An Unauthorized Renaissance? An Analysis of Artists’ Claims for Copyright Infringement Against AI Generated Art and Possible Defenses

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AN UNAUTHORIZED RENAISSANCE? AN ANALYSIS OF ARTISTS’ CLAIMS FOR COPYRIGHT INFRINGEMENT AGAINST AI GENERATED ART AND POSSIBLE DEFENSES

Victoria Young*

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I. INTRODUCTION

The digital space is a constantly developing and evolving place. Historically, courts have struggled with setting the parameters of this constantly changing medium. Currently, Artificial Intelligence (“AI”) is at the forefront of a lot of debate and discussion among intellectual property law attorneys and considered the “wild west” of copyright law.1 Recently, a

* Juris Doctor, 2024, Candidate at Florida International University ("FIU") College of Law. Many thanks to Professors Travis, Osei-Tutu, and Suarez for their feedback and support throughout the writing process and a special thank you to my family for their continued support and encouragement.

large group of artists filed a class action against several AI art generating companies: Stability AI Ltd. (“Stability”), Stability AI, Inc., Midjourney, Inc., and DeviantArt, Inc. Courts have never addressed this question of copyright infringement by AI generated art. This paper will examine the potential holdings the court may make regarding what remedies artists may obtain against AI generating art companies and its users.

Andersen and other artists similarly situated argue that Defendants directly and vicariously infringed on valid copyrights under 17 U.S.C. § 106. Plaintiffs have also raised claims of: violation of the Digital Millennium Copyright Act; violation of the statutory right of publicity; violation of the common law right of publicity; unfair competition; and breach of contract. Plaintiffs contend the infringing action began with Stability downloading copies of copyrighted works of art without consent or compensation of the artists. These illegally downloaded copies are used as “training images” in which the companies employ the images as training data for the machine learning process. Following a text prompt from users, the AI will generate output images that are similar to those found in the training data set. These resulting images can enter into direct competition in the same market as the original images.

This paper will examine the potential success of the remedies the artists are seeking, including monetary damages and injunctive relief. Next, this paper will discuss some of the potential defenses the AI companies have begun to argue, including fair use. Stability may argue the artwork the AI creates is a transformative work and thus considered fair use. The Supreme Court’s recent decision in Google v. Oracle lends support to use of a wide collection of data to create a transformative work, which benefits Defendants. Additionally, another potential carveout involves using transformative works for educational purposes.

Finally, this paper examines policy considerations the court may consider. AI generated art raises concerns regarding innovation being stifled.

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2 Complaint at 1, Andersen v. Stability AI Ltd., No. 3:23-cv-00201 (N.D. Cal. filed Jan. 13, 2023) [hereinafter Complaint]. While there are a small number of named plaintiffs, the affected class—artists of many different styles—looms large in terms of relief.

3 Id. at 33–41.

4 Id. at 1, 29.

5 Id. at 1.


7 Id. at 2659.

8 Complaint, supra note 2, at 2.

9 Google L.L.C. v. Oracle Am., Inc., 141 S. Ct. 1183, 1205, 1209 (2021). However, distinct from Oracle where there were concerns of method of operations and merger doctrine regarding the declaring code, here, most art would not face the same concerns.
and unfair competition. Article I, Section 8, Clause 8 of the Constitution, often nicknamed the Patent and Copyright Clause, gives Congress the right “to promote the [p]rogress of [s]cience and useful [a]rts, by securing for limited [t]imes to [a]uthors and [i]nventors the exclusive [r]ight to their respective [w]ritings and [d]iscoveries.” Human artists cannot keep up with the proliferation of AI art, and this AI art threatens the protections artists are given over the exclusive use and distribution of their works.

II. BACKGROUND

A. How Machine Learning Works

There are several different methods of machine learning. One common method is through supervised learning with training data. Generally speaking, the process begins with feeding the program a wide set of uploaded “training images.” These training images then consist of the data set the AI is predominantly based on. Users can then enter a text prompt, and the AI program will attempt to generate an image that corresponds to that text prompt based on the dataset of Training Images.

