

# Will Works Created by Artificial Intelligence Be Afforded Copyright Privileges?

## By Nicola Roberts-Lewis

A recent decision in the D.C. District Court determined that images made by Artificial Intelligence (AI) can be copywritten. This decision raises a policy issue regarding whether AI should be able to hold copyrights. The following discussion provides some context surrounding the issues and arguments for and against AI's right to receive copyright for its generations.

### I. What is AI?

The term Artificial Intelligence has been in the lexicon since 1955 to connote that machines, like humans, can learn.<sup>1</sup> Over the past 68 years, AI has grown to permeate endless aspects of society and has done so in various forms.<sup>2</sup> One of the most blockbusting types of AI in recent years has been generative AI, which can create a wide variety of media, including images, videos, audio, and text.<sup>3</sup> With generative AI programs going public, millions have used some kind of generative AI.<sup>4</sup>

### II. What is Copyright?

Copyright protections in the US began in 1790 with the passage of the first copyright law. The scope was limited to books, maps, and charts.<sup>5</sup> Since then, the Copyright law has been expanded to include literary works, pantomimes, motion pictures, and other things.<sup>6</sup> Modern copyright law gives the copyright to the author or authors who created the work.<sup>7</sup> If two authors contributed to the work with an intent to merge their work into an inseparable whole, an indivisible interest for each is created.<sup>8</sup> All copyrightable work must have an author, and authorship “is synonymous with human creation.”<sup>9</sup> This connotation of humanness with authorship has existed since the inception of copyright, and it makes sense that the limitations exist because other non-human “aspiring” authorities for copyrightable work, like monkeys, were also in existence at the inception of copyright law.<sup>10</sup>

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<sup>1</sup> Christopher Manning, *Artificial Intelligence Definitions*, STANFORD UNIVERSITY, <https://hai.stanford.edu/sites/default/files/2020-09/AI-Definitions-HAI.pdf> (last visited Sep. 21, 2023).

<sup>2</sup> Rochwell Anyoha, *The History of Artificial Intelligence*, HARVARD UNIVERSITY: SCIENCE IN THE NEWS (Aug. 28, 2017), <https://sitn.hms.harvard.edu/flash/2017/history-artificial-intelligence/>. Areas of society that use AI including banking, marketing, transportation, and entertainment.

<sup>3</sup> GENERATIVE AI, <https://generativeai.net/> (last visited Sept. 21, 2023).

<sup>4</sup> *Id.* (ChatGPT has 100 million users); Emily A. Vogels, *A Majority of Americans Have Heard of ChatGPT, but Few Have Tried It Themselves*, PEW RESEARCH CENTER (May 24, 2023), <https://www.pewresearch.org/short-reads/2023/05/24/a-majority-of-americans-have-heard-of-chatgpt-but-few-have-tried-it-themselves/> (“14% of U.S. adults have tried GhatGPT”).

<sup>5</sup> *The 18th Century*, US COPYRIGHT OFFICE, [https://www.copyright.gov/timeline/timeline\\_18th\\_century.html](https://www.copyright.gov/timeline/timeline_18th_century.html) (last visited Sept. 22, 2023).

<sup>6</sup> US COPYRIGHT OFFICE, *Copyright Circular 1* (2021), <https://www.copyright.gov/circls/circ01.pdf>

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Thaler v. Perlmutter*, Civil Action No. 22-1564 (BAH), 2023 U.S. Dist. LEXIS 145823 (D.D.C. Aug. 18, 2023).

<sup>10</sup> *Id.* at 16-17 (“In *Naruto v. Slater*, the Ninth Circuit held that a crested macaque could not sue under the Copyright Act for the alleged infringement of photographs this monkey had taken of himself, for “all animals, since they are not human ‘lacked statutory standing under the Act’.”)

### III. Copyright and AI

With machines having the capability to create works that fall into copyrightable categories, a problem arises when copyright is sought for these works due to the machine, and not human, authorship. The US Copyright Office is aware of these growing concerns and in March 2023, the Office launched its new “Artificial Intelligence Initiative.”<sup>11</sup> This new initiative is in response to both the new advances in AI as well as requests from Congress and AI creators.<sup>12</sup> In addition to the Initiative, the Office also issued a statement to clarify policies regarding works authored by AI. Specifically, they did not close the door on giving all AI-created work copyright. The Office will consider whether AI contributions “[were] the result of ‘mechanical reproduction’ or instead an author’s ‘own original mental conception’.”<sup>13</sup> Following this initiative, the Copyright Office issued a Notice of Inquiry (NOI) on issues of AI and copyright including the “appropriate treatment of AI-generated outputs that mimic personal attributes of human artists.”<sup>14</sup> The inquiry is still ongoing at the time of this Posting.<sup>15</sup> While the Office is making policy announcements evaluating how copyright will interact with AI and its creators, the Office in the recent case of *Thaler v. Perlmutter*, the D.C. District Court ruled that a piece of artwork produced by a computer system could not obtain a copyright.<sup>16</sup> Mr. Thaler wished to copyright an image produced by Creativity Machine and then transfer it to him as the owner of the machine.<sup>17</sup> In its denial of the application, the Copyright Office cited that the work lacked the necessary element of human authorship. Mr. Thaler then challenged the Office’s decision in the D.C. District Court, citing the Administrative Procedure Act.<sup>18</sup>

