

CASE NO. 23-5233

DISTRICT OF COLUMBIA
COURT OF APPEALS

STEPHEN THALER,

Plaintiff and Appellant,

v.

SHIRA PERLMUTTER, Register of Copyrights and
Director of the United States Copyright Office, et al.,

Defendant and Appellee.

APPELLANT'S APPENDIX

On Appeal From Order of the United States District Court
for the District of Columbia

(Oral argument not yet scheduled)

Honorable Beryl A. Howell
Case No. 1:22-cv-01564-BAH

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WASHINGTON D.C.**

Stephen Thaler, an individual

Plaintiff,

v.

Shira Perlmutter, in her official capacity as
Register of Copyrights and Director of the United
States Copyright Office; and The United States
Copyright Office;

Defendants.

Case No. : 1:22-cv-01564

COMPLAINT

Plaintiff Stephen Thaler (“Dr. Thaler”) complains and alleges against Defendant Shira Perlmutter (the “Register”), in her official capacity as the Register of Copyrights and Director of the United States Copyright Office, and Defendant the United States Copyright Office (“USCO,” and together with Register, the “Defendants”) as follows:

NATURE OF ACTION

1. Dr. Thaler is in the business of developing and applying advanced artificial intelligence (AI) systems capable of generating creative output that would historically qualify for copyright protection and that are made under conditions in which no natural person contributed to the work as a traditional author (“AI-Generated Works”).

2. Dr. Thaler filed to register copyright for an AI-Generated Work with USCO. The application named the AI as the author and Dr. Thaler as the owner of the copyright in the work.

3. Defendants, in a final agency action, denied the copyright registration application on the basis that an AI-Generated Work “lacks the human authorship necessary to support a copyright claim.”

4. Defendants also denied the copyright registration on the basis that Dr. Thaler was not entitled to apply for copyright registration for his submitted work.

5. The denial creates a novel requirement for copyright registration that is contrary to the plain language of the Copyright Act (“Act”), contrary to the statutory purpose of the Act, and contrary to the Constitutional mandate to promote the progress of science.

6. The denials are subject to judicial review under the Administrative Procedure Act (APA) 5 U.S.C. § 704. Plaintiff seeks injunctive and other relief as set forth below.

7. AI is continually getting better at creating AI-Generated Works. These works are going to be profoundly economically and socially disruptive, as they evolve from essentially academic pursuits to those having significant commercial value, including in the context of personalized music, journalism, and digital art.

JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction and is authorized to issue the relief sought under 5 U.S.C. §§ 701-06, 28 U.S.C. §§ 1331, 1338(a), 1361, and 2201-2022.

9. Venue is proper in this district under 28 U.S.C. § 1391(e).

PARTIES

10. Plaintiff Dr. Stephen Thaler is an individual who resided in the State of Missouri at all times relevant to this complaint.

11. As described more fully below, Plaintiff is the applicant for the copyright registration.

12. Defendant Shira Perlmutter is named in her official capacity as the Register of Copyrights and Director of the United States Copyright Office. Under 17 U.S.C. § 701, the powers and duties of the Copyright Office are vested in the Register.

13. Defendant the United States Copyright Office (USCO) is a department of the Library of Congress, responsible for registering copyright claims and maintaining records of copyright ownership.

FACTUAL BACKGROUND

I. HISTORY OF THE APPLICATION

14. Plaintiff is in the business of developing and using AI systems including those capable of creating “AI-Generated Works,” here referring to output that would traditionally qualify for copyright protection and made under conditions in which no natural person contributed to the work as a traditional author.

15. The present case involves Plaintiff’s application to register a copyright for an AI-Generated Work produced by one of Plaintiff’s AI systems referred to as a “Creativity Machine.” The work is the two-dimensional artwork (“The Work”) titled “A Recent Entrance to Paradise,” reproduced below:



16. On November 3, 2018, Plaintiff filed an application (#1-7100387071) to register the Work with the USCO.

17. In the application, Plaintiff identified the author of the Work as the “Creativity Machine,” and noted it was “Created autonomously by machine.” Plaintiff listed himself as the “Copyright Claimant” alongside a transfer statement labelled “Ownership of the Machine.”

18. Plaintiff separately noted in the application that the Work was autonomously created by a computer and that he was entitled to own the copyright in the Work including by virtue of the work made for hire doctrine.

19. On August 12, 2019, the USCO refused to register the claim based on the lack of human authorship. That refusal stated, “We cannot register this work because it lacks the human authorship necessary to support a copyright claim. According to your application this work was ‘created autonomously by machine.’” The refusal did not address Dr. Thaler’s entitlement to any copyright in the Work.

II. PLAINTIFF'S REQUESTS FOR RECONSIDERATION

20. Plaintiff filed two requests for reconsideration to the USCO on September 23, 2019, and May 27, 2020, respectively. Plaintiff confirmed that the submission lacked traditional human authorship. However, Plaintiff argued that the USCO's human authorship requirement was unsupported by law.

21. In denying the first request for reconsideration, the USCO reiterated its response that the copyright law only protects "the fruits of intellectual labor" that "are founded in the creative powers of the mind." Citing to *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879). The USCO stated that since copyright law is limited to "original intellectual conceptions of the author," it refused to register the claim because it determined a human being did not create the Work. The USCO again cited to *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884), 17 U.S.C. § 102(a), and the Compendium of U.S. Copyright Office Practices § 306 (3d ed. 2017).

22. On February 14, 2022, the USCO reconsidered Plaintiff's request the second time, and again refused to register the Work. The USCO accepted that the Work was autonomously created by artificial intelligence without any creative contribution from a human actor. Citing again to *In re Trade-Mark Cases*, the USCO stated that Plaintiff had failed to either provide evidence that the Work is the product of human authorship or convince the USCO to "depart from a century of copyright jurisprudence." Since there was no issue of human author involvement, the USCO limited its review to whether the human authorship requirement was unconstitutional and unsupported by case law.

23. The USCO acknowledge that the phrase "original work of authorship" was "purposefully left undefined" by Congress in order to "incorporate without change the standard

of originality established by the courts under the [1909] copyright statute[,]” citing to H.R. Rep. No. 94-1476, at 51 (1976). The USCO also acknowledged that the Act leaves “unquestionably other areas of existing subject matter that [Bill 94-1476 did] not propose to protect but that future Congresses may want to.”

24. The USCO cited again to *Burrow-Giles Lithographic Co.*, stating that copyright was afforded to photographers because photographs are “representatives of original intellectual conceptions of [an] author.” *Id.*, at 57-59. Pointing out that the court referred to “authors” as human there. *Id.*, at 58. Citing to *Mazer v. Stein*, the USCO stated that the Supreme Court defined an author as someone who “may be viewed as an individual who writes an original composition,” stating “the term in its constitutional sense, has been construed to mean an ‘originator,’ ‘he to whom anything owes its origin.’” USCO argues this requires human authorship as an essential element of protection.

25. Providing additional examples for its decision, the USCO also referred to *Urantia Found v. Kristen Maaherra*, 114 F.3d 955, 957-959 (9th Cir. 1997), arguing the court refused to extend copyright protection to non-human creations. The USCO additionally referred to *Naruto v. Slater*, 888 F.3d 418, 426 (9th Cir. 2018) arguing a monkey cannot register a copyright because the Act specifically referred to an author’s “children,” “widow,” “grandchildren,” and “widower,” which necessarily implied humans and excluded animals. The USCO acknowledged that it was unaware whether a court had considered the authorship of a copyright by artificial intelligence, but held that the decisions rejecting registration for non-human spiritual beings and animals supported its position.

26. The USCO also cited to the National Commission on New Technological Uses of Copyrighted Works (“CONTU”) as support of its position. CONTU was mandated, in part, to

study the “creation of new works by the application or intervention of [] automatic systems of machine reproduction.” In the final report in 1979, CONTU determined that the existing judicial construction requiring human authorship sufficiently enabled protection for works created with the use of computers, and that no amendment to copyright law was needed. CONTU specifically stated that eligibility of registration did not depend on the use of devices in its creation, but rather if there was the presence of at least minimal human creative effort at the time it was produced. The USCO failed to recognize that the language cited from CONTU did not specifically address works created solely by computers as it was assumed it was not possible for a machine to create autonomously at the time.

27. However, it stated that CONTU’s position mirrored that of the USCO. The USCO stated that the practice manual for the office — the Compendium of U.S. Copyright Office Practices — “has long mandated human authorship for registration.” The original Compendium implied that a work must owe its origin to a human being, and that materials provided solely by nature, by plants, or by animals were not copyrightable. Following that reasoning, the current Compendium provided examples of works that were not copyrightable, including automated computer translations, derivative sound recordings made purely by mechanical processes, human performance required for choreography and pantomimes, machine produced expression in visual arts works such as linoleum flooring, x-rays and other medical imaging, or hypertext markup language if created by a human being rather than a website design program.

28. Finally, the USCO stated that its position was supported by a recent report from the U.S. Patent and Trademark Office, where it sought public comment on whether a “work produced by an AI algorithm or process, without the involvement of a natural person... qualif[ies] as a work of authorship under the Copyright Act.” It indicated in its report that the

“vast majority of commenters acknowledged that existing law does not permit a non-human to be an author [and that] this should remain the law.” U.S. PATENT AND TRADEMARK OFFICE, PUBLIC VIEWS ON ARTIFICIAL INTELLIGENCE AND INTELLECTUAL PROPERTY POLICY at 19-21 (2020).

III. USCO’S DENIAL OF COPYRIGHT REGISTRATION IS AN ARBITRARY AND CAPRICIOUS AGENCY ACTION AND NOT IN ACCORDANCE WITH THE LAW

A. The Plain Language of the Act Allows Protection of AI-Generated Works

29. The Act affords protection to “original works of authorship,” a phrase which Congress left purposely undefined and for interpretation by the courts. 17 U.S.C. § 102(a). At no point does the Act limit authorship to natural persons. Indeed, corporations and other non-human entities have been considered “authors” for purposes of the Act for over a century. 17 U.S.C. § 101.

30. The bar for originality is low. “To qualify for copyright protection, a work must be original to the author.” *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, 499 U.S. 340, 345 (1991) (citation omitted). “Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.” *Id.*, at 345 (citation omitted).

31. The Work meets all the requirements for copyright protection. Indeed, if Dr. Thaler had submitted the same AI-Generated Work with his company listed as the author, USCO would have granted his company a registration, and no one would have known the work was AI-Generated. The USCO argues that this is not cause for concern because “[a]pplicants who mislead the Office do so at their peril.” But contrary to the USCO’s argument, the USCO does

not test, or have a means to test, to see if a registration is being submitted for an AI-Generated Work, and USCO does not require, at least for works made for hire, that a human author be disclosed in a registration filing. It is very likely that other applicants have successfully registered copyright in AI-Generated Works without exhibiting Dr. Thaler's level of transparency.

32. Copyright protection for AI-Generated Works is entirely consistent with the text and purpose of the Act. It would promote the use and development of creative AIs which would generate socially and commercially valuable works, and it would protect the moral rights of human authors by preventing someone from falsely claiming credit for work done by a machine.

B. No Case Law Stands for the Proposition that an AI-Generated Work is Ineligible for Copyright Protection

33. The USCO cites to *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879) and to *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884) in support of its Human Authorship Requirement. *Compendium of U.S. Copyright Office Practices, Third Edition*, Section 306. This Human Authorship Requirement, of course, is a Copyright Office policy—not something created by statute. In fact, it is contrary to statute.

34. Certainly, any number of judicial opinions have discussed originality in the context of human-centric mental activity, but none of those opinions have considered an AI-Generated Work. It is hardly surprising that judgments from the Gilded Age would fail to consider the possibility of AI stepping into the shoes of a person and generating something creative. Dicta from such cases should therefore not be taken out of context to create a blanket prohibition on an entire field of publicly beneficial activity.

35. The appropriate takeaway from *Burrow-Giles*—which involved the Supreme Court holding for the first time that a photograph was eligible for copyright protection—is not that an AI cannot be an author, but rather that our courts have a long history of purposive interpretation of the Act in light of technological evolution.

36. Technology has advanced considerably since CONTU determined that AI-Generated Works were too speculative to consider in 1979. See NAT'L COMM'N ON NEW TECH. USES OF COPYRIGHTED WORKS, FINAL REPORT ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS 44 (1979). Today, AI can autonomously create works indistinguishable from a human being in terms of original and creative output. Applications allowing users and companies to utilize such AI to create AI-Generated Works are commercially available and rapidly increasing in use. *See, e.g.*, <https://aiartists.org/ai-generated-art-tools/>; *see, generally*, <https://aiindex.stanford.edu/report/>. AI, including Dr. Thaler's AI, are capable of producing creative output that, at least functionally, is equivalent to “the fruits of intellectual labor” that “are founded in the creative powers of the mind.” *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879).

37. Courts associating mental activity with originality have not been using terms precisely or meaningfully in the context of AI-Generated Works. The problem of speaking precisely about such concepts with regards to computers was identified by Alan Turing, one of the founders of computer science, who in 1950 considered the question, “Can machines think?” *See* A.M. Turing, *Computing Machinery and Intelligence*, 59 *MIND* 433, 433–51 (1950). He found the question to be ambiguous, and the term “think” to be unscientific in its colloquial usage. *Id.*

38. Turing decided the better question to address was whether an individual could tell the difference between responses from a computer and an individual; rather than asking whether machines “think,” he asked whether machines could perform in the same manner as thinking entities. *Id.* Turing’s analysis from more than sixty years ago demonstrates that a test based on whether a machine is exhibiting “mental activity” would be ambiguous, challenging to administer, and of uncertain utility. The real question is whether a machine can make something indistinguishable from a person for purposes of copyright protection. The answer, as an undisputed factual matter here, is yes.

39. In addition to cases where courts have used human-centric language, USCO cites to two 9th Circuit cases it argues involves facts analogous to AI activity: animal art and works allegedly authored by spirits. First, neither is an appropriate analogy to AI-Generated Works. Second, neither case stands for the proposition claimed by USCO.

40. *Naruto v. Slater* involved a series of images that a black crested black macaque, named Naruto, took of himself in Indonesia. Naruto, by and through his Next Friends, People for the Ethical Treatment of Animals, Inc. (PETA), sued David Slater, who owned the camera used by Naruto and who subsequently used Naruto’s photographs without permission. While USCO is correct that the case was dismissed, this was not based on the USCO’s Human Authorship Requirement. The case was dismissed based on standing. As the 9th Circuit Court articulated, “We must determine whether a monkey may sue humans, corporations, and companies for damages and injunctive relief arising from claims of copyright infringement. Our court’s precedent requires us to conclude that the monkey’s claim has standing under Article III of the United States Constitution. Nonetheless, we conclude that this monkey—and all animals, since

they are not human—lacks statutory standing under the Copyright Act. We therefore affirm the judgment of the district court.” *Naruto v. Slater*, 888 F.3d 418, 420 (9th Cir. 2018).

41. The present case, unlike *Naruto*, involves a human being suing for his ownership rights to property made by his machine. There is clearly no standing issue of the sort at issue in *Naruto*. If anything, *Naruto* emphasizes the importance of a purposive approach to statutory interpretation rather than a hyper-literal, textualist approach combined with over-reliance on dicta. Because, of course, if the 9th Circuit had literally intended for animals to be unable to sue under the Act, such a holding would prohibit many lawsuits. Human beings are, obviously, animals.

42. USCO also cites to, *Urantia Foundation v. Maaherra*, 114 F.3d 955 (9th Cir. 1997), which involved a book allegedly authored in part by a spiritual being. While a very interesting case in its own right and for a variety of reasons unrelated to AI-Generated Works, the 9th Circuit found that the book was protected by copyright regardless of any spiritual influences. “For copyright purposes, however, a work is copyrightable if copyrightability is claimed by the first human beings who compiled, selected, coordinated, and arranged the Urantia teachings, ‘in such a way that the resulting work as a whole constitutes an original work of authorship.’” *Id.* at 958. “We hold that the human selection and arrangement of the revelations in this case could not have been so ‘mechanical or routine as to require no creativity whatsoever.’ We conclude, therefore, that the ‘extremely low’ threshold level of creativity required for copyright protection has been met in this case. *Id.* at 959 (citing *Feist, supra*, 499 at 345 (“The vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble, or obvious it might be.’”))

43. The 9th Circuit even noted that, “The copyright laws, of course, do not expressly require ‘human’ authorship, and considerable controversy has arisen in recent years over the copyrightability of [AI-Generated Works].” *Id.* at 958. Without addressing the protectability of AI-Generated Works, the 9th Circuit held that, “[a]t the very least, for a worldly entity to be guilty of infringing a copyright, that entity must have copied something created by another worldly entity.” *Id.* at 958. The present case lacks, on information and belief, any divine intervention.

44. There is nothing mystical about AI-Generated Works—Dr. Thaler’s AI is the result of decades of his research and investment. Investment which the Act is intended to promote, along with the distribution of creative works. “Nothing in the text of the Copyright Clause confines the “Progress of Science” exclusively to “incentives for creation.” *Golan v. Holder*, 565 U.S. 302 (2012). In *Golan*, the Supreme Court notes that inducing the dissemination of works by itself is an appropriate means to promote science.

C. Dr. Thaler is Entitled to The Work Under Common Law Principles of Property Ownership Including Accession and First Possession

45. Copyright in a work can initially vest in an author. “Copyright in a work protected under this title vests initially in the author or authors of the work.” 17 U.S.C. § 201(a). However, it is often the case that copyright in a work will instead initially vest in an author’s employer, or in a party for whom a work was prepared. “In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.” 17 U.S.C. § 201(b). In addition, the ownership of copyright may be transferred by operation of law. “The ownership of a copyright may be

transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.”

17 U.S.C. § 201(d)(1).

46. An AI is not a legal person and does not have rights. It is therefore not possible for an AI to “own” intellectual property. An AI that creates an AI-Generated Work does not do so as a legal “employee” per se. It does so, at least in the present case, in its capacity as personal property.

47. Dr. Thaler owns and operates the AI which created The Work. He is therefore entitled to property created by his AI under principles and rules of property ownership including accession and first possession.

48. It is generally the case that where property creates additional property, the owner of the original property is entitled to the subsequent property. This rule, sometimes referred to as *accession*, applies in a variety of contexts. If a person owns a cow that births a calf, the cow’s owner becomes calf’s owner. If a person owns a fruit tree that bears fruit, the tree’s owner owns the fruit. The tree owner derives title to the fruit through the tree, but this does not require the tree to execute a written document that transfers title to the fruit—the title to the fruit initially vests in the tree’s owner by virtue of her relationship to the fruit tree.¹ *See generally* Thomas W. Merrill, Accession and Original Ownership, *JOURNAL OF LEGAL ANALYSIS*, 459-505 (2009).

¹ In some cases, third parties may have conflicting entitlement claims, such as a party picking fruit, but there are no conflicting claims to entitlement in the present case. Dr. Thaler is the only possible owner of The Work.

49. Here, Dr. Thaler's AI generated a piece of intellectual property that Dr. Thaler owns because he owns the AI. If the AI had been a 3D printer that created a physical painting of The Work, Dr. Thaler would own that painting as personal property. There is no reason why Dr. Thaler should be any less entitled to the property in a digital painting made by his AI.

50. Alternately, or in addition, if the Court holds that an AI-Generated Work is indeed proper subject matter for copyright protection, then Dr. Thaler owns copyright in The Work by virtue of being the first party to possess it. "[T]he common and civil law (both of which accept the desirability of private ownership) have responded with the proposition that the taking possession of unowned things is the only possible way to acquire ownership of them." Richard A. Epstein, *Possession as the Root of Title*, 13 *Georgia Law Review* 1221, 1222 (1979). The rule of first possession is simple, but like accession, foundational to functioning systems of private property. If the AI made a piece of property, and if no other party was entitled to ownership by virtue of their relationship to the AI, then The Work was unowned property which Dr. Thaler took title to by virtue of first possession.

51. Although the work for hire doctrine provides one statutory mechanism for a party other than an author to claim initial ownership, nowhere does the Act prohibit other ownership mechanisms including pursuant to common law rules of entitlement.

D. Dr. Thaler is Also Entitled to The Work Under the Work for Hire Doctrine

52. While an AI is not an employee, the Work for Hire Doctrine is sufficiently flexible to apply in this case. Dr. Thaler built and controlled the AI which generated The Work, The Work was only created by the AI at Dr. Thaler's insistence, and The Work only exists due to Dr. Thaler's investment.

53. The Supreme Court in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) identified factors that characterize an employment relationship under agency law. Those factors, including the employer’s control over the work, control over the employee, and the status and conduct of an employee, all weigh heavily in favor of The Work being treated as a work for hire. *Id.*, at 751-752. The AI is controlled by Dr. Thaler, the AI only operates at Dr. Thaler’s direction, and the AI is owned as property by Dr. Thaler.

54. The central concern with overapplication of the work for hire doctrine is that it has the potential to exploit human authors. Employers might acquire copyrights not contemplated at the time of contracting and which would not be reflected in the agreed-upon price for employment or a work. *See, e.g.*, Anne Marie Hill, Work for Hire Definition in the Copyright Act of 1976: Conflict Over Specially Ordered or Commissioned Works, 74 Cornell L. Rev. 559, 569 (1989). Here, where the author is a machine that has no legal rights, there can be no concern about exploitation.

55. In addition to works created within the scope of employment, certain works created by independent contractors are also considered works-for-hire. 17 U.S.C. § 101. This requires that the parties “expressly agree in a written instrument signed by them that the work shall be considered a work for hire.” *Id.* However, that requirement was again motivated by the desire to protect human authors. *See, e.g.*, Anne Marie Hill, Work for Hire Definition in the Copyright Act of 1976: Conflict Over Specially Ordered or Commissioned Works, 74 Cornell L. Rev. 559, 569 (1989). In this case, again, The Work was created by the AI while the AI was under his control and at Dr. Thaler’s request and expense. In the case of an AI-Generated Work, because an AI has no rights to protect, there is no need for a written instrument for its benefit.

56. While an AI is neither a legal employee nor an independent contractor capable of executing a contract, it functionally behaves as an employee or independent contractor in creating AI-Generated Works.

E. AI Authorship is Consistent with the Purpose of the Act and the Constitution

57. It is important to interpret the Act consistent with its purpose and with the Constitution. Copyright protection is intended to promote the creation of socially valuable works. It is “intended definitely to grant valuable, enforceable rights to authors, publishers, etc., without burdensome requirements; ‘to afford greater encouragement to the production of literary [or artistic] works of lasting benefit to the world.’” *Washingtonian Co. v. Pearson*, 306 U.S. 30, 36. It is also intended to promote dissemination of those works. *See, e.g., Golan v. Holder*, 132 S. Ct. 873, 888 (2012). The Copyright Clause of the Constitution likewise is intended to promote the creation and dissemination of new works. Art. I, § 8, cl. 8. The Constitution provides for Copyright protection, “[n]ot primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given.” H.R. Rep. No 60-2222, at 7 (2d Sess. 1909).

58. Allowing protection of AI-Generated Works is required by the plain language of the Act. In 1973, the Supreme Court noted that the terms “Writings” and “Authors,” have “not been construed in their narrow literal sense but, rather, with the reach necessary to reflect the broad scope of constitutional principles.” *Goldstein v. California*, 412 U.S. 546, 561 (1973).

59. The Supreme Court has also articulated, “[w]hen technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of its basic purpose.” *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). For instance, in *Aiken*, the issue was whether playing a radio in a restaurant constituted a performance and thus

an infringement. The meaning of performance was therefore ambiguous given the technology invented after the 1909 Copyright Act. The Supreme Court held that playing a radio in a restaurant was not a “performance.” *Id.*, at 162. This was because of a simple logic that a passive listener cannot be a performer, and “those who listen do not perform, and therefore do not infringe.” *Id.*, at 159 (citation omitted).

60. The Supreme Court has directly stated that “our inquiry cannot be limited to ordinary meaning and legislative history, for this is a statute that was drafted long before the development of the electronic phenomena with which we deal here.” *Fort. Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 395 (1968). Thus, “[w]e must read the statutory language of 60 years ago in the light of drastic technological change.” *Id.* In doing so, the Supreme Court defined an airing over its airwaves as a “performance” of copyright work. *Id.* Like *Aiken*, the court looked at the actual relationship between performers and listeners, to essentially determine what was going on within the ambit of the Act.

CAUSES OF ACTION

FIRST CAUSE OF ACTION

(Administrative Procedure Act Violation for Denial of Plaintiff’s Application)

61. Plaintiff re-alleges and incorporates by reference every allegation contained in the preceding paragraphs.

62. The USCO’s second refusal to register the Work constituted final agency action and Plaintiff seeks to reverse that refusal here.

63. For the reasons stated above, requiring human authorship for registration of copyright in a work is contrary to law.

64. Defendants’ refusal to register the copyright claim in the work is contrary to law.

65. The agency actions here were arbitrary, capricious, an abuse of discretion and not in accordance with the law, unsupported by substantial evidence, and in excess of Defendants' statutory authority.

66. The refusal to register the copyright claim in the Work should be set aside and the application reinstated.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court:

1. Issue an order compelling Defendants to set aside their refusal to register the Work.
2. Award of costs and its reasonable attorney's fees to Plaintiff; and
3. All other relief as may be appropriate.

Dated: June 2, 2022

BROWN, NERI, SMITH & KHAN LLP

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EXHIBIT A

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WASHINGTON D.C.**

Stephen Thaler, an individual, 1767 Waterfall Dr.,
St. Charles, MO 63303,

Plaintiff,

v.

Shira Perlmutter, in her official capacity as
Register of Copyrights and Director of the United
States Copyright Office; and The United States
Copyright Office, 101 Independence Ave., S.E.,
Washington, D.C. 20559-6000,

Defendants.

Case No. : 1:22-cv-01564

COMPLAINT

Plaintiff Stephen Thaler (“Dr. Thaler”) complains and alleges against Defendant Shira Perlmutter (the “Register”), in her official capacity as the Register of Copyrights and Director of the United States Copyright Office, and Defendant the United States Copyright Office (“USCO,” and together with Register, the “Defendants”) as follows:

NATURE OF ACTION

1. Dr. Thaler is in the business of developing and applying advanced artificial intelligence (AI) systems capable of generating creative output that would historically qualify for copyright protection and that are made under conditions in which no natural person contributed to the work as a traditional author (“AI-Generated Works”).

2. Dr. Thaler filed to register copyright for an AI-Generated Work with USCO. The application named the AI as the author and Dr. Thaler as the owner of the copyright in the work.

3. Defendants, in a final agency action, denied the copyright registration application on the basis that an AI-Generated Work “lacks the human authorship necessary to support a copyright claim.”

4. Defendants also denied the copyright registration on the basis that Dr. Thaler was not entitled to apply for copyright registration for his submitted work.

5. The denial creates a novel requirement for copyright registration that is contrary to the plain language of the Copyright Act (“Act”), contrary to the statutory purpose of the Act, and contrary to the Constitutional mandate to promote the progress of science.

6. The denials are subject to judicial review under the Administrative Procedure Act (APA) 5 U.S.C. § 704. Plaintiff seeks injunctive and other relief as set forth below.

7. AI is continually getting better at creating AI-Generated Works. These works are going to be profoundly economically and socially disruptive, as they evolve from essentially academic pursuits to those having significant commercial value, including in the context of personalized music, journalism, and digital art.

JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction and is authorized to issue the relief sought under 5 U.S.C. §§ 701-06, 28 U.S.C. §§ 1331, 1338(a), 1361, and 2201-2022.

9. Venue is proper in this district under 28 U.S.C. § 1391(e).

PARTIES

10. Plaintiff Dr. Stephen Thaler is an individual who resided in the State of Missouri at all times relevant to this complaint.

11. As described more fully below, Plaintiff is the applicant for the copyright registration.

12. Defendant Shira Perlmutter is named in her official capacity as the Register of Copyrights and Director of the United States Copyright Office. Under 17 U.S.C. § 701, the powers and duties of the Copyright Office are vested in the Register.

13. Defendant the United States Copyright Office (USCO) is a department of the Library of Congress, responsible for registering copyright claims and maintaining records of copyright ownership.

FACTUAL BACKGROUND

I. HISTORY OF THE APPLICATION

14. Plaintiff is in the business of developing and using AI systems including those capable of creating “AI-Generated Works,” here referring to output that would traditionally qualify for copyright protection and made under conditions in which no natural person contributed to the work as a traditional author.

15. The present case involves Plaintiff’s application to register a copyright for an AI-Generated Work produced by one of Plaintiff’s AI systems referred to as a “Creativity Machine.” The work is the two-dimensional artwork (“The Work”) titled “A Recent Entrance to Paradise,” reproduced below:



16. On November 3, 2018, Plaintiff filed an application (#1-7100387071) to register the Work with the USCO.

17. In the application, Plaintiff identified the author of the Work as the “Creativity Machine,” and noted it was “Created autonomously by machine.” Plaintiff listed himself as the “Copyright Claimant” alongside a transfer statement labelled “Ownership of the Machine.”

18. Plaintiff separately noted in the application that the Work was autonomously created by a computer and that he was entitled to own the copyright in the Work including by virtue of the work made for hire doctrine.

19. On August 12, 2019, the USCO refused to register the claim based on the lack of human authorship. That refusal stated, “We cannot register this work because it lacks the human authorship necessary to support a copyright claim. According to your application this work was ‘created autonomously by machine.’” The refusal did not address Dr. Thaler’s entitlement to any copyright in the Work.

II. PLAINTIFF'S REQUESTS FOR RECONSIDERATION

20. Plaintiff filed two requests for reconsideration to the USCO on September 23, 2019, and May 27, 2020, respectively. Plaintiff confirmed that the submission lacked traditional human authorship. However, Plaintiff argued that the USCO's human authorship requirement was unsupported by law.

21. In denying the first request for reconsideration, the USCO reiterated its response that the copyright law only protects "the fruits of intellectual labor" that "are founded in the creative powers of the mind." Citing to *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879). The USCO stated that since copyright law is limited to "original intellectual conceptions of the author," it refused to register the claim because it determined a human being did not create the Work. The USCO again cited to *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884), 17 U.S.C. § 102(a), and the Compendium of U.S. Copyright Office Practices § 306 (3d ed. 2017).

22. On February 14, 2022, the USCO reconsidered Plaintiff's request the second time, and again refused to register the Work. The USCO accepted that the Work was autonomously created by artificial intelligence without any creative contribution from a human actor. Citing again to *In re Trade-Mark Cases*, the USCO stated that Plaintiff had failed to either provide evidence that the Work is the product of human authorship or convince the USCO to "depart from a century of copyright jurisprudence." Since there was no issue of human author involvement, the USCO limited its review to whether the human authorship requirement was unconstitutional and unsupported by case law.

23. The USCO acknowledge that the phrase "original work of authorship" was "purposefully left undefined" by Congress in order to "incorporate without change the standard

of originality established by the courts under the [1909] copyright statute[,]” citing to H.R. Rep. No. 94-1476, at 51 (1976). The USCO also acknowledged that the Act leaves “unquestionably other areas of existing subject matter that [Bill 94-1476 did] not propose to protect but that future Congresses may want to.”

24. The USCO cited again to *Burrow-Giles Lithographic Co.*, stating that copyright was afforded to photographers because photographs are “representatives of original intellectual conceptions of [an] author.” *Id.*, at 57-59. Pointing out that the court referred to “authors” as human there. *Id.*, at 58. Citing to *Mazer v. Stein*, the USCO stated that the Supreme Court defined an author as someone who “may be viewed as an individual who writes an original composition,” stating “the term in its constitutional sense, has been construed to mean an ‘originator,’ ‘he to whom anything owes its origin.’” USCO argues this requires human authorship as an essential element of protection.

25. Providing additional examples for its decision, the USCO also referred to *Urantia Found v. Kristen Maaherra*, 114 F.3d 955, 957-959 (9th Cir. 1997), arguing the court refused to extend copyright protection to non-human creations. The USCO additionally referred to *Naruto v. Slater*, 888 F.3d 418, 426 (9th Cir. 2018) arguing a monkey cannot register a copyright because the Act specifically referred to an author’s “children,” “widow,” “grandchildren,” and “widower,” which necessarily implied humans and excluded animals. The USCO acknowledged that it was unaware whether a court had considered the authorship of a copyright by artificial intelligence, but held that the decisions rejecting registration for non-human spiritual beings and animals supported its position.

26. The USCO also cited to the National Commission on New Technological Uses of Copyrighted Works (“CONTU”) as support of its position. CONTU was mandated, in part, to

study the “creation of new works by the application or intervention of [] automatic systems of machine reproduction.” In the final report in 1979, CONTU determined that the existing judicial construction requiring human authorship sufficiently enabled protection for works created with the use of computers, and that no amendment to copyright law was needed. CONTU specifically stated that eligibility of registration did not depend on the use of devices in its creation, but rather if there was the presence of at least minimal human creative effort at the time it was produced. The USCO failed to recognize that the language cited from CONTU did not specifically address works created solely by computers as it was assumed it was not possible for a machine to create autonomously at the time.

