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Annie Planker

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The Legal Implications of AI Generated Artwork

BY ANNIE PLANKER / ON MARCH 8, 2023

AI has been infiltrating the art world – one (key)stroke at a time.

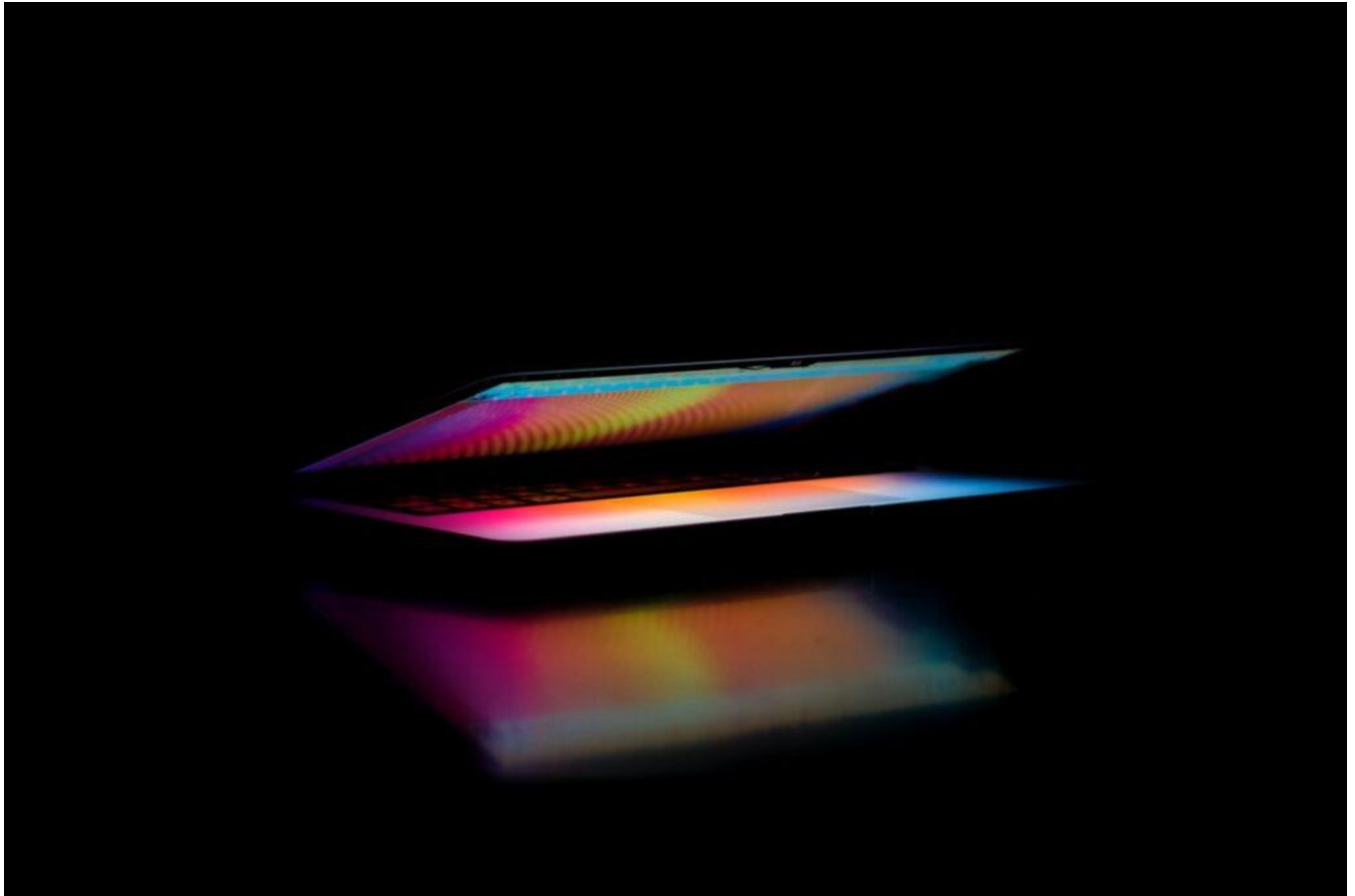


Photo by Lenin Estrada on Pexels

Recently, artificial intelligence (AI) artwork has gained tremendous attention in the art world and beyond. Though digitally generated AI art platforms have been available to creators for decades, recent programs have made it possible “to create complex, abstract or photorealistic works simply by typing a few words into a text box.”¹ Because of these new advancements, AI art has widely varied in both form and function: from self-portrait TikTok trends² to high end galleries and art competitions.³

