Copyright Office Denies Application for AI "AUTHOR"

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The three-person Review Board of the U.S. Copyright Office (Board), headed by Register of Copyrights Shira Perlmutter, recently denied an application to register the copyright claimed in a visual work created by artificial intelligence (AI). In *re Second Request for Reconsideration for Refusal to Register A Recent Entrance to Paradise* (Correspondence ID 1-3ZPC6C3; SR # 1-7100387071) (February 14, 2022). The visual work in question, titled "A Recent Entrance to Paradise" (Work), appears below.

On November 3, 2018, Steven Thaler filed an application to register a copyright claim in the Work. Thaler identified the author of the Work as the "Creativity Machine" and stated that he had acquired the copyright in the Work by virtue of being the owner of the machine. Thaler included in the application a note stating that the Work "was autonomously created by a computer algorithm running on a machine."

In an August 12, 2019, letter, a Copyright Office registration specialist refused registration, finding that the Work "lacks the human authorship necessary to support a copyright claim." Thaler subsequently requested that the Copyright Office reconsider its refusal, arguing that "the human authorship requirement is unconstitutional and unsupported by either statute or case law." After reviewing the Work in light of the points raised in Thaler's request, the Copyright Office concluded that because Thaler had "provided no evidence on sufficient creative input or intervention by a human author," the Work "lacked the required human authorship necessary to sustain a claim in copyright." The Copyright Office also stated that it would not "abandon its longstanding interpretation of the Copyright Act, Supreme Court, and lower court judicial precedent that a work meets the legal and formal requirements of copyright protection only if it is created by a human author."

Thaler then filed a second request for reconsideration, repeating his prior arguments and also arguing that as a matter of public policy the Copyright Office "should" register copyrights in machine-generated works because doing so would "further the underlying goals of copyright law, including the constitutional rationale for copyright protection." Thaler asserted that "there is no binding authority that prohibits copyright for [computer-generated works]," that copyright law already allows non-human entities [such as corporations] to be authors under the work made for hire doctrine, and that ultimately that the Copyright Office "is currently relying upon non-binding judicial opinions from the Gilded Age to answer the question of whether [computer-generated works] can be protected."

In response, the Board stated that the Copyright Act affords protection only to "original works of authorship" that are fixed in a tangible medium of expression. 17 U.S.C. § 102(a). The Board noted that although Congress has not defined what the phrase "original works of authorship" means and that the phrase is "very board," its scope is "not unlimited." Thus, the Board said, "[c]ourts interpreting the Copyright Act, including

the Supreme Court, have uniformly limited copyright protection to creations of human authors" (citing *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (a copyright is "the exclusive right of a man to the production of his own genius or intellect"); *Mazer v. Stein*, 347 U.S. 201, 214 (1954) (a copyrightable work "must be original, that is, the author's tangible expression of his ideas"); *Goldstein v. California*, 412 U.S. 546, 561 (1973) ("[w]hile an 'author' may be viewed as an individual who writes an original composition, the term, in its constitutional sense, has been construed to mean an 'originator,' 'he to whom anything owes its origin'") (citation omitted)). The Board said that the Copyright Office "is compelled to follow Supreme Court precedent, which makes human authorship an essential element of copyright protection."

The Board also noted that the *Compendium of U.S. Copyright Office Practices*, the practice manual for the Copyright Office, has long mandated human authorship for registration. Citing the second and third editions of the Compendium, the Board noted the following works that had been held not entitled to copyright protection: materials produced solely by nature, by plants, or by animals; automated computer translations; derivative sound recordings made by purely mechanical processes; machine-produced expression in visual arts works, such as linoleum flooring; and hypertext markup language if created by a website-design program. The Board said that although no Compendium section explicitly addresses AI, Copyright Office "policy and practice makes human authorship a prerequisite for copyright protection."

For those reasons the Board affirmed, as the Copyright Office's "final agency action in this matter," the first and second refusals of the Copyright Office to register a copyright in the Work. Despite the Board's decision, however, it is possible that, as suggested by the Copyright Office's first refusal of Thaler's application and a recent report from the U.S. Patent and Trademark Office on intellectual property issues raised by AI (a report that the Board cited), a work produced by AI that had sufficient creative input or intervention by a human author could quality for copyright protection under U.S. law. That issue may be taken up in a future copyright case.

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