Stability launched Stable Diffusion, which is based on a machine learning technique—diffusion—invented in 2015 by a group of researchers from Stanford University that was introduced in their paper “Deep Unsupervised Learning Using Nonequilibrium Thermodynamics.” While the technique illustrated in the paper is applicable to any type of data set, the paper specifically focused on a data set of digital images. The goal of the

12 Gillotte, supra note 6, at 2659. See generally Christian E. Mammen & Carrie Richey, AI and IP: Are Creativity and Inherently Human Activities?, 14 FIU L. REV. 275 (2020) (discussing whether AI-created works should be granted the same protections as human-created works).
13 Id. at 2660.
14 Id.
15 Complaint, supra note 2, at 5; see also Jesus Rogel-Salazar, Diffusion Models—More than Adding Noise, DOMINO DATA LAB (Oct. 4, 2022), https://www.domino.ai/blog/diffusion-models-more-than-adding-noise.
16 Complaint, supra note 2, at 5; Rogel-Salazar, supra note 15.
18 Complaint, supra note 2, at 15. See generally Sohl-Dickstein et al., supra note 17.
The diffusion technique is to progressively unsettle and breakdown through diffusion and eventually reverse diffusion to “restore and generate structure in the data.”

Figure 1. The proposed modeling framework trained on 2-d swiss roll data.

The diffusion technique is broken into two phases. The first phase of the diffusion technique entails using an image and gradually adding “noise” to the images over a series of steps. Noise is defined as random fluctuations distributed over an image. At each step of the addition of noise, the program records how the image is changed by the addition. The second phase of the diffusion technique is effectively a reversal of the first phase. As the process of altering a certain image was already recorded over several steps, the program can then run the recorded sequence backwards, effectively removing the noise. This removal process allows the program to eventually reconstruct the original image, prior to alteration with noise. The ultimate objective of the diffusion technique is to reconstruct copies of the training data with as much accuracy as possible, effectively duplicating the original

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19 Rogel-Salazar, supra note 15.
20 Sohl-Dickstein et al., supra note 17, at 2258 fig.1.
22 Complaint, supra note 2, at 15. The noise at discussion refers to Gaussian noise, which is a kind of signal noise that has a probability density function equal to normal distribution. This function is added to an image to generate this noise. See Swain, supra note 21.
23 Complaint, supra note 2, at 15; Sohl-Dickstein et al., supra note 17.
24 Complaint, supra note 2, at 15; Sohl-Dickstein et al., supra note 17.
training image.\textsuperscript{25} The underlying program relies on complex algorithms and computer processing to recognize the relationships in the data, properly record the progressive addition of noise, and store the images.\textsuperscript{26}

The diagram in Figure 1, taken from the Sohl-Dickstein paper, illustrates the two phases of the diffusion process with a spiral image as an example.\textsuperscript{27} The first row in Figure 1 illustrates a blue spiral undergoing the first phase of the diffusion process, with noise gradually being added to it.\textsuperscript{28} The middle image depicts the middle stage of the diffusion process, and the rightmost image depicts the image at the end of the diffusion process, where the image has merely become a random dispersion of noise and the original image is unrecognizable.\textsuperscript{29} The second row of the diagram illustrates the second phase of the diffusion process, and is designed to be viewed from right to left.\textsuperscript{30} The rightmost image in the second row depicts the image—a random dispersion of noise progressively “denoised”—which is the reversal of the steps of the first phase.\textsuperscript{31} The leftmost image depicts the image after the program has been able to completely denoise the image and reconstruct the original image.\textsuperscript{32}

The diffusion technique has been improved upon repeatedly since its introduction. Researchers led by Jonathan Ho at the University of California, Berkeley, introduced two new improvements to the diffusion technique: (1) “progressive lossy compression,” and (2) interpolation of latent images.\textsuperscript{33} “Progressive lossy compression” is a method that allows a diffusion model to store training images more efficiently by compressing the training images without compromising on reconstruction.\textsuperscript{34} The resulting compressed image is known as a latent image, which is fundamentally another copy of an original image from the training dataset.\textsuperscript{35} Ho explained that these latent images could be blended, or interpolated, to create a new derivative image which can eventually be reconstructed into a standard pixel-based image.\textsuperscript{36} Additionally, there are two different methods of interpolation. The first method is interpolating pixel by pixel—known as “pixel-space