The court recognized that copyright is intended to be a malleable concept, “designed to adapt with the times.”<sup>19</sup> However, they believe that human creativity is at the core of copyright, and human involvement has been the standard to which copyright decisions have been made. Including non-humans would be stretching copyright too far, presumably past what the district court has deemed is copyright’s malleability. Plaintiff in some ways acted fatally to his claim by the language he used in his initial copyright application. He explicitly said that the work was “created autonomously by machine,” and that was the only statement regarding authorship in the record.<sup>20</sup> Is the district court saying that if Mr. Thaler had not explicitly said that the work was created by the machine, and instead characterized the work as created by him because he made the machine? Perhaps an appellate decision will answer the question since this case has only been decided at the district court level. Until the appeal is brought to argument and decided, will

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<sup>11</sup> US COPYRIGHT OFFICE, Copyright Office Launches New Artificial Intelligence Initiative, (Mar. 16, 2023), <https://www.copyright.gov/newsnet/2023/1004.html>.

<sup>12</sup> *Id.*

<sup>13</sup> Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. 16190, 16192 (Mar. 16, 2023) (to be codified at 37 CFR Part 202), <https://www.govinfo.gov/content/pkg/FR-2023-03-16/pdf/2023-05321.pdf>.

<sup>14</sup> Copyright Office Issues Notice of Inquiry on Copyright and Artificial Intelligence, US COPYRIGHT OFFICE, <https://www.copyright.gov/newsnet/2023/1017.html>

<sup>15</sup> U.S. Copyright Office Extends Deadline for Comments on Artificial Intelligence Notice of Inquiry, US COPYRIGHT OFFICE, <https://www.copyright.gov/newsnet/2023/1021.html> (Comments due November 29, 2023. This Article is published in September 2023).

<sup>16</sup> *Thaler*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

we have an answer.<sup>21</sup> But until then, it is assumed that nothing made by AI can be copyrighted. But if someone does want to do that, there doesn't seem to be anything stopping people from lying on their applications.

#### **a. Ramifications if AI Could Receive Copyright**

Intellectual property scholars warn against this due to its unknown, but possibly grave impact on the world economy.<sup>22</sup> There is also more ambiguity that will need to be decided if AI works will be able copyrightable. For example, if we were to give AI copyright, and no human asked for it to be transferred to them, how would enforcement of the copyright play out? To whom and how would damages be allotted?

#### **a. Benefits if AI Could Receive Copyright**

AI has been used in music, journalism, and gaming up to this point, regardless of its copyrightable status.<sup>23</sup> If it is deemed that the contributions of AI to these materials were not due to "an author's own original mental conception" they may be denied copyright and it could be used by anyone.<sup>24</sup> When thinking about the process of getting AI to create work, a reason as to why you would want AI material to be copyrightable becomes clear. Some instances of art creation with AI tools can involve extensive time in honing prompts given to the machine, and then manually editing the finished piece from those prompts.<sup>25</sup> Companies that have invested millions into new products developed with AI may not be able to reap the profits from their investments.<sup>26</sup>

### **Conclusion**

Since the Copyright Office is still accepting public comments on its NOI, it is difficult to say where this issue is headed, but we can be sure that many people are interested in the outcome of the decision. Unfortunately, we do not have a timeline from the Office and thus there is no way to know when a statement will be released. Based on the decisions from the Office in rejecting Mr. Thaler's request for copyright with their simultaneous NOI, the issue of whether AI can receive copyright could seemingly go either way. Therefore, we will have to wait and see.

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<sup>21</sup> Zachary Small, *As Fight Over A.I. Artwork Unfolds, Judge Rejects Copyright Claim*, NEW YORK TIMES (Aug. 21, 2023), <https://www.nytimes.com/2023/08/21/arts/design/copyright-ai-artwork.html> ("Thaler's lawyer...said he would appeal the ruling.").

<sup>22</sup> Andres Guadamuz, *Artificial Intelligence and Copyright*, WIPO MAGAZINE (Oct. 2017), [https://www.wipo.int/wipo\\_magazine/en/2017/05/article\\_0003.html](https://www.wipo.int/wipo_magazine/en/2017/05/article_0003.html).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> James Vincent, *The Scary Truth About AI Copyright is Nobody Knows What Will Happen Next*, THE VERGE (Nov. 15, 2022), <https://www.theverge.com/23444685/generative-ai-copyright-infringement-legal-fair-use-training-data>, ("AI-generated print that won a state fair art fair competition.").

<sup>26</sup> Guadamuz, *supra* note 22.