

ART GENERATOR A.I. : UNCHARTED TERRITORY

INTERNATIONAL PERSPECTIVE



LATEST NEWS

USA – The work created by an A.I. cannot benefit from a copyright

USA – Artists' class action against art generators A.I.

USA/UK – Stability A.I. targeted by a complaint from Getty Images

Artificial intelligence is becoming an essential tool for the creation of works of art. The legal regime of intellectual property created and shaped for the classical methods of artistic creation, is not adapted to these new technological conceptions.

Two uncertainties must be clarified by the legislator and the judge:

- The nature of the legal **protection** of works created by A.I.
- The possible **infringement** of preexisting works by A.I. technologies.

Three American cases provide an interesting first response to these questions. Although they do not directly concern French law, they evoke general mechanisms that we share in our legal system, such as the notions of originality, data mining and infringing use.

A.I. and copyright

In France, in the present state of legislation and caselaw, the protection by copyright of a work created by an A.I. seems impossible.

Article L111-1 of the Intellectual Property Code uses the term "work of the mind", which is an irreconcilable notion with artificial intelligence. Moreover, the French Court of Cassation has long held that a legal entity cannot have the status of author, which excludes by definition the author I.A.. Moreover, originality, an essential condition of protection, is interpreted by searching for the imprint of the author's personality, which is unsuitable when dealing with a work generated by a machine.

Nevertheless, uncertainty remains in the case of a work created by an A.I. but whose process includes the intervention of a natural person.

The U.S. Copyright Office had the opportunity to rule on the question of copyright protection of works created by an artificial intelligence under the impulse of instructions given by a human being, which is called "prompt".

USA - THE WORK CREATED
BY AN A.I. CANNOT
BENEFIT FROM A
COPYRIGHT

February 21, 2023

"Zarya of the Dawn" is a comic book, the text of which was written by the author Kris Kashtanova, and the images of which were generated by Midjourney's A.I..

On September 15, 2022, the U.S. Copyright Office initially allowed the registration of the comic book within the U.S. Register and Kris Kashtanova was named the owner of the rights to the work.

However, the examiners quickly reopened the case upon learning of an A.I.'s involvement in the creation of the work, which had not been specified in the registration application.

By a ruling dated February 21, 2023, the Office partially annulled the first certificate of registration insofar as it recognized a copyright in the illustrations generated by Midjourney. According to the case law mentioned by the examiner (Urantia Found. v. Kristen, 957-59, 9th Cir. 1997), these images, not being the result of human creation and not showing human intervention, cannot benefit from the copyright regime.

To this end, the examiners analyzed the operating system of Midjourney. These images were generated under the impulse of a "prompt" dictated by Kris Kashtanova, i.e. an instruction that the A.I. is able to read and execute to create a new illustration. Kris Kashtanova was also able to use other textual commands to influence the creation and adjust the dimensions of the image created.

The Board finds that the prompts are not actual instructions and will only allow the A.I. to draw from its training data to choose visual elements to reproduce in the generated image. Therefore, the reviewers rule out any originality since these illustrations were generated by guided processes and training data.

This creative process was not controlled by Kris Kashtanova since she could not predict the machine generated image. Because of the distance between the initial instructions (the prompt) and the final result generated by the A.I., the Board considered that the image could not have resulted from the plaintiff's creative choices.

The prompt would only be the order that a client would make to an artist that he hires to create a work from general instructions or non-binding suggestions.

Finally, the Office considered that the alterations made by Kris Kashtanova of the images generated by the A.I. are insignificant, even imperceptible, and cannot meet the condition of creativity, required by the copyright.



The Copyright Office has nevertheless ruled that the texts of the work, as well as the selection, coordination and organization of the written and visual elements of the comic book, are covered by the copyright, because they were created by a human being. The Copyright Office has thus issued a new certificate of registration for these elements only, for which Kris Kashtanova is designated as the author and owner of the rights.