\begin{footnotesize}
\begin{enumerate}
\item Complaint, supra note 2, at 17.
\item Id. at 15; see generally Sohl-Dickstein et al., supra note 17.
\item Complaint, supra note 2, at 16; Sohl-Dickstein et al., supra note 17, 2258 fig.1.
\item Complaint, supra note 2, at 16; Sohl-Dickstein et al., supra note 17, 2258 fig.1.
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\item Complaint, supra note 2, at 16; Sohl-Dickstein et al., supra note 17, 2258 fig.1.
\item Complaint, supra note 2, at 17; see also Jonathan Ho et al., Denoising Diffusion Probabilistic Models, 33 ADVANCES NEURAL INFO. PROCESSING SYS. 6840, 6845 (2020).
\item Complaint, supra note 2, at 17; see also Ho et al., supra note 33, at 6845.
\item Complaint, supra note 2, at 18; see also Ho et al., supra note 33, at 6847.
\item Ho et al., supra note 33, at 6848.
\end{enumerate}
\end{footnotesize}
interpolation”—which appears as though two translucent images were stacked on top of each other, creating one image with not-so-clear results.\(^{37}\) The second method of interpolation involves interpolating with latent images and, compared to the pixel-space interpolation, the resulting image from using this method appears as single clear images, “not an overlay or combination of images.”\(^{38}\) However, both methods ultimately produce the same result—a derivative work from the training images in a dataset.\(^{39}\)

The diffusion technique was again improved in 2022 by researchers at the Ludwig Maximilian University of Munich led by Robin Rombach.\(^{40}\) Rombach developed a way to further improve the denoising process so that latent images could be interpolated in more compounded ways.\(^{41}\) The improvement is called “conditioning” and involves feeding the AI system extra information during the denoising process. This extra information typically comes in the form of text prompts, which describe components of the image desired. The Complaint in the instant case uses the text prompt example of “a dog wearing a baseball cap while eating ice cream.”\(^{42}\) The text prompts act as conditioning data to choose latent images that “are already associated with text captions.”\(^{43}\)

The Complaint alleges Stability scraped over five billion images for the training images used as training data for Stability Diffusion.\(^{44}\) Stability scraped without the consent of the artists or websites where the images were stored, thereby creating five billion unauthorized reproductions of copyrighted works to formulate training data sets for its AI program.\(^{45}\) Getty Images has also recently announced its initiation of legal proceedings against Stability in the High Court of Justice in London, alleging Stability has “[chosen] to ignore viable licensing options and long-standing legal protections in pursuit of their stand-alone commercial interests.”\(^{46}\)

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\(^{37}\) Id. at 6847; Complaint, supra note 2, at 18.

\(^{38}\) Complaint, supra note 2, at 19; Ho et al., supra note 33, at 6847.

\(^{39}\) See Complaint, supra note 2, at 19.

\(^{40}\) Stability employed Rombach as one of the primary developers of Stable Diffusion. See id. at 19–20.

\(^{41}\) Id. at 20.

\(^{42}\) Id.

\(^{43}\) Id.

\(^{44}\) Id. at 13.

\(^{45}\) Id.

III. CURRENT REQUIREMENTS FOR VALID COPYRIGHT

In order to bring a copyright infringement claim, the party bringing the action must first show proof of a valid copyright. To receive protection under the Copyright Act, a work must be an original work of authorship; fixed in a tangible medium; and have a minimal degree of creativity. There are also several requirements under § 102(a) of the Copyright Act regarding the subject matter of copyrightable work.\(^{47}\)

Copyright holders possess a plethora of exclusive rights over their copyrighted work. Under § 106 of the Copyright Act, copyright holders have the exclusive right over: (1) the reproduction of the copyrighted work; (2) adaptation of the copyrighted work, including derivative works; (3) distribution of the copyrighted work; (4) public performance; and (5) public display.\(^{48}\)

The exclusive right to prepare derivative works belongs to the copyright holder. A derivative work is:

\[\text{[A] work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications, which, as a whole, represent an original work of authorship, is a “derivative work.”}\]\(^{49}\)

In the instant case, the copies of artists’ work Stability has scraped would be considered unauthorized derivative works, as the copies are art reproductions of the preexisting copyrighted work and Plaintiffs alleged Stability did not consult or ask for consent from the artists or websites housing the copyrighted works.

A. Where AI Generated Art Stands Regarding Authorship

Stability AI currently would fail to establish valid copyrights over their AI generated art because the works fail to meet the authorship requirement under § 102(a) of the Copyright Act.\(^{50}\) The court has already

\(^{47}\) See 17 U.S.C. § 102(a).

\(^{48}\) See id. § 106.

\(^{49}\) Id. § 101.

