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US Court Decides There is No Copyright in AI-Generated Works - What About Canada?

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08/31/2023

Introduction

On August 18, 2023, the US District Court for the District of Columbia released a landmark decision on the copyrightability of AI-generated works. The Court confirmed that human authorship is necessary for copyright to subsist in a work and that content generated by AI without any human involvement is not protected under US copyright law.

Although Canadian courts have not yet considered whether copyright subsists in content created by or with the assistance of AI, some of the issues raised in the US decision are likely to resonate with Canadians.

Background

The plaintiff, Stephen Thaler, devised computer programs that use artificial intelligence to generate visual art. One of these programs, the "Creativity Machine," generated a piece of visual art entitled "A Recent Entrance to Paradise" (the GenAI Content), which looks like this:[1]

Thaler applied to the US Copyright Office to register copyright in the GenAI Content, identifying the Creativity Machine as the author of the work. According to his application, the GenAI Content was "autonomously created by a computer algorithm running on a machine." Thaler claimed ownership of the copyright in the GenAI Content as a "work-made-for-hire" on the basis that he created the AI tool that had autonomously generated the GenAI Content.

The Copyright Office denied Thaler's application, explaining that the GenAI Content lacked "the human authorship necessary to support a copyright claim." Both the Copyright Office and the Copyright Review Board maintained that position in subsequent reconsiderations, confirming that copyright protection does not extend to the "creations of non-human entities."

Thaler then brought an action against the Copyright Office and Shira Perlmutter, in her official capacity as the Register of Copyrights and the Director of the United States Copyright Office. Both parties moved for summary judgment on the sole issue of "whether a work generated entirely by an artificial system absent human involvement should be eligible for copyright."

The Decision

The Court concluded unequivocally that "United States copyright law protects only works of human creation." It stated that, although copyright is designed to adapt with the times and apply to works created with or involving new forms of technology,[2] "human creativity is the *sine qua non* at the core of copyrightability." Copyright has "never stretched so far as to protect works generated by new forms of

technology operating absent any guiding human hand. Human authorship is a bedrock requirement of copyright."

The Court noted that, to be eligible for copyright protection, a work must have an "author," which is not defined in the US *Copyright Act*. Based on the history of the US *Copyright Act*, relevant jurisprudence, and dictionary definitions, the Court concluded that an "author" must be human:

By its plain text, the [US *Copyright 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….

The Court acknowledged the possibility that copyright protection *might* attach to a work created by a human author with the assistance of an AI tool, depending on the degree of human involvement. The Court observed as well that future cases are likely to involve "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." However, the Court held that this was not such a case because Thaler had admitted that the GenAI Content was generated autonomously by the computer system. As a result, the Court determined that the decision to refuse the copyright registration was justified.

Takeaways for Canadian Lawyers

While this decision involves aspects of copyright law and practice that differ as between Canada and the US,[3] the Court's analysis bears some similarities to how a Canadian court might approach the issue.[4]

Like its US counterpart, the Canadian *Copyright Act* does not define the term "author." It is also well accepted that, like in the US, Canadian copyright law is intended to be technologically neutral, which means, among other things, that "the *Copyright Act* should continue to apply in different media, including more technologically advanced ones."[5] However, Courts have held that an author must be a natural person,[6] since the term of copyright protection in a work is tied to the author's "life" and the year of the author's death.[7] The *Copyright Act* also grants certain moral rights to the author of a work, which, because of their personal nature, might suggest that an author must be a natural person.[8]

In addition, the Supreme Court of Canada has stated that, for a work to be "original" within the meaning of the *Copyright Act*—which is an absolute requirement for copyright protection—it must be more than a mere copy of another work and involve an exercise of skill and judgment. That exercise of skill and judgment must not be so trivial that it could be characterized as a purely mechanical exercise.[9] It might well be argued that only a human author would be capable of contributing the skill and judgment necessary to give rise to an

original work.

In December 2021, the Canadian Intellectual Property Office (CIPO) issued a copyright registration that lists a human and an AI "painting app" as the co-authors of an artistic work (no. 1188619). However, because CIPO does not conduct substantive examinations of applications, and because registration creates only a *rebuttable* presumption of copyright subsistence and ownership,[10] the registration is not indicative of CIPO's position or how a Canadian court might approach these issues.

In addition, the fact that Canadian registration lists a human co-author might distinguish the painting from the work considered in the *Thaler* decision. The copyrightability of an AI-*assisted* work — and the level of human input necessary for copyright to subsist in such a work — are issues that remain to be considered by Canadian courts. Indeed, those are among the copyright issues identified by the federal government in its July 2021 *Consultation on Modern Copyright Framework for Artificial Intelligence and the Internet of Things*.[11]

Canadian stakeholders, including content creators, AI developers, and users of generative AI tools, will undoubtedly continue to monitor developments in the copyright and AI spaces domestically and internationally as the legal framework develops. The Cassels IP team will, of course, do the same.

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[1] *Thaler v. Perlmutter*, case No. 1:22-cv-01564, (D.D.C. 8/18/23), at p. 2 [*Thaler*].

[2] The Court noted that the "malleability" of copyright is "baked into" the US *Copyright Act* because copyright subsists in "original works of authorship fixed in any tangible medium of expression, *now known or later developed*." See 17 U.S.C. § 102(a) (emphasis added).

[3] For example, unlike in the US, the Canadian Intellectual Property Office does not require a person applying for copyright registration to deposit a copy of the work or other subject matter in question, nor does it conduct substantive examinations of registration applications. Cassels has previously written about copyright registration in Canada. See a copy of the article at this link or contact us for additional information.

[4] Cassels has previously written about copyright protection and AI-generated works. See: Canada: Artificial Intelligence – Country Comparative Guides (legal500.com).

[5] *Robertson v. Thomson Corp*, 2006 SCC 43, at para. 49. See also *Entertainment Software Association v. SOCAN*, 2012 SCC 34, *Rogers Communications Inc. v SOCAN*, 2012 SCC 35, and *SOCAN v Entertainment Software Association*, 2022 SCC 30.

[6] For example, see: *P.S. Knight Co Ltd v Canadian Standards Association*, 2018 FCA 222, at para 147; *Setanta Sport Limited v 2049630 Ontario Inc (Verde Minho Tapas & Lounge)*, 2007 FC 899, at para 4.

[7] *Copyright Act*, RSC 1985, c C-42, ss. 6, 7(1), and 9. See also ss. 14(1), 14.2 [*Copyright Act*].

[8] *Copyright Act*, s. 14.1(1).

[9] See *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, at para 16.

[10] *Copyright Act*, s. 53(2). The rebuttable nature of the presumption is confirmed in the caselaw.

[11] Government of Canada, "A Consultation on a Modern Copyright Framework for Artificial Intelligence and the Internet of Things", (last modified 16 July 2021), online: <https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-frameworkpolicy/ copyright-policy/consultation-modern-copyright-framework-artificial-intelligence-and-internet-things-0>.

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