27. However, it stated that CONTU’s position mirrored that of the USCO. The USCO stated that the practice manual for the office — the Compendium of U.S. Copyright Office Practices — “has long mandated human authorship for registration.” The original Compendium implied that a work must owe its origin to a human being, and that materials provided solely by nature, by plants, or by animals were not copyrightable. Following that reasoning, the current Compendium provided examples of works that were not copyrightable, including automated computer translations, derivative sound recordings made purely by mechanical processes, human performance required for choreography and pantomimes, machine produced expression in visual arts works such as linoleum flooring, x-rays and other medical imaging, or hypertext markup language if created by a human being rather than a website design program.

28. Finally, the USCO stated that its position was supported by a recent report from the U.S. Patent and Trademark Office, where it sought public comment on whether a “work produced by an AI algorithm or process, without the involvement of a natural person... qualif[ies] as a work of authorship under the Copyright Act.” It indicated in its report that the

“vast majority of commenters acknowledged that existing law does not permit a non-human to be an author [and that] this should remain the law.” U.S. PATENT AND TRADEMARK OFFICE, PUBLIC VIEWS ON ARTIFICIAL INTELLIGENCE AND INTELLECTUAL PROPERTY POLICY at 19-21 (2020).

III. USCO’S DENIAL OF COPYRIGHT REGISTRATION IS AN ARBITRARY AND CAPRICIOUS AGENCY ACTION AND NOT IN ACCORDANCE WITH THE LAW

A. The Plain Language of the Act Allows Protection of AI-Generated Works

29. The Act affords protection to “original works of authorship,” a phrase which Congress left purposely undefined and for interpretation by the courts. 17 U.S.C. § 102(a). At no point does the Act limit authorship to natural persons. Indeed, corporations and other non-human entities have been considered “authors” for purposes of the Act for over a century. 17 U.S.C. § 101.

30. The bar for originality is low. “To qualify for copyright protection, a work must be original to the author.” *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, 499 U.S. 340, 345 (1991) (citation omitted). “Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.” *Id.*, at 345 (citation omitted).

31. The Work meets all the requirements for copyright protection. Indeed, if Dr. Thaler had submitted the same AI-Generated Work with his company listed as the author, USCO would have granted his company a registration, and no one would have known the work was AI-Generated. The USCO argues that this is not cause for concern because “[a]pplicants who mislead the Office do so at their peril.” But contrary to the USCO’s argument, the USCO does

not test, or have a means to test, to see if a registration is being submitted for an AI-Generated Work, and USCO does not require, at least for works made for hire, that a human author be disclosed in a registration filing. It is very likely that other applicants have successfully registered copyright in AI-Generated Works without exhibiting Dr. Thaler's level of transparency.

32. Copyright protection for AI-Generated Works is entirely consistent with the text and purpose of the Act. It would promote the use and development of creative AIs which would generate socially and commercially valuable works, and it would protect the moral rights of human authors by preventing someone from falsely claiming credit for work done by a machine.

B. No Case Law Stands for the Proposition that an AI-Generated Work is Ineligible for Copyright Protection

33. The USCO cites to *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879) and to *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884) in support of its Human Authorship Requirement. *Compendium of U.S. Copyright Office Practices, Third Edition*, Section 306. This Human Authorship Requirement, of course, is a Copyright Office policy—not something created by statute. In fact, it is contrary to statute.

34. Certainly, any number of judicial opinions have discussed originality in the context of human-centric mental activity, but none of those opinions have considered an AI-Generated Work. It is hardly surprising that judgments from the Gilded Age would fail to consider the possibility of AI stepping into the shoes of a person and generating something creative. Dicta from such cases should therefore not be taken out of context to create a blanket prohibition on an entire field of publicly beneficial activity.

35. The appropriate takeaway from *Burrow-Giles*—which involved the Supreme Court holding for the first time that a photograph was eligible for copyright protection—is not that an AI cannot be an author, but rather that our courts have a long history of purposive interpretation of the Act in light of technological evolution.

36. Technology has advanced considerably since CONTU determined that AI-Generated Works were too speculative to consider in 1979. See NAT'L COMM'N ON NEW TECH. USES OF COPYRIGHTED WORKS, FINAL REPORT ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS 44 (1979). Today, AI can autonomously create works indistinguishable from a human being in terms of original and creative output. Applications allowing users and companies to utilize such AI to create AI-Generated Works are commercially available and rapidly increasing in use. *See, e.g.*, <https://aiartists.org/ai-generated-art-tools/>; *see, generally*, <https://aiindex.stanford.edu/report/>. AI, including Dr. Thaler's AI, are capable of producing creative output that, at least functionally, is equivalent to “the fruits of intellectual labor” that “are founded in the creative powers of the mind.” *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879).

37. Courts associating mental activity with originality have not been using terms precisely or meaningfully in the context of AI-Generated Works. The problem of speaking precisely about such concepts with regards to computers was identified by Alan Turing, one of the founders of computer science, who in 1950 considered the question, “Can machines think?” *See* A.M. Turing, *Computing Machinery and Intelligence*, 59 MIND 433, 433–51 (1950). He found the question to be ambiguous, and the term “think” to be unscientific in its colloquial usage. *Id.*

38. Turing decided the better question to address was whether an individual could tell the difference between responses from a computer and an individual; rather than asking whether machines “think,” he asked whether machines could perform in the same manner as thinking entities. *Id.* Turing’s analysis from more than sixty years ago demonstrates that a test based on whether a machine is exhibiting “mental activity” would be ambiguous, challenging to administer, and of uncertain utility. The real question is whether a machine can make something indistinguishable from a person for purposes of copyright protection. The answer, as an undisputed factual matter here, is yes.

39. In addition to cases where courts have used human-centric language, USCO cites to two 9th Circuit cases it argues involves facts analogous to AI activity: animal art and works allegedly authored by spirits. First, neither is an appropriate analogy to AI-Generated Works. Second, neither case stands for the proposition claimed by USCO.

40. *Naruto v. Slater* involved a series of images that a black crested black macaque, named Naruto, took of himself in Indonesia. Naruto, by and through his Next Friends, People for the Ethical Treatment of Animals, Inc. (PETA), sued David Slater, who owned the camera used by Naruto and who subsequently used Naruto’s photographs without permission. While USCO is correct that the case was dismissed, this was not based on the USCO’s Human Authorship Requirement. The case was dismissed based on standing. As the 9th Circuit Court articulated, “We must determine whether a monkey may sue humans, corporations, and companies for damages and injunctive relief arising from claims of copyright infringement. Our court’s precedent requires us to conclude that the monkey’s claim has standing under Article III of the United States Constitution. Nonetheless, we conclude that this monkey—and all animals, since

they are not human—lacks statutory standing under the Copyright Act. We therefore affirm the judgment of the district court.” *Naruto v. Slater*, 888 F.3d 418, 420 (9th Cir. 2018).

41. The present case, unlike *Naruto*, involves a human being suing for his ownership rights to property made by his machine. There is clearly no standing issue of the sort at issue in *Naruto*. If anything, *Naruto* emphasizes the importance of a purposive approach to statutory interpretation rather than a hyper-literal, textualist approach combined with over-reliance on dicta. Because, of course, if the 9th Circuit had literally intended for animals to be unable to sue under the Act, such a holding would prohibit many lawsuits. Human beings are, obviously, animals.

42. USCO also cites to, *Urantia Foundation v. Maaherra*, 114 F.3d 955 (9th Cir. 1997), which involved a book allegedly authored in part by a spiritual being. While a very interesting case in its own right and for a variety of reasons unrelated to AI-Generated Works, the 9th Circuit found that the book was protected by copyright regardless of any spiritual influences. “For copyright purposes, however, a work is copyrightable if copyrightability is claimed by the first human beings who compiled, selected, coordinated, and arranged the Urantia teachings, ‘in such a way that the resulting work as a whole constitutes an original work of authorship.’” *Id.* at 958. “We hold that the human selection and arrangement of the revelations in this case could not have been so ‘mechanical or routine as to require no creativity whatsoever.’ We conclude, therefore, that the ‘extremely low’ threshold level of creativity required for copyright protection has been met in this case. *Id.* at 959 (citing *Feist, supra*, 499 at 345 (“The vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble, or obvious it might be.’”))

43. The 9th Circuit even noted that, “The copyright laws, of course, do not expressly require ‘human’ authorship, and considerable controversy has arisen in recent years over the copyrightability of [AI-Generated Works].” *Id.* at 958. Without addressing the protectability of AI-Generated Works, the 9th Circuit held that, “[a]t the very least, for a worldly entity to be guilty of infringing a copyright, that entity must have copied something created by another worldly entity.” *Id.* at 958. The present case lacks, on information and belief, any divine intervention.

44. There is nothing mystical about AI-Generated Works—Dr. Thaler’s AI is the result of decades of his research and investment. Investment which the Act is intended to promote, along with the distribution of creative works. “Nothing in the text of the Copyright Clause confines the “Progress of Science” exclusively to “incentives for creation.” *Golan v. Holder*, 565 U.S. 302 (2012). In *Golan*, the Supreme Court notes that inducing the dissemination of works by itself is an appropriate means to promote science.

C. Dr. Thaler is Entitled to The Work Under Common Law Principles of Property Ownership Including Accession and First Possession

45. Copyright in a work can initially vest in an author. “Copyright in a work protected under this title vests initially in the author or authors of the work.” 17 U.S.C. § 201(a). However, it is often the case that copyright in a work will instead initially vest in an author’s employer, or in a party for whom a work was prepared. “In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.” 17 U.S.C. § 201(b). In addition, the ownership of copyright may be transferred by operation of law. “The ownership of a copyright may be

transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.”

17 U.S.C. § 201(d)(1).

46. An AI is not a legal person and does not have rights. It is therefore not possible for an AI to “own” intellectual property. An AI that creates an AI-Generated Work does not do so as a legal “employee” per se. It does so, at least in the present case, in its capacity as personal property.

47. Dr. Thaler owns and operates the AI which created The Work. He is therefore entitled to property created by his AI under principles and rules of property ownership including accession and first possession.

48. It is generally the case that where property creates additional property, the owner of the original property is entitled to the subsequent property. This rule, sometimes referred to as *accession*, applies in a variety of contexts. If a person owns a cow that births a calf, the cow’s owner becomes calf’s owner. If a person owns a fruit tree that bears fruit, the tree’s owner owns the fruit. The tree owner derives title to the fruit through the tree, but this does not require the tree to execute a written document that transfers title to the fruit—the title to the fruit initially vests in the tree’s owner by virtue of her relationship to the fruit tree.¹ *See generally* Thomas W. Merrill, Accession and Original Ownership, *JOURNAL OF LEGAL ANALYSIS*, 459-505 (2009).

¹ In some cases, third parties may have conflicting entitlement claims, such as a party picking fruit, but there are no conflicting claims to entitlement in the present case. Dr. Thaler is the only possible owner of The Work.

49. Here, Dr. Thaler's AI generated a piece of intellectual property that Dr. Thaler owns because he owns the AI. If the AI had been a 3D printer that created a physical painting of The Work, Dr. Thaler would own that painting as personal property. There is no reason why Dr. Thaler should be any less entitled to the property in a digital painting made by his AI.

50. Alternately, or in addition, if the Court holds that an AI-Generated Work is indeed proper subject matter for copyright protection, then Dr. Thaler owns copyright in The Work by virtue of being the first party to possess it. "[T]he common and civil law (both of which accept the desirability of private ownership) have responded with the proposition that the taking possession of unowned things is the only possible way to acquire ownership of them." Richard A. Epstein, *Possession as the Root of Title*, 13 *Georgia Law Review* 1221, 1222 (1979). The rule of first possession is simple, but like accession, foundational to functioning systems of private property. If the AI made a piece of property, and if no other party was entitled to ownership by virtue of their relationship to the AI, then The Work was unowned property which Dr. Thaler took title to by virtue of first possession.

51. Although the work for hire doctrine provides one statutory mechanism for a party other than an author to claim initial ownership, nowhere does the Act prohibit other ownership mechanisms including pursuant to common law rules of entitlement.

D. Dr. Thaler is Also Entitled to The Work Under the Work for Hire Doctrine

52. While an AI is not an employee, the Work for Hire Doctrine is sufficiently flexible to apply in this case. Dr. Thaler built and controlled the AI which generated The Work, The Work was only created by the AI at Dr. Thaler's insistence, and The Work only exists due to Dr. Thaler's investment.

53. The Supreme Court in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) identified factors that characterize an employment relationship under agency law. Those factors, including the employer’s control over the work, control over the employee, and the status and conduct of an employee, all weigh heavily in favor of The Work being treated as a work for hire. *Id.*, at 751-752. The AI is controlled by Dr. Thaler, the AI only operates at Dr. Thaler’s direction, and the AI is owned as property by Dr. Thaler.

54. The central concern with overapplication of the work for hire doctrine is that it has the potential to exploit human authors. Employers might acquire copyrights not contemplated at the time of contracting and which would not be reflected in the agreed-upon price for employment or a work. *See, e.g.*, Anne Marie Hill, Work for Hire Definition in the Copyright Act of 1976: Conflict Over Specially Ordered or Commissioned Works, 74 Cornell L. Rev. 559, 569 (1989). Here, where the author is a machine that has no legal rights, there can be no concern about exploitation.

55. In addition to works created within the scope of employment, certain works created by independent contractors are also considered works-for-hire. 17 U.S.C. § 101. This requires that the parties “expressly agree in a written instrument signed by them that the work shall be considered a work for hire.” *Id.* However, that requirement was again motivated by the desire to protect human authors. *See, e.g.*, Anne Marie Hill, Work for Hire Definition in the Copyright Act of 1976: Conflict Over Specially Ordered or Commissioned Works, 74 Cornell L. Rev. 559, 569 (1989). In this case, again, The Work was created by the AI while the AI was under his control and at Dr. Thaler’s request and expense. In the case of an AI-Generated Work, because an AI has no rights to protect, there is no need for a written instrument for its benefit.

56. While an AI is neither a legal employee nor an independent contractor capable of executing a contract, it functionally behaves as an employee or independent contractor in creating AI-Generated Works.

E. AI Authorship is Consistent with the Purpose of the Act and the Constitution

57. It is important to interpret the Act consistent with its purpose and with the Constitution. Copyright protection is intended to promote the creation of socially valuable works. It is “intended definitely to grant valuable, enforceable rights to authors, publishers, etc., without burdensome requirements; ‘to afford greater encouragement to the production of literary [or artistic] works of lasting benefit to the world.’” *Washingtonian Co. v. Pearson*, 306 U.S. 30, 36. It is also intended to promote dissemination of those works. *See, e.g., Golan v. Holder*, 132 S. Ct. 873, 888 (2012). The Copyright Clause of the Constitution likewise is intended to promote the creation and dissemination of new works. Art. I, § 8, cl. 8. The Constitution provides for Copyright protection, “[n]ot primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given.” H.R. Rep. No 60-2222, at 7 (2d Sess. 1909).

58. Allowing protection of AI-Generated Works is required by the plain language of the Act. In 1973, the Supreme Court noted that the terms “Writings” and “Authors,” have “not been construed in their narrow literal sense but, rather, with the reach necessary to reflect the broad scope of constitutional principles.” *Goldstein v. California*, 412 U.S. 546, 561 (1973).

59. The Supreme Court has also articulated, “[w]hen technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of its basic purpose.” *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). For instance, in *Aiken*, the issue was whether playing a radio in a restaurant constituted a performance and thus

an infringement. The meaning of performance was therefore ambiguous given the technology invented after the 1909 Copyright Act. The Supreme Court held that playing a radio in a restaurant was not a “performance.” *Id.*, at 162. This was because of a simple logic that a passive listener cannot be a performer, and “those who listen do not perform, and therefore do not infringe.” *Id.*, at 159 (citation omitted).

60. The Supreme Court has directly stated that “our inquiry cannot be limited to ordinary meaning and legislative history, for this is a statute that was drafted long before the development of the electronic phenomena with which we deal here.” *Fort. Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 395 (1968). Thus, “[w]e must read the statutory language of 60 years ago in the light of drastic technological change.” *Id.* In doing so, the Supreme Court defined an airing over its airwaves as a “performance” of copyright work. *Id.* Like *Aiken*, the court looked at the actual relationship between performers and listeners, to essentially determine what was going on within the ambit of the Act.

CAUSES OF ACTION

FIRST CAUSE OF ACTION

(Administrative Procedure Act Violation for Denial of Plaintiff’s Application)

61. Plaintiff re-alleges and incorporates by reference every allegation contained in the preceding paragraphs.

62. The USCO’s second refusal to register the Work constituted final agency action and Plaintiff seeks to reverse that refusal here.

63. For the reasons stated above, requiring human authorship for registration of copyright in a work is contrary to law.

64. Defendants’ refusal to register the copyright claim in the work is contrary to law.

65. The agency actions here were arbitrary, capricious, an abuse of discretion and not in accordance with the law, unsupported by substantial evidence, and in excess of Defendants' statutory authority.

66. The refusal to register the copyright claim in the Work should be set aside and the application reinstated.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court:

1. Issue an order compelling Defendants to set aside their refusal to register the Work.
2. Award of costs and its reasonable attorney's fees to Plaintiff; and
3. All other relief as may be appropriate.

Dated: June 2, 2022

BROWN, NERI, SMITH & KHAN LLP

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

STEPHEN THALER, an individual,

Plaintiff,

vs.

SHIRA PERLMUTTER, in her official
capacity as Register of Copyright and Director
of the United States Copyright Office; and
THE UNITED STATES COPYRIGHT
OFFICE,

Defendants.

Civil Action No. 22-1564 (BAH)

Chief Judge Beryl A. Howell

NOTICE OF FILING ADMINISTRATIVE RECORD

Pursuant to the Court's October 12, 2022 Order, Defendants submit the following
Administrative Record and certification of the Record.

Index of U.S. Copyright Office Administrative Record

Ex. No.	Title	Date	Description	Bates Range
Ex. A	Declaration of Mark Gray	11/3/2022	Certification of Administrative Record	N/A
Ex. B	"A Recent Entrance to Paradise" Application	11/3/2018	Copyright application	US_0000001- US_0000003
Ex. C	"A Recent Entrance to Paradise" Deposit	11/3/2018	Deposit submitted to Copyright Office	US_0000004
Ex. D	"A Recent Entrance to Paradise" Initial Refusal Letter	8/12/2019	Refusal Letter sent by Copyright Office	US_0000005- US_0000007

Ex. E	“A Recent Entrance to Paradise” First Reconsideration Request	9/23/2019 ¹	First Request for Reconsideration submitted by applicant	US_0000008-US_0000018
Ex. F	“A Recent Entrance to Paradise” Refusal of First Request for Reconsideration	3/30/2020	Refusal Letter sent by Copyright Office	US_0000019-US_0000021
Ex. G	“A Recent Entrance to Paradise” Second Reconsideration Request	5/27/2020	Second Request for Reconsideration submitted by applicant	US_0000022-US_0000030
Ex. H	“A Recent Entrance to Paradise” Refusal of Second Request for Reconsideration	2/14/2022	Refusal letter sent by Copyright Office Review Board	US_0000031-US_0000037

Respectfully submitted,

BRIAN M. BOYTON
Principal Deputy Assistant Attorney General

GARY L. HAUSKEN
Director

s/ Jenna Munnelly
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Of Counsel:
SCOTT D. BOLDEN
Department of Justice

Counsel for Defendants

Dated: November 8, 2022

¹ The top of the First Request for Reconsideration, US_0000009, is dated September 8, 2019, but the attorney’s signature block, US_0000016 has a date of September 23, 2019.

Registration #: *-APPLICATION-*

Service Request #: 1-7100387071

Mail Certificate

Steven Thaler
1767 Waterfall Dr.
St. Charles, MO 63303 United States

Priority: Routine

Application Date: November 03, 2018

Note to C.O.: Please note this artwork was autonomously created by a computer algorithm running on a machine called the "Creativity Machine". We are seeking to register this computer-generated work as a work-for-hire to the owner of the Creativity Machine.

Correspondent

Name: Ryan Abbott
Email: drryanabbott@gmail.com
Address: Frank Whittle Building
02 AB 05
Guildford GU27XH United Kingdom

APPX 042

US_000001

Registration Number
-APPLICATION-

Registration Decision Date:
May 19, 2019

Title _____

Title of Work: A Recent Entrance to Paradise

Completion/Publication _____

Year of Completion: 2012
Date of 1st Publication: May 25, 2016
Nation of 1st Publication: United States

Author _____

- **Author:** Creativity Machine
Author Created: 2-D artwork, Created autonomously by machine
Work made for hire: Yes
Domiciled in: United States

Copyright Claimant _____

Copyright Claimant: Steven Thaler
1767 Waterfall Dr., St. Charles, MO, 63303, United States
Transfer statement: Ownership of the machine

Rights and Permissions _____

Name: Steven Thaler
Email: sthaler@imagination-engines.com

Certification _____

Name: Ryan Abbott
Date: November 03, 2018

Correspondence: Yes



United States Copyright Office

Library of Congress • 101 Independence Avenue SE • Washington DC 20559-6000 • www.copyright.gov

August 12, 2019

Ryan Abbott
Frank Whittle Building 02 AB 05
Guildford, GU27XH
United Kingdom

Correspondence ID: 1-3NPRZ2Y

RE: A Recent Entrance to Paradise

Dear Ryan Abbott:

We cannot register this work because it lacks the human authorship necessary to support a copyright claim. According to your application this work was “created autonomously by machine.”

Copyright protects original works of human authorship that are fixed in some physical form. See 17 U.S.C. '102(a). As used in the copyright context, the term "original" means that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least a minimal degree of creativity. See *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

The U.S. Copyright Office will register an original work of authorship, provided that the work was created by a human being. The copyright law only protects “the fruits of intellectual labor” that “are founded in the creative powers of the mind.” *Trade-Mark Cases*, 100 U.S. 82, 94 (1879). Because copyright law is limited to “original intellectual conceptions of the author,” the Office will refuse to register a **claim** if it determines that a human being did not create the work. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

Neither the aesthetic appeal or commercial value of a work, nor the amount of time and effort expended to create a work are factors that are considered under the copyright law. See *Bleistein v. Donaldson*, 188 U.S. 239 (1903); *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). The question is whether there is sufficient creative authorship within the meaning of the copyright statute and settled case law.

After careful consideration, we have determined that this particular work will not support a claim to copyright under the standards described above. Therefore we cannot issue the registration which you requested. The copyright law requires that we retain the deposit of this work. See 17 U.S.C. '704(a). The nonrefundable filing fee has been applied to administrative costs.

Ryan Abbott

- 2 -

1-3NPRZ2Y

This letter is for your information only; no response is necessary.

Sincerely,

Examiner Angello
Visual Arts Division
Office of Registration Policy & Practice
U.S. Copyright Office

Enclosures:

Reply Sheet



United States Copyright Office

Library of Congress • 101 Independence Avenue SE • Washington DC 20559-6000 • www.copyright.gov

1-3NPRZ2Y

Return this sheet if you request reconsideration.

How to request reconsideration:

- Send your request in writing. **Please note that your request must be postmarked (via the U.S. Postal Service) or dispatched (via commercial carrier, courier, or messenger) no later than three months after a refusal is issued.**
- Explain why the claim should be registered or why it was improperly refused.
- Enclose the required fee – see below.
- Address your request to:
**RECONSIDERATION
Copyright RAC Division
P.O. Box 71380
Washington, DC 20024-1380**

Note: Include the Correspondence ID Number (see above) on the first page. Indicate either “First Reconsideration” or “Second Reconsideration” as appropriate on the subject line.

Notification of decision: The Copyright Office will send a written notification of its decision, including an explanation of its reasoning.

First Request for Reconsideration: The Registration Program Office considers the first request. If it upholds the refusal, you may submit a second request.

Second Request for Reconsideration: The Copyright Office Board of Review considers the second request. The Board consists of the Register of Copyrights and the General Counsel (or their respective designees), and a third member appointed by the Register. The Board’s decision constitutes final agency action.

FEES:

First Request \$250 per claim (i.e. the work(s) contained on one application)

Second Request \$500 per claim (i.e. the work(s) contained on one application)

OCT 16 2019



United States Copyright Office

Library of Congress • 101 Independence Avenue SE • Washington DC 20559-6000 • www.copyright.gov

1-3NPRZ2Y

Return this sheet if you request reconsideration.

How to request reconsideration:

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- Explain why the claim should be registered or why it was improperly refused.
- Enclose the required fee – see below.
- Address your request to:

**RECONSIDERATION
 Copyright RAC Division
 P.O. Box 71380
 Washington, DC 20024-1380**

Note: Include the Correspondence ID Number (see above) on the first page. Indicate either “First Reconsideration” or “Second Reconsideration” as appropriate on the subject line.

Notification of decision: The Copyright Office will send a written notification of its decision, including an explanation of its reasoning.

First Request for Reconsideration: The Registration Program Office considers the first request. If it upholds the refusal, you may submit a second request.

Second Request for Reconsideration: The Copyright Office Board of Review considers the second request. The Board consists of the Register of Copyrights and the General Counsel (or their respective designees), and a third member appointed by the Register. The Board’s decision constitutes final agency action.

FEES:

First Request	\$250 per claim (i.e. the work(s) contained on one application)
Second Request	\$500 per claim (i.e. the work(s) contained on one application)

OCT 16 2019

September 8, 2019

RECONSIDERATION
US Copyright Office
Receipt Analysis and Control Division
P.O. Box 71380
Washington, DC 20024-1380

RE: **First Reconsideration** Correspondence ID Number: 1-3NPRZ2Y

To the United States Copyright Office:

This first request for reconsideration (“Request”) is responsive to a notice on August 12, 2019 (“Notice”) which reported the Copyright Office’s (“Office”) determination not to issue the requested registration.

I understand this decision was made on the basis that the present submission lacks human authorship, and the Office has a Human Authorship Requirement. U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES §313.2 (3d ed. 2014). It is correct that the present submission lacks traditional human authorship—it was autonomously generated by an AI.

The Request argues that the Human Authorship Requirement is unconstitutional and unsupported by either statute or case law. Both the U.S. Constitution and principles of good public policy require that the Office permit “computer-generated works” (CGWs) to receive copyright protection. In addition, the Office should acknowledge the AI as an author where it otherwise meets authorship criteria, with any copyright ownership vesting in the AI’s owner.

I. Arguments in Support of Protections for CGWs

a. Subsistence

The Office should register copyrights for CGWs because doing so would further the underlying goals of copyright law, including the constitutional rationale for copyright protection, and because there is no binding authority that prohibits copyright for CGWs.

The U.S. Constitution explicitly provides an economic rationale for copyright protection. Namely, that Congress shall have the power to, “promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” UNITED STATES CONSTITUTION, ARTICLE I, SECTION 8, CLAUSE 8. This refers to copyright acting as a financial incentive to generate expressive works.

Copyright can promote the creation of works by allowing copyright owners to keep others from making, using, copying and selling protected works without their permission. Without copyright, it might not be possible to exclude third parties from, say, downloading music or artwork for free. Thus, copyright can increase the financial value of works by allowing copyright holders to charge a premium for their intellectual property. In turn, the increased value of works incentivizes their creation.

In addition to serving as an economic incentive, copyright is also justified on the basis of natural or moral rights, such as the right of attribution, the integrity of an author’s work, and Lockean labor theories.

Allowing copyright for CGWs would further all of these economic and moral objectives. In terms of economic rights, even though AI is not responsive to financial incentives, the

individuals and businesses who own and develop AI are. Allowing copyright for CGWs would increase the value of “creative AIs” that are capable of generating CGWs, which would thereby incentivize their development. This would reward effort upstream from the stage of creative activity and ultimately result in even more expressive works. In addition, it would prevent a perverse situation where an AI is more effective at generating creative output than a person in certain situations, but a party is forced to avoid using AI because only directly human output can attract copyright protection.

In terms of moral rights, acknowledging AI as an author would safeguard moral rights because it would prevent people from receiving undeserved acknowledgement. Taking credit for an AI’s work would not be unfair to a machine, but it would diminish the accomplishments of people who have created without using inventive AI. In addition, acknowledging AI as authors would acknowledge AI developers who can take credit for the accomplishments of their creations.

b. Ownership

An AI should clearly not own copyright. Among other reasons, machines do not have legal personality and cannot own property.

In the event that copyright protection is provided for CGWs, the default owner of copyright should be the owner of the AI that has generated the work. This best achieves the goals of copyright law because it makes a creative AI more valuable to its owner and thus most promotes the development of creative AIs. This would also be consistent with current principles of property ownership, such that the owners of chattel (including machines) are able to exploit their property, and it would not interfere with the transfer of personal property in the form of creative AIs.

Such an arrangement would not be without precedent, particularly with respect to copyright ownership where the Works Made for Hire doctrine allows an employer to be considered an author and to own copyright. 17 U.S.C. § 201(b) (2016). Indeed, in the U.S., non-human, artificial persons such as companies can already be authors under this doctrine.

Alternately, obvious ownership options other than the AI include the machine's owner, user, or programmer(s). In the present case, the current applicant, Stephen Thaler, is the owner of the AI that generated the CGW and should thus be the owner of any copyright. Stephen Thaler was also the AI's user and programmer. There is no other individual involved with the AI in the present case who would be an appropriate recipient of any copyright to the submitted CGW.

c. International Analogs

Providing copyright protection for CGWs would not be without precedent. The United Kingdom was the first jurisdiction to explicitly provide for copyright protection of CGWs. The Copyright, Designs and Patents Act 1998 ("CDPA") is the primary legislation for copyright law and it makes special provision for CGWs with different rules for authorship and copyright duration. These works are defined as those "generated by a computer in circumstances such that there is no human author of the work[s]." Copyright, Designs and Patents Act 1988, §178.

For CGW works, the CDPA provides that, "[i]n the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangement necessary for the creation of the work are undertaken." Copyright, Designs and Patents Act 1988, §9 (3). Since the enactment of the CDPA, jurisdictions such as Ireland, India

and New Zealand have followed the United Kingdom's lead in providing copyright protection for CGWs.

II. Problems with the Human Authorship Requirement

a. Policy Objections

The Human Authorship Requirement strongly discourages the use and development of creative AI. As a result of the Office's policies, CGWs in the United States now automatically enter the public domain and cannot receive copyright protection. As a result, even when an AI would be more efficient than a person, a person may need to be used to create a new work in order for copyright protection to subsist. This is a problematic state of affairs that will become even more inefficient once creative AI is able to routinely outperform people at certain creative acts. Advanced AI may result in significant and widespread social benefits assuming appropriate legal frameworks exist.

In addition, the Human Authorship Requirement is likely to lead to a state of affairs in which people inaccurately claim authorship for work done by machines. Anyone in control of an AI that has generated a CGW with value can register the work simply by listing themselves as an author. Indeed, it has previously been reported that intellectual property filings have not disclosed the fact creative works were CGWs. Ryan Abbott, *I Think, Therefore I Invent: Creative Computers and the Future of Patent Law*, 54 B. C. L. Rev. 1079–1126 (2016). The Office was only aware the present registration was a CGW because this was explicitly disclosed by the applicant. Had this not been disclosed at the time of registration, it would not have been challenged by the Copyright Office and it is unlikely a third-party would become aware of the work's AI origins. This policy encourages applicants to act dishonestly

to capture the value of CGWs. It also undermines the value of human authorship by allowing individuals to inaccurately claim they are authors.

b. Lack of Authority for the Human Authorship Requirement

I am aware of no U.S. statute that specifically addresses CGWs and copyright, or that explicitly requires an author to be a natural person. Indeed, as discussed earlier, non-human entities may be authors under, *inter alia*, the Works Made for Hire doctrine.

The Notice, and the Human Authorship Requirement, cite to dicta from over a hundred years ago to support the assertion that a human being has to create a work. Specifically, the Notice cites to the 1879 Trade-Mark Cases, 100 U.S. 82, 94 (1879), as well as to the 1886 case of *Burrow-Giles v. Sarony*, 11 U.S. 53, 58 (1884), in support of the Human Authorship Policy based on their references to “the creative powers of the mind” and “intellectual conceptions”. However, these cases did not consider whether AI could legally generate works eligible for copyright protection. Indeed, in the late 19th century, AI did not exist in any meaningful sense. The cameras of the time were tools that were incapable of functionally automating human creativity.

Today, it has now been well documented that machines are able to autonomously generate creative works, and to functionally automate human creativity. See, e.g., Ryan Abbott, *Artificial Intelligence, Big Data and Intellectual Property: Protecting Computer-Generated Works in the United Kingdom*, In RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND DIGITAL TECHNOLOGIES (Tanya Aplin ed., Forthcoming 2019) <https://ssrn.com/abstract=3064213>. It is not at all clear that there is a mechanistic difference between how people and machines engage in creative acts that justifies different legal rules, and there is certainly not a functional difference that justifies different legal rules. Because copyright law is primarily functional in nature and

concerned with the generation of new works, it should be indifferent to whether people or machines are generating these works so long as copyright law achieves its objective of promoting the useful arts.

The Copyright Office is currently relying upon non-binding judicial opinions from the Gilded Age to answer the question of whether CGWs can be protected. If CWGs are to be prohibited, this should only be on the basis of sound public policy after serious consideration. Indeed, the U.S. Patent and Trademark Office has recently launched a request for comments on patenting artificial intelligence inventions, in part to create an appropriate policy for CGWs. Federal Register / Vol. 84, No. 166 / Tuesday, August 27, 2019 / Notices.