One of these recent AI technologies, an app called DALL-E 2, was released in 2022 and “turns text descriptions into hyper-realistic images.”⁴ The app is capable of producing images in various artistic styles and can create pieces from abstract,

conceptual terms or depict specific real-life scenarios with only the clicks of a keyboard. Another app, Midjourney, used similar technology to create artist Jason M. Allen's, "Théâtre D'opéra Spatial," which won a blue ribbon in the Colorado State Fair's annual painting competition.⁵

However, despite the trending popularity and improving technology of apps like DALL-E 2 and Midjourney, not all the attention surrounding the artwork has been positive. For example, detractors have expressed concerns that AI art programs could be used to create "synthetic propaganda," "hyper-realistic deepfakes," and even "nonconsensual pornography."⁶ More obvious arguments against the work have been made since Allen's work won its blue ribbon prize; many contend that computer-generated art is a poor substitute for more traditional art and are unhappy with the idea that AI art might outperform and outrank this artwork for prizes and openings. Some individuals have even claimed that AI art is "actively anti-artist" and seeks to replace other artists in employment opportunities.⁷

In the legal world, AI art has its own set of issues and implications.⁸ One of the major concerns addresses the non-copyrightability of AI art. At this moment in time, the United States Copyright Office (USCO) does not recognize "non-human authorship."⁹ Specifically, the USCO Compendium says that it "'will not register works produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author."¹⁰ Practically, this means that art created through most AI programs are not currently registerable for copyright.

In a recent case involving AI program DIABUS and its 2D artwork "A Recent Entrance to Paradise," inventor Stephen Thaler argues that his work should have been granted copyright from the USCO, but that it was denied protection because of its AI origins.¹¹ Thaler has sued the USCO and its director Shira Perlmutter, who claim that Thaler's argument that the Act "'explicitly accommodates non-human authors' by allowing copyright registration for anonymous works, pseudonymous works, or works made for hire" is completely misconstrued.¹² Perlmutter has filed a cross-motion against Thaler's motion for summary judgment "'based on the language of the Copyright Act, Supreme Court precedent... and federal court decisions," and reaffirms "that copyright does not extend to non-human authors."¹³ Thaler, on the other hand, believes that his contributions to the work have made it "adequately creative," that the work "'contains visual elements in a novel way,'" and that granting copyright protection to AI art like his would further the Constitutional rationales for copyright protection.¹⁴

However, the USCO may not be as entrenched in its position against AI art as it seems.¹⁵ In September 2022, the graphic novel *Zarya of the Dawn*, created by artist Kristina Kashtanova, was awarded copyright protection for the images and text of the novel – images created using the AI software Midjourney.¹⁶ However, Kashtanova did not disclose her use of the software in her copyright application, and the USCO has since requested clarification from Kashtanova about the “human involvement in the process of creation of this graphic novel.”¹⁷

In addition to copyright concerns, AI art has raised issues concerning patent inventorship.¹⁸ While, in a recent Federal Circuit case, the court held that “the term “inventor” under the U.S. Patent Act must be a human being,” it did admit that it “was not confronted” with ... ‘whether inventions made by human beings with the *assistance* of AI are eligible for patent protection.’”¹⁹ The United States Patent and Trademark Office (USPTO) has recognized the importance of this question, and has begun soliciting public comment concerning inventorship with the help of artificial intelligence.²⁰ The stated goal of the comment period has been to “incentivize and protect innovation...to ensure continued U.S. leadership in AI and other emerging technologies.”²¹ The USPTO has asked commenters to consider specific questions, including whether there is “a need for the USPTO to expand its current guidance on inventorship to address situations in which AI significantly contributes to an invention... and [h]ow...the significance of a contribution [should] be assessed.”²²

In addition to copyright and patent concerns, trademark claims have also been made against certain AI art programs.²³ Recently, Getty Images filed a trademark infringement claim in the High Court of Justice in London against Stability AI, whose “Dream Studio” and “Stable Diffusion” applications produce creative images from user prompts.²⁴ Getty believes that Stability has used their “high quality...content-specific...” images with “rich metadata” to create its own products.²⁵ They argue that Stability has removed the copyright information from their images, which “creates ‘confusion as to the source of the images and falsely impl[ies] an association with Getty Images.’”²⁶ Additionally, Getty argues that Stability’s images are often “low quality, unappealing, or offensive images” and that both problems may lead to the dilution of their trademark.²⁷

Despite the many challenges that AI artwork may pose to the legal world, AI technology is developing rapidly.²⁸ Truly, the ultimate question of AI artwork may be whether the law can adapt quickly enough to allow AI artists and inventors to reach their full technological and artistic potential.

Annie Planker is a Second Year Law Student at the Benjamin N. Cardozo School of Law and a Staff Editor at the Cardozo Arts & Entertainment Law

Journal. Annie is interested in fashion law and social justice. Annie is also the current secretary of the Cardozo Wellness Society and has interned in family defense and medical malpractice.

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