The Big IP Questions Artificial Intelligence Art Is Raising

By **Tiffany Hu**

Law360 (January 13, 2023, 8:43 PM EST) -- From graphic novels to photorealistic "magic avatars" made from users' selfies, artificial intelligence-generated art is growing more prolific and raising legal concerns about ownership of the works as well as potential infringement.

In late November, an app called Lensa AI started offering a new feature that turns users' uploaded photos of themselves into stylized avatars. To do so, the app uses Stable Diffusion, an open-source machine learning model that was trained on billions of images paired with text captions from the internet. The model can then recreate images based on users' text inputs.

Since Stable Diffusion and other AI art models like DALL-E and Midjourney were introduced over the past year, artists have come out on both sides of the artificial intelligence debate. Some artists quickly criticized Lensa for ripping off their protected works by replicating them. Other artists are fighting for copyright protection in this area, such as Kristina Kashtanova, who is trying to secure a registration on her graphic novel that uses images generated from Midjourney.

While AI art is still in its early stages, the ease with which people can use AI technology to create art is raising more pressing legal concerns. Here, intellectual property attorneys explore the biggest questions surrounding AI works and the answers they have at this point.

Who Owns AI-Generated Artwork?

There are good arguments that the owners of AI-generated artwork should be either the owners of the AI platform or the user of the platform who inputs and refines the prompts, according to Christian E. Mammen of Womble Bond Dickinson. In some cases, there might be an argument that the owner of the "training data" used to train the AI could get some or all of the rights, he noted.

"For example, if a platform is trained exclusively on the works of Picasso, and the resulting work looks just like a Picasso, isn't there some argument that its value comes from it being Picasso-like?" Mammen said, noting that ownership can be assigned and transferred as well.

For now, it's not immediately clear which way the U.S. Copyright Office seems to be leaning. Last March, the Copyright Office refused to register a two-dimensional artwork generated by a so-called Creativity Machine, an AI system developed by inventor Stephen Thaler, on the grounds that it didn't have "the human authorship necessary to support a copyright claim."

Thaler, who has challenged the office's finding, argued the decision runs afoul of the Copyright Act, which protects original works of authorship — a phrase he says Congress purposely left undefined — and does not limit authorship to natural persons.

Meanwhile, Kashtanova said in September the Copyright Office issued a registration for artworks in her graphic novel "Zarya of the Dawn." Kashtanova's novel uses images created with Midjourney, an AI program that turns text into realistic images.

However, the office in October supposedly initiated cancellation of Kashtanova's registration, finding "the information in [her] application was incorrect or, at a minimum, substantively incomplete" due to her use of the Midjourney platform, according to a social media post from Kashtanova's attorney. The proceedings are ongoing.

Do AI-Created Artworks Have Rights in Themselves?

A work can be eligible for copyright protection in the U.S. if it is the product of human creativity. As it stands, the Copyright Office will refuse to register works that are entirely generated by AI technology, attorneys told Law360.

However, if there are portions with human involvement, then the office could grant authorship to at least some of those parts, says Meaghan H. Kent of Morgan Lewis & Bockius LLP.

"This line, and the extent of necessary human authorship, is in part what is being tested by Kristina Kashtanova with her partially AI-generated graphic novel," Kent said.

Kashtanova, who is represented by Van Lindberg of Taylor English Duma LLP as well as by Open Advisory Services, told the Copyright Office that she "work[ed] with the computer to get closer and closer to what [she] wanted to express," going through multiple rounds of "composition, selection, arrangement, cropping and editing for each image." This "creative, iterative process" made her the author of each image in the work, Kashtanova said.

The bar for human creativity is "fairly low," and works that have "just the minimum threshold of human creative involvement are sometimes referred to as being subject to a 'thin copyright,'" according to Womble Bond's Mammen.

However, Thaler has maintained that the work generated by the Creativity Machine has no human involvement and that copyright law should extend to works completely created by AI.

"In taking that position, Thaler is deliberately going below even the minimum human participation threshold set by the Copyright Office," Mammen said.

Is Copyright Law Equipped to Handle AI-Created Works?

Though AI artworks currently don't qualify for copyright protection in the U.S., attorneys are split over whether the existing system can keep up with the evolving technology.

Outside the U.S., there seems to be more flexibility on how to handle AI-created artworks, such as the U.K's new copyright exception allowing text and data mining for commercial uses and China's guidelines for training AI models, says Amir R. Ghavi of Fried Frank Harris Shriver & Jacobson LLP.

"Other than removing the somewhat arbitrary requirement of human creation, I'm not sure I see the need for extra legislation or flexibility for a new tool," says Ghavi. "Think of it as a magic paintbrush. Alternatively, we didn't need to change copyright law for the camera or for photo editing tools like Photoshop."

There's the question of how much of the work can be protected by copyright law, according to Margaret A. Esquenet of Finnegan Henderson Farabow Garrett & Dunner LLP. A few words of text would be difficult to protect — and even if they could be protected, it leaves the question of whether protection would extend to the resulting image, she noted.

"In my opinion, the better approach — or the more likely successful approach — to getting some sort of protection for those sorts of works, whether it's traditional copyright or some other kind of protection — would be legislative, rather than through the Copyright Office or through litigation," says Esquenet.

How Should Attorneys Address Infringement Through AI-Created Works?

There's a lot of interesting questions arising out of issues relating to infringement and fair use, attorneys say, and some predict that courts will eventually find there to be a transformative use of certain copyrighted material for the training of AI models.

Perhaps the distinction between human-authored and AI-created works for purposes of fair use will be clearer once the U.S. Supreme Court **rules** on whether Andy Warhol's prints of the music icon Prince infringe a copyrighted photo, says Kent of Morgan Lewis.

"Certainly, when there is an intent to comment or criticize on an underlying work, a finding of fair use is more likely," Kent said. "And one can see how that intent to comment or criticize would be more likely when a human author is involved."

For now, lawyers should spend more time trying to understand how AI systems work at a technical level, says Fried Frank's Ghavi, who says he found many to "casually use the term infringement" without reading up on diffusion models or earlier machine learning models.

"I think the overall debate would be richer once more lawyers have acquainted themselves with the state of the art technology," Ghavi said.

--Editing by Lakshna Mehta.