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COPYRIGHT AND AI-GENERATED ART

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The Law Office of Matthew Dedon



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The copyright status of art generated by artificial intelligence is an area of law that has seen rapid development in the past three years. This article first will focus on three landmark cases that may set precedent regarding how the copyright of art or information created by AI is treated. As of the writing of this article in March 2023, the cases are in the early phases of litigation.

The three cases are: *Doe v. GitHub*, *Andersen v. Stability AI*, and *Getty Images v. Stability AI*.

Following discussion of the cases, this article will examine past cases that may affect the copyrightability of AI-generated artwork, and the U.S. Copyright Office's existing stance on whether AI-generated art is worthy of copyright registration.

This article is divided into the following sections: current cases, are AI-generated images protected under fair use, and the U.S. Copyright Office's position on AI-generated art.

CURRENT CASES

Doe v. GitHub, 22 Civ. 6823 (N.D. Cal. Nov. 10, 2022).

The first case examined by this article does not concern artwork *per se*, but the arguments raised are likely to affect future decisions regarding AI-generated images.

In November 2022, two putative class actions were filed in the Northern District of California against GitHub, Microsoft, and Open AI. GitHub was a company founded in 2008 by open-source enthusiasts. The company created a website where programmers could post their code for use by others, typically with licenses that require, at minimum, attribution of the author and inclusion of the license.¹ GitHub grew over the next ten years and was purchased in 2018 by Microsoft for 7.5 billion.²

There are several entities under the Open AI umbrella, but the original organization is Open AI Inc, a nonprofit corporation that was co-founded by a group that includes Elon Musk, the CEO of Tesla, and Sam Altman, president of Y combinator, the tech-startup incubator.³ The non-profit held itself out as an artificial intelligence research company.⁴ In 2019, Altman created the for-profit subsidiary

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OpenAI, LP,⁵ which accepted outside investment in exchange for equity and profits. Microsoft invested \$1 billion in OpenAI at a \$20 billion valuation⁶ and became the exclusive licensee of its GPT-3 language model, the model behind the ChatGPT product that has everyone excited in early 2023.⁷

The two lawsuits challenge the legality of the GitHub product Copilot and a related product, OpenAI Codex, which powers Copilot.

The Codex program converts natural language into code. Codex is integrated into Copilot, an AI product that observes existing code that a programmer creates, and then makes suggestions by providing or filling in blocks of code using AI, similar to how Microsoft Word will make suggestions for the next few words when writing a sentence.

Combined, the integrated product allows a user to create code by describing the desired outcome in natural language. This is converted into code, and gaps are filled in by the program.⁸ GitHub charges users \$10 per month or \$100 per year for the service.⁹

In order to create the finished product, both Codex and Copilot are trained by scanning code from publicly accessible software in open source communities, much of it allegedly from GitHub.¹⁰ The programs scan in a staggering amount of data; GitHub claims it has billions of lines of code.¹¹ This huge amount of data allows the programs to identify statistical patterns regarding how certain processing functions were solved by software instructions.¹² For example, if a user were to type: “calendar for the next ten years,” Codex would identify what code is frequently used in order to solve this function and Copilot would create code based on the many examples that it scanned in. This code may not be identical to the open source code from which it is derived, but it may be substantially similar.

The problem with this whole endeavor is that while the code from the open-source communities is publicly accessible, it's not in the public domain

where anyone can use it however they please. The code posted by Github users and allegedly used is protected by copyright and released for use under license. At a minimum, these licenses usually require attribution of the author's name and copyright information.¹³ Some examples are the MIT License,¹⁴ the GNU General Public License,¹⁵ and the Apache License.¹⁶ This information is referred to as Copyright Management Information, or “CMI,” as defined in Section 1202(c) of the Digital Millennium Copyright Act.¹⁷ This CMI, as the complaint claims, was stripped out of the code used to train Copilot and Codex.¹⁸

