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Copyright Case Affirming Human Creativity Sets the Stage for AI Issues

by

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On October 11, an appeal was filed to the D.C. Circuit in the case of *Thaler v. Perlmutter*. At issue is a decision by the D.C. District Court that a work purportedly generated autonomously by an artificial intelligence (AI) system is not copyrightable. The court's conclusion that copyright law protects only works of human creation is obviously and emphatically correct. Under the Constitution and laws of the United States, copyright is exclusively a human intellectual property right. And the D.C. Circuit ought to affirm the lower court's decision.

Importantly, the District Court in *Thaler* also rightly recognized that human creators can make use of AI tools to generate copyrightable works. Future judicial application of Supreme Court precedents regarding the originality requirement for copyright eligibility should result in the recognition of copyright eligibility for works generated by human authors using AI tools in a myriad of instances. This includes instances in which the role of AI technologies in generating a work seems extensive and the creativity or control of a human author seems minimal.

This *Perspectives from FSF Scholars* paper addressing copyrightability and use of AI systems is the first in a series that will examine copyright and other intellectual property law and policy issues posed by the rise of AI technologies. Future *Perspectives from FSF Scholars* papers will address issues such as the use of copyrighted works to train AI systems, infringements of

protected works through the use of generative AI technologies, and legal implications of AI-generated works that mimic a person's likeness, style, or voice.

Stephen Thaler filed for copyright registration of a work that he expressly claimed was "autonomously created by a computer algorithm running on a machine." Copyright protection attaches when an original creative work is expressed in a tangible medium, and it does not depend on registration. But in order to enforce copyright protections and receive related benefits, registration depends on a work being copyrightable. Thaler's registration application was rejected by the Copyright Office, which wrote that "[b]ecause copyright law is limited to 'original intellectual conceptions of the author,' the Office will refuse to register a claim if it determines that a human being did not create the work." The Copyright Office Review Board affirmed the denial of registration on the grounds that copyright protection does not extend to creations of non-human entities.

According to the District Court, Thaler's framing of the registration application presented a simple and narrow question of "whether a work generated autonomously by a computer falls under the protection of copyright law upon its creation." And the court determined that the Copyright Office did not act arbitrarily or capriciously under the Administrative Procedure Act in denying the copyright registration because "United States copyright law protects only works of human creation." The court thereby dispatched Thaler's arguments that common law property principles and the work-for-hire doctrine furnished the means for transference of the autonomous AI machine's copyright [registration] to Thaler. The court explained that "[t]hese arguments concern the *to whom* a valid copyright should have been registered, and in so doing put the cart before the horse." And since "the work at issue did not give rise to a valid copyright upon its creation" there was no transferable property right or work-for-hire interest.

As the District Court recognized, the Copyright Act of 1976 provided the answer to the legal question of the copyrightability of a work created autonomously by a machine. Section 102(a) of the Act provides that copyright protections apply to "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device." And Section 101 of the Act provides that the work must be "fixed" in a tangible medium of expression "by or under the authority of the author." The court wrote that "[i]n order to be eligible for copyright, then, a work must have an 'author.'"

The word "author" is not expressly defined in the 1976 Act, but the District Court concluded that "[t]he 1976 Act's "authorship" requirement as presumptively being *human* rests on centuries of settled understanding." The court cited contemporary dictionary definitions as well as legislative history indicating that the Copyright Act of 1909's requirement that only a "person" could secure copyright for his work" was incorporated without change into the 1976 Act. And it observed that "[t]he human authorship requirement has also been consistently recognized by the Supreme Court when called upon to interpret the copyright law." For instance, *Burrow-Giles Lithographic Co. v. Sarony* (1884) defined an "author" as "originator" and "he to whom anything owes its origin."

