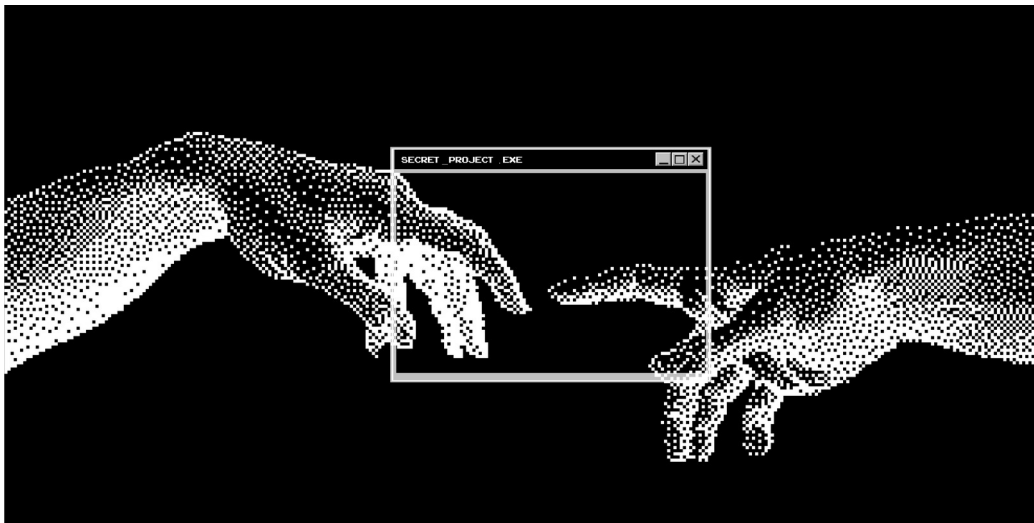


AI Researcher Prompts Unexpected Output in Federal Court: Copyright Policy

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by Julia Lisi



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In 2018, the U.S. Copyright Office denied the registration of a 2-D work of art “A Recent Entrance into Paradise” generated by artificial intelligence (“AI”). The programmer behind the AI, Dr. Stephen Thaler, [sued the Copyright Office](#) in Federal Court in D.C. in June 2022. We covered [Thaler’s initial suit](#) and his attempts to [patent an AI-generated invention](#) in previous TMCA articles.

Thaler [moved for summary judgment](#) in January 2023 as to the legal issue alone – whether an AI-generated work is copyrightable. The Copyright Office [cross-moved for summary judgment](#) in February, and Thaler [filed a reply brief](#) on March 7th. In support of these dueling summary judgment cross-motions, the parties doubled down on their initial arguments.

Thaler offered a creative view of how copyright law could adapt to accommodate AI-generated works. Specifically, Thaler argued that a programmer is analogous to an employer and is therefore the owner of the artwork created by the employee-like AI under the work for hire doctrine. The AI was like an employee, according to Thaler,

because Thaler controlled the AI, directed the AI to create the 2-D artwork, and owned the AI.

In its brief, the Copyright Office restated that copyright protection requires human authorship of the expressive elements of the work. In other words, a work of art is not registrable if a human merely typed a command into an AI program to create it. Rather, the human must direct the *creative contents* of the work. Perhaps the most surprising element of the motions was the Copyright Office's hint at the end of its motion that more guidance on AI was forthcoming.

Not long after, on March 10, 2023, the Copyright Office unveiled a Statement of Policy regarding works incorporating AI generated content, further articulating the lines drawn in its brief. We covered the intricacies of the policy in our recent TMCA post. The good news is works generated using AI *can* be registered with the Copyright Office, but only by virtue of a human author's creative additions to the AI-generated content. The central inquiry is whether the human author (and not the AI) had creative control over the expressive elements of the work. The policy is likely cold comfort for Thaler, who claimed the artwork "A Recent Entrance into Paradise" was autonomously created by the AI, i.e., without control from Thaler. The policy statement also did not give any credence to Thaler's work for hire analogy.

The Copyright Office's guidance might bring the landscape into focus for prospective applicants, but it may be too late for Thaler's current masterpiece. The summary judgment motions are still pending before the district court. We will continue to monitor this developing issue, including the Copyright Office's promise to hold a public comment period later this year.