The claims for relief surprisingly do not include direct copyright infringement, this could be because OpenAI and Github claim that using publicly available data is fair use¹⁹ and plaintiffs want to avoid any ruling that could deem it so. Instead, the plaintiffs allege a bevy of claims including violations of the Digital Millennium Copyright Act due to removing the CMI or replacing it with false CMI; breach of contract for failing to provide attribution; tortious interference with a contractual relationship, fraud, false designation of origin, unjust enrichment, unfair competition, negligence, and more.²⁰

In their motion to dismiss, defendants Microsoft and Github claim that the complaint fails due to “lack of injury and lack of an otherwise viable claim.”²¹ Defendant OpenAI was quick to point out that the plaintiffs do not allege copyright infringement, but rather “a grab bag of claims that fail to plead violations of cognizable legal rights.”²² In a *Hail Mary* counter attack, Microsoft and Github also claim that plaintiffs seek to undermine open source principles and prevent advancement in progress.²³

The hearing to rule on the motions to dismiss is scheduled for May of 2023.

***Andersen v. Stability AI et al.*, No. 23 Civ. 201 (N.D. Cal. Jan. 13, 2023).**

On January 13, 2023, a class action was brought by three artists against three AI-art companies:

Stability AI, the developer behind the software product DreamStudio that runs on the Stability Software Library called Stable Diffusion; Midjourney Inc., creator of the now popular Midjourney image generator; and DeviantArt, an online art community and developer of the DreamUp app. Many of the same attorneys that represent the plaintiffs in *GitHub* also represent the plaintiffs in *Andersen*.

Stability AI Ltd. is a UK company that owns the subsidiary Stability AI. The companies created Stable Diffusion, which derives images from the DreamStudio product. DreamStudio is a web-based app that uses Stable Diffusion to output images in response to text prompts. While Stable Diffusion outputs the images, DreamStudio provides the user interface and access to Stable Diffusion.

Midjourney Inc. markets the Midjourney Product that produces images in response to text prompts.²⁴ The suit alleges that Stable Diffusion was used in iterations of the Midjourney Product.²⁵

DeviantArt currently markets the DreamUp app, which also allegedly runs on the Stable Diffusion program.²⁶

The plaintiffs include Sarah Andersen, an Eisner Award-winning cartoonist and graphic novelist; Kelly McKernan, a professional artist who works with watercolor and acrylic gouache paintings; and Karla Ortiz, another award-winning artist whose work has been featured in many movies and videogames.

The plaintiffs' complaint involves the process by which Stability scans "training images" and then uses those training images to produce its own derivative artwork. The complaint alleges that the plaintiffs' original artworks were used as training images without attribution by the image generating programs that run on Stable Diffusion.

In a nutshell, the complaint alleges that the Stable Diffusion program works by scanning millions of images and converting those images into smaller "latent" versions that remove unimportant parts

and take up less memory. Separately the Stability AI encodes paired text along with the images. Stability then adds "noise" to the encoded images, essentially distortion that completely blocks out the original image. Through analyses of many images and the text paired with the images, patterns emerge that Stability can use when removing the noise in order to produce different images. This way Stability AI teaches the model to generate output images to be consistent with a particular text description. But these images are not perfect.²⁷

The following images were taken from the complaint. The images were generated by the Stable Diffusion software using the short phrase "a dog wearing a baseball cap while eating ice cream." Of the four images generated, only the dog in the lower left appears to be eating ice cream.²⁸



As the complaint alleges: Every output image from the system is derived exclusively from the latent images, which are copies of copyrighted images. For these reasons, every hybrid image is allegedly a derivative work.²⁹

According to the complaint, the program is a latent-diffusion system that can only copy from latent images that are tagged with terms. The system struggles with a text prompt with multiple terms like "a dog wearing a baseball cap while eating ice cream" because, although there may be photos of dogs, baseball caps, and ice cream amongst the images used to derive the latent images, it is unlikely that there are original images that combine

all three.³⁰ However, the more images that are scanned in, the more accurate the image will be that is created by the text description. After removing the noise, the model compares the new image to the original image and text descriptions that have been copied and stored.

