Who Owns What AI Creates?

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Artificial intelligence tools are as popular as they are controversial. Knowing what the law has to say isn't going to answer all your questions, but it will provide a framework for thinking about how and when it's safe to use generative AI and give you the tools to "issue spot" as you do your work.

Before we start, I want to define what I mean when I say "generative AI." There are all sorts of AI that you use without even thinking about it. For example, when you're texting and the software guesses what word you want to write next, that's AI. That's NOT what I mean when I use the phrase "generative AI." Here's what I do mean:

"Generative AI"	Grey Area	**Not "Generative AI"**
• Telling ChatGPT™ to write a blog post about fonts • Telling Midjourney™ to create an image of a cow with vampire teeth		• Having words suggested to you as you type a blog post • Using "assistive" tools within graphic design software

If You Use Generative AI, Could You Be Infringing on Someone Else's Copyright?

The answer to this question is a great big "I don't know. Yet."

As far as I know, no one has sued someone who used AI to create. The legal actions pending so far are focusing on the owners of the AI software. Here are the three leading right now:

<u>The Sarah Scribbles Case</u>
Artists Sarah Andersen, author of the web comic "Sarah Scribbles," along with fellow artists Kelly McKernan and Karla Ortiz, are suing Stability AI Ltd., Midjourney Inc., and DeviantArt Inc. The artists claim the companies are infringing on their copyrighted works when their AI uses the artists' copyrighted works as part of the training data set.

<u>The Sarah Silverman Case</u>
Sarah Silverman , Richard Kadrey, Christopher Golden are suing Meta Platforms, Inc. for using their writings as part of the training data set for Meta Platforms' AI.

<u>Getty Images v. Stability AI</u>
Getty Images brought a case in the High Court of Justice in the U.K. alleging that Stability AI copied and processed millions of images protected by copyright when it created the data set that was used to train its generative AI software. Getty Images offers a specific license that allows use Getty's images for training AI. Stability AI did not seek any such license.

Let's use the Sarah Scribbles case to think through how this novel issue will play out. How the case gets decided will depend on the analogy the courts use to understand how AI works.

Analogy: AI learns and creates just like a human artist
This is ***not*** infringing:

- I hire an artist to paint my portrait in the style of Andy Warhol.
- The artist visits museums, studies Warhol's art and then paints my portrait in Warhol's style.

This is fine because artists don't have any rights in their "style". If the courts create an analogy between what AI does and what a human artist might do, the artists are unlikely to be successful in the Sarah Scribbles case.

Analogy: AI is just creating a collage of existing images
This ***is*** infringing:

- I hire an artist to create my portrait in the style of Andy Warhol.
- The artist photographs a bunch of Warhol's paintings and makes a collage from the photos to create my portrait.

If the courts equate what AI does to putting together existing copyrighted elements, the artists are likely to win.

My prediction:

- There will be changes to copyright law, either by judicial ruling or statute, that will split the baby between what artists want and what AI companies want.
- AI companies and artists will both be unhappy.
- Ultimately, artists and AI companies will figure out a way to co-exist and share the revenue, similar to what happened to the music industry after Napster.

If You Use Generative AI, Who Owns the Copyright?

Unlike the first question in this handout, this answer is clear: No one owns it.

- If you use generative AI to write a book anyone can publish the book and pay you nothing.
- If you use generative AI to create an image, anyone can reproduce and sell it and pay you nothing.
- If your contract requires you to transfer the copyright to a deliverable, you're in breach of your contract if you use generative AI to create a deliverable.

Let's look at the rulings that support this conclusion.

The Monkey Selfie Case

Naruto, a crested macaque monkey, took selfies with the camera of photographer David Slater. Slater published a book of the selfies.

An animal rights group sued claiming that Naruto owned the copyright to the photos. The 9th Circuit Court of Appeals ruled that the Copyright Act protects only works created by humans and since Naruto isn't a human, there is no copyright to the selfies.[1]

That means it was OK for Slater to publish the book but other people can also publish a book using the photos and people, even IP lawyers, can use the photos in handouts, blog posts, and slides for presentations.

[1] *Naruto v. Slater*, 888 F.3d 418, 426 (9th Cir. 2018)

Copyright Office Ruling – Thaler

In 2019, Steven Thaler tried to register the copyright to an image created by his Creativity Machine.

He acknowledged the image was created by generative AI but claimed it was a "work made for hire" and therefore, he owned the copyright.

The Copyright Office refused to register because the image "lacks the human authorship necessary to support a copyright claim"[2] and, even if it could, the AI software can't enter into a contract to transfer a copyright.

No one owns the copyright to "A Recent Entrance to Paradise."

Copyright Office Ruling – "Zarya of the Dawn"

More recently, Kris Kashtanova created a comic book using Midjourney to draw the images. The Copyright Office initially granted Kashtanova a copyright to all aspects of the work but, soon after, the Copyright Office found out the images were created by Midjourney. The Copyright Office cancelled the registration and issued a new one that covers only the words and arrangement of the images but does not cover the individual images.

Kashnatova's attorney wrote an extension brief about the iterative, involved, and time-consuming process Kashnatova used to create the images. The Copyright Office was not convinced:

> "If Ms. Kashtanova had commissioned a visual artist to produce an image containing 'a holographic elderly white woman named Raya,' where '[R]aya is having curly hair and she is inside a spaceship,' with directions that the image have a similar mood or style to a 'Star Trek spaceship,' 'a hologram,' an 'octane render,' 'unreal engine,' and be 'cinematic' and 'hyper detailed,' Ms. Kashtanova would not be the author of that image."[3]

> "The Office does not question Ms. Kashtanova's contention that she expended significant time and effort working with Midjourney. But that effort does not make her the 'author' of Midjourney

[2] Initial Letter Refusing Registration from U.S. Copyright Office to Ryan Abbott (Aug. 12, 2019). Thaler requested reconsideration. Registration was denied because Thaler never submitted any evidence of sufficient creative input or intervention by a human author.

[3] Letter from Copyright Office in Zarya of the Dawn (Registration # VAu001480196) dated 2/21/23 page 9.

> images under copyright law. Courts have rejected the argument that 'sweat of the brow' can be a basis for copyright protection in otherwise unprotectable material. The Office 'will not consider the amount of time, effort, or expense required to create the work' because they 'have no bearing on whether a work possesses the minimum creative spark required by the Copyright Act and the Constitution.'[4]

Conclusions

Don't use generative AI for creating images until and unless you know that the AI was trained on a licensed data set.

If ownership and exclusive rights to a work aren't important, go ahead and use generative AI.

If you don't want anyone to use or reproduce what you create or you're contractually obligated to deliver copyrightable content, then stay away from generative AI.

This area of law is changing quickly. Stay up to date on new developments.

[4] Letter from Copyright Office in Zarya of the Dawn (Registration # VAu001480196) dated 2/21/23 page 10 quoting U.S. Copyright Office, Compendium of U.S. Copyright Office Practices § 310.7 and *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991)