

Copyright Law in the Age of Machine-Generated Art

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Abstract

Generative-AI-art algorithms, most notably Stable Diffusion, DALL-E, and Midjourney, have escalated a long-sidestepped conversation concerning copyright's applications to digital-born media. While much discourse surrounding AI art technologies revolves around their infringement of traditional artists' work, recent movements toward artificial generalized intelligence necessitate conversations about how to adapt the existing copyright jurisprudence to an increasingly digital world. I propose that, in light of AI art's automated nature and its shaky claims to originality, machine-generated art should be delegated to the public domain immediately upon creation. Rather than straining creative licensing to encompass hyper-digital spaces, increased legislation regarding content moderation and defamation is needed to govern emergent technologies that open up unprecedented possibilities for misrepresentation and impersonation.

Copyright Law in the Age of Machine-Generated Art

While many innovation-minded efforts have set out to declare visual art a defunct field, few technologies have threatened to decimate art as thoroughly as has generative AI. These text-to-image models, best represented by Stable Diffusion, DALL-E, and Midjourney, are trained to generate artwork from datasets of prepublished pieces without regard to these works' copyright protections, infringing upon the labor of sweat-and-blood creatives and posing unprecedented challenges for copyright law. Yet as AI steadily gains traction in professional and commercial spaces, it appears that AGI is on track to becoming reality. A more pressing question, then, becomes: should AI art itself be deemed an independent creation and receive protections under copyright? By virtue of its exploitative origins, AI art is not owed the benefits of being copyrightable. Policymakers should instead consider works authored by algorithms for immediate entry into the public domain, owing to their untenable claims to authorship and misalignment with the utilitarian and economic incentives that copyright law is intended to uphold.

At first glance, machine-generated art fulfills the definition of derivative work [Work based on or derived from one or more preexisting works. With the addition of “new original copyrightable authorship,” derivative works are protected under copyright]. and is therefore liable to receive protection under copyright law. Yet deeper inspection into AI art's dependency on ready-made art complicates its claims to creativity and originality, making this an exceedingly generous legal denomination that AI art is undeserving of. In 1983, *Gracen v. Bradford Exchange* addressed a series of porcelain plates painted with scenes from *The Wizard of Oz* that sought copyright protection. It was ruled that “superimposing one copyrighted photographic image on another” was not original, an assessment that compromises AI art's—essentially a compilation of superimpositions—copyrightability. Though perhaps a more stringent application of copyright law, *Gracen v. Bradford Exchange* nevertheless adheres to the U.S. Copyright Office's criteria for copyrightability, which maintains that protection rights are extended to original works that are independently created and possess a “modicum” of creativity. Generative AI's fulfillment of this latter criteria is doubtful. As it stands, AI employs no creative input from the end user on a visual forefront, and proponents of the technology who herald AI's artistry repeatedly mistake efficiency for creativity; dilettantes who have only ever observed a completed piece fail to appreciate the skillset necessitated by the traditional creative process or its potential for

catharsis [At a launch party for StabilityAI in October of 2022, CEO Emad Mostaque reportedly proclaimed that “The world has been creatively constipated and we’re going to let them poop rainbows.”]. Furthermore, copyright law does not consider titles, phrases, and other “variations of typographic ornamentation” for protection. As such, AI art’s claims to copyrightability are doubly precarious: its visual components are outsourced, overlaid, and bear no inspiration from the end user, while the user’s sole original contribution to the end product, their inputted text-to-image prompts, is not eligible for legal protection.

Bestowing AI imitations with legal rights would validate works generated with malicious intent that are potentially ruinous for artists’ livelihoods. Sarah Andersen, an artist leading the charge in a lawsuit against Stability AI Ltd., Midjourney Inc., and DeviantArt.Inc, has faced this reality firsthand. Her popular webcomic “Sarah Scribbles” was harassed by alt-right readers in 2016, who replicated her handwriting in a typeface that they then used to edit panels to reflect violently racist, neo-Nazi ideologies unreflective of Andersen’s own political leanings. Andersen reportedly started receiving late-night calls from embittered fans who were unaware her art had been co-opted and “got the distinct impression that the alt-right wanted a public meltdown.”

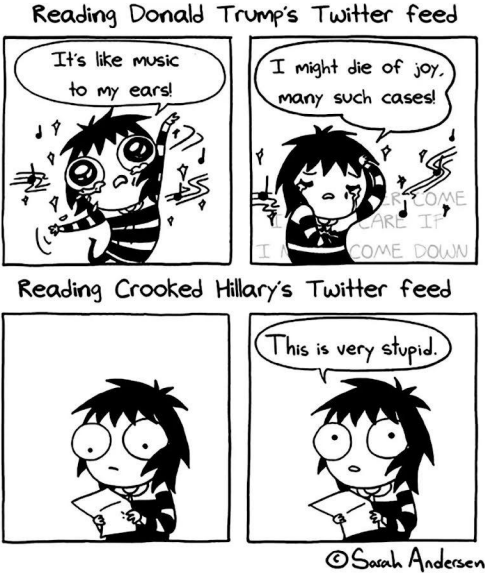


Fig. 1. Reading Donald Trump’s Twitter feed, 2017.