<https://www.federalregister.gov/documents/2019/08/27/2019-18443/request-for-comments-on-patenting-artificial-intelligence-inventions>

To the extent that the cases cited in the Notice have anything useful to offer with respect to CGWs, the relevant dicta is that just as the terms “Writings” have been construed flexibly in interpreting the Patent and Copyright Clause, so too should the term “Authors” be afforded the flexibility needed to effectuate constitutional purposes.

III. Conclusion

I submit the requested registration be granted because the Office’s Human Authorship Requirement is unconstitutional, does not further the goals of copyright law, and it is not supported by existing statutes or case law.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. Abbott", written in a cursive style.

Ryan Abbott
Attorney for Applicant

Date: September 23, 2019

OCT 16 2019



United States Copyright Office

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August 12, 2019

Ryan Abbott
Frank Whittle Building 02 AB 05
Guildford, GU27XH
United Kingdom

Correspondence ID: 1-3NPRZ2Y

RE: A Recent Entrance to Paradise

Dear Ryan Abbott:

We cannot register this work because it lacks the human authorship necessary to support a copyright claim. According to your application this work was “created autonomously by machine.”

Copyright protects original works of human authorship that are fixed in some physical form. See 17 U.S.C. ' 102(a). As used in the copyright context, the term "original" means that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least a minimal degree of creativity. See *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

The U.S. Copyright Office will register an original work of authorship, provided that the work was created by a human being. The copyright law only protects “the fruits of intellectual labor” that “are founded in the creative powers of the mind.” *Trade-Mark Cases*, 100 U.S. 82, 94 (1879). Because copyright law is limited to “original intellectual conceptions of the author,” the Office will refuse to register a **claim** if it determines that a human being did not create the work. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

Neither the aesthetic appeal or commercial value of a work, nor the amount of time and effort expended to create a work are factors that are considered under the copyright law. See *Bleistein v. Donaldson*, 188 U.S. 239 (1903); *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991). The question is whether there is sufficient creative authorship within the meaning of the copyright statute and settled case law.

After careful consideration, we have determined that this particular work will not support a claim to copyright under the standards described above. Therefore we cannot issue the registration which you requested. The copyright law requires that we retain the deposit of this work. See 17 U.S.C. ' 704(a). The nonrefundable filing fee has been applied to administrative costs.

Ryan Abbott

- 2 -

1-3NPRZ2Y

This letter is for your information only; no response is necessary.

Sincerely,

Examiner Angello
Visual Arts Division
Office of Registration Policy & Practice
U.S. Copyright Office

Enclosures:

Reply Sheet



United States Copyright Office

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March 30, 2020

Ryan Abbott
Frank Whittle Building 02 AB 05
Guildford, GU27XH
United Kingdom

Correspondence ID: 1-3ZPC6C3
Original Corresp. ID: 1-3NPRZ2Y

Re: *A Recent Entrance to Paradise*

Dear Mr. Abbott:

This correspondence responds to your September 8, 2019 letter requesting reconsideration of the U.S. Copyright Office’s (the “Office”) refusal to register a copyright claim in the above-titled work. You made this request on behalf of the copyright claimant, Stephen Thaler.

We reviewed *A Recent Entrance to Paradise* (the “Work”) in light of the points raised in your letter. We affirm our decision to refuse registration for the Work because it lacks the human authorship necessary to be eligible for copyright protection.

Discussion

The U.S. Copyright Office will register an original work of authorship only if the work was created by a human being. This includes any human being that prepares a work on behalf of an organizational author as a work made for hire.

As noted in our original refusal letter, the copyright law only protects “the fruits of intellectual labor” that “are founded in the creative powers of the mind.” *Trade-Mark Cases*, 100 U.S. 82, 94 (1879). Because copyright law is limited to “original intellectual conceptions of the author,” the Office will refuse to register a claim if it determines that a human being did not create the work. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884). See also 17 U.S.C. §102(a) & *U.S. Copyright Office, Compendium of U.S. Copyright Office Practices* § 306 (3d ed. 2017).

The Office will not register works produced by a machine or mere mechanical process that operates randomly or automatically without sufficient creative input or intervention from a human author. *Compendium (Third)* § 313.2. As you state in your letter, the Work here was “autonomously generated by an AI.” *Letter* at 1. You have provided no evidence on sufficient creative input or intervention by a human author in the Work. We conclude, therefore, that the Work lacks the human authorship necessary to sustain a claim in copyright. The various legal and policy arguments put forth in your request for reconsideration are insufficient to convince the Office to abandon its longstanding interpretation of the

Ryan Abbott

- 2 -

1-3ZPC6C3

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.

Conclusion

Because it was not created by a human author, we again refuse copyright registration for *A Recent Entrance to Paradise*.

Sincerely,



Frank Muller

Attorney-Advisor for Registration Policy & Practice
Office of Registration Policy & Practice | U.S. Copyright Office
101 Independence Ave, SE, Washington, DC 20559-6222

Enclosures:
Reply Sheet



United States Copyright Office

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1-3ZPC6C3

Return this sheet if you request reconsideration.

How to request reconsideration:

- Send your request in writing. **Please note that your request must be postmarked (via the U.S. Postal Service) or dispatched (via commercial carrier, courier, or messenger) no later than three months after a refusal is issued.**
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- Enclose the required fee – see below.
- Address your request to:
**RECONSIDERATION
Copyright RAC Division
P.O. Box 71380
Washington, DC 20024-1380**

Note: Include the Correspondence ID Number (see above) on the first page. Indicate either “First Reconsideration” or “Second Reconsideration” as appropriate on the subject line.

Notification of decision: The Copyright Office will send a written notification of its decision, including an explanation of its reasoning.

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Second Request for Reconsideration: The Copyright Office Board of Review considers the second request. The Board consists of the Register of Copyrights and the General Counsel (or their respective designees), and a third member appointed by the Register. The Board’s decision constitutes final agency action.

FEES:

First Request \$350 per claim (i.e. the work(s) contained on one application)

Second Request \$700 per claim (i.e. the work(s) contained on one application)



United States Copyright Office

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JUN 05 2020



* 1 - 3 Z P C 6 C 3 *

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 Washington, DC 20024-1380**

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FEES:

First Request \$350 per claim (i.e. the work(s) contained on one application)

Second Request \$700 per claim (i.e. the work(s) contained on one application)

May 27, 2020

JUN 5 2020

RECONSIDERATION
US Copyright Office
Receipt Analysis and Control Division
P.O. Box 71380
Washington, DC 20024-1380

RE: **SECOND Reconsideration** Correspondence ID Number: 1-3ZPC6C3; Original

Correspondence ID Number: 1-3NPRZ2Y

To the United States Copyright Office:

This second request for reconsideration (“Request”) is responsive to a notice on March 30, 2020 (“Notice”) which affirmed the Copyright Office’s (“Office”) initial determination not to issue the requested registration.

This decision was made on the basis that the present submission lacks human authorship, and the Office has a Human Authorship Requirement. U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES §313.2 (3d ed. 2014). It is correct that the present submission lacks traditional human authorship—it was autonomously generated by an AI.

The present Request argues that the Human Authorship Requirement is unconstitutional and unsupported by either statute or case law. Both the U.S. Constitution and principles of good public policy require that the Office permit “AI-generated works” or “computer-generated works” (CGWs) to receive copyright protection. In addition, the Office should list the AI as an author where it otherwise meets authorship criteria, with any copyright ownership vesting in the AI’s owner.

I. Arguments in Support of Protections for CGWs

a. Subsistence

The Office should register copyrights for CGWs because doing so would further the underlying goals of copyright law, including the constitutional rationale for copyright protection, and because there is no binding authority that prohibits copyright for CGWs.

The U.S. Constitution explicitly provides an economic rationale for copyright protection. Namely, that Congress shall have the power to, “promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” UNITED STATES CONSTITUTION, ARTICLE I, SECTION 8, CLAUSE 8. This refers to copyright acting as a financial incentive to generate expressive works.

Copyright can promote the creation of works by allowing copyright owners to keep others from making, using, copying and selling protected works without their permission. Without copyright, it might not be possible to exclude third parties from, say, downloading music or artwork for free. Thus, copyright can increase the financial value of works by allowing copyright holders to charge a premium for their intellectual property. In turn, the increased value of works incentivizes their creation.

In addition to serving as an economic incentive, copyright is also justified on the basis of natural or moral rights, such as the right of attribution, the integrity of an author’s work, and Lockean labor theories.

Allowing copyright for CGWs would further all of these economic and moral objectives. In terms of economic rights, even though AI is not responsive to financial incentives, the

individuals and businesses who own and develop AI are. Allowing copyright for CGWs would increase the value of “creative AIs” that are capable of generating CGWs, which would thereby incentivize their development. This would reward effort upstream from the stage of creative activity and ultimately result in even more expressive works. In addition, it would prevent a perverse situation where an AI is more effective at generating creative output than a person in certain situations, but a party is forced to avoid using AI because only directly human output can attract copyright protection.

In terms of moral rights, acknowledging AI as an author would safeguard moral rights because it would prevent people from receiving undeserved acknowledgement. Taking credit for an AI’s work would not be unfair to a machine, but it would diminish the accomplishments of people who have created without using inventive AI. In addition, acknowledging AI as authors would acknowledge AI developers who can take credit for the accomplishments of their creations.

b. Ownership

An AI should clearly not own copyright. Among other reasons, machines do not have legal personality and cannot own property.

In the event that copyright protection is provided for CGWs, the default owner of copyright should be the owner of the AI that has generated the work. This best achieves the goals of copyright law because it makes a creative AI more valuable to its owner and thus most promotes the development of creative AIs. This would also be consistent with current principles of property ownership, such that the owners of chattel (including machines) are able to exploit their property, and it would not interfere with the transfer of personal property in the form of creative AIs.

Such an arrangement would not be without precedent, particularly with respect to copyright ownership where the Works Made for Hire doctrine allows an employer to be considered an author and to own copyright. 17 U.S.C. § 201(b) (2016). Indeed, in the U.S., non-human, artificial persons such as companies can already be authors under this doctrine.

Alternately, obvious ownership options other than the AI include the machine's owner, user, or programmer(s). In the present case, the current applicant, Stephen Thaler, is the owner of the AI that generated the CGW and should thus be the owner of any copyright. Stephen Thaler was also the AI's user and programmer. There is no other individual involved with the AI in the present case who would be an appropriate recipient of any copyright to the submitted CGW.

c. International Analogs

Providing copyright protection for CGWs would not be without precedent. The United Kingdom was the first jurisdiction to explicitly provide for copyright protection of CGWs. The Copyright, Designs and Patents Act 1998 ("CDPA") is the primary legislation for copyright law and it makes special provision for CGWs with different rules for authorship and copyright duration. These works are defined as those "generated by a computer in circumstances such that there is no human author of the work[s]." Copyright, Designs and Patents Act 1988, §178.

For CGW works, the CDPA provides that, "[i]n the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangement necessary for the creation of the work are undertaken." Copyright, Designs and Patents Act 1988, §9 (3). Since the enactment of the CDPA, jurisdictions such as Ireland, India

and New Zealand have followed the United Kingdom's lead in providing copyright protection for CGWs.

II. Problems with the Human Authorship Requirement

a. Policy Objections

The Human Authorship Requirement strongly discourages the use and development of creative AI. As a result of the Office's policies, CGWs in the United States now automatically enter the public domain and cannot receive copyright protection. As a result, even when an AI would be more efficient than a person, a person may need to be used to create a new work in order for copyright protection to subsist. This is a problematic state of affairs that will become even more inefficient once creative AI is able to routinely outperform people at certain creative acts. Advanced AI may result in significant and widespread social benefits assuming appropriate legal frameworks exist.

In addition, the Human Authorship Requirement is likely to lead to a state of affairs in which people inaccurately claim authorship for work done by machines. Anyone in control of an AI that has generated a CGW with value can register the work simply by listing themselves as an author. Indeed, it has previously been reported that intellectual property filings have not disclosed the fact creative works were CGWs. Ryan Abbott, *I Think, Therefore I Invent: Creative Computers and the Future of Patent Law*, 54 B. C. L. Rev. 1079–1126 (2016). The Office was only aware the present registration was a CGW because this was explicitly disclosed by the applicant. Had this not been disclosed at the time of registration, it would not have been challenged by the Copyright Office and it is unlikely a third-party would become aware of the work's AI origins. This policy encourages applicants to act dishonestly

to capture the value of CGWs. It also undermines the value of human authorship by allowing individuals to inaccurately claim they are authors.

b. Lack of Authority for the Human Authorship Requirement

I am aware of no U.S. statute that specifically addresses CGWs and copyright, or that explicitly requires an author to be a natural person. Indeed, as discussed earlier, non-human entities may be authors under, *inter alia*, the Works Made for Hire doctrine.

The Notice, and the Human Authorship Requirement, cite to dicta from over a hundred years ago to support the assertion that a human being has to create a work. Specifically, the Notice cites to the 1879 Trade-Mark Cases, 100 U.S. 82, 94 (1879), as well as to the 1886 case of *Burrow-Giles v. Sarony*, 11 U.S. 53, 58 (1884), in support of the Human Authorship Policy based on their references to “the creative powers of the mind” and “intellectual conceptions”. However, these cases did not consider whether AI could legally generate works eligible for copyright protection. Indeed, in the late 19th century, AI did not exist in any meaningful sense. The cameras of the time were tools that were incapable of functionally automating human creativity.

Today, it has now been well documented that machines are able to autonomously generate creative works, and to functionally automate human creativity. See, e.g., Ryan Abbott, *Artificial Intelligence, Big Data and Intellectual Property: Protecting Computer-Generated Works in the United Kingdom*, In RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND DIGITAL TECHNOLOGIES (Tanya Aplin ed., Forthcoming 2019) <https://ssrn.com/abstract=3064213>. It is not at all clear that there is a mechanistic difference between how people and machines engage in creative acts that justifies different legal rules, and there is certainly not a functional difference that justifies different legal rules. Because copyright law is primarily functional in nature and

concerned with the generation of new works, it should be indifferent to whether people or machines are generating these works so long as copyright law achieves its objective of promoting the useful arts.

The Copyright Office is currently relying upon non-binding judicial opinions from the Gilded Age to answer the question of whether CGWs can be protected. If CWGs are to be prohibited, this should only be on the basis of sound public policy after serious consideration. Indeed, the U.S. Patent and Trademark Office has recently launched a request for comments on patenting artificial intelligence inventions, in part to create an appropriate policy for CGWs. Federal Register / Vol. 84, No. 166 / Tuesday, August 27, 2019 / Notices.

<https://www.federalregister.gov/documents/2019/08/27/2019-18443/request-for-comments-on-patenting-artificial-intelligence-inventions>

To the extent that the cases cited in the Notice have anything useful to offer with respect to CGWs, the relevant dicta is that just as the terms “Writings” have been construed flexibly in interpreting the Patent and Copyright Clause, so too should the term “Authors” be afforded the flexibility needed to effectuate constitutional purposes.

III. Conclusion

I submit the requested registration be granted because the Office’s Human Authorship Requirement is unconstitutional, does not further the goals of copyright law, and it is not supported by existing statutes or case law.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. Abbott", written in a cursive style.

Ryan Abbott
Attorney for Applicant

Date: May 27, 2020



Copyright Review Board
United States Copyright Office · 101 Independence Avenue SE · Washington, DC 20559-6000

February 14, 2022

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Re: Second Request for Reconsideration for Refusal to Register A Recent Entrance to Paradise (Correspondence ID 1-3ZPC6C3; SR # 1-7100387071)

Dear Mr. Abbott:

The Review Board of the United States Copyright Office (“Board”) has considered Steven Thaler’s (“Thaler’s”) second request for reconsideration of the Registration Program’s refusal to register a two-dimensional artwork claim in the work titled “A Recent Entrance to Paradise” (“Work”). After reviewing the application, deposit copy, and relevant correspondence, along with the arguments in the second request for reconsideration, the Board affirms the Registration Program’s denial of registration.

I. DESCRIPTION OF THE WORK

The Work is a two-dimensional artwork, reproduced below:



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II. ADMINISTRATIVE RECORD

On November 3, 2018, Thaler filed an application to register a copyright claim in the Work. The author of the Work was identified as the “Creativity Machine,” with Thaler listed as the claimant alongside a transfer statement: “ownership of the machine.” In his application, Thaler left a note for the Office stating that the Work “was autonomously created by a computer algorithm running on a machine” and he was “seeking to register this computer-generated work as a work-for-hire to the owner of the Creativity Machine.” In an August 12, 2019, letter, a Copyright Office registration specialist refused to register the claim, finding that it “lacks the human authorship necessary to support a copyright claim.” Initial Letter Refusing Registration from U.S. Copyright Office to Ryan Abbott (Aug. 12, 2019).

Thaler subsequently requested that the Office reconsider its initial refusal to register the Work, arguing that “the human authorship requirement is unconstitutional and unsupported by either statute or case law.” Letter from Ryan Abbott to U.S. Copyright Office at 1 (Sept. 23, 2019) (“First Request”).¹ After reviewing the Work in light of the points raised in the First Request, the Office re-evaluated the claims and again concluded that the Work “lacked the required human authorship necessary to sustain a claim in copyright,” because Thaler had “provided no evidence on sufficient creative input or intervention by a human author in the Work.” Refusal of First Request for Reconsideration from U.S. Copyright Office to Ryan Abbott at 1 (March 30, 2020). The 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.” *Id.* at 1–2.

Now, in a second request for reconsideration, pursuant to 37 C.F.R. § 202.5(c), Thaler renews his arguments that the Office’s human authorship requirement is unconstitutional and unsupported by case law. Letter from Ryan Abbott to U.S. Copyright Office (May 27, 2020) (“Second Request”). The Second Request repeats the same arguments from the First Request, largely advancing public policy arguments that the 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.” Second Request at 2. In response to the Office’s citation of relevant case law addressing human authorship, Thaler asserts that “there is no binding authority that prohibits copyright for [computer-generated works],” *id.*; that copyright law already allows non-human entities to be authors under the work made for hire doctrine, *id.* at 4; and 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.” *Id.* at 7.

III. DISCUSSION

The Board accepts as a threshold matter Thaler’s representation that the Work was autonomously created by artificial intelligence without any creative contribution from a human actor: “As a general rule, the U.S. Copyright Office accepts the facts stated in the registration

¹ The top of the First Request is dated September 8, 2019, but the attorney’s signature bears a date of September 23, 2019.

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materials.” U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 602.4(C) (3d ed. 2021) (“COMPENDIUM (THIRD)”). But copyright law only protects “the fruits of intellectual labor” that “are founded in the creative powers of the [human] mind.” COMPENDIUM (THIRD) § 306 (quoting *Trade-Mark Cases*, 100 U.S. 82, 94 (1879)); *see also* COMPENDIUM (THIRD) § 313.2 (the Office will not register works “produced by a machine or mere mechanical process” that operates “without any creative input or intervention from a human author” because, under the statute, “a work must be created by a human being”). So Thaler must either provide evidence that the Work is the product of human authorship or convince the Office to depart from a century of copyright jurisprudence.² He has done neither.

Thaler does not assert that the Work was created with contribution from a human author,³ so the only issue before the Board is whether, as he argues, the Office’s human authorship requirement is unconstitutional and unsupported by case law. Currently, “the Office will refuse to register a claim if it determines that a human being did not create the work.” COMPENDIUM (THIRD) § 306. Under that standard, the Work is ineligible for registration. After reviewing the statutory text, judicial precedent, and longstanding Copyright Office practice, the Board again concludes that human authorship is a prerequisite to copyright protection in the United States and that the Work therefore cannot be registered.

The Copyright Act affords protection to “original works of authorship” that are fixed in a tangible medium of expression. 17 U.S.C. § 102(a). The phrase “original work of authorship” was “purposely left undefined” by Congress in order to “incorporate without change the standard of originality established by the courts under the . . . [1909] copyright statute.” H.R. REP. NO. 94-1476, at 51 (1976). The term is “very broad,” *id.* at 52, but its scope is not unlimited. Congress chose this language to encompass a smaller set of creative works than could be protected under the Constitution.⁴ Because of this gap, the Act leaves “unquestionably other

² Under the heading “Policy Objections,” the Second Request argues that denying copyright protection for machine-generated works will encourage individuals to “act dishonestly” and “inaccurately claim authorship for work done by machines.” Second Request at 5. The Board is unconvinced that applying existing case law will result in applicants committing fraud. The Copyright Act provides criminal penalties for anyone who “knowingly makes a false representation of a material fact in the application for copyright registration . . . or in any written statement tied in connection with the application.” 17 U.S.C. § 506(e). In addition, the Register of Copyrights has the authority to cancel any registration where the “material deposited does not constitute copyrightable subject matter” or “the claim is invalid for any other reason.” 17 U.S.C. § 410(b); *see also* COMPENDIUM (THIRD) § 1807. Applicants who mislead the Office do so at their peril.

³ Because Thaler has not raised this as a basis for registration, the Board does not need to determine under what circumstances human involvement in the creation of machine-generated works would meet the statutory criteria for copyright protection. *See* COMPENDIUM (THIRD) § 313.2 (the “crucial question” of human authorship is whether a computer is “merely being an assisting instrument” or “actually conceive[s] and execute[s]” the “traditional elements of authorship in the work”) (quoting U.S. COPYRIGHT OFFICE, SIXTY-EIGHTH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 30, 1965, AT 5 (1966)).

⁴ As the House Report explains, Congress selected the term to avoid confusion about how the scope of statutory protection compared with the scope of material the Constitution authorizes Congress to protect. H.R. REP. NO. 94-1476, at 51. Under the 1909 Copyright Act, protection accrued to “all the writings of an author,” which led to uncertainty about whether the scope of protected material under the law was “coextensive” with the “writings” of “authors” that the Constitution gives Congress the power to protect. H.R. REP. NO. 94-1476, at 51; *compare* 1909 Copyright Act, Pub. L. No. 60-349, § 4, 35 Stat. 1075, 1076 (1909) (“the works for which copyright may be secured under this Act shall include all the writings of an author”) *with* U.S. CONST. art I, § 8, cl. 8 (authorizing Congress

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areas of existing subject matter that this bill does not propose to protect but that future Congresses may want to.” *Id.* at 52.⁵

Courts interpreting the Copyright Act, including the Supreme Court, have uniformly limited copyright protection to creations of human authors. For example, in *Burrow-Giles Lithographic Co. v. Sarony*, a copyright defendant argued that photographs could not be protected by copyright because the statute at the time protected certain types of creations of an “author or authors” and “a photograph is not a writing nor the production of an author” because it is simply “a reproduction on paper of the exact features of some natural object or of some person.” 111 U.S. 53, 56 (1884). The Court rejected this argument, holding that an author is “he to whom anything owes its origin; originator; maker; one who completes a work of science or literature” and that photographs are “representatives of original intellectual conceptions of [an] author.” *Id.* at 57–59. In the opinion, the Court referred to “authors” as human. *See id.* at 58 (describing a copyright as “the exclusive right of a man to the production of his own genius or intellect”), 60–61 (citing as “instructive” a decision from England where justices described an “author” as the “person” who was “the cause of the picture which is produced” and “the man” who creates or gives effect to the idea in the work).⁶

The Court has continued to articulate the nexus between the human mind and creative expression as a prerequisite for copyright protection. In *Mazer v. Stein*, the Court cited *Burrow-Giles* for the proposition that a work “must be original, that is, the author’s tangible expression of his ideas.” 347 U.S. 201, 214 (1954). And in *Goldstein v. California*, the Court again cited *Burrow-Giles* for the proposition that “[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.’” 412 U.S. 546, 561 (1973). The Office is compelled to follow Supreme Court precedent, which makes human authorship an essential element of copyright protection.

In addition to the Supreme Court precedent, lower courts have repeatedly rejected attempts to extend copyright protection to non-human creations. For example, the Ninth Circuit held that a book containing words “‘authored’ by non-human spiritual beings” can only gain copyright protection if there is “human selection and arrangement of the revelations.” *Urantia Found. v. Kristen Maaherra*, 114 F.3d 955, 957–59 (9th Cir. 1997) (holding that “some element

“[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”).

⁵ For this reason, the Board rejects Thaler’s argument that the human authorship requirement is “unconstitutional” because registration of machine-generated works would “further the underlying goals of copyright law, including the constitutional rationale for copyright protection.” *See* Second Request at 1–2. Congress is not obligated to protect all works that may constitutionally be protected. “[I]t is generally for Congress,” not the Board, “to decide how best to pursue the Copyright Clause’s objectives.” *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003). The Board must apply the statute enacted by Congress; it cannot second-guess whether a different statutory scheme would better promote the progress of science and useful arts.

⁶ In this case, as well as a previous case, the Court suggested that the requirement that an “author” be human is required by the Constitution. *See Burrow-Giles*, 111 U.S. at 56 (describing beneficiaries of the Constitution’s intellectual property clause as “authors,” who are one of “two classes” of “persons”); *see also Trade-Mark Cases*, 100 U.S. 82, 94 (1879) (reading the Constitution’s grant of power to Congress to protect “writings” as extending “only as such [works] as are original, and are founded in the creative powers of the mind” or are “the fruits of intellectual labor”).

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of human creativity must have occurred in order for the Book to be copyrightable” because “it is not creations of divine beings that the copyright laws were intended to protect”). Similarly, a monkey cannot register a copyright in photos it captures with a camera because the Copyright Act refers to an author’s “children,” “widow,” “grandchildren,” and “widower,” — terms that “all imply humanity and necessarily exclude animals.” *Naruto v. Slater*, 888 F.3d 418, 426 (9th Cir. 2018); *see also Kelley v. Chicago Park Dist.*, 635 F.3d 290, 304 (7th Cir. 2011) (rejecting a copyright claim in a “living garden” because “[a]uthorship is an entirely human endeavor” and “a garden owes most of its form and appearance to natural forces”) (internal citations omitted); *Satava v. Lowry*, 323 F.3d 805, 813 (9th Cir. 2003) (finding depictions of jellyfish not protected by copyright because material “first expressed by nature are the common heritage of humankind, and no artist may use copyright law to prevent others from depicting them”). These court decisions are reflected in the Office’s guidance in the *Compendium*, which provides examples of works lacking human authorship such as “a photograph taken by a monkey” and “an application for a song naming the Holy Spirit as the author.” COMPENDIUM (THIRD) § 313.2. While the Board is not aware of a United States court that has considered whether artificial intelligence can be the author for copyright purposes,⁷ the courts have been consistent in finding that non-human expression is ineligible for copyright protection.

Federal agencies have followed the courts. In the 1970s, questions about the impact of computing technology on the copyright system led to the creation of the National Commission on New Technological Uses of Copyrighted Works (“CONTU”). CONTU’s mandate was, in part, to study “the creation of new works by the application or intervention of [] automatic systems of machine reproduction.” National Commission on New Technological Uses of Copyrighted Works, Pub. L. 93-573, § 201(b)(2), 88 Stat. 1873, 1873 (1974). After conducting its review, CONTU determined that the existing judicial construction of “original work[s] of authorship” as requiring human authorship was sufficient to enable protection for works created with the use of computers and thus “no amendment [to copyright law] is needed.” CONTU, FINAL REPORT at 1 (1978). As CONTU explained, “the eligibility of any work for protection by copyright depends not upon the device or devices used in its creation, but rather upon the presence of at least minimal human creative effort at the time the work is produced.” *Id.* at 45–46 (noting that “[t]his approach is followed by the Copyright Office today”).

The CONTU Report mirrors the views of the Copyright Office. A decade before passage of the 1976 Copyright Act, the annual report of the Register of Copyrights considered when copyright protection could vest in expressive works created with a computer. The Register concluded that human authorship was required:

The crucial question appears to be whether the “work” is basically one of human authorship, with the computer merely being an assisting instrument, or whether the traditional element of authorship in the work (literary, artistic or musical

⁷ It appears, however, that the Eastern District of Virginia held that artificial intelligence systems cannot claim inventorship of patents. *Thaler v. Hirshfeld*, No. 1:20-cv-903, 2021 U.S. Dist. LEXIS 167393, at *16–18 (E.D. Va. Sep. 2, 2021) (concluding that under the Patent Act, “an ‘inventor’ must be a natural person” and upholding refusal of a patent application). Though the court’s opinion was based on construction of the Patent Act, rather than the Copyright Act, the similarity of the court’s statutory analysis to that in the copyright cases relied on by the Board supports the conclusion here.

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expression or elements of selection, arrangements, etc.) were actually conceived and executed not by man but by a machine.

U.S. COPYRIGHT OFFICE, SIXTY-EIGHTH ANNUAL REPORT OF THE REGISTER OF COPYRIGHTS FOR THE FISCAL YEAR ENDING JUNE 30, 1965, at 5 (1966).

For this reason, the *Compendium of U.S. Copyright Office Practices* — the practice manual for the Office — has long mandated human authorship for registration. After enactment of the 1976 Copyright Act, the second edition of the *Compendium* was updated to reflect the Office’s understanding that human authorship is required by the law. See U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 202.02(b) (2d ed. 1984) (“COMPENDIUM (SECOND)”) (“The term ‘authorship’ implies that, for a work to be copyrightable, it must owe its origin to a human being. Materials produced solely by nature, by plants, or by animals are not copyrightable.”), available at <https://www.copyright.gov/history/comp/compendium-two.pdf>. The current *Compendium* retains this requirement and articulates its application in multiple circumstances where non-human expression raises unique challenges. See COMPENDIUM (THIRD) §§ 709.1 (automated computer translations); 803.6(B) (derivative sound recordings made by purely mechanical processes); 805.4(C) & 806.4(C) (human performance required for choreography and pantomimes); 808.8(E) (human selection of color in colorized motion pictures); 906.8 (machine produced expression in visual arts works, such as linoleum flooring); 909.3(B) (x-rays and other medical imaging); 1006.1(A) (hypertext markup language if created by a human being “rather than a website design program”). Although no *Compendium* section explicitly addresses artificial intelligence, the Board concludes that Office policy and practice makes human authorship a prerequisite for copyright protection.

The Office’s position is supported by a recent report from the U.S. Patent and Trademark Office (“USPTO”) addressing intellectual property issues raised by AI. USPTO sought public comment on whether “a work produced by an AI algorithm or process, without the involvement of a natural person . . . qualif[ies] as a work of authorship” under the Copyright Act. U.S. PATENT AND TRADEMARK OFFICE, PUBLIC VIEWS ON ARTIFICIAL INTELLIGENCE AND INTELLECTUAL PROPERTY POLICY at 19 (2020), available at https://www.uspto.gov/sites/default/files/documents/USPTO_AI-Report_2020-10-07.pdf. In its summary of responses, USPTO noted that “the vast majority of commenters acknowledged that existing law does not permit a non-human to be an author [and] this should remain the law.” *Id.* at 20–21. The Board agrees.

Thaler’s secondary argument, that artificial intelligence can be an author under copyright law because the work made for hire doctrine allows for “non-human, artificial persons such as companies” to be authors, is similarly unavailing. See Second Request at 3–4. First, the Work is clearly not a work made for hire as defined in the Copyright Act. A work made for hire must be either (A) prepared by “an employee” or (B) by one or more “parties” who “expressly agree in a written instrument” that the work is for-hire. 17 U.S.C. § 101 (definition of “work made for hire”). In both cases, the work is created as the result of a binding legal contract—an employment agreement or a work-for-hire agreement. The “Creativity Machine” cannot enter

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into binding legal contracts and thus cannot meet this requirement.⁸ Second, the work-for-hire doctrine only speaks to the identity of a work's owner, not whether a work is protected by copyright. As explained above, the statute requires that a work contain human authorship. In sum, the Work is not a work made for hire because it is neither a "work of authorship" nor a work created "for hire."

Much of Thaler's second request amounts to a policy argument in favor of legal protection for works produced solely by artificial intelligence. He cites to no case law or other precedent that would undermine the Office's construction of the Copyright Act. Because copyright law as codified in the 1976 Act requires human authorship, the Work cannot be registered.

IV. CONCLUSION

For the reasons stated herein, the Review Board of the United States Copyright Office affirms the refusal to register the copyright claim in the Work. Pursuant to 37 C.F.R. § 202.5(g), this decision constitutes final agency action in this matter.


 U.S. Copyright Office Review Board
 Shira Perlmutter, Register of Copyrights
 Suzanne Wilson, General Counsel and
 Associate Register of Copyrights
 Kimberley Isbell, Deputy Director of Policy and
 International Affairs

⁸ Autonomous systems are not "artificial persons" because they lack legal personhood. See Nadia Banteka, *Artificially Intelligent Persons*, 58 HOUS. L. REV. 537, 593 (2021) (noting the "trend" across state and federal courts that legal personhood requires "that an entity be an aggregate of individuals [who] have legal personhood," as is true for corporations); cf. *Software Solutions Partners Ltd. v. H.M. Customs & Excise*, [2007] EWHC 971 [67] (Admin) (noting that "on current authority," "automated systems" could not enter contracts because "only a person with a 'mind' can be an agent in law").

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WASHINGTON D.C.**

Stephen Thaler, an individual

Plaintiff,

v.

Shira Perlmutter, in her official capacity as Register
of Copyrights and Director of the United States
Copyright Office; and The United States Copyright
Office;

Defendants.