This brings us to how the images were collected: LAION “Large-Scale Artificial Intelligence Open Network.” LAION is a nonprofit based in Germany that makes “large-scale machine learning models, datasets and related code available to the general public.”³¹ LAION’s projects are freely available to the public.³²

Stability hired LAION to create LAION-5B, a dataset of 5.85 billion Training Images. The dataset is heavily reliant on scraping and copying images from commercial image-hosting services. The website for the dataset states that it is distributed under creative commons CC-BY 4.0 license, and that the images are protected by copyright.³³ Some sources include Getty Images and Adobe Stock, and shopping sites such as Pinterest and Squarespace. User-generated content was a huge source of images, including the plaintiffs’ websites, and sites like Flickr, Wikimedia, and DeviantArt.³⁴ The complaint estimates that at least 3.3 million images from DeviantArt are in the LAION-Aesthetics dataset.³⁵

Of particular concern to the plaintiffs is the DeviantArt product DreamUp, a subscription-based product that lets users “create AI art knowing that creators and their work are treated fairly.”³⁶ However, as the plaintiffs have attested in interviews, DeviantArt did not negotiate licenses for any of the training images and is not sharing any of the revenue from the DreamUp app.³⁷ Interestingly, one of the phrases that can be used on the DreamUp app is “In the style of _____” (insert name of artist). The image produced will then have a style that is similar to the indicated artist. After the DeviantArt data scrape became public knowledge, the website updated its terms of service to allow for data scraping and machine learning activities.

Unlike the *GitHub* case, the plaintiffs in *Andersen* have claimed direct and vicarious copyright infringement. Plaintiffs cite violations by the defendants and the defendants’ end users of the five rights guaranteed by copyright: reproduction, distribution, display, creating derivatives, and performance.

In addition, plaintiffs cite violations of the Digital Millennium Copyright Act (DMCA), due to defendants removing copyright management information (CMI) from the reproduced artworks. Because the apps can mimic the style of a particular artist, which requires entering the artist’s name into the app, plaintiffs are claiming statutory and common law right of publicity violations. Finally, there is a claim of unfair competition tacked on to all the above causes of action.³⁸

This case is just getting started. The defendants’ answer is due April 18, 2023 and plaintiffs’ opposition in response to defendants’ motions is due in June.

***Getty Images, Inc. v. Stability AI, Inc.*, Case 1:23-cv-00135-UNA (D. Del.).**

For those that are not familiar with it, Getty Images Holdings is an American-British visual media company and supplier of stock images, editorial photography, video, and music. Their media library contains over 477 million assets.³⁹

In January of 2023, Getty Images announced a lawsuit against Stability in the UK, and on February 3rd followed with another suit in the Delaware District Court. Getty alleged that Stability copied over 12 million Getty images to train Stable Diffusion, without license.⁴⁰

Getty Images’ visual assets are accompanied by titles, captions, watermarks bearing the Getty Images logo with credit information, and metadata containing copyright information. So how did Getty know its images were copied to train Stability’s product? Because many images produced by any

one of the apps that use Stable diffusion contain a mutilated Getty Images Watermark.



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Why does this happen?

The images included in the LAION dataset copied many Getty images and the text associated with them. When a user inputs a phrase that is similar to scraped text, it pulls up the images associated with that text, subtracts the noise, and generates an image based on source images. If someone inputs text similar to what was on the Getty images, it looks at Getty Source images, and generates similar features, including the watermarks.

The images below are a good example of this process: The image on the left is an original Getty image. The image on the right is a Stable Diffusion image. The Diffusion image pulled from several soccer images, but the Getty watermark must have been featured in many, because a warped version appears over a soccer player's legs.



