



## Federal District Court Denies Copyright to Visual Art Piece Generated Solely by Artificial Intelligence.

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On August 18, 2023, U.S. District Court Judge Beryl A. Howell of the U.S. District Court of the District of Columbia affirmed the U.S. Copyright Office's ("Copyright Office" or the "Office") denial of a copyright application for a visual piece of art generated entirely by an artificial intelligence-driven computer called the "Creativity Machine."<sup>1</sup> Recognizing that U.S. "copyright law protects only works of human creation," the court determined that the Copyright Office "acted properly in denying copyright registration for a work created absent any human involvement."

The court's ruling is consistent with, but did not defer to, or reference, the Office's March 16, 2023 Copyright Guidance published in the Federal Register entitled "Works Containing Material Generated by Artificial Intelligence." ("March Guidance").<sup>2</sup> For a work to be copyrightable, per the March Guidance, "it must owe its origin to a human being." Furthermore, the Office "will not register works produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author."

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<sup>1</sup> *Thaler v. Perlnutter*, No. 22-cv-1564, 2023 WL 5333236 (D.D.C. Aug. 18, 2023).

<sup>2</sup> U.S. Copyright Office, Library of Congress, "Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence," U.S. Copyright Office, Library of Congress, "Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence," <https://www.govinfo.gov/content/pkg/FR-2023-03-16/pdf/2023-05321.pdf>, Statement of Policy, effective March 16, 2023, (Last visited, April 13, 2023).



*"A Recent Entrance to Paradise"*



### Where Human Authorship is Lacking, No Valid Copyright Exists.

The Plaintiff in the lawsuit, Steven Thaler, filed an application identifying the Creativity Machine as the author of the visual artwork entitled "A Recent Entrance to Paradise." His application explains that the work was "autonomously created by computer algorithm." As the owner of the Creativity Machine, Thaler sought to obtain the copyright for himself, claiming it was computer-generated "work-for-hire." Thaler advanced several theories under which a copyright of the computer's work should transfer to him as its owner. He also raised the malleable nature of copyright law that covered works created with or involving new technologies.

The court rejected Thaler's positions. According to the court, Thaler's "work-for-hire" theory went to the issue of to whom a valid copyright should issue. In doing so, Thaler failed to recognize that his application seeking copyright for work generated absent human involvement was **never** valid such that determining to whom the registration belonged put the cart before the horse. Regarding Thaler's "malleable copyright theory," the court noted that copyright law has never "protected works generated by new forms of technology operating absent any guiding human hand." The common failing in Thaler's positions was his inability to recognize a critical tenant of copyright law, that "[h]uman authorship is a bedrock requirement of copyright."



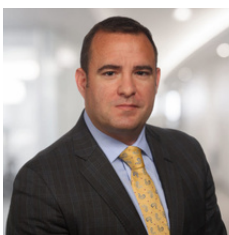
### The Court Recognizes that Future Applications of the "Human Author Test" May be More Difficult to Decide.

Judge Howell recognized that Thaler's application presented a clear set of facts that more readily lent themselves to an application of authority precluding copyrights for works originating with a non-human. She acknowledged newly approaching frontiers wherein AI is more widely used. Considering this rapidly evolving situation, she recognized that, among other things, the "increased attenuation of human activity from the actual generation of the final work will prompt challenging questions regarding how much human input is necessary to qualify the user of an AI system as an 'author' of generated work...." Finding that Thaler's application involved an autonomously computer-generated image with no human input, she held that the Copyright Office correctly denied copyright registration for that work as its lack of human authorship made it ineligible for copyright.



Judge Howell is not alone in recognizing that future copyright applications will involve more "authorship" grey areas. The Copyright Office is and has been actively examining the issues generative artificial intelligence ("AI") raises in copyright law and policy issues. After issuing its March Guidance, it did not rest on its laurels. Since then, it has held four virtual listening sessions to discuss the use of AI to create works in various creative fields. It has also held virtual learning sessions to provide registration guidance for works containing AI-generated content and international copyright issues.

The Copyright Office's March Guidance anticipates that applications that include AI will have grey areas. The Office advises that the process will be a case-by-case analysis that resembles a sliding scale wherein the more human agency is involved in the creative process, the more likely a product, even those created by a mechanical process, is copyrightable. Considering AI's ability to generate works that are harder and harder to differentiate from those made by humans, we are only at the beginning of addressing this issue. For those concerned that AI will replace human creativity, Judge Howell's ruling and the continued efforts of the Copyright Office should give them a sigh of relief---at least for now.



### About the Author

For more than twenty years, [Richard L. Hathaway](#) has litigated non-competition, non-solicitation, trade secrets, and other matters protecting business innovation and intellectual property. He has successfully enforced his business clients' agreements and rights in Texas state or federal court and arbitration. He has recently obtained a multi-million dollar arbitration award for a business against a former employee for misappropriating trade secrets. He and his team can assist your company in protecting its trade secrets via a policy and training review or aggressively pursuing available legal avenues. He is available via email at: [Rhathaway@krcl.com](mailto:Rhathaway@krcl.com) and phone at: 214-777-4270.