Case No. 1:20-cv-00903-LMB-TCBVAED

BRIEF IN SUPPORT

**BRIEF IN SUPPORT OF
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

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Timothy Lamoureux, Esq. (*pro hac vice*
application pending)
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I. INTRODUCTION AND SUMMARY OF ARGUMENT

With the facts not in dispute, this case boils down to one novel legal question: Can someone register a copyright in a creative work made by an artificial intelligence (“AI-Generated Work”)? The plain language and purpose of the Copyright Act (“Act”) agree that such works should be copyrightable. In addition, standard property law principles of ownership, as well as the work-for-hire doctrine, apply to make Plaintiff Dr. Stephen Thaler (“Dr. Thaler”) the copyright’s owner.

Dr. Thaler created an AI that he directed to create artwork. It successfully did so, creating a piece named “A Recent Entrance to Paradise” (the “Work”).

However, when Dr. Thaler attempted to register the Work with the United States Copyright Office (“USCO”), the agency denied the registration, proclaiming that the office has a “Human Authorship Requirement” policy that applies to creative works, and that they will only register a human-made work.

This policy is unsupported by law. The plain language of the Copyright Act (the “Act”) does not restrict copyright to human-made works, nor does any case law. The USCO mistakenly relies on dicta, predominantly from cases predating even the existence of modern computers, together with inappropriate reliance on a technical report that pre-dates autonomously creative AI. Unfortunately, the USCO’s policy frustrates the purpose of the Act which is to promote the dissemination and creation of works. By contrast, allowing copyright on AI-Generated Works encourages the development and use of creative AI which results in the generation of more works, and provides incentives for those works to be disseminated.

The Work is therefore copyrightable and it belongs to Dr. Thaler. This ownership follows from bedrock property law principles, namely, that when someone has property that generates additional property, like a tree bearing fruit, a cow having a calf, or a 3D printer making a physical painting, the owner of the original property owns the subsequent property. Dr. Thaler is also the owner based on being the first possessor of the Work, as first possession is a basis for ownership. Finally, given the way the AI was created, how it operates, and Dr. Thaler’s

ownership of it, there is no need to transfer property from the AI, as he could be the author pursuant to the work-for-hire doctrine, and therefore the original owner.

Plaintiff moves for summary judgment as to the legal issue alone—whether an AI-Generated Work is copyrightable.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Local Rule 7(h), Plaintiff Dr. Stephen Thaler (“Thaler”), submits this statement of material facts as to which there is no genuine issue.

1. Plaintiff Dr. Stephen Thaler develops, owns, and applies AI systems capable of generating creative output that would historically qualify for copyright protection and that are made under conditions in which no natural person contributed to the work as a traditional author (“AI-Generated Works”). *See* US_26¹ (“In the present case, the current applicant, Stephen Thaler, is the owner of the AI that generated the CGW and should thus be the owner of any copyright. Stephen Thaler was also the AI’s user and programmer.”)

2. Plaintiff’s AI system produced a two-dimensional artwork (the “Work”) titled “A Recent Entrance to Paradise,” reproduced below:

¹ The Administrative Record was filed by the USCO as Docket Entry 13. The USCO Bates Stamped the pages of the record US_0000001-37. For simplicity, given the small number of pages comprising the Administrative Record, it shall be referred to using the USCO’s Bates prefix following by up to two digits.



US_31.

3. On November 3, 2018, Plaintiff filed an application (#1-7100387071) to register the Work with the United States Copyright Office. US_01-03.

4. In the application, Plaintiff identified the author of the Work as “Creativity Machine,” and noted it was “Created autonomously by machine.” *Id.* at 02. Plaintiff listed himself as the “Copyright Claimant” alongside a transfer statement labelled “Ownership of the Machine.” *Id.*

5. Plaintiff separately noted in the application that the Work was autonomously created by a computer and that he was entitled to own the copyright in the Work including by virtue of the work made for hire doctrine. *Id.*

6. On August 12, 2019, the USCO refused to register the claim based on the lack of

human authorship. That refusal stated, “We cannot register this work because it lacks the human authorship necessary to support a copyright claim. According to your application this work was ‘created autonomously by machine.’” US_05. The refusal did not address Dr. Thaler’s entitlement to any copyright in the Work. *See id.*

7. Plaintiff filed two requests for reconsideration to the USCO on September 23, 2019, and May 27, 2020, respectively. US_09-16, US_23-30. Plaintiff confirmed that the submission lacked traditional human authorship. *Id.* However, Plaintiff argued that the USCO’s human authorship requirement was unsupported by law. *Id.*

8. In denying the first request for reconsideration, the USCO reiterated its response that the copyright law only protects “the fruits of intellectual labor” that “are founded in the creative powers of the mind.” Citing to *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879). US_19. The USCO stated that since copyright law is limited to “original intellectual conceptions of the author,” it refused to register the claim because it determined a human being did not create the Work. *Id.* The USCO again cited to *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58(1884), 17 U.S.C. § 102(a), and the Compendium of U.S. Copyright Office Practices § 306 (3ded. 2017). *Id.*

9. On February 14, 2022, the USCO reconsidered Plaintiff’s request the second time, and again refused to register the Work. US_31-37. The USCO accepted that the Work was “autonomously created by artificial intelligence without any creative contribution from a human actor.” US_32. Citing again to *In re Trade-Mark Cases*, the USCO stated that Plaintiff had failed to either provide evidence that the Work is the product of human authorship or convince the USCO to “depart from a century of copyright jurisprudence.” US_33. Since there was no issue of human author involvement, the USCO limited its review to whether the human authorship requirement was unconstitutional and unsupported by case law. *See* US_31-37.

10. The USCO stated that the phrase “original work of authorship” was “purposefully left undefined” by Congress in order to “incorporate without change the standard of originality established by the courts under the [1909] copyright statute[,]” citing to H.R. Rep.

No. 94-1476, at 51 (1976). US_33-34. The USCO further stated that the Act leaves “unquestionably other areas of existing subject matter that [Bill 94-1476 did] not propose to protect but that future Congresses may want to.” *Id.*

11. The USCO cited again to *Burrow-Giles Lithographic Co.*, stating that copyright was afforded to photography because photographs are “representatives of original intellectual conceptions of [an] author,” observing that the court referred to “authors” as human. US_34. Citing to *Mazer v. Stein*, the USCO stated that the Supreme Court defined an author as someone who “may be viewed as an individual who writes an original composition.” US_34. The USCO further relied on the stating *Goldstein v. California*, citing that “the term in its constitutional sense, has been construed to mean an ‘originator,’ ‘he to whom anything owes its origin.’” *Id.* USCO argues this requires human authorship as an essential element of protection. *Id.*

12. Providing additional examples for its decision, the USCO also referred to *Urantia Found v. Kristen Maaherra*, 114 F.3d 955, 957-959 (9th Cir. 1997), arguing the court refused to extend copyright protection to non-human creations. US_34-35. The USCO additionally referred to *Naruto v. Slater*, 888 F.3d 418, 426 (9th Cir. 2018) arguing a monkey cannot register a copyright because the Act specifically referred to an author’s “children,” “widow,” “grandchildren,” and “widower,” which necessarily implied humans and excluded animals. The USCO acknowledged that it was unaware whether a court had considered the authorship of a copyright by artificial intelligence but argued that the decisions rejecting registration for non-human spiritual beings and animals supported its position. US_35.

13. The USCO also cited to the National Commission on New Technological Uses of Copyrighted Works (“CONTU”) as support of its position. CONTU was mandated, in part, to study the “creation of new works by the application or intervention of [] automatic systems of machine reproduction.” US_35. In the final report in 1979, CONTU determined that the existing judicial construction requiring human authorship sufficiently enabled protection for works created with the use of computers, and that no amendment to copyright law was needed. US_35-

36. CONTU specifically stated that eligibility of registration did not depend on the use of devices in its creation, but rather if there was the presence of at least minimal human creative effort at the time it was produced. US_35.

14. Finally, USCO cited to “a recent report from the U.S. Patent and Trademark Office (“USPTO”) addressing intellectual property issues raised by AI.” In its summary of responses, USPTO stated that “the vast majority of commenters acknowledged that existing law does not permit a non-human to be an author [and] this should remain the law.” US_36.

III. LEGAL STANDARD

Under the APA, “the statute provides that [the Federal Courts] ‘decide all relevant questions of law’ and ‘interpret . . . statutory provisions.’ We ordinarily set aside agency actions that are either ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,’ or ‘in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.’” *Am. Bankers Ass’n v. Nat’l Credit Union Admin.*, 934 F.3d 649, 662 (D.C. Cir. 2019) (quoting 5 U.S.C. § 706.).

“[W]hen, as here, the court is reviewing a final agency action under the APA, the standard set forth in Rule 56(a) does not apply. Instead of reviewing the record for disputed facts that would preclude summary judgment, the function of the district court is a more limited one: to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.” *Ardmore Consulting Grp., Inc. v. Contreras-Sweet*, 118 F. Supp. 3d 388, 393 (D.D.C. 2015) (internal quotation marks and citations omitted). As the Court of Appeal has further explained, “when a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal . . . [t]he ‘entire case’ on review is a question of law.” *Am. Bioscience, Inc. v. Thompson*, 269 F. 3d 1077, 1083 (D.C.Cir.2001) (quoting *Marshall County Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C.Cir.1993).)

Plaintiff seeks an order compelling Defendants to reinstate the Applications and vacate the prior decision on the petition for registration of copyright. Under the APA, the Court “shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be—(A)

arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . .” 5 U.S.C. § 706(2). The court must judge the propriety of the agency’s action based “solely [on] the grounds invoked by the agency” when it made the challenged decision. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

IV. ARGUMENT

A. **The Work Is Copyrightable**

3. The Act’s Plain Language Establishes That AI-Generated Works Are Copyrightable

It is undisputed that the Work constitutes a fixed, visual artwork that would be protected under the Act had it been created through traditional human labor. The sole basis for the USCO’s refusal to register the Work is because it claims that copyright protection is limited to “creations of human authors.”² US_34. The USCO does not clarify whether its “Human Authorship Requirement” is a requirement related to authorship in of itself or the standard for originality, but in either case, the Work satisfies the requirements set forth in the Copyright Act, as it constitutes an “original work[] of authorship.” 17 U.S.C. § 102(a); 17 U.S.C. § 301(a).

The Supreme Court set forth a method for determining a phrase’s “ordinary meaning” when reading an undefined statutory term by first checking the dictionary. *See Mohamad v. Palestinian Authority*, 566 U.S. 449, 456-57 (2012). In this instance, the language in the Act never states that an author must be a human being, though it would have been simple to explicitly state as much. The dictionary defines an author as, “one that originates or creates something.” *Author*, Merriam-Webster Dictionary (2022). Likewise, “one” does not denote a legal person, as it is defined as “a single person or *thing*.” *One*, Merriam-Webster Dictionary (2023) (Emphasis

² To the extent that there is any question as to the level of creativity a machine is capable of, the procedural posture of the case is that the Creativity Machine did make an “original work,” and it is not a mere copy of another work. 17 U.S.C. § 102(a). Thus, to the extent there is any argument as to the capability of the machine to create a work, that is not in dispute and cannot form the basis of the Copyright Office’s, or this Court’s, determination of the issues. As such, issues as to the independent efforts are not relevant.

added.) Under a dictionary definition, the Creativity Machine literally qualifies as an author. What the the Act’s language indicates is that when an entity—a person, a business, a machine—generates a creative work, that entity is the author.³

To the extent USCO argues an AI cannot generate an objectively original or creative work, the bar for originality and creativity is low. “To qualify for copyright protection, a work must be original to the author.” *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, 499 U.S. 340, 345 (1991) (citation omitted). “Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.” *Id.*, at 345 (citation omitted); *e.g. Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951) (Originality is “little more than a prohibition of actual copying. No matter how poor the ‘author’s’ addition, it is enough if it be his own.”) (Quoting *Wihtol v. Wells*, 231 F.2d 550 (7th Cir. 1956)); *Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*, 684 F.2d 821 (11th Cir. 1982).

Thus, as a *factual* matter, an AI system created an artwork that objectively meets the standard for originality. The Work “owes its origin” to the Creativity Machine and was a “product of the independent efforts of the author,” which is the small hurdle required to reach copyrightability. *See* 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.01(A)(1) (rev. ed.2022). USCO cannot point to a statutory prohibition on AI-Generated Works,⁴ so it instead grandiosely claims that “a century of copyright jurisprudence” supports its

³ Additionally, 17 U.S.C. § 101 includes a definition for an “anonymous work” that contemplates a “work . . . of which no natural person is identified as author,” and the Act has a full framework of how to treat such works.

⁴ The Act, instead, explicitly accommodates non-human authors. For instance, It is not controversial that a non-human entity can be an author under the work for hire theory, but in this case the author *is* a human. Corporations, for instance, have able to be authors since long before the current inception of the Copyright Act. *See e.g. Vitaphone Corp. v. Hutchinson Amusement Co.*, 28 F. Supp. 526, 529 (D. Mass. 1939) (“Assuming the corporation in the present case, or any other corporation, is incapable of exercising intellect so as to be primarily entitled to secure copyright, yet it is perfectly plain that a corporation can be ‘an employer in the case of works made for hire’ under the terms of the statute, and entitled to copyright.”) Thus, given how the Act treats works for hire, in general, anonymous, and pseudonymous works, by divorcing

position. US_33. But, in fact, the only thing USCO has to support its position is dicta. US_33. So much so, that the cases that USCO cites in support of its Human Authorship Requirement in its Compendium—*Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) and *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879)—are from the 19th century and greatly predate even the invention of the first modern computers. The USCO admits it is aware of no case that prohibits the protection of an AI-Generated Work. The fact that various courts have referred to creative activity in human-centric terms, based on the fact that creativity has traditionally been human-centric and romanticized, is very different than there being a legal requirement for human creativity. Works of creativity, containing anything unique to its creator, is subject to “copyright unless there is a restriction in the words of the act.” See *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250, 23 S. Ct. 298, 47 L. Ed. 460 (1903). Of course, corporate authorship has also been a fixture of American copyright law for more than a century. *Act of March 4, 1909, ch. 320*, 35 Stat. 1075.

Here, there should be no question that the Work is adequately creative and original. It contains visual elements arranged in a novel way, which merits protection. See e.g. *Roulo v. Russ Berrie & Co.*, 886 F.2d 931, 939 (7th Cir. 1989) (“just as individual words do not deserve copyright protection, it is the unique combination of these common elements which form the copyrighted material.”). This is required by the plain language of the Act and its ordinary meaning, and no case stands to the contrary.

4. Should the Court Consider the Copyright Act Ambiguous, the Purpose of the Act Must be Considered and Requires Protection of AI-Generated Works

a. *Courts Have Recognized that Technological Advancement Can Cause Ambiguity in the Copyright Act*

The Supreme Court has made it clear that technological changes must be considered when

duration from an author’s “lifetime,” the Act currently fully accommodates nonhuman authors. See 17 U.S.C. § 302.

interpreting the Copyright Act, because “[w]e have understood the provision to set forth general principles, the application of which requires judicial balancing, depending upon relevant circumstances, including ‘significant changes in technology.’” *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1197 (2021) (quoting *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 430 (1984).) The present case is a clear example of technological evolution requiring purposive analysis. At the time of the Act’s adoption in 1976, AI-Generated Works were not yet a reality. USCO cites to the 1979 CONTU report in support of its position, but ignores that CONTU did not seriously consider the possibility of AI-Generated Works as they were considered “too speculative” at the time. Arthur Miller, *Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is anything new since CONTU?*, 106 HARV. L. REV 977, 1066 (1993). Now that, as a factual matter, the universe of authorship has expanded to include AI, there is a need to consider how the purpose of the Act can best be achieved in light of technological advances.

b. The Purpose of the Copyright Act Requires Protection of AI-Generated Works

The purpose of the Copyright Act arises out of the Constitutional mandate “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” *Id.* The Copyright Clause has been interpreted by the Supreme Court to provide an explicit rationale for granting copyright protection—namely to encourage the creation and dissemination of works for the public benefit rather than for the purpose of benefiting authors.

Copyright is “intended definitely to grant valuable, enforceable rights to authors, publishers, etc., without burden-some requirements; ‘to afford greater encouragement to the production of literary [or artistic] works of lasting benefit to the world.’” *Washingtonian Co. v. Pearson*, 306 U.S. 30, 36 (1939). The Act is also intended to promote dissemination of those works. *See, e.g., Golan v. Holder*, 132 S. Ct. 873, 888 (2012).

Protection of AI-Generated Works is consistent with this constitutional mandate and the Copyright Act, as the Supreme Court has reiterated rewarding authors is subordinate to incentivizing the dissemination of creative works. “The immediate effect of our copyright law is to secure a fair return for an author’s creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.” *Twentieth Century Music Corp.*, 422 U.S. at 156; *see also United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) (“It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius.”); Sterk, “Rhetoric and Reality in Copyright Law,” 94 MICH. L. REV. 1197, 1203 (1996) (“[I]t is incentive language that pervades the Supreme Court’s copyright jurisprudence.”). “The primary objective of copyright is not to reward the labor of authors, but ‘[t]o promote the Progress of Science and useful Arts.’” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (alteration in original); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985) (“It is evident that the monopoly granted by copyright actively served its intended purpose of inducing the creation of new material of potential historical value.”). Likewise, In *Mazer v. Stein*, the Court articulated that, “the economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and the useful arts.’” *Mazer v. Stein*, 347 U.S. 201, 219 (1953).

Congress has been equally consistent in finding that the purpose of Copyright is to promote the generation and dissemination of works. Congress passed its first Copyright Act in 1790, which inherited numerous provisions from the Statute of Anne. The Act stated it was “for the encouragement of learning, by securing copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned.” Authors and proprietors are mentioned, but the public remained the law’s primary beneficiaries. Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*. 64 TUL. L. REV. 991, 1015, (1989). (“Congress adopted a rather pragmatic view of the kinds of works that achieved

that objective: the first copyright law protected maps, charts, and books-in that order. The great majority of works for which authors or publishers sought copyright protection under that first statute were highly useful productions.”).

As American copyright law continued to develop, Congress continued to emphasize its public-centric focus. In submitting the bill that became the Copyright Act of 1909,⁵ the House of Representatives committee responsible for the bill submitted a report, also adopted by the Senate, noting the following:

The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, for the Supreme Court has held that such rights as he has are purely statutory rights, but upon the ground that the welfare of the public will be served and progress of science and useful arts will promoted by securing to authors for limited periods the exclusive rights to their writings. The Constitution does not establish copyrights, but provides that Congress shall have the power to grant such rights if it thinks best. Not primarily for the benefit of the author, but primarily for the benefit of the public, such rights are given. Not that any particular class of citizens, however worthy, may benefit, but because the policy is believed to be for the benefit of the great body of people, in that it will stimulate writing and invention, to give some bonus to authors and inventors.

H.R. REP. No. 2222, 60th Cong., 2d Sess. (1909) at 5.

The Congress in drafting the 1976 Copyright Act noted the trend caused by these purposes:

The history of copyright law has been one of gradual expansion in the types of works accorded protection, and the subject matter affected by this expansion has fallen into two general categories. In the first, scientific discoveries and technological developments have made possible new forms of creative expression that never existed before. In some of these cases the new expressive forms--electronic music, filmstrips, and computer programs, for example-- could be regarded as an extension of copyrightable subject matter Congress had already intended to protect, and were thus considered copyrightable from the outset without the need of new

⁵ H.R. 28192. H.R. REP. No. 2222, 60th Cong., 2d Sess. (1909).

legislation. In other cases, such as photographs, sound recordings, and motion pictures, statutory enactment was deemed necessary to give them full recognition as copyrightable works.

See H.R. REP. 94-1476, 51, 1976 U.S.C.C.A.N. 5659, 5664. The Copyright Office, in altering the Congress' legislation, is rewriting the law in direct contradiction, therefore, of not just the constitutional mandate, but the Act as well.

c. The Supreme Court, Applying the Purpose of Copyright, Has Expanded the Scope of Copyright, Reading the Act Expansively, Not Regressively as the USCO Urges

The Supreme Court has routinely resolved copyright cases consistently with the Act's purpose. As early as 1884, the Supreme Court was presented with the lexical conundrum of whether a photograph constituted a "writing" under the then-applicable copyright act, which preceded the invention of photography. *See Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) ("photography, as an art, was then unknown, and the scientific principle on which it rests, and the chemicals and machinery by which it is operated, have all been discovered long since that statute was enacted."). The Court thus determined that "[w]e entertain no doubt that the constitution is broad enough to cover an act authorizing copyright of photographs, so far as they are representatives of original intellectual conceptions of the author." *Id.* The Court further explained what an author, an undefined term in the current Act, is, referring to an English decision: "'author' involves originating, making, producing, as the inventive or master mind, the thing which is to be protected, whether it be a drawing, or a painting, or a photograph," and agreeing with the same, "[t]hese views of the nature of authorship and of originality, intellectual creation, and right to protection, confirm what we have already said." *Id.* at 61.

Likewise, in *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975), the Supreme Court made it clear that "[w]hen technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of its basic purpose." In *Aiken*, the issue was whether playing a radio in a restaurant constituted a performance and thus an infringement.

The meaning of performance was therefore ambiguous given the technology invented after the 1909 Copyright Act. The Supreme Court held that playing a radio in a restaurant was not a “performance.” *Id.*, at 162. The Court held that a passive listener cannot be a performer, and “those who listen do not perform, and therefore do not infringe.” *Id.*, at 159 (citation omitted).

The Supreme Court has consistently relied on the principle that “our inquiry cannot be limited to ordinary meaning and legislative history, for this is a statute that was drafted long before the development of the electronic phenomena with which we deal here.” *Fort. Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 395 (1968). Thus, “[w]e must read the statutory language of 60 years ago in the light of drastic technological change.” *Id.* In doing so, the Supreme Court defined an airing over its airwaves as a “performance” of copyrighted work. *Id.* The Supreme Court reiterated that “[t]hese terms have not been construed in their narrow literal sense but, rather, with the reach necessary to reflect the broad scope of constitutional principles.” *Goldstein*, 412 U.S. at 561. In the case of an AI-Generated Work, while an AI will not be motivated to generate additional works by the prospect of copyright or financial gain, individuals like Dr. Thaler, and businesses like music and movie studios, will be motivated to develop and use AI to generate new works, thereby achieving the purpose of the act. In addition, regardless of how a work is generated, the same incentives are needed to have legal persons disseminate both AI- and human-generated works.

Denying copyright to AI-created works would thus go against the well-worn principle that “[c]opyright protection extends to **all** ‘original works of authorship fixed in any tangible medium’ of expression.” *Action Tapes, Inc. v. Mattson*, 462 F.3d 1010, 1013 (8th Cir. 2006) (emphasis added); *see also Bell Atl. Bus. Sys. Servs., Inc. v. Hitachi Data Sys. Corp.*, No. C 93–20079 JW, 1995 WL 836331, at *3 (N.D. Cal. Dec. 14, 1995) (“Copyright protection extends to **all** original works of authorship fixed in any tangible medium of expression”) (emphasis added). This is especially when true when, as written, there are no limitations on who can be an author, and it essentially comes down to the uncontroversial principle that “[w]ritings are what authors create, but for one to be an author, the writing has to be original.” 2 Patry § 3:20.

In sum, the history of the Supreme Court and Congress is replete with both bodies readings the Copyright Act to increase, not decrease, the scope of copyrightable material based on its purpose. The USCO's restrictive view defies its Congressional mandate, and the Supreme Court's interpretative canons for the Copyright Act and must not be given weight.

d. The USCO's Interpretation of the Act Is Not Entitled to Deference

This Court reviews an agency's constitutional and statutory interpretations and application, as well as conclusions of law, *de novo*, *i.e.*, without deference. *See Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984). As an initial matter, the deference analysis is foreclosed by unambiguous language. *See Smith v. City of Jackson, Miss.*, 544 U.S. 228, 266 (2005) (“[I]t is elementary that ‘no deference is due to agency interpretations at odds with the plain language of the statute itself.’”) (Quoting *Pub. Emps. Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 171 (1989).)

Deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) is also not appropriate for Copyright Act decisions that are not based on its own formal rulemaking and regulatory authority. *See Fox Television Stations, Inc. v. FilmOn X LLC*, 150 F. Supp. 3d 1, 25 (D.D.C. 2015) (“The Court will not apply Chevron deference in the absence of formal rulemaking. ...”) Just like in *FilmOn X LLC*, the “Copyright Office’s position . . . is not based on a formal regulation” and therefore not entitled to *Chevron* deference. *Fox Television Stations, Inc. v. FilmOn X LLC*, 150 F. Supp. 3d 1, 25 (D.D.C. 2015).

Defendants are not entitled to *Skidmore* deference either as described in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), which “is ‘entitled to respect’ only to the extent it has the ‘power to persuade.’” *Fox v. Clinton*, 684 F.3d 67, 76 (D.C. Cir. 2012) (quoting *Gonzales v. Oregon*, 546 U.S. 243, 256 (2006).) Thus, if the decision does not come from “reasoned decisionmaking” it is not entitled to any deference. *See id.* at 77. In this instance, relying on gilded age discussions of quasi-metaphysical creative sparks and dicta, in defiance of the agency’s mandate to promote the dissemination and generation of works, is not reasoned decisionmaking.

In any event, “[e]ven if some level of deference were owed to the [agency’s] interpretation . . . neither *Chevron* nor *Skidmore* permits a court to defer to an incorrect agency interpretation.” *PhotoCure ASA v. Kappos*, 603 F. 3d 1372, 1376 (Fed. Cir. 2010). Here, the USCO’s reasoning is not only unpersuasive—it is manifestly contrary to the purpose of the copyright system.

The USCO’s explanation for its decision points haphazardly to a variety of inapt authorities that shed no light on the question of AI-Generated Works. The USCO begins by citing to *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879) and to *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884) in support of its Human Authorship Requirement. *Compendium of U.S. Copyright Office Practices, Third Edition*, Section 306.

The appropriate takeaway from *Burrow-Giles*—which involved the Supreme Court holding for the first time that a photograph was eligible for copyright protection—is not that AI-Generated Works cannot be protected, but rather that our courts have a long history of purposive interpretation of the Act considering technological evolution. A photograph is, literally, not a writing, but the Supreme Court took a purposive approach by considering what definition would promote the goals of the Copyright Clause, rather than taking a hyper-literal approach that would have frustrated progress.

The related cases, *Mazer* and *Goldstein* relied on by USCO also actually support copyright registration for AI-Generated Works. While the USCO cites *Mazer* for the requirement of a “tangible expression of his ideas,” to the extent this employs language referring to a personal pronoun, this actually describes the exact situation at hand, regarding the ideas formed by the AI. *Mazer v. Stein*, 347 U.S. at 214. As *Mazer* further explains, this distinguishes from a mere “reproduction,” which the Work certainly is not. *See id.*

Goldstein also supports Plaintiff’s argument. While USCO cites to the language that “author” in its constitutional sense, has been construed to mean an ‘originator,’ ‘he to whom anything owes its origin.’”⁶ Instead, the point being made by the Court is clarified by further context, where it explains the expansiveness of how to interpret the Act, in that that “the word

‘writings’ might be limited to script or printed material, it may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor.” *Goldstein v. California*, 412 U.S. 546, 561 (1973). To the extent the USCO may not want to credit the AI with such capabilities, it is unquestionable it performed “aesthetic labor,” creating something new. *See id.* This justifies full copyright protection, per *Mazer* and *Goldstein*.

USCO is also wrong to rely on a technical report written in 1979, when “CONTU did not attempt to determine whether a computer work generated with little or no human involvement is copyrightable” because it was “too speculative” to consider at the time.⁶ Further contradicting USCO’s conclusions, Arthur Miller, one of the CONTU commissioners, expressed confidence in the Harvard Law Review that, “[i]f the day arrives when a computer really is the sole author of an original artistic, musical, or literary work (whether novel or computer program), copyright law will be embracive and malleable enough to assimilate that development into the world of protected works.” *Id.* at 1073. Professor Miller further opined:

Our discomfort with the notion of computer-”authored” works (even if we cannot articulate a principled reason for the discomfort) is in keeping with a recurring phenomenon in the development of copyright law. In every age, a new technology has appeared about which people have expressed fear and concern, claiming that it defies the boundaries of the existing legal system. With respect to copyright, these claims were made about photographs, motion pictures, sound recordings, radio, television, and other telecommunications. In each case, the copyright system has managed over time to incorporate the new medium of expression into the existing

⁶ Arthur R. Miller, Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since Contu?, 106 Harv. L. Rev. 977, 1069-70 (1993) With respect to whether AI-generated works would eventually be permitted under the Copyright Act, he states, “[i]t is far from clear that the federal courts ultimately will conclude that our copyright law requires human authorship, although that conclusion may have an emotional appeal to many. The Constitution’s reference to ‘authors’ does not prevent the protection of computer-created works because that reference does not mandate that authors be flesh and blood. Textually, the Clause says little more than that ‘Authors’ are those responsible for creating the ‘Writings’ that Congress chooses to protect. Two centuries ago, that meant only maps, charts, and books, all of which at that time had only human authors. Today, of course, ‘Writings’ embraces an amazing spectrum of modes of expression completely unknown at that time, including computer programs, computer databases, sound recordings, motion pictures, photographs, and countless others. There is no reason why ‘Authors’ cannot undergo a comparable transformation. Certainly, the policies underlying copyright do not prevent it; if anything, these policies might well be inhibited by a human author requirement.” *Id.* at 1065.

framework. Most recent of the upstart new technology has been assumed by computers. For a while the computers-and-copyright battlefield was centered on the copyrightability of computer programs as literary works. That contest now has been largely fought and resolved in favor of copyrightability. It may be that the next battle will be over copyrightability of computer-generated works.⁷

The USCO's discussion of CONTU and *In re Trade-Mark Cases*, taken together, show how the USCO is clearly incorrect on factual grounds it cannot challenge. The USCO also ignores the Supreme Court's principle that "our inquiry cannot be limited to ordinary meaning and legislative history, for this is a statute that was drafted long before the development of the electronic phenomena with which we deal here." *Fort. Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 395 (1968). Thus, "[w]e must read the statutory language of 60 years ago in the light of drastic technological change." *Id.* In doing so, the Supreme Court defined an airing over its airwaves as a "performance" of copyright work. *Id.* Like *Aiken*, the court looked at the actual relationship between performers and listeners, to essentially determine what was going on within the ambit of the Act. USCO additionally mentions a recent US Patent and Trademark Office ("USPTO") Report based on a public request for comment in which it claims that "the vast majority of commenters acknowledged that existing law does not permit a non-human to be an author [and] this should remain the law." *Id.* at 20–21. Respectfully, this statement by USPTO is not an accurate summary of either the submissions received as part of the request for comments, and it does not reflect a consensus of attitudes toward this matter. In any event, an appeal to a majority opinion of interested parties does not in any way indicate that opinion is correct or a proper legal analysis, and therefore should not form the basis for agency action.

⁷ Arthur Miller, *Computers and Authorship: The Copyrightability of Computer-Generated Works*, WIPO WORLDWIDE SYMPOSIUM ON THE INTELLECTUAL PROPERTY ASPECTS OF ARTIFICIAL INTELLIGENCE (1991), https://www.wipo.int/edocs/pubdocs/en/wipo_pub_698.pdf, at 245-246. Arthur Miller went on to, describing photographic equipment that was less sophisticated than today's, noting that in a situation of accidental photography, which the USCO has never challenged, "[i]f the photograph is a copyrightable work of authorship, there is no apparent reason why the computer-generated work should be treated differently." *Id.* at 1072.

Finally, the USCO misreads two cases regarding animal-created works and works allegedly authored by spirits: *Naruto v. Slater*, 888 F.3d 418, 420 (9th Cir. 2018) and *Urantia Found. v. Kristen Maaherra*, 114 F.3d 955, 957-59 (9th Cir. 1997). In neither case did the Court choose to rule on the copyrightability of works owing their origin to non-humans despite it being at issue.

The *Naruto* case is not analogous because it involves animal art rather than AI-generated Works, and, in any event, it was decided based on standing. *Naruto v. Slater*, 888 F.3d 418, 420 (9th Cir. 2018) (“We must determine whether a monkey may sue humans, corporations, and companies for damages and injunctive relief arising from claims of copyright infringement. Our court’s precedent requires us to conclude that the monkey’s claim has standing under Article III of the United States Constitution. Nonetheless, we conclude that this monkey—and all animals, since they are not human—lacks statutory standing under the Copyright Act. We therefore affirm the judgment of the district court.”) The present case, unlike *Naruto*, involves a human being suing for his own ownership rights in the Work.

Urantia involved a work allegedly authored in part by a spirit, which, respectfully, has no relevance to AI-Generated Works. See *Urantia Found. v. Kristen Maaherra*, 114 F.3d at 958. The 9th Circuit apparently even felt the need to clarify this, stating that, “[t]he copyright laws, of course, do not expressly require ‘human’ authorship, and considerable controversy has arisen in recent years over the copyrightability of [AI-Generated Works].” *Id.* at 958. Without addressing the protectability of AI-Generated Works, the 9th Circuit held that, “[a]t the very least, for a worldly entity to be guilty of infringing a copyright, that entity must have copied something created by another worldly entity.” *Id.* at 958. The present case only involves original creation by worldly entities.