“I see a monster forming,” Andersen wrote in her opinion piece on AI art for *The New York Times*. Extending copyright to imitations like the one above would allow them to be legally recognized as standalone pieces and protect the AI user from being punished for

plagiarization— despite having alienated the original artist’s creativity from their work. Such a debacle may sound familiar to those following the coinciding rise in deepfakes, where fans have staunchly objected to disseminating parodies of celebrities’ voices and appearances, a phenomenon that has the potential to put not only their careers, but also their reputations, in jeopardy. As Andersen puts it, these AI algorithms are “trying to program a piece of [her] soul,” and assigning an institutional endorsement of originality to regurgitations made to ladle derision upon creative professionals’ work, identity, and values would be a moral failure of the legal system.

Furthermore, extending copyright protection to machine-generated art fulfills neither copyright law’s economic rationale nor its primary objective of benefiting the public, making AI art’s endowment with property rights not only unethical but also an ineffectual decision. Copyright law is guided by a utilitarian philosophy. The idea is that authors, when granted a limited monopoly, will be more incentivized to output works that prove to be inspirational, provocative, or comforting, ultimately bringing benefit to the public. These twofold intentions behind copyright law don’t apply to machine-generated art the same way they do to traditional; considering how the costs of production and barriers to entry for AI art are practically nonexistent, their creation does not warrant a limited monopoly. The energy exerted in order to secure rights for machine-authored work would require much of the costs of copyright protection but procure little of the benefit because generative works operate on a “first-to-market” incentive—their worth is determined by the number of views, page visits, and other forms of digital traffic they incite—a playground for competition that moves forward faster than the copyright office can review content and regardless of whether a piece is copyright protected. While copyright law’s purpose is to encourage creators to make products that promote the public good, previous arguments indicate that AI art can only be described as disruptive. The social strata that AI art occupies is one it already thrives in; as such, institutions would be better off endorsing other content—say, traditional art—rather than unnecessarily making space for generated art in the existing jurisprudence.

In light of the rational and moral difficulties encountered when applying copyright law to AI art, automatically delegating generated artworks to the public domain is the most logical course of action. The public domain, Copyright Commons, and other “copyleft” denominations open up works to creative reuse for all interested users without prompting

them to wade through royalties or legal encumbrances, a bona fide art library that enables users to access and stimulate human creativity in ways reminiscent of the claims made in AI art algorithms' mission statements. Indeed, on a digital stage where user-generated social platforms accelerate production and blur the line between author and audience, "sharing"—in both the distributive and cost-free sense of the term—dominates users' consciousness while "business"—born out of the arduous, obsolete producer-to-audience distribution model—recedes. While this is the case, AI art enthusiasts interested in monetizing their work should keep an open mind; the initial machine-authored work cannot be copyrighted under this model, but derivative works inspired by that AI piece can, leading AI to be a launchpad for ideas and to take a more mediatory role between technology and human ability. Nevertheless, this is not to say that the public domain is without issues. The ability to distinguish between human-authored and machine-authored works will prove to be increasingly difficult, and a pressing concern emerges in that commercial reuse is permitted in copyleft spaces, opening up defamatory AI works to being used for profit by a limitless number of entities. But the fact remains that imposing copyright law as it exists today over every digit and pixel of the datafied world is not a viable solution. Policymakers should not focus on protecting generated works, but rather reinvent creative licensing and amplify legislation concerning slander and libel so as to accommodate for a digital space that has long rendered traditional ideals of authorship and creativity obsolete.

Generative art algorithms' entrance onto the AI scene have escalated the need for a long-delayed conversation about copyright protection in the digital age. Not only does AI art sit poorly with copyright law's existing clauses, but it circulates in a near-unregulatable digital space and defies the economic, utilitarian, and moral rationales behind the legal denomination. Given this, an attainable solution would be to consider AI art for immediate entry into the public domain, a space built upon tenets of universal access and creative and commercial reuse. While such an action plan conveniently absolves the current jurisprudence of the need to ruminate creative rights and the way they're enforced, policymakers should consider that more practical avenues toward equitable creative licensing in the long run necessitate an examination of today's highly-digital social stratas and what ways copyright law can reflect this reality.

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Biography

Grace Wang is an undergraduate student at UC Berkeley studying Economics and Data Science. She is interested in how generative AI can be ethically introduced into creative fields that are traditionally modes of human expression.

