Paint Me Like One of Your AI Girls: Artificial Intelligence's Future in Art

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The rise of AI generated art pushes to the forefront of conversation the question of what it really means to create art and who can create art. Director [Guillermo del Toro](#) discussed the idea of animation created by machines and said, "I consume and love art made by humans. I am completely moved by that. And I am not interested in illustrations made by machines and the extrapolation of information."

While del Toro might not be moved by such art, the world has recently become captivated by AI generated art pieces. They can be found in museum displays in the Netherlands, or winning Colorado State Fair art competitions. Whether you love or hate the new trend, AI art is here, and it is bringing with it several complicated questions for Intellectual Property law.

AI art generators, which have seen increasing popularity in recent months, have come under fire in a potential class action suit filed by [three artists in California](#). The suit targets Stability AI Ltd., Midjourney Inc., and Deviant Art Inc. Shortly after, Getty Images filed a copyright infringement suit against Stability AI in UK court.

Each of these companies use the AI art generator program [Stable Diffusion](#). This program uses machine learning to create art pieces from things like simple text-based prompts. The ease at which art can be created explains the programs rapidly growing popularity. A prompt such as, "Space Basketball styled Picasso" can produce a well-made piece of art that removes nearly all the skill and creative roadblocks that limit many artists.

The three artists that filed the class action suit claim that the AI companies used copyrighted images found on the internet, without the consent of authors, to teach their AI generators. In essence, they claim that the AI generators are doing nothing more than taking bits and pieces from copyrighted works and then mashing them together to form derivative works of art that will negatively affect the market for actual works made by the artists that they took from.

The primary defense for the companies will be based upon fair use for the art Stable Diffusion is creating. Fair use is a defense that may be used against claims of breach of a copyright. Fair use allows use of a copyrighted work without the owner's permission for purposes of criticisms, comments, etc. While it is unclear just what all art can be used for to claim fair use, courts consider [four factors](four-factors) when considering whether to apply fair use. The factors include the purpose and character of the use, nature of the work, amount of the portion being used to the copyrighted work, and effect of the use upon the potential market. These factors help determine if the fair use work is transformative of the original copyrighted work. The defense will largely focus on whether such art is transformative in nature, but the analysis on whether art is transformative is very fact dependent. This means that each AI art generation case will be walking a fine line between transformative art and copying.

Defenders of these art generators argue that what the generators are essentially mimicking from all of the art pieces used as data to teach the program is the "style" of an author. Style is more of an idea than it is some quickly apparent and identifiable piece of the art, making it difficult to copyright.

These difficult questions have not come with easy answers as governments and courts around the world are scrambling to try and draw the line on where AI becomes transformative. In

the United Kingdom, Parliament [has proposed expanding exceptions](#) to their infringement rules for date mining, providing a much-needed tool for AI art generators in the way they learn to draw.

[The U.S Copyright office](#) has made a new policy statement that says AI generated art may be copyrighted as long as there is "sufficient human authorship." While this clearly shows the direction the U.S copyright office wants to take, it also creates a new question that courts or legislature will quickly have to answer, or risk being flooded with breach of copyright claims. How much human authorship is sufficient authorship?

While these court cases, and actions being performed by governments are steps in the right direction when it comes to dealing with the growing trend of AI generated art. Both structures will continue to be put under growing pressure to set clear guidelines for this new technology. Even then, will it be enough? Can government policy and legal precedent, historically known for being slow and stagnant, possibly hope to keep up with AI technology that is primarily characterized as fast and ever changing?