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B. Dr. Thaler Is the Owner of the Copyright in the Work Either By Common Law Property Principles or, in the Alternative, Because as a Work For Hire Ownership Originally Vested in Him

3. Accession And The Right of First Possession Both Allow Dr. Thaler to Be an Owner By Operation of Law

As previously discussed, the USCO does not merit deference in its interpretation of whether an AI-created work can be copyrightable, and it likewise makes a plain legal error when it argues that even if the work were copyrightable, the Creativity Machine could not transfer the copyright to Dr. Thaler, because it fails to recognize two separate mechanisms that would make Dr. Thaler the original owner by operation of law given standard property principles.⁸ As the Act explicitly states, copyrights do not need to be transferred by copyright, but can also transfer “by operation of law.” *See* 17 U.S.C. § 204(a).

Such transfers by operation of law, include intestate succession (*Griffin v. Sheeran*, 351 F. Supp. 3d 492, 501 (S.D.N.Y. 2019)) and other similar automatic state-law processes. *See e.g. Fantasy, Inc. v. Fogerty*, 664 F. Supp. 1345, 1356 (N.D. Cal. 1987), *aff’d*, 984 F.2d 1524 (9th Cir. 1993), *rev’d, on other grounds* 510 U.S. 517, 114 S. Ct. 1023, 127 L. Ed. 2d 455 (1994) (Discussing how a copyright transfer made via “transfer of assets from a dissolving corporation to its shareholders is a transfer by operation of law.”); *U.S. Home Corp. v. R.A. Kot Homes, Inc.*, 563 F.Supp.2d 971 (D.Minn. 2008) (Copyright transfer was automatic through merger under Minnesota law.); *see also Houghton Mifflin Co. v. Stackpole Sons, Inc.*, 104 F.2d 306, 311 (2d Cir.), *cert. denied*, 308 U.S. 597, 60 S.Ct. 131, 84 L.Ed. 499 (1939) (The Second Circuit allowed an infringement suit to proceed “since possession of the manuscript by the German publishers is evidence of [copyright] ownership, and the transfer in question is sufficient to convey a title good as against third persons”). In such instances, no written agreement is

⁸ As can be seen in cases such as *Houghton Mifflin Co. v. Stackpole Sons, Inc.*, 104 F.2d 306., 311 (2d Cir.), the mere fact nobody claims property does not mean that such property does not exist.

necessary, as explicitly stated in the statute. Two transfers from the Creativity Machine to Dr. Thaler “by operation of law” apply in this circumstance: (1) the “fruit of the tree,” and (2) the right of first possession.

*a. General Principles of Property Begetting Property
Remaining with the Property Owner Provide the Copyright
to Dr. Thaler*

Professor Thomas W. Merrill of Columbia Law School explains that accession should be viewed like a force, as it “operates like a magnet. Imagine that the contested object is like an iron pellet dropped on a table covered by various magnets; the pellet moves toward and becomes affixed to the magnet that exerts the strongest magnetic force on it, as determined by the size and power of the magnets as well as their physical proximity to the pellet. Similarly, prominent connection for purposes of accession is a function not merely of physical proximity but also other forces (mass, for example) that enter into our perception of what it means to say that something has a prominent connection to something else.” Thomas W. Merrill, *Accession and Original Ownership*, 1 J. Legal Analysis 459, 463 (2009). There are numerous examples in the law of property acceding in ways that appear mundane and inherently reasonable. For instance, if Dr. Thaler owned a fruit tree, he would own the fruit from that tree. This does not require the tree to execute a written agreement to transfer the fruit, the fruit belongs to Dr. Thaler by virtue of his relationship to the tree. Similarly, if Dr. Thaler owned a cow that birthed a calf, “[t]he general rule, in the absence of an agreement to the contrary, is that the offspring or increase of tame or domestic animals belongs to the owner of the dam or mother.” (*Carruth v. Easterling*, 150 So.2d 852 (Miss. 1963)). This has been referred to as the “doctrine of increase.” Thomas W. Merrill, *Accession and Original Ownership*, 1 J. Legal Analysis 459, 463 (2009).

Indeed, in a 6th Century case sometimes cited as the earliest example of copyright, King Diarmed of Ireland recognized this ancient rule of property and its relevance to intangible property in pronouncing that, “to every cow belongs her calf, therefore to every book belongs its

copy.” *The Cathach / The Psalter of St Columba*, ROYAL IRISH ACADEMY (Aug. 31, 2015), www.ria.ie/cathach-psalter-st-columba (last visited Aug 7, 2022).

The same principle applies in the context of newly formed land caused by alluvial formations vesting in the riparian landowner. *See Nebraska v. Iowa*, 143 U.S. 359, 365–66 (1892). In addition, the Supreme Court has repeatedly upheld the same general principle ruling that interest follows the owner of the principal. *See Brown v. Legal Found. Of Washington*, 538 U.S. 216, 235 (2003); *Philips v. Washington Legal Found*, 524 U.S. 156, 164-71 (1998); *Webb’s Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 162-64 (1980)).

Just like with all these examples, Dr. Thaler invented and owns the original property—the Creativity Machine. Its output, of all kinds, automatically vests in him. That is evident in the fact that if his AI had made a physical painting, he would own that tangible property. Just as interest is a concept, an intangible form of property like copyright also belongs in the owner of the underlying property “by process of law.”

Another way to view the principle comes through accession to, for instance, improvements to property. “[T]he general rule is quite well settled that, where the articles later attached to an automobile or other principal article of personal property became so closely incorporated with the principal article that they cannot be identified and detached therefrom without injury to the automobile or principal article, such articles become part of the machine or principal article to which they are so attached and will pass by accession to one having a chattel mortgage or other lien upon the principal article, if the lien is enforced.” *In re C Tek Software, Inc.*, 127 B.R. 501, 507–08 (Bankr. D.N.H. 1991). In this case, therefore, if copyright initially vests in an AI that cannot hold property, the owner of the AI would own any inseparable addition to his property.

b. Dr. Thaler Has the Right of First Possession to the Copyright

Alternately, another standard legal concept, and “one of the most basic premises of property law,” is that “the first person to possess an object is its owner.” João Marinotti,

Possessing Intangibles, 116 Nw. U. L. Rev. 1227, 1238 (2022). In Professor Marinotti’s article on intangible property, he explains the way to understand first possession, and possession, is not through any physical means but “conceptualized as a means of information exchange rather than a physical fact.” *Id.*

Dr. Thaler owns copyright in the Work by virtue of being the first party to possess it and communicate his ownership. “[T]he common and civil law (both of which accept the desirability of private ownership) have responded with the proposition that the taking possession of unowned things is the only possible way to acquire ownership of them.” Richard A. Epstein, *Possession as the Root of Title*, 13 Georgia Law Review 1221, 1222 (1979). The rule of first possession is simple, but like accession, foundational to functioning systems of private property. If the AI made a piece of property, and if no other party was entitled to ownership by virtue of their relationship to the AI, then the Work was unowned property which Dr. Thaler took title to by virtue of first possession.

The law regarding discovered goods, has been consistently that the finder has a right “to any one, unless it be to the right owner, he shall be charged for them.” *Coykendall v. Eaton*, 37 How. Pr. 438, 442 (N.Y. Gen. Term 1869). This has been enshrined in this country’s earliest laws, becoming hornbook and taught in first-year law courses henceforth. *See e.g. Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805) (granting full property rights in a hunted fox to the farmer who ultimately claimed it, not the hunter who fruitlessly pursued it).

As previously cited, this principle has historically applied in copyright law without controversy for a party to claim copyright against any third-persons. In *Houghton Mifflin Co.* the Second Circuit explained this exact concept: “It is to be noted that, if an analogy is to be drawn between literary property and ordinary chattels . . . since possession of the manuscript by the German publishers is evidence of ownership, [] the transfer in question is sufficient to convey a title good as against third persons, without any rights in the premises. That analogy has been asserted and relied on in [copyright] cases. We think it is sound and justifies the plaintiff’s claim [of ownership as necessary for an infringement action].” *Houghton Mifflin Co. v. Stackpole Sons*,

104 F.2d 306, 311 (2d Cir. 1939) (citing copyright ownership cases where this analogy had previously been applied, *Callaghan v. Myers*, 128 U.S. 617, 658 (1888); *Gerlach-Barklow Co. v. Morris & Bendien*, 23 F.2d 159, 161 (2d Cir. 1927)).

Likewise, Dr. Thaler possesses the machine, owns the machine, developed the machine, operated the machine, possesses the Work, and possesses every indica of ownership of the Work. In its possession he holds more than just the digital copy, but also the rights to the copyright embodied within it as well, certainly as to anyone who could bring a lawsuit to challenge him. As the USCO has noted, lacking legal personhood, the Machine lacks standing so Dr. Thaler having a title that is “good as to third persons” remains secure.

4. Alternatively, the Work Is a Work-For-Hire and Dr. Thaler Its Author

Should the Court agree with the USCO that a copyright cannot vest in an AI, there is no need for it to do so under the since the Work can also qualify as a work for hire. 17 U.S.C. § 201 (“Copyright in a work protected under this title vests initially in the author or authors of the work . . . [i]n the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author. . . .”).⁹ In other words, even though the AI created the Work, the property initially vests in the party who employed it, pursuant to the standard process set forth in the Act.

The only question under this theory is whether an AI can be an employee, and while it may not qualify as one under the labor code, it does not have to, and can be treated that way for the limited purpose of the work for hire doctrine without impacting the labor code. The Second Circuit previously explained that for purposes of copyright and purposes of the labor code, one

⁹ To the extent the Copyright Office argues that qualifying as an author does not make the work copyrightable, all that is required is “originality” and that the original wok is a work of “authorship,” so this clearly no bar to Stephen Thaler. *See I Melville B. Nimmer & David Nimmer, Nimmer on Copyright* § 2.01(A)(1) rev. ed.2022). But for Dr. Thaler, the Work would not exist, it is original, and under the law, that means Dr. Thaler owns the copyright in the Work. Nonetheless, the Copyright Office is not quibbling about the correct author to name in the registration, but rather finding the Creative Machine’s output is simply not copyrightable at all.

can be an employee under the USCO without being an employee under the NLRB. *See Horror, Inc. v. Miller*, 15 F.4th 232, 244-47 (2d Cir. 2021) Looking at the Copyright Act’s plain language, an AI can be so employed.

Regarding the Work at bar, in his registration, Dr. Thaler, listed himself as the owner under a “work for hire,” theory, and in his letters fully explained how the Work was created. The undisputed facts of how the Work was created story fits neatly within the plain language of what constitutes a work for hire under the Copyright Act. Dr. Stephen Thaler provided instructions and directed his AI to create the Work. The person for whom the Creativity Machine prepared the Work is unquestionably Dr. Thaler.

The USCO as part of its correspondence with Dr. Thaler could have informed him that he should list himself as the author of the Work. Instead, the USCO refused to register the copyright based on its theory that a work created by an AI is inherently uncopyrightable. US44. The USCO is, however, incorrect.

Starting with the plain language of the statute, an employee under the Copyright Act can be an AI, and thus the person “for whom the work was prepared,” is the original author. *See* 17 U.S.C. § 201(b). While an AI system is not a legal person, and is not an employee in the sense of the labor code, in the context of the work for hire doctrine it acts as an employee. As discussed, *supra* Section IV.A.1, the first step is to read the language of the Act as standardly used, so one should look to the dictionary. *See Mohamad v. Palestinian Authority*, 566 U.S. 449, 456-57 (2012). As before, all the language in the Act remains agnostic as to the humanity of the creator in a work made for hire. As it makes clear, a work can be for hire done by an “employee” or if agreed to for an independent contractor creating a limited subset of copyrightable works. 17 U.S.C. § 101. Merriam-Webster’s Dictionary provides the definition of employee as “one employed by another usually for wages or salary and in a position below the executive level.” *Employee*, Merriam-Webster Dictionary (2023). The definition of employed here can mean, “to make use of (someone or something inactive)” or “to use or engage the services of,” which can both apply to a machine. *See Employ*, Merriam-Webster Dictionary (2023). Likewise, “one” does

not denote a legal person either, as it is defined as “a single person or *thing*.” *One*, Merriam-Webster Dictionary (2023) (Emphasis added.) What these definitions show is a disconnect between an “employee” and any requirement it be human in the context of work-for-hire.

The Supreme Court’s interpretation of employee in the context of work-for-hire also has no human requirement. In *Community for Creative Non-Violence v. Reid*, the Supreme Court identified the factors that characterize an employment relationship under agency law. 490 U.S. 730 (1989) (“In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are [1] the skill required; [2] the source of the instrumentalities and tools; [3] the location of the work; [4] the duration of the relationship between the parties; [5] whether the hiring party has the right to assign additional projects to the hired party; [6] the extent of the hired party’s discretion over when and how long to work; [7] the method of payment; [8] the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; [9] whether the hiring party is in business; [10] the provision of employee benefits; [11] and the tax treatment of the hired party.”) On balance, these factors weigh heavily in favor of the Work being treated as a work for hire. *Id.* at 751-752. The Supreme Court, likewise, has also “reject[ed] the suggestion of respondent and amici that the § 101(1) term ‘employee’ refers only to formal, salaried employees.” *Id.* fn. 8. In addition, later case law makes it clear that even if certain factors do not apply, as there was no payment for instance, this does not prevent finding of a work for hire. *Aymes v. Bonelli*, 980 F.2d 857 (2d Cir. 1992) (Explaining that the “factors should not merely be tallied but should be weighed according to their significance in the case.”)

Taking the scenario as a whole, the AI is entirely controlled by Dr. Thaler, the AI only operates at Dr. Thaler’s direction, and the AI is owned as property by Dr. Thaler. Ultimately, Dr. Thaler is unquestionably the “person for whom the work was prepared,” (17 U.S.C. 101), and the Creativity Machine was, for all intents and purposes, within the broad conception of the Work for Hire Doctrine acting as an employee.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WASHINGTON D.C.**

STEPHEN THALER, an individual,

Plaintiff,

v.

SHIRA PERLMUTTER, in her official
capacity as Register of Copyrights and
Director of the United States Copyright
Office; and THE UNITED STATES
COPYRIGHT OFFICE,

Defendants.

1:22-CV-01564-BAH

**DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT AND CROSS MOTION FOR SUMMARY JUDGMENT**

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WASHINGTON D.C.**

STEPHEN THALER, an individual,

Plaintiff,

v.

SHIRA PERLMUTTER, in her official
capacity as Register of Copyrights and
Director of the United States Copyright
Office; and THE UNITED STATES
COPYRIGHT OFFICE,

Defendants.

1:22-CV-01564-BAH

DEFENDANTS' RESPONSE
TO PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND CROSS
MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Defendants, Shira Perlmutter, in her official capacity as Register of Copyrights and Director of the United States Copyright Office, and the United States Copyright Office, (collectively, the Office or Defendants) pursuant to Fed. R. Civ. P. 56, respectfully request that the Court deny Plaintiff's, Stephen Thaler, an individual, Motion for Summary Judgment, grant its Cross Motion for Summary Judgment, and dismiss Plaintiff's case with prejudice.

This case turns on a single question: Did the Office act reasonably and consistently with the law when it refused to extend copyright protection to a visual work that Plaintiff represented was created without any human involvement? The answer is yes.

The work at issue is a two-dimensional artwork entitled "A Recent Entrance to Paradise" (the Work), as shown below:



In his application, Plaintiff represented that the copyright author was the “Creativity Machine,” an artificial intelligence (AI) machine which he alleged had “autonomously” created the Work. Plaintiff also stated that he was the owner of the copyright in the Work because he owned the Creativity Machine or, in the alternative, pursuant to the “work for hire” doctrine.

In rejecting the application, the Office confirmed that copyright protection does not extend to non-human authors. As described herein, the Office’s determination was based on the language of the Copyright Act, Supreme Court precedent, and federal court decisions refusing to extend copyright protection to non-human authorship. The Office cited these authorities when it rejected the arguments asserted by Plaintiff, and repeatedly explained the basis for its decision in response to Plaintiff’s requests for reconsideration. The Office also correctly rejected Plaintiff’s arguments that he is the owner of the Work based on common law or the work made for hire doctrine. The Office’s refusal to register the Work is supported by the Administrative Record and was sound, reasoned, and firmly based on the applicable laws. There are no material issues of fact in dispute, and Defendants are entitled to summary judgment.

I. RESPONSE TO PLAINTIFF’S STATEMENT OF UNDISPUTED MATERIAL FACTS

In response to Plaintiff’s Statement of Undisputed Material Facts, Defendants will respond to each paragraph as numbered in Plaintiff’s Summary Judgment Brief. *See* Dkt. 16 at 2-6. Even if accepted as true, Plaintiff’s facts do not preclude summary judgment in favor of Defendants.

A. Facts Defendants do not Dispute

For purposes of this Motion only, Defendants do not dispute the following paragraphs from Plaintiff’s Statement of Undisputed Material Facts: Paragraphs 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, and 14.

B. Facts Defendants Dispute As In Conflict With the Record

Plaintiff’s Material Fact No. 1: The first sentence of Paragraph 1 is argumentative and does not state a fact at issue in this case. Defendants do not dispute the quoted language in the citation parenthetical.

Plaintiff’s Material Fact No. 5: Paragraph 5 is argumentative and does not accurately reflect the record. Plaintiff’s note on the application stated the Work “was autonomously created by a computer algorithm running on a machine call the ‘Creativity Machine’. We are seeking to register this computer-generated work as a work-for-hire to the owner of the Creativity Machine.” Dkt. 13-2 at US_0000001.

Plaintiff’s Material Fact No. 6: The second sentence of Paragraph 6 is argumentative and does not accurately reflect the record. The Office’s August 12, 2019 letter stated “[w]e cannot register this work,” Dk. 13-4 at US_0000005, therefore there was no “copyright in the Work” to “address.”

II. STANDARD OF REVIEW

Summary judgment is appropriate where “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “The movant has the burden of showing that there is no genuine issue of fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). “When evaluating cross-motions for summary judgement, each motion is reviewed ‘separately on its own merits to determine whether [any] of the parties deserves judgment as a matter of law.’” *Fox Television Station, Inc. v. Filmon X LLC*, 150 F. Supp. 3d 1, 11 (D.D.C. 2015) (quoting *Family Trust of Mass., Inc. v. United States*, 892 F. Supp. 2d 149, 154 (D.D.C. 2012)). Review under the Administrative Procedure Act (APA) is limited to a consideration of the administrative record. 5 U.S.C. § 706. And, in the context of an APA challenge to the denial of an application for copyright registration, the standard of review is whether the denial was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* Therefore, the Court must “determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.” *Kaiser Found. Hosps. v. Sebelius*, 828 F. Supp. 2d 193, 198 (D.D.C. 2011). “This standard of review is ‘narrow,’ and the court applying it ‘is not to substitute its judgment for that of the agency.’” *Ardmore Consulting Group, Inc. v. Contreras-Sweet*, 118 F. Supp. 3d 388, 393 (D.D.C. 2015) (quoting *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). The Supreme Court has held that “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *State Farm*, 463 U.S. at 43. “Judicial review in APA cases is ‘[h]ighly deferential’ and ‘presumes the validity of agency action,’ permitting reversal only when ‘the agency’s decision is not supported by substantial

evidence, or if the agency has made a clear error in judgment.” *Ashton v. United States Copyright Office*, 310 F. Supp. 3d 149, 156-57 (D.D.C. 2018) (quoting *Hagelin v. Fed. Election Comm’n*, 411 F.3d 237, 242 (D.C. Cir. 2005)).

III. LEGAL STANDARD

The Office’s decision to refuse registration of the Work was based on established legal standards, including the text of the Copyright Act, judicial interpretation of the Act, and the Office’s own public guidance and practices. The legal inquiry into whether a particular work can be registered begins with the text of the statute. The Copyright Act of 1976, 17 U.S.C. § 101 et seq., (the Act) grants copyright protection to “original works of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102(a). Copyright protection confers certain exclusive rights, including the rights to copy and distribute the work. *Id.* § 106. The Act defines categories of works of authorship in which copyright protection can subsist, including “pictorial, graphic, and sculptural works,” *id.* § 102(a), which include “two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings.” *Id.* § 101. Defendants do not dispute that the Work—a two-dimensional work of visual art—falls within the *categories* of works of authorship identified in the Act. *See id.* But that is not the end of the inquiry. Even if the Work qualifies as a category of work within the scope of the statute, the Act protects only “original works of authorship” that are fixed in a tangible medium of expression. *Id.* § 102(a). Accordingly, the Office will refuse registration for works that are not “original works of authorship,”¹ not fixed, or are subject to statutory exclusions.²

¹ Plaintiff claims that “[i]t is undisputed that the Work constitutes a fixed, visual artwork that would be protected under the Act had it been created through traditional human labor,” Dkt.

The Office’s decision also relied on its many years of experience interpreting and applying copyright law. It collects this understanding of the law and provides standards for examining and registering works in its *Compendium of U.S. Copyright Office Practices (Third Edition)* (*Compendium*). Updates to the *Compendium* are typically adopted following a period for public notice and comment. See U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT PRACTICES, Introduction at 7 (3d. ed. 2021) (COMPENDIUM(THIRD)) (referencing welcoming public input on the *Compendium* during “formal notice and commenting periods”). The Office looks to the *Compendium* when reviewing copyright registration applications, including with regard to the requirements for copyrightability. As other courts have recognized, registration decisions that have been based on “the Copyright Act, the content of related regulations, and the *Compendium* . . . can hardly be deemed to be ‘arbitrary and capricious’” and such reasonable determinations “must be accorded substantial deference.” *Yu Zhang v. Heineken N.V.*, No. CV 08-06506, 2010 WL 4457460, at *6 (C.D. Cal. May 12, 2010) (citation omitted).

The *Compendium* contains several sections addressing the human authorship requirement. The *Compendium* specifies “the Office will refuse to register a claim if it determines that a human being did not create the work.” COMPENDIUM(THIRD) § 306. Likewise, the *Compendium* provides that copyright law only protects “the fruits of intellectual

16 at 7, but the Office did not consider whether other registration requirements, including that the work must be “original,” were met. The term “original” means that the work was independently created by the author, as opposed to copied from other works. See *Feist Publications v. Rural Telephone Services, Co.*, 499 U.S. 340 (1991). Because Plaintiff provided minimal information as to how the Work was prepared, the Office is unable to determine whether the Work meets this standard because, among other potentially relevant facts, the Office does not know what preexisting works the Creativity Machine was trained on.

² The Act excludes copyright protection for “any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” 17 U.S.C. § 102(b).

labor” that “are founded in the creative powers of the [human] mind.” *Id.* (quoting *Trade-Mark Cases*, 100 U.S. 82, 94 (1879)). Similarly, the *Compendium* points out that “to qualify as a work of ‘authorship’ a work must be created by a human being” and “works that do not satisfy this requirement are not copyrightable.” *Id.* § 313.2. The *Compendium* provides numerous examples of works that lack the human authorship requirement necessary for copyrightability including “works produced by nature, animals, or plants.” *Id.* Most notably, the *Compendium* specifies that the Office “will not register works produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author.” *Id.*

IV. FACTUAL BACKGROUND

Plaintiff applied to register the Work on November 3, 2018. *See* Dkt. 13-2. When Plaintiff submitted his application, he included a note for the Office that stated “[p]lease note this artwork was autonomously created by a computer algorithm running on a machine called the ‘Creativity Machine’. We are seeking to register this computer-generated work as a work-for-hire to the owner of the Creativity Machine.” *Id.* at US_0000001. Plaintiff further filled in the “Author” field of the application as “Creativity Machine” and stated that the work created by the author was a “2-D artwork, Created [sic] autonomously by machine.” *Id.* at US_0000002. Plaintiff also checked a box that the work was a “work made for hire,” claiming ownership was transferred due to “[o]wnership of the machine.” *Id.*

On August 12, 2019, the copyright examiner assigned to the application refused registration. *See* Dkt. 13-4. The examiner’s decision explained that the Work “lacks the human authorship necessary to support a copyright claim” and pointed to Plaintiff’s statement in the application that the work was “created autonomously by machine.” *Id.* at US_0000005 (quoting

Dkt. 13-2 at US_0000002). The decision also pointed to previous Supreme Court opinions stating that copyright protects only “the fruits of intellectual labor” that “are founded in the creative powers of the mind” and is limited to “original intellectual conceptions of the author.” Dkt 13-4 at US_0000005 (quoting *Trade-Mark Cases*, 100 U.S. at 94; *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884)).

Plaintiff appealed the initial refusal of registration on September 23, 2019³. See Dkt. 13-5. Plaintiff’s request for reconsideration opened by acknowledging that “[i]t is correct that the present submission lacks traditional human authorship—it was autonomously generated by an AI.” *Id.* at US_0000009.⁴ Plaintiff’s request for reconsideration was largely based on policy arguments in support of registration, including the argument that the Office “should register copyrights for [machine-generated works] because doing so would further the underlying goals of copyright law, including the constitutional rationale for copyright protection, and because there is no binding authority that prohibits” registration. *Id.* at US_0000010; *see also id.* at US_0000013 (under heading “Policy Objections,” arguing that the human authorship requirement “strongly discourages the use and development of creative AI”). Plaintiff also argued without analysis that because “non-human, artificial persons such as companies can already be authors” under the work made for hire doctrine, that provided “precedent” for permitting him to register the Work. *Id.* at US_0000012. Finally, Plaintiff criticized the Office’s

³ The top of Plaintiff’s first request for reconsideration is dated September 8, 2019, but the attorney’s signature block has a date of September 23, 2019. Compare Dkt. 13-5 at US_0000009 with Dkt. 13-5 at US_0000016.

⁴ At no point in Plaintiff’s copyright application or his two requests for reconsideration did he suggest that he had any involvement in or direction of the specific expressive content of the Work. See generally Dkt. 13-5; Dkt. 13-7. For that reason, there is no evidence in the Administrative Record that, as Plaintiff now argues, he “provided instructions and directed his AI to create the Work.” Dkt. 16 at 25.

reliance on the Supreme Court’s opinions in the *Trade-Mark Cases* and *Sarony*, describing them as “non-binding judicial opinions from the Gilded Age” that did not foreclose protection for machine-generated works. *Id.* at US_0000015.

The Office denied Plaintiff’s request for reconsideration on March 30, 2020. *See* Dkt. 13-6. In a letter, the Office of Registration Policy & Practice again explained that the *Trade-Mark Cases* and *Sarony* limited copyright law to protecting only the creations of human authors. *Id.* at US_0000019. The Office further noted that Plaintiff explicitly admitted the work was “autonomously generated by an AI” and had “provided no evidence on sufficient creative input or intervention by a human author in the Work.” *Id.* Finally, it found the policy arguments were “insufficient to convince the Office to 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.” *Id.* at US_0000019-20.

Plaintiff appealed⁵ this decision to the Copyright Office Review Board, a body that provides final review of registration refusals and whose three members are appointed by the Register of Copyrights and the Office’s General Counsel. *See* 37 C.F.R. § 202.5(c), (f), (g). Because Plaintiff did “not assert that the Work was created with contribution from a human author,” the “only issue before the Board” was whether the Office’s refusal to register non-human works violated the law. Dkt. 13-8 at US_0000033. After considering the statute and relevant law, the Board found that the Office correctly interpreted copyright law to require human authorship. *Id.*

⁵ Plaintiff’s May 27, 2020 second request for reconsideration was largely identical to his previous request, so it is not described further. *Compare* Dkt. 13-7 *with* Dkt. 13-5.

The Board’s decision rested on several grounds. First, it found that the Supreme Court had repeatedly interpreted the copyright term “author” as a human whose mind originated a work. *See id.* at US_0000034 (discussing *Sarony*, *Mazer v. Stein*, and *Goldstein v. California*). Second, the Board noted that federal appellate courts have refused to extend copyright protection to non-human authors, including animals and divine spirits. *Id.* at US_0000034-35. Third, the Board pointed to the final report by the National Commission on New Technological Uses of Copyrighted Works, which Congress tasked with considering copyright questions raised by computer technology. *Id.* at US_0000035. That report agreed with the Office’s past and present view that copyright requires “at least minimal human creative effort.” *Id.* Fourth, the Board noted that for almost 40 years the Office’s registration practices required human authorship. *Id.*⁶ Fifth, the Board found the work made for hire doctrine inapplicable because: (1) it does not affect whether a work is within the scope of copyright; and (2) the Work did not meet the statutory requirements that the work be prepared either by an “employee” or pursuant to “a written instrument.” *Id.* at US_0000036

The Board’s decision to affirm refusal of registration constituted a “final agency action” by the Office with respect to the issues addressed therein, 37 C.F.R. § 202.5(g), and is subject to review by a federal district court under the APA. *See* 17 U.S.C. § 701(e) (“[A]ctions taken by the Register of Copyrights under this title are subject to the provisions of the Administrative Procedure Act”); *see also* 5 U.S.C. § 704 (“Agency action made reviewable by statute . . . [is] subject to judicial review.”).

V. THE COPYRIGHT OFFICE’S ACTION WAS JUSTIFIED

⁶ The Board also pointed to a recent study by the U.S. Patent and Trademark Office, which found a similar consensus among practitioners. *See* Dkt. 13-8 at US_0000036.

A. Plaintiff Must Show the Office’s Decision was Arbitrary, Capricious, or an Abuse of Discretion to Prevail on its APA Claim

As Plaintiff acknowledges, the Office’s refusal to register the Work is governed by the APA. *See* Dkt. 16 at 6. In setting the scope of judicial review, the APA provides that courts may “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706. As discussed above, the Supreme Court has held that “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *State Farm*, 463 U.S. at 43 (citation omitted). A “satisfactory explanation” is one from which “the agency’s [decision] path may reasonably be discerned,” and does not require express or detailed analysis of every argument raised. *Id.* The burden is on the party challenging an agency’s decision under the APA. *See Nuvio Corp. v. FCC*, 473 F.3d 302, 305 (D.C. Cir. 2006) (noting that, under the APA, it is “petitioners’ burden” to show that an action is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”) (quoting 5 U.S.C. § 706(2)(A)).

Plaintiff has failed to meet his burden here. The refusal to register the Work was neither arbitrary, capricious, nor an abuse of discretion. The Office credited Plaintiff’s representation of the Work as created “autonomously” by a machine and applied longstanding legal criteria to conclude it must deny Plaintiff’s registration application. The Office considered and rejected the arguments asserted by Plaintiff, and it explained clearly how it applied the law to Plaintiff’s application. In particular, the Review Board’s February 14, 2022 decision provided a satisfactory explanation and rational basis for the decision to refuse registration of the Work. *See* Dkt. 13-8 at US_0000037 (“Because copyright law as codified in the 1976 Act requires human authorship, the Work cannot be registered.”).

Further, contrary to Plaintiff's assertion, *see* Dkt. 16 at 15-16, the Court should give substantial deference to the Office's judgment regarding copyrightability in recognition of the Office's extensive expertise. *See Esquire, Inc. v. Ringer*, 591 F.2d 796, 801–02 (D.C. Cir. 1978) (giving “considerable weight” to the Register's refusal determination); *Custom Chrome, Inc. v. Ringer*, No. Civ. A. 93-2634(GK), 1995 WL 405690, at *4 (D.D.C. June 30, 1995) (accorded “great weight” to the Register's registration decision). Plaintiff alleges that the Office's decision is not entitled to deference because the human authorship requirement is not based on a formal regulation. *See* Dkt. 16 at 15-16. However, the Office was created to oversee copyright registration and “has been concerned with the distinction between copyrightable and noncopyrightable works of art since the Copyright Act of 1870 characterized copyrightable subject matter as works of fine art.” *Norris Indus. v. Int'l Tel. & Tel. Corp.*, 696 F.2d 918, 922 (11th Cir. 1983). For this reason, courts credit the Office's expertise in interpreting the Act, particularly in the context of registration. *See, e.g., Esquire, Inc.*, 591 F.2d at 801; *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 480 (6th Cir. 2015) (“the Copyright Office's expertise in identifying and thinking about the difference between art and function surpasses ours”), *aff'd on other grounds* 580 U.S. 405 (2017).

Plaintiff's disagreement with the Office's conclusion does not establish an abuse of discretion, nor does it indicate that the Office acted arbitrarily or capriciously. *See, e.g., Citizens Telecoms. Co. of Minn., LLC v. FCC*, 901 F.3d 991, 1010 (8th Cir. 2018) (noting that a plaintiff's “disagreement is no basis for finding” a federal agency's interpretation to be “arbitrary and capricious”). The Office's conclusion that copyright law does not protect non-human creators was a sound and reasoned interpretation of the applicable law.

B. The Office Correctly Refused Plaintiff’s Application to Register the Work

1. The History and Language of the Act Supports the Office’s Conclusion that Only Human Authorship Qualifies for Copyright Protection

Contrary to Plaintiff’s argument, there is no support in the Act for his assertion that copyright extends to works created solely by machines. For example, Plaintiff is mistaken that because the statutory phrase “works of authorship” is undefined, the Act permits AI-generated works to be registered. *See* Dkt. 16 at 7-9. Rather, the human authorship requirement is a longstanding requirement of copyright law. The 1909 Copyright Act explicitly provided that only a “person” could “secure copyright for his work.” Act of Mar. 4, 1909, c. 320, §§ 9, 10, 35 Stat. 1075, 1077. In enacting the 1976 Act, Congress did not intend to change the standards for copyright authorship. *See* H.R. REP. NO. 94-1476, at 51 (1976) (noting that Congress intended to incorporate the “original work of authorship” standard under the 1909 Act).