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Getty has the copyright registration or exclusive license for most of its collection. Not surprisingly, it is claiming the maximum statutory damages of \$150,000 for each scraped work.⁴³ Similar to the plaintiffs in *Andersen*, Getty is also claiming violation of the DMCA due to removing copyright management information. Because of the mutilated watermarks it is claiming trademark infringement and dilution. Getty also claims unfair competition and deceptive trade practices, making the argument that the Stable Diffusion images are designed to directly compete with Getty Images, and hurt its market of image licensing.⁴⁴

Similar to *Andersen*, this case is still in the early stages. The defendant's answer is due April 18, 2023, and the plaintiff's response to any motions is due in June.

ARE AI-GENERATED IMAGES PROTECTED UNDER FAIR USE?

OpenAI, Github, and Stability AI⁴⁵ claim that their use of code or images is protected by fair use. Several recent cases may support this argument.

Authors Guild v. HathiTrust, 755 F.3d 87 (2d Cir. 2014) and *Authors Guild v. Google*, 721 F.3d 132 (2d Cir. 2015).

In two cases, one against the HathiTrust digital library, and one against Google, the Authors Guild and other plaintiff groups claimed that its members' work was infringed through use of books scanned by Google. In both cases, the court found fair use.

The HathiTrust Digital Library is a spin-off of the Google Books Library Project where the libraries of the University of California system were digitized by Google and then combined by HTDL. HathiTrust's aim was long term preservation of the collection. The main functionality of the collection is a full-text search. Additionally, HathiTrust's collection is available for students with print disabilities by offering them secure system access for screen readers.

The court found that the creation of a full-text searchable database is a quintessentially transformative use because it does not supersede the objectives or purposes of the original creation. A search engine had been deemed transformative before in *Kelly v. Arriba Soft*⁴⁶ and *Perfect 10 v. Amazon*.⁴⁷ The court also found the disability access transformative and the non-commercial preservation transformative. Because the use was held transformative, the court stated that the second prong of the fair use test, the “nature of the copyrighted work” need not be considered.

The *Authors Guild v. Google* centered on the legality of the Google Book Search library project launched in 2003. Copyrighted works were scanned whole, but only a snippet view of scanned pages was available to users. Authors protested the use of their work without their permission, and a class action settlement was filed in 2005, settlement talks lasted for years and ultimately fell through, and the case picked up again in 2012. Ultimately the Second Circuit held that Google’s use of the works was fair use. In the court’s opinion the use was transformative, advanced the progress of science and the arts, was a valuable research tool, and enhanced sales to the original authors.

Google LLC v. Oracle America, Inc., 593 U.S. ____ (2021).

In 2012, Oracle sued Google for copyright infringement because Google copied roughly 11,000 lines of source code from then Sun Microsystems’s Java SE to build Google’s Android mobile operating system. The code was part of an application program interface, or API. Nearly a decade later the case reached the Supreme Court, and the Court issued an opinion in 2021. Justice Breyer wrote for the 6-3 majority. The Supreme court did not rule on whether API was copyrightable but held that if it was then Google’s use of the API code was fair use.

The Court reviewed the four factors at issue in fair use: 1) the nature of the copyrighted work; 2) the purpose and character of the use; 3) the amount and

substantiality of the portion used; and 4) the effect of the copying in the market for or value of the copyrighted work.

Regarding the nature of the copyrighted work, the Court found that the copied code was declarative, rather than implementive, and analogized the code to the Dewey Decimal System. This code was functional in nature, but also “inherently bound together with uncopyrightable ideas (general task division and organization) and new creative expression (Android’s implementing code)”. The Court noted that this was further from the core of copyright, and that this factor favored fair use.

Regarding the purpose and character of Google’s use, the Court found the use transformative. Key to the decision was that Google’s use furthered the development of progress of science and the arts by creating a new platform that could be used by programmers.

