U.S. District Court for the District of Colorado, but a decision on the applicant's motion for summary judgment should be issued in the coming months.

Best Practices

For now, works made solely by autonomous AI are not eligible for copyright protection in the U.S. The requisite level of human involvement in AI-generated works has quickly become a fact-dependent inquiry. Copyright protection is available for the selection and arrangement of AI-generated materials and works with significant human editing. But works generated through text prompting may face an uphill battle.

To maximize protection, authors should review their creative workflows and document human involvement in AI-assisted projects, particularly for commercial content. For example, organizations and authors should retain any prompts provided by the author to the AI tool and carefully document any edits made in post-production of the generated work.

Organizations should review employee contracts and internal policies regarding intellectual property rights and the use of AI in generating copyrightable works to avoid pitfalls in registration and enforcement that may result from use of AI.

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[1] Letter from US Copyright Office to Stephen Thaler, "A Recent Entrance to Paradise" (Feb. 14, 2022) (Second Refusal to Reconsider Registration, Correspondence ID: ID 1-3ZPC6C3).

[2] Thaler v. Perlmutter, 687 F. Supp. 3d 140 (D.D.C. 2023).

[3] Thaler v. Perlmutter, 130 F.4th 1039 (D.C. Cir. 2025).

[4] Compendium of U.S. Copyright Office to Stephen Thaler (3d. ed. 2021).

[5] Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 54 (1884).

[6] Brief of Federal Respondent, Thaler v. Perlmutter, No. 25-499.

[7] CRITTERZ.

[8] E.g., A Single Piece of American Cheese,

[9] SURYAST.

[10] Allen v. Perlmutter, 1:24-cv-2665 (filed in D. Co. Sept. 26, 2024). Dkt. 57 at 22, 28. Dkt. 41 at 1.