Plaintiff misconstrues other provisions of the Act when citing them in support of his position. *See* Dkt. 16 at 7-9. He claims that the Act “explicitly accommodates non-human authors” by allowing copyright registration for anonymous works, pseudonymous works, or works made for hire. *Id.* at 8 n.3, n.4. The opposite is true; the Act assumes that authors are human. But Congress created “special provisions” to address those circumstances where a work’s term cannot be computed by using an author’s life because the human author is not identified. *See* H.R. REP. NO. 94-1476, at 137. For anonymous and pseudonymous works,⁷ the Act addresses these types of works by providing a fixed length of protection. *See* 17 U.S.C. § 302(a)–(c). However, if the author’s identity is revealed in the registration record before the

⁷ Plaintiff’s arguments regarding works made for hire are addressed separately below in Section V.C.

term expires, the copyright term is measured from the human author's death. *Id.* Nothing about Congress's treatment of the term of protection for anonymous and pseudonymous works supports Plaintiff's argument that Congress intended the Act to protect non-human creations.

2. Supreme Court Precedent Supports the Office's Decision

The Office was correct to rely on the Supreme Court's decision in *Burrow-Giles Lithographic Co. v. Sarony*, which held that photographs could be protected because they contained sufficient human creativity to qualify as "works of authorship." Dkt. 13-8 at US_0000034. The case arose after Congress had amended the relevant copyright statute to include photographs, and the defendant had infringed a copyright in a photograph of Oscar Wilde. *See Sarony*, 111 U.S. at 54–55. The defendant challenged the constitutionality of the law, arguing that Congress may only protect the "writings" of "authors," under U.S. Const. art. I, § 8, cl. 8, and that photographs were ineligible because "a photograph is not a writing nor the production of an author" because they are created by the camera. *Id.* at 56 (defendant argued that photographs were merely "reproduction on paper of the exact features of some natural object or of some person"). The Supreme Court disagreed, finding that the term "writings" in the Copyright Clause broadly means "the literary productions of those authors," and "Congress very properly has declared these to include all forms of writing, printing, engraving, etching, etc., by which the ideas in the mind of the author are given visible expression." *Id.* at 58.

The Court held that photographs were copyrightable creation of "authors" because they reflected creative choices by humans. *Id.* at 57–59. The then-copyright statute protected the creation of "authors" and the Court construed an "author" as "he to whom anything owes its origin; originator; maker; one who completes a work of science or literature" and found that photographs were protected by copyright as "representatives of original intellectual conceptions

of [an] author.” *Id.* In its opinion, the Court emphasized the photographer had a “mental conception” of the photograph, given form by decisions such as “posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation” creating the image. *Id.* at 60.⁸ Human creativity was essential: had the photograph been a “mere mechanical reproduction” that “involve[d] no originality of thought or any novelty in the intellectual operation,” then “copyright [would offer] no protection.” *Id.* at 59.

Contrary to Plaintiff’s argument, nothing in *Sarony* requires registration of the Work at issue in this case. Unlike the Work here, which Plaintiff claims was created “autonomously,” Dkt. 13-2 at US_0000001, the human photographer in *Sarony* made creative choices such as how he arranged the subject and altered the lighting of the scene. *See* 111 U.S. at 60. The Court’s ruling in *Sarony* was not based on a free-flowing policy exercise untethered from the statute as Plaintiff’s desired result would demand in this case. Rather, copyright law at the time “name[d] photographs among other things for which the author, inventor, or designer may obtain copyright.” *Id.* at 55; *contra* Dkt. 16 at 13 (suggesting that *Sarony* construed statutory text that “preceded the invention of photography”). As the Court in *Sarony* noted, absent human authorship, the photograph would not be entitled to copyright protection. *See* 111 U.S. at 60.

⁸ This echoed the Court’s decision five years earlier in *Trade-Mark Cases*, which noted that “the writings which are to be protected [under the Copyright Clause] are the fruits of intellectual labor, embodied in the form of books, prints, engravings and the like.” 100 U.S. at 94.

The Supreme Court’s later cases have similarly articulated a nexus between human expression and copyright. In *Mazer v. Stein*, the Court cited *Sarony* for the proposition that a work “must be original, that is, the author’s tangible expression of his ideas.” 347 U.S. 201, 214 (1954). And in *Goldstein v. California*, the Court again cited *Sarony* for the proposition that “[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.’” 412 U.S. 546, 561 (1973).

3. Federal Appellate Courts Have Reached the Same Conclusion

Plaintiff is not the first to attempt to extend copyright protection to non-humans. In earlier cases, including *Urantia Found. v. Kristen Maaherra*, *Naruto v. Slater*, and *Kelley v. Chicago Park Dist.*, appellate courts have rebuffed would-be non-human authors.⁹ And the Board’s decision explained its reliance on these cases. *See* Dkt. 13-8 at US_0000034–35 (explaining that “lower courts have repeatedly rejected attempts to extend copyright protection to non-human creations” and citing relevant cases); *Urantia Found. v. Kristen Maaherra*, 114 F.3d 955, 957–59 (9th Cir. 1997) (holding that “some element of human creativity must have occurred in order for the Book to be copyrightable” because “it is not creations of divine beings that the copyright laws were intended to protect”); *Naruto v. Slater*, 888 F.3d 418, 426 (9th Cir. 2018) (reasoning that a monkey cannot register a copyright in photos it captures with a camera because the Act refers to an author’s “children,” “widow,” “grandchildren,” and “widower,” — terms that “all imply humanity and necessarily exclude animals”) (decided on other grounds); *Kelley v.*

⁹ Courts examining this question under United States patent law have reached a similar conclusion. The Federal Circuit recently rejected an attempt by Plaintiff to patent an invention by a machine. *See Thaler v. Vidal*, 43 F.4th 1207, 1210 (Fed. Cir. 2022) (“there is no ambiguity: the Patent Act requires that inventors must be natural persons; that is, human beings”).

Chicago Park Dist., 635 F.3d 290, 304 (7th Cir. 2011) (observing that “authorship is an entirely human endeavor”) (internal citations omitted).¹⁰

Plaintiff’s attempt to re-write the holdings of these cases is unpersuasive. *See* Dkt. 16 at 19. *Urantia Found.* is not a case limited to works “authored in part by a spirit.” Rather, the “threshold issue” of that case was whether a work “claimed to embody the words of celestial beings *rather than human beings*, is copyrightable at all.” *Urantia Found.*, 114 F.3d at 958 (emphasis added). Addressing the argument that copyright requires “the requisite ingredient of human creativity,” the court held that “in this case some element of human creativity must have occurred in order for the Book to be copyrightable.” *Id.* While Plaintiff suggests that the “worldly” nature of the Creativity Machine is sufficient for copyright protection, Dkt. 16 at 19, the record in this case lacks evidence that Work was the result of “human” creativity, Dkt. 13-8 at US_0000033.

Similarly, *Naruto* is not merely an “animal art” case. Dkt. 16 at 19. In that case, the Ninth Circuit considered a complaint alleging that a monkey was “the author and owner of” photographs and had a right to sue under the Copyright Act. *Naruto*, 888 F.3d at 426. As Plaintiff concedes, the court answered in the negative because “animals other than humans” cannot sue under the Act. *Id.* at 426. The court also noted that “if Congress and the President intended to take the extraordinary step of authorizing animals” to sue, the statute would need to state so clearly. *Id.* at 425 (quoting *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1179 (9th Cir.

¹⁰ These judicial decisions are reflected in the Office’s guidance in its *Compendium*, which requires that copyrighted works be created by a human and provides examples of unregistrable works such as “a photograph taken by a monkey” and “an application for a song naming the Holy Spirit as the author.” COMPENDIUM (THIRD) § 313.2. Similarly, the *Compendium* incorporates the holdings in cases such as *Trade-Mark Cases* and *Sarony*, which require human authorship as a condition for copyright protection. *See, e.g., id.* §§ 306, 313.2.

2004)). Copyright protection for works created entirely by machines would be even more extraordinary.

Finally, Plaintiff’s Motion omits *Kelley*, a case cited by the Office. *See* Dkt. 13-8 at US_0000035. In *Kelley*, the Seventh Circuit held that a “living garden” was not copyrightable, in part, because “works owing their form to the forces of nature cannot be copyrighted.” 635 F.3d at 304. The Seventh Circuit cited the Office and explained that because “authorship is an entirely human endeavor,” “[a]uthors of copyrightable works must be human.” *Id.* at 304 (citing COMPENDIUM (SECOND) §§ 202.02(b), 503.03(a) and PATRY ON COPYRIGHT § 3:19 (2010)). Even though the garden in *Kelley* was the product of some human involvement, it was “not the kind of authorship required for copyright.” 635 F.3d at 304. Rather, the constituent elements of the garden “originate[d] in nature, not in the mind of the [human] gardener.” *Id.* The same is true here—the Work’s visual elements are not the product of human endeavor but were instead “autonomously created by a computer algorithm.” Dkt. 13-2 at US_0000001.

4. The Creativity of the Work’s Visual Elements is Irrelevant

Plaintiff accurately states that the scope of “works” covered by the Act reflects a deliberate choice by Congress regarding the scope of copyrightable material, including what works are “work[s] of authorship,” 17 U.S.C. § 102(a). Dkt. 16 at 7-9. However, Plaintiff’s claim that the Work is “adequately creative” because it “contains visual elements in a novel way” misses the point. *Id.* at 9. The question of the category of the Work or its creativity is not the inquiry on which the Office based its refusal decision. *See* Dkt. 13-8. Section 102 protects “original works of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102(a). Creativity and originality are required, but not sufficient for protection; it is only the creativity and originality of “authors”—humans—that are eligible for copyright. In this case, the

arrangement of visual elements in the Work is not determinative. Rather, the Work's defect is that its "author" is not human and, therefore, it cannot be a "work of authorship" under § 102(a).

5. Plaintiff Cannot Supplement the Administrative Record Regarding the Work's Creation

The Court should not credit Plaintiff's statement, made for the first time in his Motion, that he "provided instructions and directed his AI to create the Work," that "the AI is entirely controlled by Dr. Thaler," or that "the AI only operates at Dr. Thaler's direction." Dkt. 16 at 25–26. These unsubstantiated allegations were not part of the Administrative Record before the Copyright Office.¹¹ The Office was entitled to rely on Plaintiff's contemporaneous statements and "accept[] as a threshold matter Thaler's representation that the Work was autonomously created by artificial intelligence without any creative contribution from a human actor." Dkt. 13–8 at US_0000032. In any event, even if Plaintiff "created an AI that he directed to create artwork," Dkt. 16 at 1, that does not mean that he directed the specific contents of any work, which is what copyright protection requires.

¹¹ Plaintiff is incorrect in stating that the Office "could have informed him that he should list himself as the author of the Work." Dkt. 16 at 25. The Office refused the Work because Plaintiff did not "author" any part of the Work. As he made clear, the Work was created "autonomously by machine." Dkt. 16 at 3 (quoting Dkt. 13-2 at US_0000001). The application's defect was substantive, not clerical.

C. Neither Common Law Nor the Work-Made-for-Hire Doctrine are a Basis for Plaintiff to Claim Authorship of the Work

Plaintiff is also incorrect that common law or the work made for hire doctrine permits him to claim a copyright interest in the Work.¹² *See* Dkt. 16 at 20-26. As explained above, copyright does not protect the creations of non-human authors therefore there is no interest to be claimed. No copyright in the Work exists and therefore Plaintiff’s common law property and work made for hire arguments do not alter the Office’s conclusion. However, for completeness, Defendants will address each argument.

As an initial matter, Plaintiff’s reliance on common law regarding property ownership is irrelevant because they involve physical rather than intangible property.¹³ *See* Dkt. 16 at 21-24. It is a fundamental principle of intellectual property, confirmed in the Act, that ownership of a material object is distinct from ownership of intangible rights embodied in that object. *See* 17 U.S.C. § 202 (“Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first

¹² At the outset, the Court should reject Plaintiff’s invocation of common law property principles as a basis for overturning the Office’s decision. Plaintiff did not cite these cases during the registration process, so the Office’s decision did not have the opportunity to consider them. *See OddzOn Prods. v. Oman*, 924 F.2d 346, 350 (D.C. Cir. 1991) (because copyright registration argument “was not raised in the application proceedings, that question is not appropriately before us for review”).

¹³ Plaintiff relies heavily on a proclamation from the King of Ireland in the 6th Century and state court cases establishing physical property principles. *See* Dkt. 16 at 21-22. Given that Plaintiff has described the Supreme Court’s decisions in *Sarony* and *Mazer* as “non-binding judicial opinions from the Gilded Age,” Dkt. 13-7 at US_0000029, decisions by state courts and foreign monarchs should be afforded no greater weight. *See also* Dkt. 16 at 15 (criticizing the Office for “relying on gilded age discussions of quasi-metaphysical creative sparks and dicta”).

fixed, does not of itself convey any rights in the copyrighted work embodied in the object.”).¹⁴ Plaintiff’s invitation to apply physical property doctrines such as accession and first possession to copyright would contravene the statutory scheme and upend the foundations of copyright law.¹⁵

Moreover, Plaintiff’s common law argument fails because it is foreclosed by the text and structure of the Act. Plaintiff suggests that because the Act references “operation of law,” that language permits common law principles to determine what material is protected by copyright. Dkt. 16 at 20. But “operation of law” is only mentioned as relevant for transfers of an existing copyright—not for whether a copyright exists in the first place. *See* 17 U.S.C. § 201(d) (“ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law”); *id.* § 204(a) (copyright transfers must be in writing unless transfer is “by operation of law”). Section 102(a), the subject matter of copyright, and § 201(a), which provides that copyright “vests initially in the author or authors of the work,” do not reference “operations of law.” And, because Congress deliberately used “operations of law” elsewhere in the Act, its omission in the Act’s discussion of the subject matter of copyright and initial creation

¹⁴ Plaintiff’s citation to *Houghton Mifflin Co. v. Stackpole Sons, Inc.* is inapposite. *See* Dkt. 16 at 23-24. In *Houghton Mifflin Co.*, the parties disagreed whether Adolf Hitler’s *Mein Kampf* was protected by copyright, with an alleged infringer arguing that the plaintiff lacked standing due to defects in a “carefully drawn document intended to transfer all American rights to publish and sell this work.” 104 F.2d 306, 310 (2d Cir. 1939). The court held only that “if an analogy is to be drawn between literary property and ordinary chattels,” the fact that the publisher owned the manuscript provided circumstantial evidence the copyright had been transferred as well. *Id.* at 311 (emphasis added). Unlike here, there was no dispute concerning human authorship.

¹⁵ Moreover, to the extent that state property law conflicts with the Act, it is preempted by the Supremacy Clause. *See Goldstein*, 412 U.S. at 561 (looking at “federal copyright law” to determine whether the state law at issue “st[ood] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”).

should be treated as intentional and foreclose property common law determining those issues. *See, e.g., Ill. Pub. Telcoms. Ass'n v. FCC*, 752 F.3d 1018, 1023 (D.C. Cir. 2014) (“we will not read into the statute a mandatory provision that Congress declined to supply”).

Plaintiff’s argument that he is the owner of the Work because it is a work made for hire also fails. *See* Dkt. 16 at 24-26. The Act sets clear guidance regarding works made for hire. It states that “the employer or other person for whom the work was prepared is *considered* the author for purposes of this title” 17 U.S.C. § 201(b) (emphasis added). The Act defines a “work made for hire” as either (1) a work “prepared by an *employee* within the scope of *his or her* employment” or (2) a qualifying work “specially ordered or commissioned” by one or more parties, “if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.” *Id.* § 101 (definition of “work made for hire”) (emphasis added).¹⁶ Congress’s use of personal pronouns to refer to the employee’s relationship with the employer indicates that Congress intended such employees to be human, not machines.¹⁷ The “Creativity Machine” is not a person, is not Plaintiff’s employee, and is not Plaintiff’s agent. The work made for hire doctrine does not apply here.

Further, Plaintiff cannot avoid this statutory language by appealing to the Supreme Court’s decision in *Community for Creative Non-Violence (CCNV) v. Reid*, 490 U.S. 730 (1989). *See* Dkt. 16 at 26. Plaintiff recites the factors the Court considered but ignores that the Court’s

¹⁶ Plaintiff does not claim that the Work satisfies the terms of the second clause in the work made for hire definition (relating to “specially ordered or commissioned” works). Therefore, any argument that the Work was specially ordered or commissioned has been waived.

¹⁷ Plaintiff’s argument that computers can be employees for copyright purposes is extraordinary and could have broad implications for employment and tax law. The Court should not construe the term “employee” in a way that would disrupt other established areas of law, such as including inanimate machines in the definition of “employee.”

treatment of the work made for hire doctrine assumed that the employee in question is a human. *See CCNV*, 490 U.S. at 751-52. The factors the Court provided in *CCNV* for evaluating whether an agent is an employee include “the provision of employee benefits” and “the tax treatment of the hired party.” *Id.* A machine cannot satisfy these elements: it neither receives benefits nor pays taxes.

Moreover, *CCNV*'s importation of the common-law agency doctrine into the Act's “employee” determination required a human. In *CCNV*, the Court explained that Congress “intended to describe the conventional master-servant relationship as understood by common-law agency doctrine” in referencing employees. *CCNV*, 490 U.S. at 739–40.¹⁸ And it is clear that agents must be human: “agency” describes “the fiduciary relationship that arises when one person (a ‘principal’) manifests assent to another *person* (an ‘agent’) that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.” RESTATEMENT (THIRD) OF AGENCY § 1.01 (emphasis added). Because the Creativity Machine cannot be an agent, it correspondingly cannot be an employee under the work made for hire doctrine.¹⁹

¹⁸ The Restatement of Agency no longer uses the “master-servant” terminology; in its place it uses the phrase “respondeat superior.” RESTATEMENT (THIRD) OF AGENCY § 2.04 (AM. L. INST. 2006).

¹⁹ Plaintiff's semantic argument that he is the Creativity Machine's employer under the Act because he “make[s] use of,” *i.e.*, “employs” the machine, Dkt. 16 at 25–26, is unjustifiable under the statute. Further, this reasoning would allow any human author's inanimate tool to qualify as an employee—including a pencil, piano, or camera—as one can “make use of” those implements when creating a work.

D. Plaintiff’s Policy Arguments are Irrelevant and Fail to Demonstrate that the Office’s Decision was Arbitrary and Capricious

Much of Plaintiff’s Motion is devoted to policy arguments in favor of copyright protection for AI created works. But policy arguments do not demonstrate that the Office’s decision was arbitrary and capricious under current law. Rather, these arguments simply show that Plaintiff disagrees with the Office’s decision.²⁰ As the Federal Circuit stated in response to these same policy arguments raised in *Thaler v. Vidal*, “Thaler’s policy arguments are speculative and lack a basis in the text of the Patent Act and in the record. In any event, the text before us is unambiguous, and we may not ‘elevate vague invocations of statutory purpose over the words Congress chose.’” 43 F.4th at 1213 (quoting *Sw. Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1792-93 (2022)).

Here, Plaintiff’s policy arguments do not support his claim that Defendants violated the APA. Instead, Plaintiff’s arguments merely state his own view that the human-authorship requirement “frustrates the purpose of the [Copyright] Act which is to promote the dissemination and creation of work.” Dkt. 16 at 1. And Plaintiff made similar arguments to the Office during the registration process. *See* Dkt. 13-5; Dkt. 13-7. Plaintiff claimed that because copyright serves as “a financial incentive to generate expressive works,” copyright for machine-generated works would provide economic incentives for developing “creative AIs” capable of generating

²⁰ For example, Plaintiff criticizes the Office’s reference to the National Commission on New Technological Uses of Copyrighted Works (“CONTU”) Report by claiming that the Office “ignores that CONTU did not seriously consider the possibility of AI-Generated Works as they were considered ‘too speculative’ at the time.” Dkt. 16 at 21 (citation omitted). But the Office relied on the CONTU Report to support its understanding that “the existing judicial construction of ‘original work[s] of Authorship’ . . . require[s] human authorship.” Dkt. 13-8 at US_0000035 (citing CONTU, FINAL REPORT at 1 (1978) (emphasis added)). While Plaintiff disagrees, as a policy matter, with what the law should be, the CONTU Report itself observes that Congress would be responsible for any change to the copyright laws. CONTU, FINAL REPORT at 44–46.

new expressive material. Dkt. 13-7 at US_0000024–25; *see also id.* at US_0000024 (arguing that “[b]oth the U.S. Constitution and principles of good public policy require that the Office permit ‘AI-generated works’ or ‘computer-generated works’ (CGWs) to receive copyright protection”).

Regardless of Plaintiff’s own views, the Constitutional purpose of copyright is to incentivize *humans* to create expressive works. “[T]he Framers intended copyright itself to be the engine of free expression,” by “suppl[ying] the economic incentive to create and disseminate ideas.” *Harper & Row, Publr. v. Nation Enters.*, 471 U.S. 539, 558 (1985). Unlike humans, machines do not have rights of free expression, and do not need economic incentives to create and disseminate expressive content. *Cf.* Dkt. 13-7 at US_0000025 (Plaintiff’s admission that “machines do not have legal personality”). For this reason, the Supreme Court has described copyright as “advanc[ing] public welfare,” by rewarding “[s]acrificial days devoted to such creative activities.” *Mazer*, 347 U.S. at 219. But machines built to generate works autonomously—like the Creativity Machine—do not “sacrifice” time. A machine functions as designed without motivation or reward.²¹

In any event, this is not the forum to resolve Plaintiff’s policy arguments. The rapid development of AI technology, particularly systems capable of generating expressive material, raises many questions about its interplay with copyright law. *See, e.g.*, 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->

²¹ As the Office’s decision noted, the Supreme Court’s construction of the Copyright Clause suggested that the Constitution itself limits copyright protection to only creations of “authors,” *i.e.*, humans. *See* Dkt. 13-8 at US_0000034 n.6 (citing *Sarony*, 111 U.S. at 56 (describing beneficiaries of the Constitution’s intellectual property clause as “authors,” who are, along with inventors, one of “two classes” of “persons”)).

training-data (discussing the “key questions from which the topic’s many uncertainties unfold”). The Office will be addressing these issues in the coming year. Among other things, it is preparing registration guidance for works generated by using AI, planning public events to discuss emerging issues, and taking steps to issue a notice of inquiry on complex questions involving copyright and AI.²² The Office’s AI initiatives will consider the broader policy questions surrounding AI, and Plaintiff is welcome to participate in that work. But the Court here is limited to applying the law as it exists now, not as Plaintiff might wish it to be. Plaintiff’s policy arguments cannot be the basis for finding the Office’s decision arbitrary or capricious or contrary to law.

VI. PLAINTIFF’S REQUESTED RELIEF IS OUTSIDE THE SCOPE OF THE APA

Plaintiff’s Proposed Order requests that the Court order Defendants to “register the Copyright in the artwork entitled ‘A Recent Entrance to Paradise,’ as applied for by Stephen Thaler.” Dkt. 16-1. Such relief, however, is outside the scope of the APA. *See Coach, Inc. v. Peters*, 386 F. Supp. 2d 495, 498 (S.D.N.Y. 2005) (“plaintiffs have cited no authority, and the Court is aware of none, that would allow this Court, on a review under the APA, to order [the Copyright Office] to register the works.”) (citing *Atari Games Corp. v. Oman*, 979 F.2d 242, 247 (D.C. Cir. 1992) (remanding to “the district court with instructions to again return the matter of Atari’s application to the Register for renewed consideration”)).

²² This is an area of congressional interest as well. Congress recently solicited the Office’s input on forming a national commission on AI. *See* Letter from Senators Thom Tillis and Chris Coons to Kathi Vidal, Under Secretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark Office, and Shira Perlmutter, Register of Copyrights and Director of the U.S. Copyright Office (Oct. 27, 2022), <https://www.copyright.gov/laws/hearings/Letter-to-USPTO-USCO-on-National-Commission-on-AI-1.pdf>.

As detailed above, the refusal to register the Work, the agency action at issue, is a discretionary act and was lawfully done, in accordance with the Office's policies and procedures. And, even if the Court were to find that the Office abused its discretion, which it did not, the remedy would not be an order compelling registration, but rather "renewed consideration" of the copyrightability of the Work. *Atari Games Corp.*, 979 F.2d at 247.

CONCLUSION

The Administrative Record shows that the Office's refusal to register the Work was soundly and rationally based on settled law, and not arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law. For the reasons stated above, Defendants respectfully request that the Court deny Plaintiff's Motion for Summary Judgment and grant Defendants' Cross-Motion for Summary Judgment.

Respectfully submitted,

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Dated: February 7, 2023

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WASHINGTON D.C.**

Stephen Thaler, an individual

Plaintiff,

v.

Shira Perlmutter, in her official capacity as Register
of Copyrights and Director of the United States
Copyright Office; and The United States Copyright
Office;

Defendants.

Case No. 1:22-cv-01564-BAH

**PLAINTIFF'S COMBINED
OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT AND REPLY IN
SUPPORT OF PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT**

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I. INTRODUCTION

The United States Copyright Office (“USCO”) has failed to support its central argument that the Copyright Act contains an implied human authorship requirement. Indeed, the Court need not look very far to see how unfounded that claim is—non-humans have been authors under the statute for more than a hundred years. The plain language of the Copyright Act (“Act”) clearly allows non-human authors. Nor does anything in the Act exclude certain non-human authors, such as AI systems, from creating copyrighted works.

To the extent the Court finds the statute ambiguous in the case of an AI-generated work, this is perhaps *the* paradigmatic case of technological evolution requiring purposive statutory interpretation. Under a purposive approach, the Copyright Act clearly permits protection of AI-generated works, because contrary to what USCO argues, the Supreme Court has been crystal clear that the purpose of the statute is to benefit the American public by promoting the generation and dissemination of works. The Act’s purpose is not to compensate human authors.

No case or other authority holds AI-generated works are inherently unprotectable, as the USCO urges. While dicta in various cases states that there is a need for human creativity, no one in these cases was considering artificial creativity, and no one could have reasonably foreseen the capabilities of modern AI. Even in dicta, the USCO points to no direct statement by the Supreme Court, the federal circuits, or even Commission on New Technological Uses of Copyrighted Works (CONTU), that an AI-generated work is not protectable under the Act.

Given that an AI-generated work can have copyright protection, in this case, the only possible owner of the work is Dr. Stephen Thaler (“Dr. Thaler”). Dr. Thaler is the AI’s owner, programmer, and user. USCO now takes the position that because Dr. Thaler never stated on the record how he was involved in the creation of the work, that he cannot now argue that the work is

a work-made-for-hire. This is not accurate, as Dr. Thaler did, in his letters to the USCO, state both that he was claiming copyright including under the work made for hire (WMFH) doctrine, and also that he programmed the AI and was its user. Employees can have a different meaning under the Copyright Act's WMFH doctrine than under labor laws, and here the AI can qualify as an employer for this limited purpose because it meets almost all Supreme Court's criteria for these purposes, which is sufficient. The USCO also never contradicts standard legal principles of property transfers by law that entitled Dr. Thaler to the copyright at issue. It argues instead that these principles cannot create copyright, but that was never Dr. Thaler's argument.

II. ARGUMENT

A. The Copyright Act Has Always Allowed Nonhuman Authors, and This Should Apply Equally to Works Created by AI Systems

1. The Copyright Act Clearly Contemplates and Allows Non-Human Authorship

The Copyright Act includes a clear regime for works created by authors with no natural lifespan, in other words, non-human authors. As set forth in 17 U.S. Code § 302(c), copyrights created by anonymous or pseudonymous authors last a set duration regardless of the date of death of the author. Likewise, works made for hire have no set time based on lifetime. Non-humans have been authors under in U.S. Copyright since at least the 1909 Copyright Act.

The work for hire provision states, “the employer or other person for whom the work was prepared is considered the author for purposes of this title” in the case of a work for hire. 17 U.S.C. § 201(b). Even though it uses the phrase “other person,” person here is used in its broadest sense to include non-human entities. *See Warren v. Fox Fam. Worldwide, Inc.*, 328 F.3d 1136, 1140–41 (9th Cir. 2003). The Act already treats human and non-human authors differently. For instance,

with regard to termination rights, it explicitly excludes “works for hire,” creating a class of those authors, individual human creators, for whom there are additional rights and protections under the Act, and “works for hire” which include non-human authors, for which no such protection exists. 17 U.S.C. § 203. The bottom line is that nothing in the Act’s language limits authorship to human beings, it instead fully contemplates non-human authors and already treats them differently, and numerous non-humans have been declared authors by the courts without controversy. See, e.g., *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 143 (2d Cir. 2013); *Warren v. Fox Fam. Worldwide, Inc.*, 328 F.3d at 1140–41. Any distinctions the USCO attempts to draw lack support beyond conjecture. It is unambiguous that the Copyright Act envisions and allows for non-human authors.

To be clear, in cases in which, for example, a company registers copyright as an author, there is no requirement that any natural person be disclosed, or any requirement for any disclosure about how the work was created. As the USCO explains in its registration form for a work of visual art: “Author(s). After reading these instructions, decide who are the ‘authors’ of this work for copyright purposes... If you have checked ‘Yes’ to indicate that the work was ‘made for hire,’ you must give the full legal name of the employer (or other person for whom the work was prepared). You **may** also include the name of the employee along with the name of the employer (for example: ‘Elster Publishing Co., employer for hire of John Ferguson’)... For any part of this work that was ‘made for hire,’ check ‘Yes’ in the space provided, give the employer (or other person for whom the work was prepared) as ‘Author’ of that part, and leave the space for dates of birth and death blank.” <https://www.copyright.gov/forms/formva.pdf> (emphasis added), last accessed February 25, 2023. It is entirely possible that the USCO has already registered numerous AI-generated works given that the USCO does not even contemplate disclosing the role of AI on its

registration form and has no meaningful way of detecting the use of AI in the creation of a work.

2. The USCO Has No Support For Its View that Original Works of Authorship Require Humans

The USCO conflates “original work of authorship” and its Human Authorship Requirement without any basis or justification. Despite the USCO’s argument that looks at the history of the prior version of the Act, there is no linkage between the 1909 Copyright Act language cited and the originality requirement. *See* Opp. at 13. Despite having no authority to support this position, USCO argues that it is Dr. Thaler who misinterprets the Act’s language, while the USCO employs smoke and mirrors to attempt to obfuscate plain language.

The USCO effectively handwaves term limits not connected to the life of the author by looking solely at the anonymous and pseudonymous provisions, calling them “special provisions.” Opp. 13 (citing H.R. REP. NO. 94-1476, at 137). This argues past the point. While these provisions may have historically involved natural persons, that is very different than there being a requirement for human authorship. The USCO ignores works for hire’s disconnect from the life of the author given that it is often, and uncontroversially, *not human*. Thus, the USCO, by ignoring clear carve-outs for non-human creators, misconstrues the plain language of the Copyright Act.

The Supreme Court precedent the USCO relies on does not change the plain language of the Act or otherwise support the USCO’s argument that AI cannot be an author. The common issue is that there is a general assumption that “intellectual” labor is something a human does, but none of these cases address non-human creativity or AI-based creativity in ways that help the USCO. The USCO cites *Trade-Mark Cases* discussing “fruits of intellectual labor,” but artificial *intelligence* by its nature, and according to Dr. Thaler’s application, performs intellectual labor. *See In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879); US0026. As such, this case supports Dr.

Thaler's position, or at least it fails to support USCO's position.

Likewise, the USCO misrelies on *Sarony*. There is nothing inherently human about the concept of choice, and certainly not legally in any way the USCO has articulated through authority. On its face, the "intellectual conception" that *Sarony* requires was done by the AI in this case. *See Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 59 (1884).

Likewise, there is nothing inherently human about an "idea." Essentially, the USCO has begun with a factual assumption that it is not legally in the position to take to justify a claim that every requirement is inherently human. But the cases relied on by the USCO like *Mazer v. Stein* never identifies that a tangible idea must come from a human. *See Mazer v. Stein*, 347 U.S. 201, 214 (1954) ("They must be original, that is, the author's tangible expression of his ideas.") Likewise, there is nothing about the language regarding an "originator" required by Court that is inherently human, as the Work in this case likewise owns its origin to artificial intelligence. *See Goldstein v. California*, 412 U.S. 546, 561 (1973) ("While 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.'").

As Plaintiff already briefed, *Urantia* and *Naruto* do not support USCO's arguments. *Urantia* involved alleged divinity in creation, but as noted in the Brief, the AI exists in the physical world. *Compare Urantia Found. v. Kristen Maaherra*, 114 F.3d at 958 ("[a]t the very least, for a worldly entity to be guilty of infringing a copyright, that entity must have copied something created by another worldly entity."). It is surprising the USCO would attempt to rely on this case for support, given the 9th Circuit even went out of its way to clarify that its holding did not apply to AI-generated works, referring to the instant controversy without resolving it, "[t]he copyright laws, of course, do not expressly require 'human' authorship, and considerable controversy has arisen

in recent years over the copyrightability of [AI-Generated Works].” *Id.* at 958.

Likewise, in its Opposition, the USCO admits *Naruto* was an animal standing case. The USCO writes that “‘Animals other than humans’ cannot sue under the Act.” Opp. at 17. The USCO further writes that “[I]f Congress and the President intended to take the extraordinary step of authorizing animals’ to sue, the statute would need to state so clearly.” Opp. at 17. This language all relates to *standing*, not the ownership of a copyright, which is the question presented here. For the avoidance of doubt, Dr. Thaler is suing on his own behalf, whereas his AI is not a party to this case and is not attempting to sue or otherwise claim any right. Dr. Thaler, undisputedly a human being, owns the copyright at issue, and is seeking this Court’s holding in support of that right.

