

Comment on Artificial Intelligence and Copyright

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I am a full-time freelance artist and illustrator (working with Procreate and oil on canvas). I appreciate the opportunity to voice my concerns about AI here. Due to my professional expertise as an artist, I will comment specifically on AI image generators. I cannot speak for areas impacted by AI tech other than visual art, but I assume many aspects are similar.

I'll be answering the following two questions and provide additional final thoughts at the end:

a1. As described above, generative AI systems have the ability to produce material that would be copyrightable if it were created by a human author. What are your views on the potential benefits and risks of this technology? How is the use of this technology currently affecting or likely to affect creators, copyright owners, technology developers, researchers, and the public?

2. Does the increasing use or distribution of AI-generated material raise any unique issues for your sector or industry as compared to other copyright stakeholders?

18. Under copyright law, are there circumstances when a human using a generative AI system should be considered the "author" of material produced by the system? If so, what factors are relevant to that determination? For example, is selecting what material an AI model is trained on and/or providing an iterative series of text commands or prompts sufficient to claim authorship of the resulting output?

INTRODUCTION

In my opinion, the benefits and risks of AI technology shouldn't be part of a zero-sum game, but unfortunately, they are. Generally speaking, technological progress has always come with benefits in the same categories: improved physical and mental health, more prosperity, more freedom for all. But technological progress has also always come with risks in the same categories. In my perception, there is a LOT of talk about the benefits of AI technology for all. And it's increasingly everywhere: in ads, in videos, in higher education, in companies, in private. We need to be able to have serious conversations about both benefits and risks simultaneously without being downplayed as fearmongering or anti-tech. The onset of video cameras, for example, brought about progress as well as abuse of this particular technology, and their use needed to be regulated. Personally, I love technological progress – but I won't ignore the harm done while focusing blindly on the benefits only.

For this reason, I will focus on the risks of AI technology and the negative impact it has had, and not mention the benefits here.

QUESTION A1. As described above, generative AI systems have the ability to produce material that would be copyrightable if it were created by a human author. What are your views on the potential benefits and risks of this technology? How is the use of this technology currently affecting or likely to affect creators, copyright owners, technology developers, researchers, and the public?

AI technology companies like Midjourney and Stable Diffusion have been successful almost solely because the entire business model is based on rights violations and theft. As a result, they are already harming and removing artists' economic opportunities through no fault of their own.

Not a single artist whose protected work was used to train AI software has seen one penny from the software companies listed above who coincidentally also made billions with the artists' art. If you asked one of these companies to provide their services completely for free (including no ads, no sponsorships, no monthly payments), it's very reasonable to assume they would decline. Instead, they would probably argue that as commercial businesses, they've put resources, time and money into their work and therefore deserve their financial success.

But these companies have used copyrighted material all over the internet (not only limited to royalty free stock material, as is the case with music) without permission or offering reimbursement. They have therefore committed a form of digital theft. The difference between digital theft and physical theft is the physical form of the stolen or misappropriated object. Images on the internet exist "only" in pixelated form – but exist physically, nonetheless. If I made a photocopy of a living artist's finished painting on canvas and sold that picture without the artist's permission, that would be a copyright violation. If I stole an artist's painted canvas, it would be considered theft. What's different between these two cases and the commercial use of large data sets of copyrighted material, other than the scale and technology used?

Therefore, AI image generators are largely unethical business models that have impacted and will continue to impact the livelihoods and careers of working artists through absolutely no fault of their own. Here's just one example: numerous artists in various parts of my industry like book illustration have complained about a drastic decline of jobs or commissions because many writers have resorted to using AI generated images on book covers. Who profits? AI software companies and writers. Who is being (economically) harmed? Artists on whose backs those data sets were created.

Had Midjourney or any other companies created profit-oriented databases using art and images through ethical methods, I personally wouldn't have a problem with the whole thing. That way, AI technology could have been beneficial to ALL as opposed to creating economic harm for artists in the name of human progress. But of course, if that had been the case, they wouldn't have been able to become billion-dollar companies so quickly.

QUESTION 2: Does the increasing use or distribution of AI-generated material raise any unique issues for your sector or industry as compared to other copyright stakeholders?

Yes. For example, regarding data scraping, there is a big double standard between the music industry and the fine arts industry, which results in the different treatment of copyrighted human artistic works.

AI tech companies face much higher barriers in scraping copyrighted music. They can only train on royalty free music. Because owned music is very strictly protected, and they would face lawsuits otherwise- and rightly so.

Human-made visual art and photography have not provided similar barriers in preventing AI companies from creating profit-oriented datasets. Therefore, visual datasets have not received the same careful treatment by AI companies simply because it was easier for AI tech companies to scrape visual art.

