

Issue 05

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ARTIFICIAL INTELLIGENCE, DIGITAL IMAGES, COPYRIGHTS AND NFTS:

A CASE ANALYSIS OF THE US COPYRIGHT OFFICE'S DENIAL OF "A RECENT ENTRANCE TO PARADISE," A WORK CREATED BY AN ALGORITHM.

This paper analyzes the recent decision from the Review Board of the United States Copyright Office, issued on February 14, 2022, regarding artificial intelligence ("AI") and copyright protection. Herein, this paper will highlight some of the key points of the decision and suggest that they are likely to appear in future copyright matters regarding digital images sold through NFTs, as they start to arise in US Courts.



Steven Thaler has unsuccessfully sought copyright protection for the AI-created A Recent Entrance to Paradise. Image via US Copyright Office.

"A Recent Entrance to Paradise"- An Image Created by an Algorithm Was Not Considered Copyrightable by the Review Board.

On November 3, 2018, Steven Thaler ("Thaler") filed an application for an US copyright registration of a digital image ("Image") called "A Recent Entrance to Paradise." In the application, Thaler identified "Creativity Machine" as the author of the work and not himself. He also stated that the Image was "autonomously created by a computer algorithm running on a machine" and that he was seeking to register the Image as a "work-for-hire to the owner of the Creative Machine."

On August 12, 2019, the US Copyright Office refused Thaler's registration, stating that the Image "lack[ed] the human authorship necessary to support a copyright claim." In response, Thaler filed a request for reconsideration on the grounds that the "human authorship requirement [was] unconstitutional and unsupported by either statute or case law," an argument which the Copyright Office rejected. Thaler subsequently filed a second request for reconsideration, largely repeating the same arguments in his first, which again was rejected by the Copyright Office in the current decision at issue herein.

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In summary, the Copyright Office maintained its longstanding position that “the term authorship implies that, for a work to be copyrightable, it must owe its origins to a human being. Materials produced solely by nature, by plants, or by animals are not copyrightable.” In their refusals of Thaler’s requests, the Copyright Office also cited a USPTO decision about AI saying that the author of a patent invention could not be a machine. There, the USPTO said that “the vast majority of comments acknowledged that existing laws do not permit a non-human to be an author [and] this should remain the law.” Finally, the Copyright Office also cited an important guideline from the COMPENDIUM (THIRD) §313.2., which explains that “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 the work.” Note that, in the decision of the registrability of the Image “A Recent Entrance to Paradise,” the Copyright Office and Thaler are not discussing whether the computer that created the Image assisted in the creation of the Image or was self executing. In Thaler’s copyright application, he expressly stated that the Image was created by a “Creative Machine,” meaning that it was self-executed by the computer. Thus, the Copyright Office applied its well-established understanding that non-humans cannot be the author of a copyrighted work. The decision also discusses the concept of work-for-hire, but that issue is not relevant for the purposes of this paper.

What are NFTs?

NFTs are digital tokens that verify that something is authentic and unique, and represent a physical or digital asset in the digital world. NFTs are stored in a technology called blockchain. An NFT is purchased with another digital asset, called digital currency. The most popular digital current for purchasing NFTs is Ethereum, but there are others. NFTs can be purchased on many online marketplaces, the largest being open sea (www.opensea.io).

People like to compare NFTs to a deed. For example, when you buy a house, you don’t own the house/have the property simply by signing the purchase agreement. The deed needs to be recorded in order to prove that you own the property. Once the deed is recorded, then you have proof of your ownership of the property. The same holds true with NFTs. Once you own the NFT, you have proof of your ownership of the physical or digital asset.

To clarify, the NFT is not the physical or digital asset itself, but rather proof of ownership of such asset, akin to a certificate of authenticity verifying that a digital or physical asset is what it is supposed to be: authentic and unique. When we say unique, it means that the NFT represents something non fungible; it cannot be exchanged for another of the same kind. For example, a particular Van Gogh painting is non fungible because there is only one Vincent Van Gogh and

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only one of that particular painting by him. On the other hand, money is fungible because you can exchange a \$5 bill for another \$5 dollar bill.

In order to buy or sell an NFT, the first thing you need is a wallet to safeguard the cryptocurrency you purchased. You can have a centralized or a non centralized wallet. The difference is that, in a centralized wallet, you have someone who controls the wallet and if you lose the password to your wallet, you can contact someone to try to solve it. The non centralized wallet, on the other hand, does not have a company or an individual behind the wallet and, because of that, you cannot contact anyone if you lose your credentials to access it. In short, if you lose your key to a non centralized wallet, you can say goodbye to your cryptocurrency. After you have the wallet, you then need to "mint" your file on a website to generate a token (NFT) and, from there, put it up for sale on the Internet. In addition, when you put your digital or physical asset up for sale, you need to create a smart contract associated with it that specifies the terms of the sale: how you can use your NFT, if there is an IP connected, royalties, etc.