The USCO’s reliance *Kelley* suffers from a similar flaw. *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 304 (7th Cir. 2011). *Kelley* involved moral rights claim under the Visual Artists Rights Act of 1990, which is not at issue in this case. *Id.* at 300. In turn, the moral rights claim depended on there being copyright in a *garden*. *Id.* This failed based on authorship and fixation, as without fixation there cannot be a protectable writing.

While the *Kelley* court stated that authors are human, this was in the context of holding that authorship cannot depend on forces of nature. “[W]orks owing their form to the forces of nature cannot be copyrighted.” *Id.* at 305. The garden “originate[s] in nature, and natural forces—not the intellect of the gardener...” Owing a form to nature means there was no “intelligence” involved. *Id.* What the Court must contend with is that the AI in the present case does have intelligence, it is just artificial.

None of *Urantia*, *Naruto*, or *Kelley* involved AI-generated works, and the present work is not one owing its origin to divine forces, nature, or monkeys. Even in dicta, none of these cases do the work that USCO is looking for.

“Congress’ silence is just that—silence.” *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987). The bottom line is that authorship has an extremely broad definition, with no restriction on AI authorship. There is a long history of non-human authors in copyright jurisprudence. The USCO must strain the language and rely on inapt case law and proclamations regarding human authorship that are far removed from this plain language, and it amounts to ignoring the statute’s own plain language.

B. Dr. Thaler Is the Only Logical Owner of His AI’s Creations

Just as authors are often not human, as with corporations, copyrights commonly vest in employers by virtue of the “work for hire” provision the Act. 17 U.S.C. § 201 (“Copyright in a work protected under this title vests initially in the author or authors of the work . . . [i]n the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author. . . .”) The USCO takes umbrage at the concept of an AI-as-employee, because of several assumed issues, none of which are applicable in this case. USCO challenges the designation of the work made for hire in the report, it challenges the claim that a machine/tool can be an employee under the WMFH doctrine, and it argues the level of control levied by Dr. Thaler is not part of the record and therefore not at issue. Each one of these arguments misses the mark.

The work was listed as a “work for hire,” in which case the “author” for statutory purposes is Dr. Thaler. *See* US0002. Thus, if the issue is simply that the machine cannot legally be the “author,” then the Work is a WMFH.¹ The AI, in the sense that it is anything, is an autonomous

¹ The USCO notes that the idea that an AI can be an employee would have broad implications is inaccurate and ignores Dr. Thaler’s analysis of the Act-specific interpretation that has already been applied to the Copyright Act regarding employees that does *not* apply outside of that context. *See Horror, Inc. v. Miller*, 15 F.4th 232, 244-47 (2d Cir. 2021). Thus, this attempt to conjure a parade of horrors hits a dead end immediately as it ignores clear precedent.

actor operating under the direction of its programmer and user. The USCO ignores the autonomy of AI when constructing its counterarguments.

For instance, the USCO argues, in part, that an AI cannot be an employee for copyright purposes, because that could include pencils, but the comparison is absurd. A pencil does not functionally automate tasks and make creative decisions. The AI-as-employee, unlike a “pencil,” is autonomous, and performs in functionally the same manner as a human employee in this limited context. It completes a task on behalf of its employer, and the result is that the employer simply owns the work. USCO overcomplicates the scenario using *non sequitur*.

The USCO’s arguments as to pronouns in the statute indicating that a work for hire cannot be performed by an AI is also without support. The USCO argues that the personal “his” and “her” that refer to employee in 17 U.S.C. 101 forecloses an AI, but they ignore the numerous places “his or her” or some variant on the pronouns, are used in the Act to refer to both humans *and* non-humans. For instance, in Section 504(b) of the Act Congress wrote, “The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement...” Now, the USCO is certainly not going to challenge that a copyright owner does not have to be human or claim that only humans can sue for infringement. Likewise, infringers, are also “required to prove his or her deductible...” *Id.* The same language is used in Section 911(b). The USCO will likewise not argue that only human beings can be infringers, yet the pronouns are used inclusively. In addition, Section 113(d)(3) of the Act refers to a “system of records whereby any author of a work of visual art . . . may record his or her identity and address with the Copyright Office...” Once again, authors including nonhumans is noncontroversial, and once again the Act uses “his or her” inclusively to nonhumans.

The USCO provides no rationale whatsoever to explain why the Act uses “his or her”

throughout to refer to entities that even the USCO would agree are nonhuman, and yet only in the “work for hire” definition it should mean a human where the Act was clearly not drafted with any such limitation in mind. The correct thing to do is follow the canon of construction that identical language is used the same way throughout the Act, which means it refers to humans and nonhumans alike. *See John Doe, Inc. v. Gonzalez*, No. CIV.A.06-966(CKK), 2006 WL 1805685, at *20 (D.D.C. June 29, 2006), *aff’d sub nom. John Doe, Inc. v. Drug Enf’t Admin.*, 484 F.3d 561 (D.C. Cir. 2007) (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 478 (1992)).

As it stands in common usage as well, pronouns can often refer to non-persons. Many natural persons do not identify with gendered pronouns, gendered pronouns are used to refer to non-human animals, and gendered pronouns are popularly used to refer to AI systems such as Siri or Alexa. Ordinary meanings also change over time—a “computer” once referred to a natural person making computations.

Applying the *CCNV* factors also supports treating the AI-generated work as a WMFH. While the USCO argues that the AI cannot meet all the factors, the Supreme Court already made it explicitly clear that not all employment factors are necessary to establish employment, as its own analysis weighed some factors for and some against independent contractor status. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 752 (1989). Thus, the fact that not all factors apply does not prevent the finding of employment for purposes of the WMFH doctrine.

Finally, the USCO gets it backward regarding supplementing the record. Its decision must be justified based on the record as it stands. The record must be taken as true at this stage, as by inventing new factual reasons to deny registration that are not in the record, the Court cannot find “as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.” *Ardmore Consulting Grp., Inc. v. Contreras-Sweet*, 118 F. Supp. 3d 388, 393

(D.D.C. 2015) (internal quotation marks and citations omitted). If such a fact would preclude registration, it is not on the record. What is on record is Dr. Thaler’s statement that he programmed and used the machine, and that it created the Work at issue as a work made for hire. US0002; US0024.

Dr. Thaler is not attempting to supplement the record. Control and ownership are clear on the face of the application and the letters to the USCO stating that Dr. Thaler owned, programmed, and used the AI. US0026 (“In the present case, the current applicant, Stephen Thaler, is the owner of the AI that generated the CGW and should thus be the owner of any copyright. Stephen Thaler was also the AI’s user and programmer.”) To the extent the USCO attempts to recast this argument to be that Dr. Thaler directed the AI in the same manner as one would use simple editing software, that is not the argument. The AI created the artwork autonomously, but in terms of ownership, and control of the AI itself, Dr. Thaler is the “user” and “programmer” who directed the AI to make the Work, which is in a manner entirely analogous to a work for hire. A very high level of control is clear on the record, as Dr. Thaler programmed and invented the AI, so the USCO’s argument that there is inadequate direction for it to be an employee is contrafactual, and Dr. Thaler’s explanation cannot be challenged given the procedural posture of this case.

C. The USCO Misconstrued Dr. Thaler’s Common Law Argument, and Therefore Did Not Address It: Dr. Thaler Does Not Argue Common Law Created Copyright, Merely That Such Principles Entitle the Owner of an AI to Own Copyrights in Its Creations

The USCO appears to have misconstrued the common law argument. It is not designed to explain that the copyright exists in the first instance, but what law operates to make Dr. Thaler its owner. The issue presented has essentially two parts. First, has a copyright been created that exists

in the Work? Second, how does Dr. Thaler own it? The common law transfer issue addresses this second question.

When copyright comes into being, since an AI can be the creator under the plain language of the Act, the copyright exists, and if the Court rejects work for hire, it is owned by Dr. Thaler due to standard property principles. This was fully briefed in the opening brief. Plaintiff Opening Brief at 20-24. As no discussion of transfer by operation of law through operational of law as to copyrights that exist was briefed by the USCO, they have waived any such argument.

D. The Copyright Office Is Not Entitled to Deference

The Copyright Office also overstates the amount of weight its opinion should be granted. First, the USCO fails to show it should be given deference at all under the APA, as it is not empowered to interpret the Copyright Act itself. The USCO's authority showing support comes from cases interpreting its own regulations, not the Act itself. To support its argument that its interpretation should have "considerable weight," the USCO cites a case where the USCO was interpreting its own regulations. *See Esquire, Inc. v. Ringer*, 591 F.2d 796, 801 (D.C. Cir. 1978). The full quote, which the USCO did not include, is that "Considerable weight is to be given to an agency's interpretation of its regulations." *Id.* The USCO was interpreting its own regulation regarding the copyrightability of utilitarian designs for which was an "issue of long-standing concern and is clearly a matter in the Register has considerable expertise." *Id.* Likewise, another functional art case was selected by the USCO to make the same point, because this is one area the USCO does have experience, has drafted regulations, and has clearly developed a longstanding expertise. *See Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 480 (6th Cir. 2015) ("the Copyright Office's expertise in identifying and thinking about the difference between art and function surpasses ours"), *aff'd on other grounds* 580 U.S. 405 (2017). In this case, however, the

USCO has in its own briefing disavowed knowledge as to how the AI functions, so espousing expertise on registration of such works, defies logic, and its reasoning is entitled to no deference.

In the case at bar, the USCO's analysis amounts to a surface-level proclamation that does not merit deference. The USCO has not provided evidence it considered question the issue of AI authorship meaningfully in the past, so the USCO's argument is inapt, without any authority supporting its conclusions. As noted in Dr. Thaler's Opening Brief, Miller specifically chose not to speak on it except to say that it would likely be allowed. Arthur Miller, *Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is anything new since CONTU?*, 106 HARV. L. REV 977, 1066 (1993) (Calling AI-generated works "too speculative" to discuss further in CONTU's analysis.)²

In addition, Dr. Thaler does not argue that disagreement makes the USCO's decision arbitrary and capricious (Opp. at 12); this is the USCO's strawman. The fact that the USCO has no support for its argument makes the decision not to register the Work arbitrary and capricious. The Copyright Office begins its brief by challenging the factual underpinnings of Dr. Thaler's brief, but in doing so, has revealed that it is looking at facts beyond the non-human identity of the AI. The USCO, in a footnote, states that it did not consider whether the "originality" requirement was met. Opp. at 6, fn. 1. However, it does not investigate this factor as part of its ordinary review of other applications for registration. Nonetheless, for the purpose of the Opposition, in doing so, the USCO admits that with more information it could determine that the work *was* original, so it posits that an AI could create an objectively original work.

² CONTU was the Commission on New Technological Uses of Copyrighted Works, was created to study issues associated with copyrighted works in computers and computer-related works in the late 1970s. See *Final Report of the National Commission on New Technological Uses of Copyrighted Works*. digital-law-online.info, University of Utah. National Commission on New Technological Uses of Copyrighted Works. July 31, 1978. Retrieved February 23, 2023.

The appeal to the Compendium is also circular reasoning. Just because the USCO has previously stated an erroneous stance in its Compendium does not mean it should have greater deference. On its face, the Compendium's reliance on only two cases from the 19th Century for the proposition that AI-generated works are unprotectable, cases from far before the concept of AI authorship was conceivable, means the Compendium is woefully relying on inapt case law and dicta that necessarily has no bearing on the question at bar. While USCO's brief inaccurately claims that: "Plaintiff relies heavily on a proclamation from the King of Ireland in the 6th Century and state court cases establishing physical property principles." (Opp. at 20). In fact, Plaintiff's Brief only once mentioned the proclamation to explain that the basic property principles in question governing ownership are ancient. By contrast, the Compendium only relies on cases from the same Century that Luddism was in fashion to govern its approach to frontier technologies.

Finally, the USCO never argues that it is afforded any deference when rendering an interpretation that defies the plain language of the statute it is interpreting. *See PhotoCure ASA v. Kappos*, 603 F. 3d 1372, 1376 (Fed. Cir. 2010). As such, no deference should be afforded the USCO's interpretation.

E. By Ignoring the Purpose of the Act, the USCO Makes Clear Why Its Decision Was Arbitrary and Capricious

It is well-settled law that purpose should be considered if a statute is ambiguous. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1197 (2021) (quoting *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 430 (1984).) The Supreme Court made it clear that when there are changes in technology creating ambiguity, the "principles" of the Act must be followed. *Id.* Although the USCO has disavowed any argument that the Copyright Act is ambiguous, eliminating room for any deference. *See Nat'l Cable & Telecommunications Ass'n v. Brand X*

Internet Servs., 545 U.S. 967, 982, (2005) (When a court’s “construction follows from the unambiguous terms of the statute . . . [it] leaves no room for agency discretion.”) Disavowing the purpose and principle of the Act entirely, as the USCO does in its opposition, supports a finding that the considerations of the USCO lack a rational basis, rendering it arbitrary and capricious, as it ignores the clear mandate from the Supreme Court.

After ignoring the importance of the statutory purpose, the USCO goes on to argue in the alternative and simply misstates the purpose of the Copyright Act. The purpose is not to “incentivize humans,” as that is merely the tool by which the purpose is obtained, which was clearly explained by the Supreme Court. *Twentieth Century Music Corp.*, 422 U.S. at 156 (“The immediate effect of our copyright law is to secure a fair return for an author’s creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”); *Mazer v. Stein*, 347 U.S. 201, 219 (1953) (“the economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and the useful arts.’”)

Likewise, the USCO ignores how copyright’s ultimate aim is served by AI, by handwaving it as something that requires no incentive, but this makes the same fundamental mistake the USCO has made throughout. The recipient of the inventive is Dr. Thaler. Dr. Thaler, and others, do require incentives to build and use AI to create and disseminate works, due to lacking the “economic incentive to create and disseminate ideas.” See *Harper & Row, Publs. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

III. CONCLUSION

For the foregoing reasons, Dr. Thaler asks that the USCO’s decision not to register the

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WASHINGTON D.C.**

STEPHEN THALER, an individual,

Plaintiff,

v.

SHIRA PERLMUTTER, in her official
capacity as Register of Copyrights and
Director of the United States Copyright
Office; and THE UNITED STATES
COPYRIGHT OFFICE,

Defendants.

1:22-CV-01564-BAH

**DEFENDANTS' REPLY IN SUPPORT THEIR
CROSS-MOTION FOR SUMMARY JUDGMENT**

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**DEFENDANTS' REPLY IN SUPPORT OF
THEIR CROSS-MOTION FOR SUMMARY
JUDGMENT**

INTRODUCTION

Nothing in Plaintiff's Opposition and Reply makes the Copyright Office's reasoned rejection of the application to register a work alleged to be autonomously created by artificial intelligence (AI) arbitrary or capricious. Rather than meaningfully engaging with the facts, established law, or relevant standard under the APA, Plaintiff merely repeats policy arguments that AI-generated works deserve copyright protection. The Court should decline Plaintiff's invitation to reverse the Copyright Office's decision to refuse registration of an AI-generated work. Plaintiff provides no basis to support either rejection of the longstanding human authorship requirement for copyright protection or creation of an exception for AI-generated works.

**I. THE COPYRIGHT OFFICE CORRECTLY REFUSED PLAINTIFF'S
COPYRIGHT APPLICATION FOR LACK OF HUMAN AUTHORSHIP**

Plaintiff's argument is based on a misreading of the Copyright Act (the Act) and the relevant caselaw regarding human authorship. As discussed in Defendants' Cross-Motion, both the Act and the relevant caselaw support the Copyright Office's position.

A. Copyright Protection Requires Human Authorship

First, as discussed in Defendants’ Cross-Motion, the Supreme Court has consistently referred to a human person when discussing the term “author” as used in the Copyright Clause of the Constitution and in copyright statutes. *See* Dkt. 17 at 10, 16 (citing *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884); *Mazer v. Stein*, 347 U.S. 201, 214 (1954); *Goldstein v. California*, 412 U.S. 546, 561 (1973)); *see also* *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903) (describing a copyrightable work as “the personal reaction of an individual upon nature,” and describing copyright as protecting the unique, singular “personality” of an individual’s work). This follows from the Supreme Court’s holdings that copyright protects only “the fruits of intellectual labor” that “are founded in the creative powers of the mind” and is limited to “original intellectual conceptions of the author.” *See* Dkt. 17 at 14 (quoting *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879); *Sarony*, 111 U.S. at 58).

Second, Plaintiff’s repeated assertions that the current Act allows for “non-human authorship” are incorrect and unsupported in the statutory text. Defendants addressed this argument in their Cross-Motion, *see* Dkt. 17 at 13-14 (discussing text, structure, and history of statutory provisions regarding authorship); *see, e.g.*, 17 U.S.C. § 302(a) (term of copyright protection endures for “a term consisting of the life of the author and 70 years after the author’s death”); § 302(b) (for joint works, term consists of “life of the last surviving author” plus 70 years), and Plaintiff’s Opposition and Reply does not and cannot show otherwise. The case-law relied upon by Plaintiff fails to support Plaintiff’s contention that person “is used in its broadest sense to include non-human entities.” Dkt. 18 at 2-3. In both *Warren v. Fox Fam. Worldwide, Inc.* and *Marvel Characters, Inc. v. Kirby*, the case-law cited by Plaintiff, *see* Dkt. 18 at 3, the courts were addressing written agreements between employers and employees and not the

definition of the term “person.” See *Warren v. Fox Fam. Worldwide, Inc.*, 328 F.3d 1136, 1140-41 (9th Cir. 2003); *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 143 (2d Cir. 2013).

The only statutory language Plaintiff points to in support of his position is the works made for hire provision, 17 U.S.C. § 201(b). See Dkt. 18 at 2-4. Plaintiff seems to reason that the use of “author” in this provision (which refers to a transfer of ownership rights to an employer or other party) somehow opens the floodgates to copyright protection for all variety of non-human authorship. See Dkt. 18 at 7-10. However, a review of section 201(b) reveals that Plaintiff’s argument misconstrues the meaning of a work made for hire. Section 201(b) provides that:

in the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

This provision only states that the employer or “other person” who commissioned the work is *considered* to be the author for the purpose of the Act, it does not contemplate that any non-human is the literal author of the work. See § 201(b). Indeed, the provision presupposes that the creator of a work made for hire is human. *Id.* The statute enumerates two ways that a person or employer can gain authorship of a copyrighted work. The parties can either contract for a transfer of rights (for eligible types of works), or the work made for hire may arise out of an employment relationship. *Id.* Neither option is applicable to Plaintiff’s AI. With regard to the former, the statute requires that the parties expressly agree and memorialize their agreement in a signed written instrument. *Id.* Plaintiff’s “Creativity Machine” lacks the capacity to enter into a valid contract. See, e.g., *Malone v. Saxony Coop. Apartments, Inc.*, 763 A.2d 725, 729 (D.C. 2000) (there must be a meeting of the minds on all essential terms for a contract to be valid); *Relf v. Mathews*, 403 F. Supp. 1235, 1238 (D.D.C. 1975) (individual entering into a contract “must

have the legal and mental capacity to decide what is truly in his or her own interest”). With regard to the latter, a work made for hire in an employment relationship must have been created by an employee “within the scope of his or her employment.” § 201(b). Defendants’ Cross-Motion discusses the many reasons that the “Creativity Machine” cannot plausibly be Plaintiff’s employee or agent. *See* Dkt. 17 at 22-23.

In other words, regardless of who ultimately owns the copyrighted work (and regardless of whether we refer to these people or entities as owners or “authors”), the works made for hire provision is based on the understanding that the copyrightable work was originally created by a human. *See* § 201(b). Like the remainder of the Act, the works made for hire provision undermines Plaintiff’s claim that the Court can disregard the human authorship requirement. Plaintiff does not – and cannot – explain why the corporate acquisition of rights in a copyrighted work is equivalent to non-human creation of such a work. And, Plaintiff seems to acknowledge that the normal rule, in all other contexts, is that the creator of a work is considered its author. *See* Dkt. 17 at 4 (characterizing the works for hire provision as a “carve out”).¹

Third, Plaintiff misconstrues the case-law on human authorship. AI is an emerging technology, and neither Plaintiff nor Defendants are aware of cases specifically addressing whether AI can be considered an author under the Act. Appellate Courts have, however, considered analogous cases regarding works created by animals, nature, and other non-humans. *See* Dkt. 18 at 5-6 (citing *Kelley v. Chicago Park District*, 635 F.3d 290 (7th Cir. 2011) (involving “a living garden”), *Naruto v. Slater*, 888 F.3d 418 (9th Cir. 2018) (involving

¹ Plaintiff’s brief mention of the provisions regarding anonymous and pseudonymous works also does not support his claim that the Act contemplates non-human authors. *See* Dkt. 18 at 2. Anonymous and pseudonymous works have human authors; they are simply not identified on the copies of the works. *See* 17 U.S.C. § 101; *see also* Dkt. 17 at 13-14.

photographs taken by a monkey), and *Urantia Foundation v. Kristen Maaherra*, 114 F.3d 955 (9th Cir. 1997) (involving a book “authored by celestial beings”). These decisions employ reasoning that applies squarely to this case and have uniformly rejected non-human authorship of copyrighted works. *See id.*

Efforts by Plaintiff to avoid the holdings in those cases are superficial at best. Plaintiff urges this Court to ignore any case-law that addressed multiple copyright issues—as if reaching more than one question could somehow dilute or nullify a court’s opinion as to authorship. *See* Dkt. 18 at 5-6. For example, Plaintiff’s main quarrel with *Kelley* – the case involving a living garden – is that the Seventh Circuit’s holding involved both authorship and fixation issues.² *Id.* at 6. Regardless of the other issues at stake, *Kelley* unambiguously addressed the type of human involvement required for copyright protection. *See Kelley*, 635 F.3d at 303 (“[A] living garden lacks the kind of authorship and stable fixation normally required to support copyright” and “authorship and fixation are *explicit* constitutional requirements”). Even Plaintiff concedes that “the *Kelley* court stated that authors are human.” Dkt. 18 at 6.

Similarly, in trying to discount *Naruto* – the case regarding photographs taken by a monkey – Plaintiff notes that the case was decided on standing grounds.³ *See* Dkt. 18 at 6. Plaintiff fails to explain why this observation makes the case any less relevant. In *Naruto*, the

² Plaintiff also attempts to distinguish *Kelley* because the case involved a portion of the Act amended by the Visual Artists Rights Act of 1990 (VARA). *See* Dkt. 18 at 6. This fact, however, is irrelevant because VARA did not remove the authorship requirement or other basic copyrightability standards. *Kelley*, 635 F.3d 299 (VARA “supplements general copyright protection; to qualify for moral rights under VARA, a work must first satisfy basic copyright standards”).

³ To the extent Plaintiff suggests that Defendants’ citation to this case was misleading, Defendants’ Cross-Motion informed the Court in several places that the Ninth Circuit decided the case based on a lack of standing. *See* Dkt. 17 at 16, 17.

court's analysis of the monkey's standing to bring a copyright claim was based on its status as a non-human. In determining that only a human has standing under the Act, the court examined statutory provisions involving the term "author" and concluded that they "all imply humanity." *Naruto*, 888 F.3d at 426. Indeed, if the term "author" implies humanity in a standing context, it must also imply humanity when used in the context of copyrightability. Plaintiff recognizes as much – acknowledging that identical terms within the same statute bear the same meaning. *See* Dkt. 18 at 9 (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 478 (1992)).

Finally, Plaintiff's characterization of *Urantia* is just simply incorrect. Although the court in *Urantia* noted the scholarly debate over whether computer-generated works are copyrightable, it did not, as Plaintiff claims, go "out of its way to clarify that its holding did not apply to AI-generated works." Dkt. 18 at 5. To the contrary, the court explicitly affirmed that there is a "human creativity" requirement for copyrightability. *Urantia Found.*, 114 F.3d at 958.

B. Plaintiff's Ownership Arguments are Inapplicable to Copyright

The Court should find that the Copyright Office's decision was not arbitrary or capricious based solely on the arguments above. However, even if Plaintiff were correct that a non-human could create a copyright work—a conclusion not supported by any statute or court opinion—Plaintiff has failed to demonstrate that he is the proper claimant to register the copyright. Plaintiff's Opposition and Reply repeats flawed arguments about the works made for hire doctrine. The premise of Plaintiff's argument is that he is equivalent to an employer of the "Creativity Machine." *See* Dkt. 18 at 9-10. But, Plaintiff's programming, direction, and use of the AI, do not magically anthropomorphize the machine into an employee. Plaintiff cites no cases or other support for the proposition that a computer has ever been treated as an employee under copyright law or common-law agency principles. *Id.* at 8-9. Further, Plaintiff concedes

that several of the factors the Supreme Court has used to determine whether someone is an employee cannot apply to a machine. *See id.* at 9; *see also* Dkt. 17 at 22-23 (discussing factors laid out in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)).

Plaintiff's other argument, that rights in the Work were transferred to him, is equally unavailing. *See* Dkt. 18 at 10-11 (referencing Dkt. 16 at 20-24). Ownership of a copyright is generally transferred through a signed written agreement. *See* 17 U.S.C. § 204(a). Perhaps because Plaintiff and the "Creativity Machine" could not enter into such an agreement, *see* Section I.A *supra*, Plaintiff claims that he gained copyright ownership "by operation of law" under common-law property principles. Dkt. 18 at 11; *see also* § 204(a). Plaintiff recognizes (Dkt. 16 at 20) that the transfer of copyright by operation of law typically involves circumstances such as intestate succession, where it is impossible for the deceased to sign a written agreement, or distribution of copyrights from a dissolving corporation, where other documents related to the transaction demonstrate the intended transfer. In an attempt to fit the facts here within this framework, Plaintiff points to common-law principles that relate to physical property. *See, e.g.*, Dkt. 16 at 20-24 (referencing "fruit of the tree" and right of first possession). Unsurprisingly, Plaintiff cites no case in which these principles have been applied to a transfer of copyright ownership.⁴ Plaintiff also fails to explain why common law property principles would not be preempted by the Act. *See* Dkt. 17 at 21, n.15.

⁴ One of the many reasons that the law treats physical and intellectual property differently relates to concerns surrounding not only ownership but lack of ownership. Clarifying ownership in real property is important not just to avoid disputes, but also to establish who is responsible for caring for the property. By contrast, unowned expressive works reside in the public domain. *See, e.g., Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

II. PLAINTIFF’S POLICY ARGUMENTS REGARDING THE COPYRIGHT ACT ARE IRRELEVANT AND WRONG

Unable to harmonize this case with statute or precedent, Plaintiff resorts to diverting the Court’s attention to incorrect arguments about copyright policy and the purpose of the Act. *See, e.g.*, Dkt. 18 at 1, 13 (suggesting that “this is perhaps *the* paradigmatic case . . . requiring purposive statutory interpretation”). Plaintiff asserts without support that any ambiguity as to the protectability of AI-created works should be resolved in light of the purpose of the statute, at least as Plaintiff sees it. *See id.* But any ambiguity in the statute would make it exceedingly difficult for Plaintiff to demonstrate that the Copyright Office’s human authorship requirement is arbitrary. *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 985 (2005) (“Before a judicial construction of a statute . . . may trump an agency’s, the court must hold that the statute unambiguously requires the court’s construction.”).

As an initial matter, Plaintiff’s understanding of the Act’s purpose is incomplete. Plaintiff focuses narrowly on the creation of works and disclaims the importance of economic incentives for human creators. *See* Dkt. 18 at 13-14. Courts have recognized that the copyright system seeks a balance of the economic incentives for creators and the dissemination of works for the public good. *See, e.g., Sony*, 464 U.S. at 429 (exclusive right in intellectual property involves “a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society’s competing interest in the free flow of ideas, information, and commerce on the other hand”); *Comput. Assocs. Int’l v. Altai*, 982 F.2d 693, 696 (2d Cir. 1992) (copyright law establishes a “delicate equilibrium” between incentivizing authors to create and avoiding “monopolistic stagnation”); *see also* Dkt. 17 at 35.

Even more significantly, Plaintiff’s claim that the Copyright Office’s conclusion here deserves *no* deference (beyond its own regulations) is contrary to the applicable standard of review and to the routine practice of Appellate Courts, including the D.C. Circuit, when considering copyright issues. The APA’s directive that agency action may be overturned only when “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” – not Plaintiff’s incorrect contention that any ambiguity must be resolved in his favor – must guide this case.⁵ 5 U.S.C. § 706; *see also, e.g., OddzOn Prods., Inc. v. Oman*, 924 F.2d 346, 349-50 (D.C. Cir. 1991) (Ginsburg, J.) (reserving consideration of the question of the best way to interpret a provision of the Copyright Act for a case that was not an APA claim regarding refusal of registration, and limiting its inquiry to determining whether the Copyright Office acted arbitrarily); *see also Custom Chrome, Inc. v. Ringer*, No. CIV. A. 93–2634(GK), 1995 WL 405690, *6 (D.D.C. June 30, 1995) (stating that a plaintiff’s request for the court to interpret a section of the Copyright Act “clearly misconceived the function of this court” in the context of an APA claim regarding a registration refusal). Here, the Copyright Office’s decision was not arbitrary or capricious. It was a well-reasoned decision based on the text of the Constitution and the Act, as well as Supreme Court and appellate decisions that uniformly support a human authorship requirement.

More broadly, courts routinely defer to the Copyright Office’s experience and expertise related to the interpretation and application of the Act. *See, e.g., Cablevision Sys. Dev. Co. v. Motion Picture Ass’n of Am., Inc.*, 836 F.2d 599, 609-10 (D.C. Cir. 1988) (giving deference to

⁵ The Copyright Office’s human authorship requirement also satisfies the somewhat stricter *Chevron* standard, which obliges a court, ordinarily, to leave undisturbed a reasonable agency interpretation of a statute if Congress has not directly addressed the issue presented. *See Agape Church, Inc. v. F.C.C.*, 738 F.3d 397, 408 (D.C. Cir. 2013) (citing *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984)).

the Copyright Office's interpretation of language in Section 111 of the Copyright Act); *see also Inhale, Inc. v. Starbuzz Tobacco, Inc.*, 739 F.3d 446, 449 (9th Cir. 2014) (finding Copyright Office opinion letter and Compendium interpreting language in section 101 of Copyright Act persuasive); *Marascalco v. Fantasy, Inc.*, 953 F.2d 469, 473 (9th Cir. 1991) (giving deference to Copyright Office's interpretation of section 304 of the Copyright Act). Courts have highlighted the specific importance of deference in the context of registration decisions, in light of the Copyright Office's expertise. Dkt. 17 at 12; *see also OddzOn*, 924 F.2d 346 at 348, 350.

CONCLUSION

For the reasons discussed above, the Office's refusal to register the Work was soundly and rationally based on settled law, and was not arbitrary or capricious, or an abuse of discretion. Defendants therefore respectfully request that the Court grant Defendants' Cross-Motion for Summary Judgment.⁶

⁶ Plaintiff failed to respond to Defendants' argument that the Court does not have the authority to order the Copyright Office to register the Work. *See* Dkt. 17 at 26-27. If the Court were to grant Plaintiff's Motion for Summary Judgment, Plaintiff has conceded that the appropriate remedy would be renewed consideration of the copyrightability of the Work.

Respectfully submitted,

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Dated: April 4, 2023

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

STEPHEN THALER,

Plaintiff,

v.

SHIRA PERLMUTTER, *Register of
Copyrights and Director of the United States
Copyright Office, et al.*

Defendants.

Civil Action No. 22-1564 (BAH)

Judge Beryl A. Howell

ORDER

Upon consideration of plaintiff Stephen Thaler's Motion for Summary Judgment, ECF No. 16, defendants Shira Perlmutter's and the United States Copyright Office's Cross-Motion for Summary Judgment, ECF No. 17, the legal memoranda submitted in support and in opposition, and the entire record herein, for the reasons set forth in the accompanying Memorandum Opinion, it is hereby—

ORDERED that, plaintiff's Motion for Summary Judgment, ECF No. 16, is **DENIED**; it is further

ORDERED that defendants' Cross-Motion for Summary Judgment, ECF No. 17, is **GRANTED**; and it is further

ORDERED that the Clerk of the Court is directed to close this case.

SO ORDERED.

This is a final and appealable Order.

Date: August 18, 2023



Beryl A. Howell

BERYL A. HOWELL
United States District Judge

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

STEPHEN THALER,

Plaintiff,

v.

SHIRA PERLMUTTER, *Register of
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Copyright Office, et al.*

Defendants.

