

# Generative AI Cannot Meet Authorship Requirement for Copyright Protection, District Court Rules

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A recent decision by Judge Beryl Howell in the United States District Court for the District of Columbia (“D.C. District Court”) affirmed that human authorship is required for copyright registration. In granting the United States Copyright Office’s (USCO) motion for summary judgment, the court agreed with the USCO’s denial of a copyright registration for a work created by generative artificial intelligence (AI) absent any human involvement. This is one of several recent decisions addressing whether copyright protection is available for works created by generative AI, and raises numerous legal and policy issues that will continue to be addressed by courts and other government bodies in the near future.<sup>1</sup>

Here, Stephen Thaler developed and owns a generative AI called the “Creativity Machine” that is capable of producing visual artwork. Thaler used “Creativity Machine” to generate a piece of artwork entitled “A Recent Entrance to Paradise.” Subsequently, Thaler attempted to obtain a copyright registration for the artwork, but these attempts were denied by the USCO. In his copyright application filed with the USCO, Thaler identified “Creativity Machine” as the author, stating that “A Recent Entrance to Paradise” was “autonomously created by computer algorithm running on the machine.”<sup>2</sup> In response, the USCO denied the application in view of the failure to meet the originality requirement of the United States Copyright Act (the “Act”)<sup>3</sup> because the work “lack[ed] the human authorship necessary to support a copyright claim.”<sup>4</sup> After the USCO finally rejected the copyright application, Thaler filed a complaint in the D.C. District Court against the USCO and its director in June 2022. The complaint alleged the USCO’s denial of a copyright registration to Thaler’s AI-generated artwork was “arbitrary, capricious, an abuse of discretion and not in accordance with the law, unsupported by substantial evidence, and in excess of Defendants’ statutory authority.”<sup>5</sup> As such, Thaler requested an order compelling the USCO and its director to set aside their refusal to register the AI-generated artwork.

Thaler filed a motion for summary judgment, alleging there was no genuine dispute of material fact and that he was entitled to judgment as a matter of law.<sup>6</sup> Specifically, Thaler argued that a statutory reading of the Act and underlying copyright policy indicate that AI-generated work is copyrightable because the Act provides copyright protection to “original works of authorship.”<sup>7</sup> Accordingly, Thaler argued the Act does not explicitly define author as a human being, and the plain and ordinary meaning of the term “author” therefore includes generative AI within the scope of the Act’s protections. Moreover, Plaintiff argued this statutory interpretation comports with the purpose of the Act, especially in view of current technological advancements in generative AI. Here, Thaler argued that because the Act derives from the Copyright Clause of the Constitution, which granted Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries,”<sup>8</sup> the purpose of copyright protection is to encourage the creation and dissemination of works for the public benefit rather than for the benefit of authors. To carry out the Act’s purpose, Thaler further asserted the scope of copyright protections necessarily expanded as technology has progressed. By way of example, Thaler discussed the expansion of copyright protections to photography because the Act at the time preceded the invention of cameras,<sup>9</sup> a machine (like Thaler’s “Creativity Machine”) capable of rendering images.

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Ultimately, the D.C. District Court rejected each of the Dr. Thaler’s arguments. In addressing the motions, the D.C. District Court found the sole question at issue was whether a work autonomously generated by an AI is copyrightable.<sup>10</sup> In response to that question, the D.C. District Court held the plain text of the Copyright Act actually requires human authorship. In addition to the statutory language cited by Thaler, the Act also states that copyright protection will be provided to “original works of authorship *fixed* in any tangible medium,”<sup>11</sup> where a work is “fixed” “by or under the authority of the *author*.”<sup>12</sup> Thus, in the D.C. District Court’s view, the work must have an “author” who is “an originator with the capacity for intellectual, creative, or artistic labor,” and this originator must be a human being.<sup>13</sup>