The backbone of this settled understanding that a copyrightable work rests upon human creative involvement and control is the Constitution's Article I, Section 8 Copyright Clause, which grants Congress power "to 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." The District Court identified correctly the private property understanding of copyrights that was widely held by the Founding Fathers:

> At the founding, both copyright and patent were conceived of as forms of property that the government was established to protect, and it was understood that recognizing exclusive rights in that property would further the public good by incentivizing individuals to create and invent. The act of human creation-and how to best encourage human individuals to engage in that creation, and thereby promote science and the useful arts-was thus central to American copyright from its very inception. 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.

Free State Foundation President Randolph May and I dive deeper into the Founding Fathers' political philosophy and its bearing on copyright in our book, *The Constitutional Foundations of Intellectual Property: A Natural Rights Perspective* (Carolina Academic Press, 2015). American constitutionalism is premised on a theory of human rights – natural rights – that is reflected in the Declaration of Independence's pronouncement that "all men are created equal" and "endowed by their Creator with certain unalienable rights" and that government exists to secure those rights. The Constitution was drafted and ratified in the name of "We the People," and it expressly confers on Congress authority to secure by law the exclusive rights of human authors in their creative works. And the 1976 Act and Supreme Court decisions interpreting both the Constitution and laws passed by Congress recognize that copyright protections require human creativity. In other words, every source of authority for U.S. copyright law – from the political philosophy expressed in the Declaration to the words of the Constitution, the text of the Copyright Act, and Supreme Court decisions – reflects the commonsense fact that copyright originates in human beings and exists for human flourishing.

Quite perceptively, the District Court in *Thaler v. Perlmutter* ventured that future cases involving works generated using AI technologies will pose greater conceptual difficulties for courts to resolve as matters of copyright law. The court identified "challenging questions" to 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 where the systems may have been trained on unknown pre-existing works."

However, Supreme Court jurisprudence articulating the originality requirement should lead to the judicial recognition of copyright eligibility for works generated by human authors using AI tools in a variety of circumstances. The District Court cited cases such as *Sarony* for the proposition that copyright law reflects the fact that "human creativity is channeled through new tools or into new media" because the "original intellectual conceptions of the author" control or guide the use of the tools or media. Generative AI is a new tool and the mere fact of its usage by an author or other creator does not render the resulting work beyond the bounds of copyright

eligibility. For instance, creative works are – or ought to be – copyrightable when authors employ and control generative AI systems to assist in the development of the authors' original expressions for plotlines, events, or characters in a short story, novel, or screenplay. Similarly, copyright eligibility extends – or ought to extend – to TV, movie, or other visual content originated by an AI system trained by original direct inputs by creative artists. And copyright eligibility exists – or should exist – when creative artists input original musical compositions or sound recordings into AI systems in order to develop and refine those works into final products.

Moreover, original expressive works should, in innumerable instances, be copyrightable and accorded wide scope of protection even if the role of AI technologies in generating a work seems extensive and the creativity or control of a human author seems relatively minimal. In *Feist Publications Inc. v. Rural Telephone Service Company, Inc*. (1991), the Supreme Court explained: "Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity." The court added in *Feist* that "the requisite level of creativity is extremely low; even a slight amount will suffice." Close copyrightability questions surely will arise when the generative role of AI is increased and human creativity is decreased. But in general, the court's originality jurisprudence is hospitable to copyright protections even where human creative involvement seems minimal.

The more challenging questions for courts to face likely will involve unauthorized use of pre-existing creative content in training AI technology to help third parties produce new works. Complex legal questions also are likely to be presented by the reproduction, distribution, display, and public performance of secondary works that are produced using AI systems trained using copyrighted works. But foundational understanding of copyright as a human author's private property right, the text of the 1976 Act, and the Supreme Court's originality jurisprudence provide courts with analytical tools that ought to serve them well in navigating such issues. The District Court in *Thaler v. Perlmutter* commendably drew on those legal authorities in reaching a straightforward result, and the D.C. Circuit ought to affirm the lower court's decision.

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Further Readings

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