Civil Action No. 22-1564 (BAH)

Judge Beryl A. Howell

MEMORANDUM OPINION

Plaintiff Stephen Thaler owns a computer system he calls the “Creativity Machine,” which he claims generated a piece of visual art of its own accord. He sought to register the work for a copyright, listing the computer system as the author and explaining that the copyright should transfer to him as the owner of the machine. The Copyright Office denied the application on the grounds that the work lacked human authorship, a prerequisite for a valid copyright to issue, in the view of the Register of Copyrights. Plaintiff challenged that denial, culminating in this lawsuit against the United States Copyright Office and Shira Perlmutter, in her official capacity as the Register of Copyrights and the Director of the United States Copyright Office (“defendants”). Both parties have now moved for summary judgment, which motions present the sole issue of whether a work generated entirely by an artificial system absent human involvement should be eligible for copyright. *See* Pl.’s Mot. Summ. J. (Pl.’s Mot.”), ECF No. 16; Defs.’ Cross-Mot. Summ. J. (“Defs.’ Mot.”), ECF No. 17. For the reasons explained below, defendants are correct that human authorship is an essential part of a valid copyright claim, and

therefore plaintiff’s pending motion for summary judgment is denied and defendants’ pending cross-motion for summary judgment is granted.

I. BACKGROUND

Plaintiff develops and owns computer programs he describes as having “artificial intelligence” (“AI”) capable of generating original pieces of visual art, akin to the output of a human artist. *See* Pl.’s Mem. Supp. Mot. Summ. J. (“Pl.’s Mem.”) at 13, ECF No. 16. One such AI system—the so-called “Creativity Machine”—produced the work at issue here, titled “A Recent Entrance to Paradise:”



Admin. Record (“AR”), Ex. H, Copyright Review Board Refusal Letter Dated February 14, 2022 (“Final Refusal Letter”) at 1, ECF No. 13-8.

After its creation, plaintiff attempted to register this work with the Copyright Office. In his application, he identified the author as the Creativity Machine, and explained the work had been “autonomously created by a computer algorithm running on a machine,” but that plaintiff sought to claim the copyright of the “computer-generated work” himself “as a work-for-hire to the owner of the Creativity Machine.” *Id.*, Ex. B, Copyright Application (“Application”) at 1, ECF No. 13-2; *see also id.* at 2 (listing “Author” as “Creativity Machine,” the work as “[c]reated autonomously by machine,” and the “Copyright Claimant” as “Steven [*sic*] Thaler” with the transfer statement, “Ownership of the machine”). The Copyright Office denied the application on the basis that the work “lack[ed] the human authorship necessary to support a copyright claim,” noting that copyright law only extends to works created by human beings. *Id.*, Ex. D, Copyright Office Refusal Letter Dated August 12, 2019 (“First Refusal Letter”) at 1, ECF No. 13-4.

Plaintiff requested reconsideration of his application, confirming that the work “was autonomously generated by an AI” and “lack[ed] traditional human authorship,” but contesting the Copyright Office’s human authorship requirement and urging that AI should be “acknowledge[d] . . . as an author where it otherwise meets authorship criteria, with any copyright ownership vesting in the AI’s owner.” *Id.*, Ex. E, First Request for Reconsideration at 2, ECF No. 13-5. Again, the Copyright Office refused to register the work, reiterating its original rationale that “[b]ecause copyright law is limited to ‘original intellectual conceptions of the author,’ the Office will refuse to register a claim if it determines that a human being did not create the work.” *Id.*, Ex. F, Copyright Office Refusal Letter Dated March 30, 2020 (“Second Refusal Letter”) at 1, ECF No. 13-6 (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) and citing 17 U.S.C. § 102(a); *U.S. Copyright Office, Compendium of U.S.*

Copyright Office Practices § 306 (3d ed. 2017)). Plaintiff made a second request for reconsideration along the same lines as his first, *see id.*, Ex. G, Second Request for Reconsideration at 2, ECF No. 13-7, and the Copyright Office Review Board affirmed the denial of registration, agreeing that copyright protection does not extend to the creations of non-human entities, Final Refusal Letter at 4, 7.

Plaintiff timely challenged that decision in this Court, claiming that defendants’ denial of copyright registration to the work titled “A Recent Entrance to Paradise,” was “arbitrary, capricious, an abuse of discretion and not in accordance with the law, unsupported by substantial evidence, and in excess of Defendants’ statutory authority,” in violation of the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2). *See* Compl. ¶¶ 62–66, ECF No. 1. The parties agree upon the key facts narrated above to focus, in the pending cross-motions for summary judgment, on the sole legal issue of whether a work autonomously generated by an AI system is copyrightable. *See* Pl.’s Mem. at 13; Defs.’ Mem. Supp. Cross-Mot. Summ. J. & Opp’n Pl.’s Mot. Summ. J. (“Defs.’ Opp’n”) at 7, ECF No. 17. Those motions are now ripe for resolution. *See* Defs.’ Reply Supp. Cross-Mot. Summ. J. (“Defs.’ Reply”), ECF No. 21.

II. LEGAL STANDARD

A. Administrative Procedure Act

The APA provides for judicial review of any “final agency action for which there is no other adequate remedy in a court,” 5 U.S.C. § 704, and “instructs a reviewing court to set aside agency action found to be ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,’” *Cigar Ass’n of Am. v. FDA*, 964 F.3d 56, 61 (D.C. Cir. 2020) (quoting 5 U.S.C. § 706(2)(A)). This standard “‘requires agencies to engage in reasoned decisionmaking,’ and . . . to reasonably explain to reviewing courts the bases for the actions they take and the conclusions they reach.” *Brotherhood of Locomotive Eng’rs & Trainmen v. Fed. R.R. Admin.*,

972 F.3d 83, 115 (D.C. Cir. 2020) (quoting *Dep't of Homeland Sec. v. Regents of Univ. of Cal.* (“*Regents*”), 140 S. Ct. 1891, 1905 (2020)). Judicial review of agency action is limited to “the grounds that the agency invoked when it took the action,” *Regents*, 140 S. Ct. at 1907 (quoting *Michigan v. EPA*, 576 U.S. 743, 758 (2015)), and the agency, too, “must defend its actions based on the reasons it gave when it acted,” *id.* at 1909.

B. Summary Judgment

Pursuant to Federal Rule of Civil Procedure 56, “[a] party is entitled to summary judgment only if there is no genuine issue of material fact and judgment in the movant’s favor is proper as a matter of law.” *Soundboard Ass’n v. FTC*, 888 F.3d 1261, 1267 (D.C. Cir. 2018) (quoting *Ctr. for Auto Safety v. Nat’l Highway Traffic Safety Admin.*, 452 F.3d 798, 805 (D.C. Cir. 2006)); *see also* Fed. R. Civ. P. 56(a). In APA cases such as this one, involving cross-motions for summary judgment, “the district judge sits as an appellate tribunal. The ‘entire case’ on review is a question of law.” *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083–84 (D.C. Cir. 2001) (footnote omitted) (collecting cases). Thus, a court need not and ought not engage in fact finding, since “[g]enerally speaking, district courts reviewing agency action under the APA’s arbitrary and capricious standard do not resolve factual issues, but operate instead as appellate courts resolving legal questions.” *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1096 (D.C. Cir. 1996); *see also Lacson v. U.S. Dep’t of Homeland Sec.*, 726 F.3d 170, 171 (D.C. Cir. 2013) (noting, in an APA case, that “determining the facts is generally the agency’s responsibility, not [the court’s]”). Judicial review, when available, is typically limited to the administrative record, since “[i]t is black-letter administrative law that in an [APA] case, a reviewing court should have before it neither more nor less information than did the agency when it made its decision.” *CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014) (internal quotation marks and citation omitted).

III. DISCUSSION

Under the Copyright Act of 1976, copyright protection attaches “immediately” upon the creation of “original works of authorship fixed in any tangible medium of expression,” provided those works meet certain requirements. *Fourth Estate v. Public Benefit Corporation v. Wall-Street.com, LLC*, 139 S. Ct. 881, 887 (2019); 17 U.S.C. § 102(a). A copyright claimant can also register the work with the Register of Copyrights. Upon concluding that the work is indeed copyrightable, the Register will issue a certificate of registration, which, among other advantages, allows the claimant to pursue infringement claims in court. 17 U.S.C. §§ 410(a), 411(a); *Unicolors v. H&M Hennes & Mauritz, L.P.*, 142 S. Ct. 941, 944–45 (2022). A valid copyright exists upon a qualifying work’s creation and “apart” from registration, however; a certificate of registration merely confirms that the copyright has existed all along. *See Fourth Estate*, 139 S. Ct. at 887. Conversely, if the Register denies an application for registration for lack of copyrightable subject matter—and did not err in doing so—then the work at issue was never subject to copyright protection at all.

In considering plaintiff’s copyright registration application as to “A Recent Entrance to Paradise,” the Register concluded that “this particular work will not support a claim to copyright” because the work lacked human authorship and thus no copyright existed in the first instance. First Refusal Letter at 1; *see also* Final Refusal Letter at 3 (providing the same rationale in the final reconsideration decision). By design in plaintiff’s framing of the registration application, then, the single legal question presented here is whether a work generated autonomously by a computer falls under the protection of copyright law upon its creation.

Plaintiff attempts to complicate the issues presented by devoting a substantial portion of his briefing to the viability of various legal theories under which a copyright in the computer's work would transfer to him, as the computer's owner; for example, by operation of common law property principles or the work-for-hire doctrine. *See* Pl.'s Mem. at 31–37; Pl.'s Reply Supp. Mot. Summ. J. & Opp'n Def.'s Cross-Mot. Summ. J. (“Pl.'s Opp'n”) at 11–15, ECF No. 18. These arguments concern *to whom* a valid copyright should have been registered, and in so doing put the cart before the horse.¹ By denying registration, the Register concluded that no valid copyright had ever existed in a work generated absent human involvement, leaving nothing at all to register and thus no question as to whom that registration belonged.

The only question properly presented, then, is whether the Register acted arbitrarily or capriciously or otherwise in violation of the APA in reaching that conclusion. The Register did not err in denying the copyright registration application presented by plaintiff. United States copyright law protects only works of human creation.

Plaintiff correctly observes that throughout its long history, copyright law has proven malleable enough to cover works created with or involving technologies developed long after traditional media of writings memorialized on paper. *See, e.g., Goldstein v. California*, 412 U.S. 546, 561 (1973) (explaining that the constitutional scope of Congress's power to “protect the ‘Writings’ of ‘Authors’” is “broad,” such that “writings” is not “limited to script or printed material,” but rather encompasses “any physical rendering of the fruits of creative intellectual or aesthetic labor”); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (upholding

¹ In pursuing these arguments, plaintiff elaborates on his development, use, ownership, and prompting of the AI generating software in the so-called “Creativity Machine,” implying a level of human involvement in this case entirely absent in the administrative record. As detailed, *supra*, in Part I, plaintiff consistently represented to the Register that the AI system generated the work “autonomously” and that he played no role in its creation, *see* Application at 2, and judicial review of the Register's final decision must be based on those same facts.

the constitutionality of an amendment to the Copyright Act to cover photographs). In fact, that malleability is explicitly baked into the modern incarnation of the Copyright Act, which provides that copyright attaches to “original works of authorship fixed in any tangible medium of expression, *now known or later developed.*” 17 U.S.C. § 102(a) (emphasis added). Copyright is designed to adapt with the times. Underlying that adaptability, however, has been a consistent understanding that human creativity is the *sine qua non* at the core of copyrightability, even as that human creativity is channeled through new tools or into new media. In *Sarony*, for example, the Supreme Court reasoned that photographs amounted to copyrightable creations of “authors,” despite issuing from a mechanical device that merely reproduced an image of what is in front of the device, because the photographic result nonetheless “represent[ed]” the “original intellectual conceptions of the author.” *Sarony*, 111 U.S. at 59. A camera may generate only a “mechanical reproduction” of a scene, but does so only after the photographer develops a “mental conception” of the photograph, which is given its final form by that photographer’s decisions like “posing the [subject] in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation” crafting the overall image. *Id.* at 59–60. Human involvement in, and ultimate creative control over, the work at issue was key to the conclusion that the new type of work fell within the bounds of copyright.

Copyright has never stretched so far, however, as to protect works generated by new forms of technology operating absent any guiding human hand, as plaintiff urges here. Human authorship is a bedrock requirement of copyright.

That principle follows from the plain text of the Copyright Act. The current incarnation of the copyright law, the Copyright Act of 1976, provides copyright protection to “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 17 U.S.C. § 102(a). The “fixing” of the work in the tangible medium must be done “by or under the authority of the author.” *Id.* § 101. In order to be eligible for copyright, then, a work must have an “author.”

To be sure, as plaintiff points out, the critical word “author” is not defined in the Copyright Act. *See* Pl.’s Mem. at 24. “Author,” in its relevant sense, means “one that is the source of some form of intellectual or creative work,” “[t]he creator of an artistic work; a painter, photographer, filmmaker, etc.” *Author*, MERRIAM-WEBSTER UNABRIDGED DICTIONARY, <https://unabridged.merriam-webster.com/unabridged/author> (last visited Aug. 18, 2023); *Author*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/dictionary/author_n (last visited Aug. 10, 2023). By its plain text, the 1976 Act thus requires a copyrightable work to have an originator with the capacity for intellectual, creative, or artistic labor. Must that originator be a human being to claim copyright protection? The answer is yes.²

The 1976 Act’s “authorship” requirement as presumptively being *human* rests on centuries of settled understanding. The Constitution enables the enactment of copyright and patent law by granting Congress the authority to “promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective

² The issue of whether non-human sentient beings may be covered by “person” in the Copyright Act is only “fun conjecture for academics,” Justin Hughes, *Restating Copyright Law’s Originality Requirement*, 44 COLUMBIA J. L. & ARTS 383, 408–09 (2021), though useful in illuminating the purposes and limits of copyright protection as AI is increasingly employed. Nonetheless, delving into this debate is an unnecessary detour since “[t]he day sentient refugees from some intergalactic war arrive on Earth and are granted asylum in Iceland, copyright law will be the least of our problems.” *Id.* at 408.

writings and discoveries.” U.S. Const. art. 1, cl. 8. As James Madison explained, “[t]he utility of this power will scarcely be questioned,” for “[t]he public good fully coincides in both cases [of copyright and patent] with the claims of individuals.” THE FEDERALIST NO. 43 (James Madison). At the founding, both copyright and patent were conceived of as forms of property that the government was established to protect, and it was understood that recognizing exclusive rights in that property would further the public good by incentivizing individuals to create and invent. The act of human creation—and how to best encourage human individuals to engage in that creation, and thereby promote science and the useful arts—was thus central to American copyright from its very inception. Non-human actors need no incentivization with the promise of exclusive rights under United States law, and copyright was therefore not designed to reach them.

The understanding that “authorship” is synonymous with human creation has persisted even as the copyright law has otherwise evolved. The immediate precursor to the modern copyright law—the Copyright Act of 1909—explicitly provided that only a “person” could “secure copyright for his work” under the Act. Act of Mar. 4, 1909, ch. 320, §§ 9, 10, 35 Stat. 1075, 1077. Copyright under the 1909 Act was thus unambiguously limited to the works of human creators. There is absolutely no indication that Congress intended to effect any change to this longstanding requirement with the modern incarnation of the copyright law. To the contrary, the relevant congressional report indicates that in enacting the 1976 Act, Congress intended to incorporate the “original work of authorship” standard “without change” from the previous 1909 Act. *See* H.R. REP. NO. 94-1476, at 51 (1976).

The human authorship requirement has also been consistently recognized by the Supreme Court when called upon to interpret the copyright law. As already noted, in *Sarony*, the Court’s

recognition of the copyrightability of a photograph rested on the fact that the human creator, not the camera, conceived of and designed the image and then used the camera to capture the image. *See Sarony*, 111 U.S. at 60. The photograph was “the product of [the photographer’s] intellectual invention,” and given “the nature of authorship,” was deemed “an original work of art . . . of which [the photographer] is the author.” *Id.* at 60–61. Similarly, in *Mazer v. Stein*, the Court delineated a prerequisite for copyrightability to be that a work “must be original, that is, the author’s tangible expression of his ideas.” 347 U.S. 201, 214 (1954). *Goldstein v. California*, too, defines “author” as “an ‘originator,’ ‘he to whom anything owes its origin,’” 412 U.S. at 561 (quoting *Sarony*, 111 U.S. at 58). In all these cases, authorship centers on acts of human creativity.

Accordingly, courts have uniformly declined to recognize copyright in works created absent any human involvement, even when, for example, the claimed author was divine. The Ninth Circuit, when confronted with a book “claimed to embody the words of celestial beings rather than human beings,” concluded that “some element of human creativity must have occurred in order for the Book to be copyrightable,” for “it is not creations of divine beings that the copyright laws were intended to protect.” *Urantia Found. v. Kristen Maaherra*, 114 F.3d 955, 958–59 (9th Cir. 1997) (finding that because the “members of the Contact Commission chose and formulated the specific questions asked” of the celestial beings, and then “select[ed] and arrange[d]” the resultant “revelations,” the *Urantia Book* was “at least partially the product of human creativity” and thus protected by copyright); *see also Penguin Books U.S.A., Inc. v. New Christian Church of Full Endeavor*, 96-cv-4126 (RWS), 2000 WL 1028634, at *2, 10–11 (S.D.N.Y. July 25, 2000) (finding a valid copyright where a woman had “filled nearly thirty stenographic notebooks with words she believed were dictated to her” by a “‘Voice’ which

would speak to her whenever she was prepared to listen,” and who had worked with two human co-collaborators to revise and edit those notes into a book, a process which involved enough creativity to support human authorship); *Oliver v. St. Germain Found.*, 41 F. Supp. 296, 297, 299 (S.D. Cal. 1941) (finding no copyright infringement where plaintiff claimed to have transcribed “letters” dictated to him by a spirit named Phyllos the Thibetan, and defendant copied the same “spiritual world messages for recordation and use by the living” but was not charged with infringing plaintiff’s “style or arrangement” of those messages). Similarly, in *Kelley v. Chicago Park District*, the Seventh Circuit refused to “recognize[] copyright” in a cultivated garden, as doing so would “press[] too hard on the[] basic principle[]” that “[a]uthors of copyrightable works must be human.” 635 F.3d 290, 304–06 (7th Cir. 2011). The garden “ow[ed] [its] form to the forces of nature,” even if a human had originated the plan for the “initial arrangement of the plants,” and as such lay outside the bounds of copyright. *Id.* at 304. Finally, 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. 888 F.3d 418, 420 (9th Cir. 2018). While resolving the case on standing grounds, rather than the copyrightability of the monkey’s work, the *Naruto* Court nonetheless had to consider whom the Copyright Act was designed to protect and, as with those courts confronted with the nature of authorship, concluded that only humans had standing, explaining that the terms used to describe who has rights under the Act, like “‘children,’ ‘grandchildren,’ ‘legitimate,’ ‘widow,’ and ‘widower[,]’ all imply humanity and necessarily exclude animals.” *Id.* at 426. Plaintiff can point to no case in which a court has recognized copyright in a work originating with a non-human.

Undoubtedly, we are approaching new frontiers in copyright as artists put AI in their toolbox to be used in the generation of new visual and other artistic works. The increased attenuation of human creativity from the actual generation of the final work will prompt challenging questions regarding how much human input is necessary to qualify the user of an AI system as an “author” of a generated work, the scope of the protection obtained over the resultant image, how to assess the originality of AI-generated works where the systems may have been trained on unknown pre-existing works, how copyright might best be used to incentivize creative works involving AI, and more. *See, e.g.*, Letter from Senators Thom Tillis and Chris Coons to Kathi Vidal, Under Secretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark Office, and Shira Perlmutter, Register of Copyrights and Director of the U.S. Copyright Office (Oct. 27, 2022), <https://www.copyright.gov/laws/hearings/Letter-to-USPTO-USCO-on-National-Commission-on-AI-1.pdf> (requesting that the United States Patent and Trademark Office and the United States Copyright Office “jointly establish a national commission on AI” to assess, among other topics, how intellectual property law may best “incentivize future AI related innovations and creations”).

This case, however, is not nearly so complex. While plaintiff attempts to transform the issue presented here, by asserting new facts that he “provided instructions and directed his AI to create the Work,” that “the AI is entirely controlled by [him],” and that “the AI only operates at [his] direction,” Pl.’s Mem. at 36–37—implying that he played a controlling role in generating the work—these statements directly contradict the administrative record. Judicial review of a final agency action under the APA is limited to the administrative record, because “[i]t is black-letter administrative law that in an [APA] case, a reviewing court should have before it neither more nor less information than did the agency when it made its decision.” *CTS Corp.*, 759 F.3d

at 64 (internal quotation marks and citation omitted). Here, plaintiff informed the Register that the work was “[c]reated autonomously by machine,” and that his claim to the copyright was only based on the fact of his “[o]wnership of the machine.” Application at 2. The Register therefore made her decision based on the fact the application presented that plaintiff played no role in using the AI to generate the work, which plaintiff never attempted to correct. *See* First Request for Reconsideration at 2 (“It is correct that the present submission lacks traditional human authorship—it was autonomously generated by an AI.”); Second Request for Reconsideration at 2 (same). Plaintiff’s effort to update and modify the facts for judicial review on an APA claim is too late. On the record designed by plaintiff from the outset of his application for copyright registration, this case presents only the question of whether a work generated autonomously by a computer system is eligible for copyright. In the absence of any human involvement in the creation of the work, the clear and straightforward answer is the one given by the Register: No.

Given that the work at issue did not give rise to a valid copyright upon its creation, plaintiff’s myriad theories for how ownership of such a copyright could have passed to him need not be further addressed. Common law doctrines of property transfer cannot be implicated where no property right exists to transfer in the first instance. The work-for-hire provisions of the Copyright Act, too, presuppose that an interest exists to be claimed. *See* 17 U.S.C. § 201(b) (“In the case of a work made for hire, the employer . . . owns all of the rights comprised in the copyright.”).³ Here, the image autonomously generated by plaintiff’s computer system was

³ In any event, plaintiff’s attempts to cast the work as a work-for-hire must fail as both definitions of a “work made for hire” available under the Copyright Act require that the individual who prepares the work is a human being. The first definition provides that “a ‘work made for hire’ is . . . a work prepared by an *employee* within the scope of *his or her* employment,” while the second qualifies certain eligible works “*if the parties expressly agree in a written instrument signed by them* that the work shall be considered a work made for hire.” 17 U.S.C. § 101 (emphasis added). The use of personal pronouns in the first definition clearly contemplates only human beings as eligible “employees,” while the second necessitates a meeting of the minds and exchange of signatures in a valid contract not possible with a non-human entity.

never eligible for copyright, so none of the doctrines invoked by plaintiff conjure up a copyright over which ownership may be claimed.

IV. CONCLUSION

For the foregoing reasons, defendants are correct that the Copyright Office acted properly in denying copyright registration for a work created absent any human involvement. Plaintiff's motion for summary judgment is therefore denied and defendants' cross-motion for summary judgment is granted.

An Order consistent with this Memorandum Opinion will be entered contemporaneously.

Date: August 18, 2023



A handwritten signature in cursive script that reads "Beryl A. Howell".

BERYL A. HOWELL
United States District Judge

**U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:22-cv-01564-BAH**

THALER v. PERLMUTTER et al
Assigned to: Judge Beryl A. Howell
Case in other court: USCA, 23-05233
Cause: 05:0701 Judicial Review of Agency Decision

Date Filed: 06/02/2022
Date Terminated: 08/18/2023
Jury Demand: None
Nature of Suit: 899 Administrative
Procedure Act/Review or Appeal of Agency
Decision
Jurisdiction: U.S. Government Defendant

Plaintiff

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V.

Defendant

SHIRA PERLMUTTER
*in her official capacity as Register of
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APPX 200

**UNITED STATES COPYRIGHT
OFFICE**

represented by **Jenna Elizabeth Munnelly**
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Date Filed	#	Docket Text
06/02/2022	1	COMPLAINT against SHIRA PERLMUTTER, THE UNITED STATES COPYRIGHT OFFICE (Filing fee \$ 402 receipt number ADCDC-9278447) filed by STEPHEN THALER. (Attachments: # 1 Civil Cover Sheet, # 2 Summons Summons to S. Perlmutter, # 3 Summons Summons to the United States Copyright Office)(Neri, Geoffrey) (Entered: 06/02/2022)
06/03/2022		NOTICE OF ERROR re 1 Complaint; emailed to geoff@bnsklaw.com, cc'd 0 associated attorneys -- The PDF file you docketed contained errors: 1. Noncompliance with LCvR 5.1(c). Please file an errata correcting the initiating pleading to include the name & full residence address of each party using the event Errata., 2. Missing summonses-government. When naming a government agent or agency as a defendant, you must supply a summons for each defendant & two additional summonses for the U.S. Attorney & U.S. Attorney General. Please submit using the event Request for Summons to Issue., 3. COMPLIANCE DEADLINE is by close of business today. This case will not proceed any further until all errors are satisfied. (znmg,) (Entered: 06/03/2022)
06/03/2022	2	ERRATA by STEPHEN THALER re 1 Complaint, filed by STEPHEN THALER. (Attachments: # 1 Exhibit Exhibit A - Corrected Complaint)(Neri, Geoffrey) (Entered: 06/03/2022)
06/03/2022	3	REQUEST FOR SUMMONS TO ISSUE filed by STEPHEN THALER. (Attachments: # 1 Summons Summons to United States Copyright Office, # 2 Summons Summons to Attorney General, # 3 Summons Summons to United States Attorney)(Neri, Geoffrey) (Entered: 06/03/2022)
06/03/2022		Case Assigned to Chief Judge Beryl A. Howell. (znmg) (Entered: 06/03/2022)
06/03/2022	4	SUMMONS (4) Issued Electronically as to SHIRA PERLMUTTER, UNITED STATES COPYRIGHT OFFICE, U.S. Attorney and U.S. Attorney General (Attachment: # 1 Notice and Consent)(znmg) (Entered: 06/03/2022)
06/06/2022	5	STANDING ORDER. Signed by Chief Judge Beryl A. Howell on June 6, 2022. (lcbah4) (Entered: 06/06/2022)
08/30/2022	6	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. SHIRA PERLMUTTER served on 7/27/2022 (Attachments: # 1 Exhibit Ex. A- Declaration of Personal Service, # 2 Exhibit Ex. B - Declaration of E. McCanna re Service by Certified Mail)(Neri, Geoffrey) (Entered: 08/30/2022)
08/30/2022	7	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed. UNITED STATES COPYRIGHT OFFICE served on 7/27/2022 (Attachments: # 1 Exhibit Ex. A - Declaration re Personal Service, # 2 Exhibit Ex. B - Declaration of E. McCanna re Service by Certified Mail)(Neri, Geoffrey) (Entered: 08/30/2022)
08/30/2022	8	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed on United States Attorney General. Date of Service Upon United States Attorney General n/a (Mailed 7/26/2022). (Attachments: # 1 Exhibit Ex. A - Declaration of E. McCanna re Service by Certified Mail)(Neri, Geoffrey) (Entered: 08/30/2022)

08/30/2022	9	RETURN OF SERVICE/AFFIDAVIT of Summons and Complaint Executed as to the United States Attorney. Date of Service Upon United States Attorney on 7/26/2022. Answer due for ALL FEDERAL DEFENDANTS by 9/24/2022. (Neri, Geoffrey) (Entered: 08/30/2022)
09/26/2022	10	NOTICE of Appearance by Jenna Elizabeth Munnelly on behalf of SHIRA PERLMUTTER, UNITED STATES COPYRIGHT OFFICE (Munnelly, Jenna) (Entered: 09/26/2022)
09/26/2022	11	ANSWER to Complaint by SHIRA PERLMUTTER, UNITED STATES COPYRIGHT OFFICE.(Munnelly, Jenna) (Entered: 09/26/2022)
10/11/2022	12	STIPULATION <i>RE BRIEFING SCHEDULE</i> by STEPHEN THALER. (Neri, Geoffrey) (Entered: 10/11/2022)
10/12/2022		MINUTE ORDER (paperless) ISSUING, upon consideration of the parties' 12 Joint Stipulation re Briefing Schedule, the following SCHEDULING ORDER: (1) By November 8, 2022, defendants shall file a certified index of the administrative record; (2) By January 10, 2023, plaintiff shall file any motion for summary judgment; (3) By February 7, 2023, defendants shall file any opposition to plaintiff's motion, together with any cross-motion for summary judgment; (4) By March 7, 2023, plaintiff shall file any opposition to defendants' cross-motion, together with any reply in support of his own motion for summary judgment; and (5) By April 4, 2023, defendants shall file any reply in support of their cross-motion for summary judgment. Signed by Chief Judge Beryl A. Howell on October 12, 2022. (lcbah4) (Entered: 10/12/2022)
10/13/2022		Set/Reset Deadlines: defendants' certified index of the administrative record due by 11/8/2022; summary judgment motion due by 1/10/2023; cross-motion and opposition to summary judgment motion due by 2/7/2023; opposition to cross-motion and reply to opposition to summary judgment motion due by 3/7/2023; reply to opposition to cross-motion due by 4/4/2023. (ztg) (Entered: 10/13/2022)
11/08/2022	13	NOTICE of Filing Administrative Record by SHIRA PERLMUTTER, UNITED STATES COPYRIGHT OFFICE re Order,, (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H)(Munnelly, Jenna) (Entered: 11/08/2022)
11/11/2022	14	MOTION for Leave to Appear Pro Hac Vice :Attorney Name- Ryan Benjamin Abbott, Filing fee \$ 100, receipt number ADCDC-9666392. Fee Status: Fee Paid. by STEPHEN THALER. (Attachments: # 1 Declaration Declaration of R. Abbott ISO Pro Hac Vice Application, # 2 Text of Proposed Order [Proposed] Order Granting Pro Hac Vice Application)(Neri, Geoffrey) (Entered: 11/11/2022)
11/14/2022		ORDER granting plaintiff's 14 Motion for Leave to Appear <i>Pro Hac Vice</i> . Mr. Abbott may enter an appearance <i>pro hac vice</i> for the purpose of representing STEPHEN THALER in this action. Counsel should register for e-filing via PACER and file a notice of appearance pursuant to LCvR 83.6(a) Click for instructions. Signed by Chief Judge Beryl A. Howell on November 14, 2022. (lcbah4) (Entered: 11/14/2022)
01/10/2023	15	NOTICE of Appearance by Ryan Benjamin Abbott on behalf of STEPHEN THALER (Abbott, Ryan) (Entered: 01/10/2023)
01/10/2023	16	MOTION for Summary Judgment by STEPHEN THALER. (Attachments: # 1 Text of Proposed Order)(Abbott, Ryan) (Entered: 01/10/2023)

02/07/2023	17	RESPONSE re 16 MOTION for Summary Judgment <i>and Cross Motion for Summary Judgment</i> filed by SHIRA PERLMUTTER, UNITED STATES COPYRIGHT OFFICE. (Munnelly, Jenna) (Entered: 02/07/2023)
02/07/2023	19	Cross MOTION for Summary Judgment by SHIRA PERLMUTTER, UNITED STATES COPYRIGHT OFFICE. (See Docket Entry 17 to view document). (zed) (Entered: 03/08/2023)
03/07/2023	18	REPLY to opposition to motion re 16 Motion for Summary Judgment filed by STEPHEN THALER. (Abbott, Ryan) Modified docket event/text on 3/8/2023 (zed). (Entered: 03/07/2023)
03/07/2023	20	Memorandum in opposition to re 19 Motion for Summary Judgment filed by STEPHEN THALER. (See Docket Entry 19 to view document). (zed) (Entered: 03/08/2023)
04/05/2023	21	REPLY to opposition to motion re 19 MOTION for Summary Judgment filed by SHIRA PERLMUTTER, UNITED STATES COPYRIGHT OFFICE. (Munnelly, Jenna) (Entered: 04/05/2023)
04/05/2023	22	Unopposed MOTION for Leave to File <i>Reply in Support of Cross-Motion for Summary Judgment Out of Time</i> by SHIRA PERLMUTTER, UNITED STATES COPYRIGHT OFFICE. (Munnelly, Jenna) (Entered: 04/05/2023)
04/06/2023		MINUTE ORDER (paperless) GRANTING the government's 22 Unopposed Motion for Leave to File Reply Out of Time. Signed by Judge Beryl A. Howell on April 6, 2023. (lcbah4) (Entered: 04/06/2023)
08/18/2023	23	ORDER DENYING the plaintiff's 16 Motion for Summary Judgment and GRANTING the defendants' 17 Cross-Motion for Summary Judgment. See Order for further details. The Clerk of the Court is directed to close this case. Signed by Judge Beryl A. Howell on August 18, 2023. (lcbah1) (Entered: 08/18/2023)
08/18/2023	24	MEMORANDUM OPINION regarding the plaintiff's 16 Motion for Summary Judgment and the defendants' 17 Cross-Motion for Summary Judgment. Signed by Judge Beryl A. Howell on August 18, 2023. (lcbah1) (Entered: 08/18/2023)
10/11/2023	25	NOTICE OF APPEAL TO DC CIRCUIT COURT as to 24 Memorandum & Opinion, 23 Order on Motion for Summary Judgment, by STEPHEN THALER. Filing fee \$ 505, receipt number ADCDC-10413149. Fee Status: Fee Paid. Parties have been notified. (Abbott, Ryan) (Entered: 10/11/2023)
10/12/2023	26	Transmission of the Notice of Appeal, Order Appealed (Memorandum Opinion), and Docket Sheet to US Court of Appeals. The Court of Appeals fee was paid re 25 Notice of Appeal to DC Circuit Court,. (mg) (Entered: 10/12/2023)
10/18/2023		USCA Case Number 23-5233 for 25 Notice of Appeal to DC Circuit Court, filed by STEPHEN THALER. (znmw) (Entered: 10/18/2023)

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