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**No Need for Supreme Court Review of Case Rejecting Copyright for
Autonomous AI**

by

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At its February 27 conference, the Supreme Court is expected to consider whether to grant certiorari in *Thaler v. Perlmutter*, a case posing the question whether creative works generated by an artificial intelligence (AI) system without a human author’s direct contribution can be copyrighted. The easy answer to that question is “No.” The bet is that the Court will decline to review a lower court decision that convincingly ruled that the requirement of human authorship for copyright protection is grounded in the Copyright Act’s text and reinforced by longstanding judicial and Copyright Office precedent.

A Supreme Court decision addressing the copyrightability of works created using generative AI will likely have to await a more difficult dispute than *Thaler v. Perlmutter*. A more fitting case for Court review would involve a work in which a human author had at least some direct involvement in producing its expression while also relying heavily on generative AI tools. Such a case would require the Court to grapple with how much human creative control is necessary to qualify as authorship and which aspects of a work produced using AI receive copyright protection. Existing legal doctrines—including the human authorship requirement, the minimal originality standard, and the idea/expression dichotomy—provide the tools necessary to answer

those questions. But *Thaler v. Perlmutter* presents no such line-drawing difficulty. A ruling from the Court on copyrightability and generative AI will likely have to wait for another day.

Thaler v. Perlmutter arose from the Copyright Office’s refusal to register an artwork that Dr. Stephen Thaler expressly claimed was created autonomously by machine. The Office denied the application because no human author was identified. Thaler sought review under the Administrative Procedure Act. In August 2023, the U.S. District Court for the District of Columbia concluded that human authorship is a bedrock requirement of copyright.

On appeal, [the D.C. Circuit affirmed](#). Applying traditional tools of statutory interpretation, the court determined that “author,” as used in the Copyright Act, refers only to human beings. Numerous statutory provisions confirm this understanding. Section 201(a) vests copyright initially in the author, who must have the capacity to own property. Section 302(a) measures duration by the life of the author. Section 203(a)(2) provides for termination rights upon death to a widow or widower and surviving children or grandchildren. Such provisions are wholly incompatible with machines.

The D.C. Circuit observed that its decision accords with other circuits holding that authors must be human, including *Kelley v. Chicago Park District* (2011), *Urantia Foundation v. Maaherra* (1997), and *Naruto v. Slater* (2018). Importantly, the court also recognized that copyright protection may extend to works created by humans using AI as a tool. Whenever the Copyright Act references machines, it treats them as tools—not authors. Copyright law requires that the author be human—the person who created, operated, or meaningfully used the technology—not the machine itself.

By framing the question as one involving a work claimed to be authored exclusively and autonomously by generative AI, *Thaler v. Perlmutter* presents no difficult boundary questions about mixed human-AI creation. Moreover, nothing in Dr. Thaler’s certiorari petition identifies a circuit split, doctrinal confusion, or any misapplication of law by the lower courts warranting Supreme Court intervention. The Solicitor General’s brief opposing review ably defended the D.C. Circuit’s reasoning and result, explaining that the lower court faithfully applied statutory text, Supreme Court precedent, and longstanding Copyright Office practice recognizing human authorship as the *sine qua non* of copyrightability.

The Supreme Court’s 2023 denial of certiorari in [Thaler v. Vidal](#) (2022) further suggests that review is unlikely here. In *Vidal*, the Federal Circuit held that an AI system cannot qualify as an “inventor” under the Patent Act because the statute’s reference to an “individual” presupposes a natural person. By declining to review *Vidal*, the Court allowed the Federal Circuit’s straightforward statutory interpretation to stand. A parallel question is presented in *Thaler v. Perlmutter*: whether the Copyright Act permits authorship by a machine rather than a human being. As in the patent context, resolution of the copyright issue involves routine statutory construction of clear statutory language, making Supreme Court intervention both unlikely and unnecessary.

More complex copyrightability questions are sure to arise in the future. In my 2023 *Perspectives from FSF Scholars* paper, “[Copyright Case Affirming Human Creativity Sets the Stage for AI Issues](#),” I explained that existing doctrine is capable of addressing those harder cases:

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.

That conclusion follows directly from Supreme Court originality jurisprudence. In [Feist Publications, Inc. v. Rural Telephone Service Co.](#) (1991), the Court explained that originality requires only independent creation and at least some minimal degree of creativity. The requisite level of creativity is extremely low; even a slight amount will suffice. Accordingly, original expressive works should, in myriad instances, be copyrightable even where generative AI systems play a substantial role, so long as a human author provides some degree of creative control and expression.

The Copyright Office’s January 2025 [Report on Copyright and Artificial Intelligence, Part 2: Copyrightability](#) further illustrates how existing doctrines apply in practice. Drawing on [Burrow-Giles Lithographic Co. v. Sarony](#) (1884) – in which the Supreme Court upheld copyright in a photograph because the photographer exercised creative judgment in staging and composition – the Office reaffirmed that the use of a machine as a tool does not defeat copyright protection. The same principle applies in the AI context: technology may assist, but authorship rests with the human originator of expressive choices.

As discussed in my February 2025 *Perspectives from FSF Scholars* paper, “[Copyright Office Report Confirms Copyrightability of AI-Generated Works](#),” the Office also clarified that prompts alone typically do not supply sufficient authorship where they merely convey abstract ideas. Under the idea/expression dichotomy, codified in Section 102(b), ideas are not protected – only their expression. However, where human authors contribute copyrightable expressive inputs or exercise creative selection, coordination, and arrangement of AI-generated material, protection may extend to those human-authored aspects.

The Office’s 2025 report also cites examples of agency practice applying these principles. In 2023, the Office granted registration for the text and the selection, coordination, and arrangement of images in the graphic novel *Zarya of the Dawn*, which incorporated AI-generated imagery, while denying protection for the Midjourney-generated images themselves because the applicant disclaimed authorship of those elements. That same year, the Office refused registration for the AI-generated image *Théâtre D’Opéra Spatial*, concluding that the applicant – who relied primarily on text prompt – could not demonstrate sufficient control over the specific expressive output produced by the system. These determinations indicate that copyrightability questions involving works produced using generative AI are navigable on a case-by-case basis using existing law.

Given the clear conclusion in *Thaler v. Perlmutter* that the Copyright Act, judicial precedent, and longstanding agency practice ground copyrightability in human authorship, the Supreme Court is unlikely to take up the case and rule on the merits. Nor is review necessary. Nonetheless, *Thaler v. Perlmutter* confirms that existing copyright law provides reliable, principled guidance for administrative and judicial resolution of AI-related copyrightability questions – both in straightforward cases and in the more complicated disputes that will inevitably follow.

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