Regarding the amount and substantiality of the portion used, the Court compared the roughly 11,000 lines of code to the total 2.86 million lines in the final product, which amounted to 0.4 percent and was minimal.

Regarding the effect on the market, the Court considered the amount of money that the copyright owner might lose, the source of the loss, and the public benefits the copying will likely produce. The Court found that evidence at trial demonstrated that Google’s Android platform did not harm the potential markets for Oracle’s Java SE, and that Oracle had been unable to move into the phone market. The Court found that the lower court’s fair use determination meant that Sun would have had difficulty entering the smartphone market, even if Google had not used portions of the Sun Java API. As for the public benefit, the Court found that a holding for Oracle would create a limiting effect on the future creativity of new programs.

The above cases indicate that if an otherwise infringing use grows big enough, fast enough, and if

it can be conveniently used by enough people, then a court may hold it to be fair use because it served the Copyright Act's purpose of promoting the progress of science and useful arts. AI-generated art is certainly convenient and has progressed very quickly.

THE US COPYRIGHT OFFICE'S POSITION ON AI-GENERATED ART

The Copyright Office has not yet weighed in on whether AI-generated art may be fair use. However, it has taken a position on the very nature of the art. Currently, the Office's position is that AI-generated art is not eligible for copyright. But this may soon change.

In a recent communication, the Office terminated the copyright in the artwork to the comic book "Zarya of the Dawn."

In September 2022, the author Kris Kashtanova registered the copyright for the comic book, featuring artwork that was generated by Midjourney. In late October, the Office initiated cancellation proceedings due to Kashtanova's use of Midjourney in her creative process. In their response, Kashtanova's attorneys described the creative process that Kashtanova used to generate the Midjourney artwork. Comparing her to a photographer, and Midjourney to a camera, the attorneys described the prompts that Kashtanova created in order to generate the Midjourney imagery. The prompts themselves were iterated on many times in order to create the final image that was used in the comic book. After the images were generated, Kashtanova arranged and cropped the images to produce the final version of the graphic novel.⁴⁸

This was not enough for the Copyright Office. On February 21, 2023, the Office canceled Kashtanova's copyright in the artwork generated by Midjourney. In its response, The Office explained that in her original registration application, Kashtanova did not disclose that artificial

intelligence was involved in the creation of the artwork.⁴⁹ The Office agreed that the text of the comic book and the arrangement of the images was worthy of copyright protection, but the individual images themselves were not. The Office took the position that because Kashtanova could not predict the images that Midjourney produced, instead producing hundreds of images and selecting several, that Kashtanova was ultimately not the author of the images for copyright purposes. The Office cited *Burrow-Giles Lithographic Co. v. Sarony*⁵⁰ to the effect that the "author" of a copyrighted work is the one "who has actually formed the picture," the one who acts as "the inventive or master mind."⁵¹

Ultimately, Kashtanova's original copyright registration was cancelled, and a new registration issued for the text and arrangement of the images only. But that is not the end of the Copyright Office's position on AI-generated art.

On March 16th, the Office launched a new initiative to "examine the copyright law and policy issues raised by artificial intelligence (AI), including the scope of copyright in works generated using AI tools and the use of copyrighted materials in AI training."⁵² Upon request from Congress and the public, the Office has scheduled a number of public listening sessions with artists, AI developers, and lawyers with expertise on this topic. The listening sessions will allow the experts to weigh in on their goals and concerns regarding AI-generated artwork. Later in 2023, the Office will also publish a notice of inquiry soliciting public comments regarding copyright issues arising from the use of AI.

CONCLUSION (?)

This is an area of copyright law that is just getting started. AI-generated art does not neatly fit into any existing copyright areas. Now that the technology has been created, it is unlikely that it will be put away no matter the outcome of any of the preceding cases. One way or another, AI-generated art is here to stay. ✱

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