The Future of AI and Copyright Law

Without copyright protections, most scholars would argue, there would be no way to make a living off of artistic endeavors.[1] Were copyright protections suspended today, the music, film, theater, and publishing industries would be crushed. Smaller, independent artists selling their products on Etsy and Instagram would be almost completely eliminated from the market.[2] For decades, scholars that advocated for curtailing or even abolishing copyright protections were generally few and far between compared to those advocating for more copyright protections.[3] The mantra has continually been that more and stronger copyright protections are always better for artists. The revolutionary developments in Artificial Intelligence ("AI") enabling AI-generated artistic works to enter the market have caused a violent clash with this mantra and have pushed many into seriously questioning it for the first time.

There are three active lawsuits that will have lasting implications for the development and implementation of AI in the entertainment, technology, and corporate sectors. In *Thaler v. Perlmutter*, the D.C. Court of Appeals will be deciding whether an AI program, rather than a human, can hold a copyright over its artistic work products.[4] The second and third lawsuits, *Silverman v. OpenAI, et al.*[5] and *Silverman v. Meta Platforms, Inc.,*[6] are class action suits in which Sarah Silverman is serving as the lead plaintiff. The book authors bringing the suit are suing Meta and OpenAI for using their works to train AI programs without obtaining permission, paying any royalties, or acknowledging the reliance on the copyrighted works to train the AI programs. The reality, for better or worse, is that both the entertainment and technology industries will have to adapt to the rulings of these lawsuits. Accordingly, corporations, creative businesses, and even indie artists need to prepare for the different possible legal changes that could result from the suits.

Thaler v. Perlmutter **and Better Defining Human Authorship**

Stephen Thaler created an AI program called the "Creativity Machine."[7] The Creativity Machine produced an AI-generated image titled "A Recent Entrance to Paradise."[8] Thaler submitted an application to the U.S. Copyright Office to gain a copyright interest over A Recent Entrance to Paradise that would be legally held by the Creativity Machine.[9] Thaler, as the creator and owner of the Creativity Machine, wanted to have the copyright interest then transferred to him under the Work-For-Hire Doctrine.[10] The U.S. Copyright Office rejected the application

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[1] GLYNN LUNNEY, COPYRIGHT'S EXCESS MONEY AND MUSIC IN THE US RECORDING INDUSTRY 2 (2018).
[2] *Id.* at 11-12.
[3] *Id.* at 49-58.
[4] Thaler v. Perlmutter, No. 22-1564, 2023 WL 5333236 (D.D.C. Aug. 18, 2023).
[5] Complaint, Silverman et. al v. OpenAI, Inc., No. 4:23-cv-03416, 2023 WL 4448007 (N.D.Cal. filed July 7, 2023).
[6] Complaint, Silverman et. al v. Meta Platforms, Inc., No. 3:23CV03417, 2023 WL 4463445 (N.D.Cal. filed July 7, 2023).
[7] *Thaler*, 2023 WL 5333236, at *1.
[8] *Id.* at *1.
[9] *Id.* at *1.
[10] *Id.* at *1.

because "human authorship… [is] a prerequisite for a valid copyright..."[11] Thaler then sued the Copyright Office in the D.C. District Court to try and have the decision overturned.[12]

The D.C. District Court ruled that the Copyright Office decided correctly, stating that "[h]uman authorship is a bedrock requirement of copyright."[13] This ruling follows the precedent of cases like *Naruto v. Slater*[14] and *Kelley v. Chicago Park District*.[15] In *Naruto*, the Ninth Circuit rejected the People for the Ethical Treatment of Animals' argument that a crested macaque named Naruto should have a copyright interest over his own selfie. In *Kelley*, the Seventh Circuit rejected a copyright claim for a landscaped garden, citing, among other reasons, the fact that the plaintiff could not demonstrate any original contributions he had made to the plants that would satisfy the original contribution requirement.[16]

Thaler is appealing the judgment, but the reality is he is unlikely to obtain a different outcome from the higher courts.[17] What stands out about *Thaler*'s ruling is that the judge's reframing of prior case law's interpretation of the human authorship requirement may open new avenues to challenging the copyrightability of an AI-generated image regardless of whether the applicant is a human or not.

How Much Human Authorship Is Necessary?