In addition to the language of the Act, the D.C. District Court found centuries of understanding and well-established case law show that the “author” presumptively must be human. Even in Thaler’s photography example, authorship was based upon acts of human creativity. It was the human creator—and not the machine—that designed the image, and the camera was merely used to capture it. As observed by the D.C. District Court, “[c]opyright has never stretched so far, however, as to protect works generated by new forms of technology operating absent any guiding human hand.”<sup>14</sup> Indeed, federal appellate courts have consistently refused to provide copyright protections to non-human authors, such as animals and divine spirits.<sup>15</sup>

Despite the holding in this case, the D.C. District Court’s opinion suggests that courts will continue to face complex questions involving generative AI. Notably, the D.C. District Court declined to review Thaler’s argument that he had a controlling role in generating the artwork at issue because the argument was not presented in the administrative record of the USCO proceedings, and the judicial review was therefore limited to the same information provided to the USCO. For example, in his motion, Thaler introduced new issues by asserting the “AI is entirely controlled by Thaler, [and] the AI only operates at Thaler’s direction,” while the administrative record shows the USCO’s decisions were based on the facts presented that Thaler played no role in using the generative AI to create the artwork.<sup>16</sup>

We have previously addressed Thaler’s unsuccessful attempts to obtain patent protection for inventions generated by AI, where the United States Court of Appeals for the Federal Circuit held the term “inventor” in the United States Patent Act refers to a human being and an AI cannot be an “inventor.”<sup>17</sup> While unanswered questions remain about the level of involvement allowed for an AI to be considered an “author” and “inventor” to obtain copyright and patent protection, respectively, Judge Howell’s decision previews the complicated and nuanced issues that courts will face in the future.

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<sup>1</sup> See David. C. Vondle *et al.*, *Generative AI and Recent Copyright Developments*, Akin (July 26, 2023), <https://www.akingump.com/en/insights/alerts/generative-ai-and-copyright-issues>.

<sup>2</sup> *Stephen Thaler v. Shira Perlmutter et al.*, No. 22-1564 (BAH) (D.D.C. Aug. 18, 2023) (quoting Thaler’s Copyright Application).

<sup>3</sup> Copyright Office Letter Refusing Registration from U.S. Copyright Office to Ryan Abbott (Aug. 12, 2019) (“First Refusal Letter”); see also Copyright Office Letter Refusing Registration from U.S. Copyright Office to Ryan Abbott (March 30, 2020) (“Second Refusal Letter”); see also Copyright Review Board Refusal Letter (Feb. 14, 2022) (“Final Refusal Letter”).

<sup>4</sup> First Refusal Letter.

<sup>5</sup> Complaint at ¶ 65, *Stephen Thaler v. Shira Perlmutter and the United States Copyright Office*, No. 22-1564 (BAH) (No. 1).

<sup>6</sup> Plaintiff’s Motion for Summary Judgment and Brief in Support Thereof, *Stephen Thaler v. Shira Perlmutter and the United States Copyright Office*, No. 22-1564 (BAH) (No. 16).

<sup>7</sup> 17 U.S.C. § 102(a).

<sup>8</sup> U.S. Const. art. I, § 8.

<sup>9</sup> *Supra* note 5, at 13 (discussing *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884)).

<sup>10</sup> Memorandum Opinion at 4, *Stephen Thaler v. Shira Perlmutter and the United States Copyright Office*, No. 22-1564 (BAH) (No. 24).

<sup>11</sup> 35 U.S.C § 102(a) (emphasis added).

<sup>12</sup> 35 U.S.C. § 101 (emphasis added).

<sup>13</sup> *Supra* note 6, at 9.

<sup>14</sup> *Supra* note 6, at 8.

<sup>15</sup> Defendants’ Response to Plaintiff’s Motion for Summary Judgment and Cross Motion for Summary Judgment, *Stephen Thaler v. Shira Perlmutter and the United States Copyright Office*, No. 22-1564 (BAH) (No. 17) (citing *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018) and *Urantia Found. v. Kristein Maaherra*, 1115 F.3d 955 (9th Cir. 1997)).

<sup>16</sup> *Supra* note 5, at 26.

<sup>17</sup> <https://www.akingump.com/en/insights/alerts/federal-circuit-confirms-inventor-must-be-human-not-ai>.