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Robo-Rights: As AI Art Takes Over, Who's the Real Artist in the Machine Learning Age?

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With the US Copyright Office (USCO) continuing their stance that protection only extends to human authorship, what will this mean for artificial intelligence (AI)-generated works — and artists — in the future?

Almost overnight, the limited field of Machine Learning and AI has become nearly as accessible to use as a search engine. Apps like Midjourney, Open AI, ChatGPT, and DALL-E 2, allow users to input a prompt into these systems and a bot will generate virtually whatever the user asks for. Microsoft recently announced its decision to make a multibillion-dollar investment in OpenAI, betting on the hottest technology in the industry to transform internet as we know it.[1]

However, with accessibility of this technology growing, questions of authorship and copyright ownership are rising as well. There remain multiple open questions, such as: who is the author of the work — the user, the bot, or the software that produces it? And where is this new generative technology pulling information from?

AI and Contested Copyrights

As groundbreaking as these products are, there has been ample backlash regarding copyright infringement and artistic expression. The stock image company, Getty Images, is suing Stability AI, an artificial intelligence art tool behind Stable Diffusion. Getty Images alleges that Stability AI did not seek out a license from Getty Images to train its system. Although the founder of Stability AI argues that art makes up 0.1% of the dataset and is only created when called by the user's prompt. In contrast, Shutterstock, one of Getty Images largest competitors, has taken an alternative approach and instead partnered with Open AI with plans to compensate artists for their contributions.

Artists and image suppliers are not the only ones unhappy about the popularity of machine learning. Creators of open-source code have targeted Microsoft and its subsidiary GitHub, along with OpenAI, in a proposed class-action lawsuit. The lawsuit alleges that the creation of AI-powered coding assistant GitHub Copilot is relying on software piracy on an enormous scale. Further, the complaint claims that GitHub relies on copyrighted code with no attribution and no licenses. This could be the

first class-action lawsuit challenging the training and output of AI systems. Whether artists, image companies, and open-source coders choose to embrace or fight the wave of machine learning, the question of authorship and ownership is still up for debate.

The USCO made clear last year that the copyright act only applies to human authorship; however they have recently signaled that in 2023 the office will focus on the legal grey areas surrounding the copyrightability of works generated in conjunction with AI. The USCO denied multiple applications to protect AI authored works previously, stating that the "human authorship" element was lacking. In pointing to previous decisions, such as the 2018 decision that a monkey taking a selfie could not sue for copyright infringement, the USCO reiterated that "non-human expression is ineligible for copyright protection." While the agency is standing by its conclusion that works cannot be registered if it is exclusively created by an AI, the office is considering the issue of copyright registration for works co-created by humans and AI.

Patent Complexities

The US Patent and Trademark Office (USPTO) will have to rethink fundamental patent policies with the rise of sophisticated AI systems as well. As the USPTO has yet to speak on the issue, experts are speculating alternative routes that the office could choose to take: declaring AI inventions unpatentable, which could lead to disputes and hinder the incentive to promote innovation, or concluding that the use of AI should not render otherwise patentable inventions unpatentable, but would lead to complex questions of inventorship. The latter route would require the USPTO to rethink their existing framework of determining inventorship by who conceived the invention.

Takeaway

The degree of human involvement will likely determine whether an AI work can be protected by copyright, and potentially patents. Before incorporating this type of machine learning into your business practices, companies should carefully consider the extent of human input in the AI creation and whether the final work product will be protectable. For example:

- An apparel company that uses generative AI to create a design for new fabric may not have a protectable copyright in the resulting fabric design.
- An advertising agency that uses generative AI to develop advertising slogans and a pitch deck for a client may not be able to protect the client from freely utilizing the AI-created work product.
- A game studio that uses generative AI to create scenes in a video game may not be able to prevent its unlicensed distribution.
- A logo created for a business endeavor may not be protected unless there are substantial human alterations and input.
- Code that is edited or created by AI may be able to be freely copied and replicated.

Although the philosophical debate is only beginning regarding what "makes" an artist, 2023 may be a uniquely litigious year defining the extent in which AI artwork is protectable under existing intellectual property laws.

FOOTNOTES

[1] https://www.cnn.com/2023/01/23/tech/microsoft-invests-chatgpt-openai/index.html; https://www.nytimes.com/2023/01/12/technology/microsoft-openai-chatgpt.html

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