Arguably, the most important line in the District Judge's opinion in *Thaler* was,

> 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.[18]

Traditionally, the decision in *Kelley* was interpreted to mean the cultivated garden was not copyrightable because it was insufficiently original and not fixed in a stable enough medium.[19] The schematics of the garden were copyrightable, but not the garden itself because the plants were 1) constantly growing and changing and 2) the human gardener's only creative contribution was planting the flowers in an initial arrangement.[20] The originality test in *Kelley*

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[11] *Id*. at *1.
[12] *Id.* at *1.
[13] *Id.* at *4.
[14] Naruto v. Slater, 888 F.3d 418 (9th Cir. 2018).
[15] Kelley v. Chicago Park Dist., 635 F.3d 290 (7th Cir. 2011).
[16] *Id.* at 304-05.
[17] Wes Davis, *AI-Generated Art Cannot Be Copyrighted, Rules a US Federal Judge*, THE VERGE (Aug. 19, 2023, 6:42 PM), https://www.theverge.com/2023/8/19/23838458/ai-generated-art-no-copyright-district-court.
[18] *Kelley,* 635 F.3d at 304; *Thaler,* 2023 WL 5333236, at *5.
[19] JEANNE C. FROMER & CHRISTOPHER SPRINGMAN, COPYRIGHT LAW: CASES AND MATERIALS 43 (2023) ("A garden's constituent elements are alive and inherently changeable, not fixed. Most of what we see and experience in a garden…originates in nature, not in the mind of the gardener.").
[20] *Id.* at 44.

focused only on the gardener's level of input. The test did not directly weighed the level of the gardener's input against nature's input. In *Thaler*, however, the issue is framed as an imbalance in human-nature authorship, making the disqualifying factor the absence of a human exercising the highest level of creative control rather than a lack of originality or a fixed medium. The imbalance argument could be used to challenge the copyrightability of AI images altogether, rather than just whether the program can hold its own copyright.

Thaler's ruling introduces new questions into future analysis of whether an AI-produced work is copyrightable. In cases where the human contributor merely feeds other creators' works into an AI program and prompts the program to make an image or write a story, would human-program authorship not weigh more heavily in favor of the program? Since the program would not itself be able to qualify as an author, would this make the human contributor, like Kelley, ineligible to claim copyright over the produced work? It is possible that the future court decisions could create a test to evaluate the level of human authorship rather than deciding between all or nothing for AI-produced artistic works. If that were the case, all artists who wish to integrate AI into their operations would need to ensure that there is enough human involvement to earn a copyright interest in the work. This would require running all AI projects through copyright lawyers, applying for a copyright on every work to have official documentation, and carefully documenting the amount of human versus program control over the final product.

Silverman v. OpenAI* and *Meta Platforms

Another challenge for AI users on the horizon is that courts may declare the AI programs themselves to be infringing works. Sarah Silverman is the lead plaintiff bringing multiple claims against OpenAI and Meta. Her first major claim is that ChatGPT, a product of OpenAI, is itself an infringing work because it obtained her book, *The Bedwetter*, from an illegal database of pirated materials.[21] Her second claim is that once a work has been fed into an AI program without the copyright holder's permission, the program itself, and by extension every work it produces, are infringing works that directly violate Section 106 of the 1976 Copyright Act.[22] Her complaint states, "Because the OpenAI Language Models cannot function without the expressive information extracted from Plaintiffs' works (and others) and retained inside them, the OpenAI Language Models are themselves infringing derivative works."[23] The program would qualify as direct infringement, and any works it produces would qualify as vicarious infringement. She alleges the same claims against Meta Platforms' Large Language Models.[24]

Her third major claim is that the programs violate the Digital Millenium Copyright Act. The AI programs draw on Silverman's copyrighted book to produce their own material, but they strip out all information about the copyright Silverman holds.[25] There is no reference or

[21] *OpenAI, Inc.,* 2023 WL 4448007 ¶¶ 25, 30-35, 42.
[22] *Id.* ¶¶ 52-58.
[23] *Id.* ¶ 57.
[24] *Meta Platforms*, 2023 WL 4463445 at ¶¶ 41, 44-45, 49-51, 55.
[25] *OpenAI, Inc.,* 2023 WL 4448007 ¶¶ 63-68; *Meta Platforms*, 2023 WL 4463445 ¶¶ 49-52.

indication in the final product that her book was used to produce the AI-generated work.[26] Under 17 U.S.C. § 1202(b)(1) and (3), it is illegal to make a derivative work and distribute it without any "Copyright Management Information," which includes "copyright notice, title, or other identifying information."[27] Her remaining claims are for negligence, unjust enrichment, and unfair competition.[28]

Could AI Learn from Spotify?