In conclusion, these illustrations generated by I.A. Midjourney are not eligible for copyright protection because of the insufficiency in this case, of the link between the intellectual reflection carried out by the author and the resulting work, thus excluding any originality. The U.S. Copyright Office does not deny protection to a work created by I.A. as a matter of principle. But this is a reminder that this protection is subordinated to the proof of an original creative and artistic vision materialized in the work limits its application, the specificity of A.I. being to draw from pre-existing works.

Kris Kashtanova has 30 days to appeal the decision of the U.S. Copyright Office.

A.I., counterfeiting and data mining

The functioning of art generating A.I. implies a certain exploitation of previous works protected by a copyright. These A.I. scan pre-existing works of art to analyze and extract mathematical patterns or representations, which will then allow them to create a new image on demand.

These technologies appropriate the artistic work of others without consent, credit or compensation. Even if the images generated by A.I. do not reproduce or copy pre-existing works in the sense of copyright, they nevertheless exploit an artist's style and technique without permission and without the artist's knowledge.

The A.I. learning system also raises questions in terms of data mining. The technology will learn by scrolling through billions of images available in online databases. The question is to know if this data mining is legal under the current legislation in this field.

The stakes for the legal and judicial authorities are high and they will have to deal with this crucial issue that is on the way to revolutionize the art market. And if the law remains powerless to prevent these infringements, authors will have to resort to alternative means to protect their works. We are already seeing the development of tools to counteract A.I. technologies that imitate the style of images, known as "style masks". This is the case, for example, of Glaze, a software developed by researchers at the University of Chicago.

Today, there is an increasing number of legal proceedings on these issues.

USA - ARTISTS' CLASS
ACTION AGAINST ART
GENERATORS A.I.

January 13, 2023

A class action lawsuit was filed on January 13, 2023 in the Northern District Court of California, against the companies Midjourney, Stability AI and DeviantArt for copyright infringement, by three famous American artists: Sarah Andersen, Kelly McKernan and Karla Ortiz.

These A.I. have indeed learned by downloading and using without authorization billions of images protected by a copyright and being part of the LAION-5B database notably.

The plaintiffs denounce the infringement of the copyrights of several million artists with nearly 5 billion images used to drive the challenged A.I. They also denounce violations of their right of representation, their right of disclosure and acts of unfair competition. The three artists request a trial by jury to obtain damages for the harm caused by the infringement of their rights and an injunction to prevent any future harm.

The plaintiffs further explain that their damages are not hypothetical insofar as the works generated by these A.I. are already being commercialized online.

The developers of the art-generating A.I. intend to invoke the American doctrine of "fair use" which authorizes a punctual infringement of copyright, if this infringement can be justified by the public interest.

To be continued...



USA/UK - STABILITY A.I. TARGETED BY A COMPLAINT FROM GETTY IMAGES

3 february, 2023

On February 3, 2023, Getty Images, a company that provides stock images on the Internet, filed a complaint in Delaware federal court against the London-based start-up Stability AI. The latter would have used Getty's image database to train its generative A.I. Stable Diffusion, without proper license or explicit authorization.

Stable Diffusion's machine training involves deep learning by copying the captions and metadata associated with Getty's 12 million scanned images. The latter considers that this use was made in an illicit manner by Stability AI, which knowingly circumvented the rules, even though Getty offers a separate license specifically for the purpose of learning an A.I.

Stable Diffusion also produced images that strongly resembled images held by Getty or that seemed to be an obvious derivative of them. Finally, Getty explains that some of the images produced by Stable Diffusion A.I. have the watermark "gettyimages", which constitutes an infringing use of the trademarks of the same name.

The plaintiff thus invokes the damage to her reputation and image, the infringement of her copyright and trademark rights and denounces acts of unfair competition. She asks the court to award her damages, to enjoin all unlawful acts and to order the destruction of all versions of Stable Diffusion caused by the use of Getty Images' content.

Getty Images has also initiated proceedings, currently pending, before the High Court of Justice in London.

TO BE CONTINUED....

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