The US Copyright Office itself states that *“copyright serves all of us, incentivizing creation and enriching our culture.”* However, I have spoken with and read from visual artists who are increasingly concerned about even publishing their human-made creations on the internet for fear of being made obsolete because of AI tech. Some have even talked about quitting their art profession or hobby altogether, and some have already done so. The rise of copyright-protected AI generated images could in the long run stifle the creative output of human artists.

Question 18. Under copyright law, are there circumstances when a human using a generative AI system should be considered the “author” of material produced by the system? If so, what factors are relevant to that determination? For example, is selecting what material an AI model is trained on and/or providing an iterative series of text commands or prompts sufficient to claim authorship of the resulting output?

In my opinion and that of many fellow artists, AI generated images with no or barely visible human creative touch should never be granted copyright because that would mean harm to artists and also be illogical and unjust. (Alternatively, particular text prompts themselves might be granted copyright ownership as they are a direct result of human creative effort. However, I’m not an authority on copyright in writing though, so I can’t comment on that.)

First off, a side thought: the US Copyright Office is “committed to (...) promote creativity and free expression ***for the benefit of all.***” Granting copyright ownership to AI images while ignoring the violated copyright of human artists is in direct opposition to the US Copyright Office’s mission statement. Why? Because even if we agreed on the ethics of granting copyright to AI-generated images, the artists of the stolen human art should first be reimbursed or compensated for their violated copyright ownership. It makes no sense to grant copyright protection to an AI image before making human artists whole, especially when that same image only exists because copyrighted material was mined without respecting the original copyright holders.

Secondly, creativity alone is not enough to warrant copyright. I can’t copyright a unique creative idea I’ve had in my mind just because I had it. Some type of effort is required – with caveats. That was the whole original idea of copyright, and I quote from your website: *“Copyright is a type of intellectual property that protects original works of authorship as soon as an author fixes the work in a tangible form of expression. (...) copyright protects expression, and never ideas, procedures, methods, systems, processes, concepts, principles, or discoveries.”*

Suppose an art director at a gaming company gives a prompt to a concept artist they hired and now waits for the artist to finish the tangible piece of art. Does the finished piece automatically give copyright protection or usage rights to the art director or game company, just because they gave prompts to the artist? No, they don’t. The art director or gaming company wouldn’t be allowed to use the art without the agreement of the artist (e.g., through a licensing agreement plus a fee). Even if the artist sent over the finished work for feedback – unless there is an agreement, the artist holds the rights to the image until the agreement is reached.

It's almost literally the same with AI. A person types a prompt. The machine spits out a randomized amalgamation from a gigantic data set. If the final image happens to be identical to the person's imagination while typing the prompt, that's because of the algorithm – not because the imagination impacted the algorithm. I believe it's essential to make this causal distinction between the maker of the result and the prompt giver. What would happen if one identical prompt were entered twice in a row to create two separate new images? The outcome would be random and different – not purposeful the way an individual creates art by drawing, painting, or sculpting.

If anything, people claiming a copyright on an AI creation after entering prompts should only be able to retrieve the image after paying some sort of licensing fee directly to the artists involved in the training data set. (Not equivalent to a subscription fee to the software program.) Which is clearly unrealistic due to the huge amount of copyrighted material enabling the creation of that AI image.

Lastly, I want to bring up the importance of human inspiration in copyright. I've heard many voices highlighting what they believe are similarities between human artistic inspiration and AI images training on data sets. But humans are not machines. Machines are not human. By that same token, we could treat computer processors the exact same way as human brains just because they're comparable in some aspects. Renowned artist Karla Ortiz broke down the difference in her article "[Why AI Models are not inspired like humans.](#)"

In my opinion, removing the human factor in copyright-related matters removes all meaning from the concept of copyright and its original purpose of protecting HUMAN creativity. Keeping the focus on human effort in final works (as opposed to random computer-made results) should remain a necessary component in obtaining copyright. Because after all, copyright is a social concept that we use to show each other that we value human creations. The animal world doesn't consider copyright ownership and creativity because it's not what's important to animals. Computers or cameras don't care about copyright ownership because that's not how they work.

It is, however, what makes our human world.

Once we start granting copyright to machine output just because humans typed a few buttons, the notion of copyright will dissolve very quickly, in my opinion. It's like patent ownership: A patent acts as an incentive for invention. Why? Because that's simply how humans work and progress.

But only protecting creativity reasonably is how we make true, lasting progress – as opposed to making quick changes through unethical methods.

Thank you for your time.