

## DC Circ.'s Copyright Denial Of AI Art Is A Sign Of Future Fights

By **Ivan Moreno**

Law360 (March 19, 2025, 10:08 PM EDT) -- A computer scientist's quest to register artwork made by his artificial intelligence system hit another roadblock this week when the D.C. Circuit concluded that only human authors qualify for copyright protection, but his case foreshadows complex questions that courts and perhaps Congress will have to grapple with as the technology evolves.

Stephen Thaler is not giving up on his goal to copyright an image titled "A Recent Entrance to Paradise" that a system he programmed and dubbed the Creativity Machine made on its own, saying through his attorney that he plans to appeal Tuesday's ruling.

But his declaration at the start of the registration process that his system was the sole author of the work has made it easy for courts to reject his arguments for a copyright, attorneys tell Law360. That's because the U.S. Copyright Office has interpreted the Copyright Act to require humans to be the authors of registered works, a position that a D.C. federal judge and a D.C. Circuit panel affirmed.

"This was like a test case, one of the first dealing with copyrightability surrounding artificial intelligence," said Kevin Madigan, senior vice president of policy and government affairs at the Copyright Alliance, which represents the interests of thousands of individual creators and organizations.



The D.C. Circuit on Tuesday denied inventor Stephen Thaler's attempt to copyright an image titled "A Recent Entrance to Paradise" that his system created. (Court Documents)

Thaler applied to register the artwork from his system in 2019, years before ChatGPT and other generative systems captured the public's imagination. Since then the Copyright Office has enacted guidance that allows copyrights for works that include such computer-generated elements as long as those are disclaimed, and it says more than 1,000 such works have been registered.

When Thaler asks for an en banc rehearing from the D.C. Circuit, and then possibly U.S. Supreme Court, he will challenge **the appeals panel's finding** that he waived his argument that he invented the Creativity Machine and that he should be the owner of the copyright registration, according to his attorney Ryan Abbott of Brown Neri Smith & Khan LLP.

"In the request for reconsideration [from the Copyright Office], we explained that while the AI autonomously did the thing that

traditionally makes a human being an author, the AI was something that was made, used and built by an individual," Abbott said.

Even so, Thaler will have a hard time overcoming the plain reading of the Copyright Act regarding authors, according to Jonathon Hance, a partner at Bracewell LLP. While the Copyright Act does not define "author," several provisions indicate authors must be human, including the premise that an author has the ability to own property and language on how ownership interests can be transferred to spouses or heirs, the D.C. Circuit said in its ruling.

The U.S. Constitution also references authors and inventors in the context of promoting exclusive rights "to their respective writings and discoveries" for a limited time.

"If you were going to take this all the way up to the current Supreme Court, you've got a lot of folks on there that are original, plain language constructionists," Hance said. "I think it's going to be hard to get a majority of the Supreme Court to find that authors, as used by the framers, would have included machines."

The D.C. Circuit's ruling said that photography, sound recordings, videos and computer programs are once-novel technologies now protected by copyright, but noted that the evolution in copyright law "has been at Congress's direction, not through courts giving new meaning to settled statutory terms."

Absent intervention from Congress, the Copyright Office's human-authorship requirement is "pretty intractable in the law," said Julie Albert, a partner at Baker Botts LLP. She added, however, that more guidance is needed from the government agency on the level of human involvement needed to register a copyright involving generative elements.

The Copyright Office **said in January** that simply directing the models to make art, music, videos and other works is not enough for people using those systems to be considered authors.

"What is de minimus? What is creation and selection? What about prompts?" Albert said. "[The Copyright Office has] taken the position now that prompts themselves are probably not enough human intervention to merit copyright protection, but there is a whole universe of complexity of prompts into AI systems."

Thaler is not the only one who has challenged the Copyright Office's human-authorship requirement. A Colorado artist who created the first model-generated image to win an award at the state's fair **sued the agency** in September, taking a different tack than Thaler by arguing that he had an active role in creating the work, "Théâtre D'opéra Spatial." The artist, Jason Allen, said he used more than 600 prompts to bring his vision to life, along with tools like Gigapixel AI and Adobe Photoshop to refine and enhance the artwork.





Colorado artist Jason Allen is suing the U.S. Copyright Office for refusing to register a work titled "Théâtre D'opéra Spatial," which was generated on the Midjourney platform. (Court Documents)

Allen's case, unlike Thaler's, might force courts to weigh the contributions of machines and humans in a particular work while considering whether a copyright is merited.

"I think where there was the potential for interesting analysis was if the court waded into the creative contribution that would be sufficient to provide authorship to [Thaler]," said Gerard Donovan, a partner at Reed Smith LLP.

Still, it's not clear whether a program will ever be considered the author of a work.

"I think it will require a substantial change in technology and the way that we interact with it," said Avery Williams, a principal at McKool

Smith PC. "The way I see generative AI systems developing, they require less human involvement, not more. But it's a little bit of a crystal ball depending on how this technology advances."

There is also a compelling reason to keep copyright registrations in the hands of humans, said Kristian Stout, director of innovation policy at the International Center for Law & Economics, a privately funded research group.

"You can almost call it like a human protectionist element," Stout said. "On the economic side, you want to make sure that you have the incentives for humans to keep producing the relevant works. Without new human works, the AI will just keep consuming its own outputs, which will be problematic in the long run."

--Editing by Brian Baresch and Jay Jackson Jr.