Plaintiffs Sarah Andersen, Kelly McKernan and Karla Ortiz filed a class action lawsuit against Stability AI, DeviantArt, Inc. and Midjourney, Inc., alleging that Stable Diffusion was “trained” on plaintiffs’ copyrighted works to generate images in their art styles. Plaintiffs believe that this constituted direct and vicarious copyright infringement, violation of the Digital Millennium Copyright Act (DMCA) and the statutory and common law right of publicity, unfair competition and breach of contract. The defendants moved to dismiss.

The court limited the scope of the plaintiffs’ claims to a set of 16 works belonging to Andersen because of their failure to register any of the other works with the Copyright Office, but did not dismiss the copyright allegations because Andersen did not specify which of her works were used as training images for Stable Diffusion.

Instead, the court found that it was enough for Andersen to point out the search results for her name on haveibeentrained.com (a website showing users whether their works have been included in AI training datasets) as they were grounds for the court to find it plausible that all of Andersen’s works that were registered as collections and were online were scraped into training datasets.

Court denied Stability’s motion to dismiss the claims of direct infringement because it found that the plaintiffs’ allegations were sufficient to plead direct infringement.

However, their claims against DeviantArt were not as strong. Plaintiffs argued that DeviantArt engaged in direct infringement by:

1. “distributing Stable Diffusion, which contains compressed copies of the training images, as part of…DreamUp”
   1. The court found it highly unlikely that a theory like this could prove allegations that the generated images are highly similar to the training images (this is how I interpreted the part “the court found it highly unlikely that such a theory could work absent allegations that the output images are substantially similar to the training images.”
   2. The court still granted plaintiffs the opportunity to amend so that they could clarify the extent to which the generated images look like the training images
2. “creating and distributing their DreamUp,” which plaintiffs claim is an “infringing derivative work” in and of itself
   1. Court found that plaintiffs’ complaint didn't adequately explain how Stable Diffusion actually stores and uses the training images
      1. The complaint was unclear as to whether Stable Diffusion made copies of copyrighted works or whether it used “statistical and mathematical methods” to capture concepts from the training images
   2. Court directed plaintiffs to amend their complaint to clarify their “definition of and theory with respect to the inclusion of compressed copies of Training Images in Stable Diffusion” and to “provide more facts that plausibly show how DeviantArt is liable for direct copyright infringement when … DeviantArt simply provides its customers access to Stable Diffusion as a library.”
3. generating and distributing output images that infringe on the derivative work

The court also found the direct infringement claims against Midjourney to be insufficiently detailed because the plaintiffs didn't offer what training Midjourney undertook for its AI platforms and as such the court couldn't determine whether Midjourney had improperly used their copyrighted images. The plaintiffs’ other theories of liability against Midjourney were also insufficient for the same reasons discussed with respect to their claims against DeviantArt, so the court accordingly dismissed this claim against Midjourney with “leave to amend.” (?)

The court similarly dismissed the claims of vicarious infringement against DeviantArt and Midjourney because such claims require an underlying act of infringement. The court also dismissed such claims against Stability with leave to amend because the complaint didn't offer plausible facts about Stable Diffusion’s “compressed copies” of training images and how they might be present in DreamStudio, but the court said that even if the plaintiffs did offer plausible facts, there would still be potential defects in the vicarious infringement claim because the plaintiffs did not identify how the defendants’ AI platforms were used in an infringing way by third parties.

The DMCA claims centered on whether any of the defendants had removed copyright management infringement (CMI), or textual information that identifies the title, author and copyright owner of a work, from any of the plaintiffs’ works knowing that this would cause, allow, help or hide copyright infringement. The defendants argued that the complaint didn't allege what CMI had been altered or removed, if any, with which the court agreed. As such, the court ordered the plaintiffs to amend the complaint with information about the particular types of CMI omitted or changed, which defendants did so and when.

Parts left:

Unfair competition claim:

The court favored to dismiss for a variety of reasons:

1. Any unfair competition claim based on implied copyright violations was invalidated by the Copyright Act
2. The claim was also based on the Lanham Act (?) and as such it required dismissal because the complaint “ did not allege any plausible facts ‘in support of how a user could be deceived that one of the named plaintiffs was the origin of an Output Image, sponsored the Output Image, or approved of the Output Images such that their goodwill was injured or they suffered other specific injury.’”
3. The plaintiffs failed to specify how each of the defendants’ AI products uses the plaintiffs’ names or associates work with the plaintiffs
4. The common law part of the unfair competition claim was dismissed because there wasn't enough clarity on what exactly the defendants were accused of misusing/misappropriating

Breach of contract (only against DeviantArt):

DeviantArt breached its ToS and Privacy Statement by:

1. Sharing plaintiffs’ and “the class’” personal data with unauthorized 3rd parties in violation of the Privacy Statement
2. Selling and distributing that personal data in “contravention of…DeviantArt’s policies” (?)
3. Use of that personal data after the Privacy Statement explicitly stated that it will be deleted
4. Use and distribution of that personal data outside of the constraints set by the Privacy Statement

The court dismissed this claim because the plaintiffs didn't specify any provisions of DeviantArt’ ToS or Privacy Statement and didn't identify how the actions of 3rd parties like Stability would result in a breach of contract by DeviantArt. The court stated, “[i]f plaintiffs attempt to amend this claim, they must identify the exact provisions in the T[erms of Service] they contend Deviant Art breached and facts in support of breach,” and, “[t]o the extent plaintiffs rely on provisions that appear to protect or benefit DeviantArt but not the users, or contracts DeviantArt entered into with other entities, plaintiffs must identify those precise provisions …, but also facts supporting plaintiffs’ theory that they are intended third-party beneficiaries of those provisions.”

Additional defenses and motions from defendants:

DeviantArt wanted to dismiss and strike the plaintiffs’ right of publicity claims based on the 1st Amendment (the court needed a fuller “evidentiary record” before the defense could be “adjudicated”) and California's anti-SLAPP statute (the court postponed ruling on the motion to strike until the plaintiffs had realleged their right to publicity claim). Similarly, the court denied Midjourney’s motion to strike the plaintiffs’ class action accusations as early at the pleadings stage

Summary: <https://www.loeb.com/en/insights/publications/2023/11/andersen-v-stability-ai-ltd>