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Copyright Decision On AI-Generated Art Is Just The Beginning

By Adam Lidgett

Law360 (August 23, 2023, 8:21 PM EDT) -- A D.C. federal court last week shot down an artificial intelligence researcher's argument that the U.S. Copyright Office shouldn't have rejected his application for a computer-generated image, but issues over how creators use AI and obtain copyright protection for those works aren't going away, attorneys told Law360.

U.S. District Judge Beryl Howell on Aug. 18 granted summary judgment to the federal government in a June 2022 lawsuit from researcher Stephen Thaler, who fought the office's rejection of his copyright application to register the two-dimensional artwork "A Recent Entrance to Paradise" made by his AI system.

But the decision in this evolving space is far from the final word on how creators are using machines and whether they can avail themselves of the intellectual property system to protect works created by those machines.

"This decision highlights the problems with the Copyright Office's current analysis of AI-assisted works," Van Lindberg of Taylor English Duma LLP told Law360. "Unlike the Thaler picture, AI-assisted works always have a human author that creates a 'mental conception' of the desired work and uses the tool to help create that output."

In Judge Howell's decision, she repeatedly cited *Burrow-Giles Lithographic Co. v. Sarony*, a Supreme Court ruling from 1884 that Lindberg said found that "photographs were only protectable because of all the extra stuff that humans did other than taking the photograph."

However, in another decision, *Bleistein v. Donaldson Lithographing Co.*, "the Supreme Court recognized that even basic photographs are copyrightable because they always contain 'something unique' that is the result of the author's involvement," Lindberg said. That case, which was not mentioned in Judge Howell's decision, was from the early 1900s.

"The Copyright Office is currently leaning on *Sarony* to justify its decisions to exclude AI-assisted art from registration," Lindberg said. "I believe that before long, it will move on to the rule from *Bleistein* — either the courts or the office will recognize that even a minimal amount of human direction is enough to support the copyrightability of art created with AI tools."

AI tools allow creators to ultimately have control over their works, such as whether to add angles or light, according to William D. Schultz, co-chair of Merchant & Gould PC's internet, cybersecurity and e-

commerce practice.

"The AI system could be composed entirely of the author's works," Schultz said. "At some point, an argument could be made that the human put in so much detail into the resulting work that the human had ultimate creative control — despite the image being generated by a machine."

While Judge Howell ruled that only human-made creations can be protected by copyright, that doesn't necessarily mean that AI can't play a part in the system, according to William Frankel, a partner at Crowell & Moring LLP.

Copyright protection boils down to whether there is enough human creation in a creative work, noting that creators use tools — like a camera — to channel their creativity into actual works, Frankel said.

"As future copyright claimants assert authorship using AI tools, it will be interesting to see how the Copyright Office and the courts will distinguish the original conceptions of human authors from machine-generated expression," Frankel said. "And as AI systems become more robust and sophisticated, this task is likely to become ever more challenging."

In a policy statement from earlier this year, the U.S. Copyright Office offered guidance on AI-generated art, which has raised legal concerns about ownership of the works as well as potential infringement. The office said copyright "applicants have a duty to disclose the inclusion of AI-generated content in a work submitted for registration and to provide a brief explanation of the human author's contributions to the work."

The U.S. Copyright Office also decided in February to cancel part of artist Kristina Kashtanova's registered copyright on the comic book "Zarya of the Dawn," finding that some parts of the book couldn't be protected since they were generated by the artificial intelligence program Midjourney.

Judge Howell's decision could be viewed as a road map for how to copyright something using artificial intelligence, according to Nancy Del Pizzo, co-chair of Rivkin Radler LLP's intellectual property practice group.

While Thaler tried to identify his AI machine as the creator in the copyright application, that meant there wasn't any element of human creation, Del Pizzo said. However, she said, "there could be some combination of human authorship with use of AI as a tool for creating the work that would qualify for copyright protection."

"This decision could initiate more creative copyright applications, at least more specifications of what the human authors contributed in using AI that could be copyrightable," Del Pizzo said.

Darren Oved, a partner at Oved & Oved LLP and chairman of the firm's litigation department, told Law360 "there will inevitably be more litigation testing" the parameters of copyright law and AI.

"There is clearly large-scale financial interest in understanding at what point creative works can utilize AI and still be protectable," Oved said.

While the "bedrock" of copyright law is having an actual human be the author of a work, Judge Howell acknowledged that her decision wasn't the end of the conversation, according to Baker Botts partner Suzanne Hengl.

"By referring to AI as a new addition to an artist's toolbox, the court gives a nod to the notion that AI may have the potential to be used by artists — just as a photographer uses a camera or a producer uses a digital audio workstation — to create a work that is protectable," Hengl said. "It is now up to artists and content creators who want to produce works eligible for copyright protection to figure out how that tool can be implemented to complement, assist or enhance, rather than usurp, the creative control exercised by the human author."

--Editing by Robert Rudinger.

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