

Artists v. AI Images

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by Case Collard and Kristina Maude

AI technology is developing at a tremendous pace and AI image creation is no exception. AI images are even winning art contests. Since AI generates artistic images modeling others' work, human artists are asking "is it copyright infringement for AI technology to use my work to learn how to create images and produce AI works?" The Northern District of California may answer that burning question.

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In January 2023 artists Sarah Andersen, Kelly McKernan and Kayla Ortiz filed a class action copyright lawsuit against Stability AI Ltd., Midjourney, Inc., and DeviantArt. The



case is listed as *Andersen v. Stability AI Ltd*, U.S. District Court for the Northern District of California, No. 3:23-cv-00201. The Plaintiffs contend that AI used copyrighted works without their permission to help the technology learn how to copy and analyze works to produce new images. They also contend that the AI technology creates unauthorized derivative works. Put simply, the technology allows a user to type in a prompt of what type of art they want, in what style of artist, and can request it to have certain subjects in the picture. The artists argue that this essentially creates derivative works of their art. Other counts include infringement of the Digital Millennium Copyright Act, state law claims, and infringement of the right to publicity.

In April, each Defendant filed a motion to dismiss the artists' complaint. The Defendants' argue that the artists failed to identify a "single allegedly infringing output image" that was allegedly used by the Defendants to train their system. The Defendants further argue that the artists cannot show any single image created by AI is substantially similar to an artists' own copyrighted works. Most recently, on June 2, the Plaintiffs' filed oppositions to each of the Defendant's motions to dismiss. A judge has yet to publish a decision on the motions to dismiss.

Defendant Midjourney argues that if the court were to resolve the claims of direct

copyright infringement, it would have to proceed on an image-by image basis to determine which works are protectable and which are considered fair use. The fair use defense to copyright infringement allows a creator to use a work even if unauthorized and it is still not considered copyright infringement because it is a “fair use” of the copyrighted material. To determine if a work is fair use, a court will look to four factors: 1) the purpose and character of the use, 2) the nature of the copyrighted work, 3) the amount and substantiality of the work used in relation to the whole and, 4) the effect of the use upon the potential market for the work.

The defendants may focus on the first and third factors. When looking at the purpose and character of the use, the Defendant’s may point out using any copyrighted works is still transformative in nature – the AI technology is generating new images that differ from the original works. Regarding the amount of the prior work used, the Defendant’s will likely argue that the material copied is an insignificant portion of the input material used by the AI program to generate an image. However, the Plaintiff’s will likely argue that AI will divert sales because the general public can now use AI as a substitute for buying their art. These decisions will be pivotal to determine if works generated through AI are copyright infringement or fair use.

This case will have important results for several parties. For artists, the concern is that AI driven image creation may steal from their livelihood. Using AI, anyone can get an image that looks like their favorite artists by providing the system with a clear prompt.

For the Defendants, this represents a landmark lawsuit that will determine if and how their company will be allowed to leverage AI going forward. For Stability AI, it will determine if their new AI technology will be able to be utilized and to what extent. For Midjourney and DeviantArt, it will answer if they are able to use Stability’s technology on their platforms to allow users to create their own images using AI technology.

This lawsuit represents some of the first litigation to address key questions around AI image creation. As artificial intelligence comes more into the mainstream, it will be up to cases like these to help determine how AI images will be regulated, used, and to what extent. The rest of the world will be watching as this case will send some of the first signals for how the U.S. judicial system may view AI and copyright infringement claims.