If Silverman wins on any of her first three claims, the future of AI development will change dramatically. Currently, ChatGPT learns from everything fed into it and draws on works introduced to it by users around the world.[29] Like a Google search engine, there is one program, and everyone is using it at once. If the introduction of one work without permission makes the program an infringing derivative work, the liability for companies using the program to develop artistic works widens exponentially. Companies would be barred from using and distributing anything made by or with the help of the AI program. To avoid liability, companies will have to either create their own AI program or get a siloed version of ChatGPT that the company can train itself. Additionally, AI developers will have to negotiate with creators about how to navigate the Digital Millenium Copyright Act. They will have to reach a compromise in which creators' copyright interests are respected, but developers can publish AI-generated works without an enormous 'credits' section. So, what will this all look like?

One area of the law that could hold the answers to this dispute is music copyright law, specifically in relation to streaming services. Currently, there is a mandatory licensing process for interactive streaming services.[30] Artists can negotiate directly for a desired license fee to have their songs included on interactive streaming services like Spotify, and they can refuse to include their music until they receive their requested compensation.[31] However, for lesser-known artists without bargaining power, there are non-profit organizations that can establish a baseline license fee for their works and help these artists collect and receive their royalties and fees. These large non-profit organizations must be registered as Collectives.[32] The Collectives enable streaming services like Spotify to keep costs low and acquire music from lesser-known artists without having to engage in talent scouting or direct negotiations. Should the artist feel the licensing fee is too low but not wish to engage in negotiations directly with the service, they can go before the

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[26] *OpenAI, Inc.*, 2023 WL 4448007 ¶ 65; *Meta Platforms,* 2023 WL 4463445 at ¶¶ 49-52.
[27] *OpenAI, Inc.*, 2023 WL 4448007 ¶¶ 64-66; *Meta Platforms,* 2023 WL 4463445 ¶¶ 49-52; 17 U.S.C. § 1202 (1998).
[28] *OpenAI*, *Inc.*, 2023 WL 4448007 ¶¶ 70, 75, 80-87; *Meta Platforms*, 2023 WL 4463445 ¶¶ 1-14, 55-58.
[29] Cecily Mauran, *What Not to Share With ChatGPT If You Use It for Work*, MASHABLE (May 30, 2023), https://mashable.com/article/openai-chatgpt-ai-chatbot-what-not-to-share.
[30] 17 U.S.C. §§ 114(d)(2), (f).
[31] Avery Blank, *Taylor Swift's Record Deal: A Master Negotiator Gets What She Wants For Her Career*, FORBES (Nov. 26, 2018), https://www.forbes.com/sites/averyblank/2018/11/26/taylor-swifts-record-deal-a-master-negotiator-gets-what-she-wants-for-her-career-how-you-can-too/?sh=172036f778d6.
[32] *See* 37 C.F.R. § 370.5(c); *see also Powering the Future of Music*, SOUNDEXCHANGE, https://www.soundexchange.com/#:~:text=SoundExchange%20is%20the%20largest%20neighboring,their%20music%20is%20played%20internationally (last visited Oct. 3, 2023); *Licensing 101*, SOUNDEXCHANGE, https://www.soundexchange.com/service-provider/licensing-101/ (last visited Oct. 3, 2023).

Copyright Royalty Board to request a higher licensing fee.[33] Overall, this structure has produced an efficient and effective win-win for artists and music platforms.

Similarly, instead of AI companies having to negotiate with each author directly, new Collectives could provide licenses to authors, photographers, and other creators and help them decide on a flat royalty fee they would be willing to receive for each time their work is used in an AI program. Like Spotify, AI program users would then have a list of works to choose from to train their local ChatGPT programs, and the Collective would ensure the artists receive their licensing fees each time their works are used. However, implementing this structure in the AI space would likely require Congress to expand the mandatory licensing processes already in existence for interactive music services to include AI programs. If the law were passed, Collectives would be able to step in and begin issuing licenses as well as collecting and distributing fees to artists whose works have been used to develop AI programs or produce works. Putting this structure in place would also enable businesses to use local AI programs with confidence that they are not violating copyright laws and further revolutionize their own processes and business offerings.

[33] 17 U.S.C. § 114(d)(2); 17 U.S.C. § 114(f).