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MCLE

Artificial creativity: Navigating the copyright implications of AI-generated art

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The rise of artificial intelligence (AI) has led to a proliferation of creative works generated by machines. Not surprisingly, these works, which range from music and literature to visual art and poetry, have sparked considerable legal controversy about whether AI-generated art is eligible for copyright protection.

Copyright law, which is intended to protect original works of authorship, grants exclusive rights to authors to use, reproduce, and distribute their works. However, the legal definition of an "author" has traditionally been based on the premise of human authorship, which would ostensibly not extend to purely AI-generated art.

This was the upshot of the Ninth Circuit's recent decision in *Naruto v. Slater*, 888 F.3d 418, 425 n.7 (9th Cir. 2018). Commonly known as the "Monkey Selfie" case, Naruto involved a photographer, David Slater, who set up his camera on a tripod in a national park, only for a macaque monkey named Naruto to use the camera to take several photos, including a selfie. Slater subsequently published the photos in a book, leading to a copyright dispute between Slater and People for the Ethical Treatment of Animals (PETA), which sued on behalf of Naruto, arguing that Naruto should be recognized as the copyright owner of the selfie.

Naruto's claim was dismissed, and the Ninth Circuit affirmed, holding that Naruto lacked standing to sue under the Copyright Act because animals cannot sue for infringement. Significantly, the court reasoned that "[t]he Copyright Act does not expressly authorize animals to file copyright infringement suits under the statute," and other sections of the Copyright Act, which refer to "children" and "widows," for example, imply that the author must be a human being. *Naruto v. Slater*, 888 F.3d 418, 426 (9th Cir. 2018)

For its part, the Copyright Act itself offers precious little guidance, providing only that copyright protection subsists in "original works of authorship," 17 U.S.C. § 102(a), while remaining conspicuously silent on the legal definition of an "author." As the Ninth Circuit observed in *Urantia Foundation v. Maaherra* - a case involving whether a book containing words authored by non-human spiritual beings could be entitled to copyright protection: "The copyright laws, of course, do not expressly require 'human' authorship, and considerable controversy has arisen in recent years over the copyrightability of computer-generated works." *Urantia Found. v. Maaherra*, 114 F.3d 955, 958 (9th Cir. 1997). Nevertheless, as the court went on to find, "some element of human creativity" must have occurred in order for a work to be copyrightable. Id.

While the Ninth Circuit in *Urantia Foundation* had no occasion to specifically address whether AI-generated works are subject to copyright protection, it nevertheless set the stage for the question: can machines be considered authors and receive copyright protection for their output?

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Enter Stephen Thaler, a computer scientist who, in November 2018, filed an application to register the copyright in a work of art called "A Recent Entrance to Paradise," generated by an AI that Thaler had created called the "Creativity Machine." Significantly, Thaler's application listed the AI as the author of the work.

Citing both *Urantia Foundation* and *Naruto* as precedent, the U.S. Copyright Office denied Thaler's claim, finding that, among other things, his application violated a key requirement of copyright: human authorship. Thaler requested the Copyright Office to reconsider, not once, but twice. The Copyright Office, however, remained steadfast in its denial, reasoning that the courts have "uniformly limited copyright protection to creations of human author." See Letter from Shira Perlmutter et al., Reg. of Copyrights, Copyright Rev. Bd., to Ryan Abbott, Attorney, Brown, Neri, Smith & Khan, LLP (Feb. 14, 2022), https://www.copyright.gov/rulings-filings/review-board/docs/a-recent-entrance-to-paradise.pdf [https://perma.cc/7SXJ-SYUC].

Not one to go quietly into the night, Thaler sued the Copyright Office in federal district court for the registration, arguing that the plain language of the Copyright Act allows for the protection of AI-generated works under a concept similar to protections afforded to corporations, and furthermore, that no case law specifically prohibits AI-generated works from being protected by copyright. Thaler's lawsuit is currently pending before the U.S. District Court for the District of Columbia, with cross-motions for

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summary judgment having been filed by both sides. While no hearing date has yet been set on those motions, we should expect to receive some guidance from the court shortly.

Whoever ultimately wins the battle, the policy implications on both sides of the argument are sizable. On one hand, AI-generated art may be considered a new form of creativity and innovation that should be rewarded and protected. AI algorithms are capable of analyzing vast amounts of data and producing new and original works of art that would be difficult, if not impossible, for a human artist to create. These works of art are often characterized by their originality and novelty, which are key components of copyrightability.

On the other hand, granting copyright protection to AI-generated art could potentially be used to lock out human artists and create a new form of intellectual property that is controlled entirely by machines. Moreover, there is a question as to whether AI algorithms are truly creative, as they are limited by the data and instructions provided by their human creators.

As it stands, there is currently no clear answer to whether AI-generated art qualifies for copyright protection. While the Copyright Office has made its position clear, it is the courts that will have the final say. Decisions like *Urantia Foundation* and *Naruto* provide useful guidance on the current trend in the case law, strongly suggesting that such works are not copyrightable, yet the specific question of copyright protection for purely AI-generated works remains unsettled. This could be changing soon, however, as Thaler's lawsuit works its way through the court system.

In the meantime, it appears likely that, so long as a work contains "some element of human creativity" it may qualify for protection as an "original work of authorship." Accordingly, when AI-generated art is used as a starting point for subsequent creative refinement by a human artist, the resulting work should be protected by copyright. In any event, whichever way the legal landscape shakes out, one thing seems certain: the disruptive implications of AI-generated art are going to be profound.