NFTs are evolving fast, and lawyers are quickly trying to understand the legal consequences of its use and exactly what underlying rights it has.

NFTs and Visual Arts

CryptoPunks



Six examples of the 10,000 randomly generated CryptoPunks

Developer(s)	Larva Labs
Designer(s)	John Watkinson & Matt Hall
Platform(s)	Ethereum
Release	June 2017
Genre(s)	Collectable

* Cryptopunks images available on wikipedia
https://en.wikipedia.org/wiki/CryptoPunks#cite_note-10

The majority of digital images sold through the Internet are done using NFTs. Those digital images are being called digital art. However, we need to ask whether this digital art can be considered a copyrightable work under visual arts and/or have protection under the Visual Artist Right Act (VARA). Here we need to remember the important copyright requirement

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mentioned above in the “A Recent Entrance to Paradise”: in order for a work to be registered as a visual art and, therefore, copyrightable, the artwork needs to be created by the human mind and not solely by IA or an algorithm.

When the digital art movement started through the sale of NFTs, three main “digital art” collections gained notoriety in the NFT world: the cryptopunks, the Bored Yacht Club and the Cryptokitties. There is not much literature on how those digital collectibles images are created, but some research indicates that some of them could be created through an algorithm. The sale of those digital image collections are done through a smart contract attached to the digital

image, allowing the “creator/author” to receive royalties each and every time they are purchased and resold on the Internet. However, there is not much discussion on whether those digital images could be copyrightable or the issue that is raised in the recent Copyright Office decision regarding the “A Recent Entrance to Paradise”, about the algorithm creating the image. If the same reasoning from the Copyright Office’s recent decision is applicable for the digital image collections sold through NFTs that are created through algorithms, then the conclusion would be that they are not copyrightable and, as a result, you cannot attach the payment of “royalties” in a smart contract. Thinking alternatively, if these collections are

not considered copyrightable, then perhaps they could be considered a simple product or an investment, although the latter of which could raise some securities law issues.

Conclusion: How is it possible to overcome the argument that AI does not generate a copyrightable work?

Lawyers are neither developers nor artists. I am a lawyer and I personally do not understand the mechanics of coding. However, our role as lawyers is not to code, but rather to work with the law in order to solve problems for a client. With that said, I believe in order to solve the issues regarding the sale of digital images as NFTs, lawyers should seek guidance from developers and artists alike to make sure that they understand the creative process behind the digital image. While the U.S Courts have yet to announce their view on the registrability of works created by algorithms as digital arts protected under the copyright law, the Copyright Office has some guidance saying that the crucial issue of images generated through an algorithm is whether the machine is merely assisting or conceiving and executing the elements of the work. Thus, it is also up to us lawyers to come up with arguments in favor or against the registrability of digital images created through algorithms or other AI mechanisms using this guidance.

The world has evolved and so has the concept of how art is expressed. Before the Internet boom, visual artists used traditional mediums such as canvas, paper, pencils, paint and other real tools to create their art. Now, in the modern world, and

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Especially after the pandemic when everything became digital, art can be expressed through a computer as a digital image. The issue this raises, however, is whether that image generated by a computer through algorithms could be registered as a copyrightable work when the algorithm is only assisting the creator? From my point of view, we could follow two paths to try to answer that question.

The first path could be considering the concept of visual art and what the Copyright Office cited in the “A Recent Entrance to Paradise” decision: “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 the work.” As previously said, lawyers are not artists or coders themselves, but that doesn’t mean they cannot try to understand. Personally, I have been talking with some digital artists in order to try to understand the creative process. With every artist I talk to, they mention how many hours and how much effort they put into the work before creating the digital image. Could their hours and effort be evidence for the argument that the computer is only an assistant to the artist/author in creating the work? I think the answer to this question is not easy to answer.

The second path could be looking at the code behind the digital image, which is a unique

combination of words and numbers. Considering that the initial code is created by a human, could the code behind the digital image - the combination of words and numbers - be copyrightable as a software? This is another interesting question to be answered.

These two paths are just two possible avenues to be discussed, though I suspect more will arise when lawyers begin to think outside the box, adapt to our new reality, and start thinking of new ideas to protect works created by and through new methods in the digital world. We must begin this discussion because digital art is here, and likely going to be the future of art.