\(^{50}\) See id. § 102(a).
established that the author of a copyrightable work must be a human being.51 In Naruto, a wildlife photographer gave a camera to Naruto, a crested macaque. The monkey then proceeded to take several “selfies” with the camera, which the photographer ultimately published in a book along with other wildlife photographs.52 PETA, on behalf of Naruto, attempted to bring a copyright infringement claim but was ultimately unsuccessful. The court in Naruto held Naruto lacking standing under the Copyright Act because the Copyright Act refers to authorship as being a work created by a human. Similarly, the court also has held that AI cannot be the inventor listed on a patent in Thaler v. Vidal.53

However, the U.S. Copyright Office published on March 16, 2023, a new policy statement regarding protections for art, music, and other works that were created with contributions from Artificial Intelligence.54 The Copyright Office recognized that the question of registrability of works containing “human-authored elements combined with AI generated images,” is no longer a future hypothetical.55 In February of 2023, the Copyright Office re-examined the registration of a graphic novel, Zarya of the Dawn, which contained human created text with AI generated images.56 The Copyright Office determined the author’s text as well as the selection and arrangement of the graphic novels textual and visual elements could be copyrightable; however, the individual images could not be protected by copyright.57 The Copyright Office reasoned that the human author had contributed substantial portions to the creation of the graphic novel.58 Despite this shift regarding AI contributions in authorship, Stability and the other Defendants will ultimately still fail regarding authorship as the generated images from Stable Diffusion is based entirely on the AI system and its dataset. The question in the context of this case would become whether the program user putting in a text prompt

51 See Naruto v. Slater, 888 F.3d 418, 420 (9th Cir. 2018).
52 Id.
55 Id. at 16191.
57 See id.
58 See Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, 88 Fed. Reg. at 16190, https://www.govinfo.gov/content/pkg/FR-2023-03-16/pdf/2023-05321.pdf. This reasoning similarly follows Tufenkian Import/Export Ventures, Inc. v. Einstein Mooney, Inc., where the plaintiff was able to obtain copyright protection over the creative contributions he made to his carpet designs that were based on works from the public domain. 338 F.3d 127, 129 (2d Cir. 2003).
is sufficient to satisfy the human-made element under the new guidelines from the Copyright Office.

B. Minimal Creativity

As mentioned above, originality consists of two factors: (1) the work was independently created by the author; and (2) the work possesses at least some minimal degree of creativity. Not only would AI generated art fail on the authorship requirement for a copyright, but AI generated art may also ultimately fail to satisfy the minimal degree of creativity requirement. While the court in *Feist* recognized compilations of facts and databases require significant time and labor, “sweat of the brow” alone is insufficient to confer entitlement to a valid copyright.\(^\text{59}\) Additionally, if a work manages to qualify as a copyrightable compilation, the copyright governs over only the author’s original contributions to the compilations.\(^\text{60}\)

Section 102(b) also dictates that “[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”\(^\text{61}\) In *Lotus Development Corp. v. Borland International*, the First Circuit held a computer menu command hierarchy is not copyrightable because the menu is a method of operation, and therefore falls outside of copyright protection.\(^\text{62}\)

In the instant case, Stability may attempt to argue the AI database system required significant labor and time to compile the database and is therefore entitled to copyright protection; however, Stability would ultimately fail. Not only would the claim for a valid copyright fail as the AI system consists of unauthorized copies of copyrighted work—not mere facts readily available to the public—but Stable Diffusion’s system itself was created under an open license.\(^\text{63}\) Stable Diffusion has also been incorporated into the software programs of the Midjourney product and DreamUp, which were released by Defendants Midjourney and DeviantArt, respectively. Therefore, Stability has failed to introduce any new original contributions under 17 U.S.C. § 106. Furthermore, the inclusion of an artist’s work in a


\(^{60}\) See *id.* at 359.

\(^{61}\) 17 U.S.C. § 102(b).


\(^{63}\) Stability’s choice to release Stable Diffusion under an open-source license has led to a proliferation of other programmers adopting and re-releasing their own software based on Stable Diffusion. Complaint, *supra* note 2, at 12–13.
compilation does not give the compiler any copyrights therefrom.\textsuperscript{64} The inclusion of the artist’s copyrighted work does not forfeit the artist’s registered copyright if the artist did not authorize the publication of the compilation.\textsuperscript{65}

IV. COPYRIGHT INFRINGEMENT

The second requirement needed to successfully prevail on a copyright infringement claim is actual infringement.\textsuperscript{66} A successful copyright infringement claim requires copying or another infringing act.\textsuperscript{67} Additionally, the infringing act must be volitional. There are several layers to the copyright infringement test. Reproduction of a protected work through direct copying or similar access is required. Moreover, there must be original or protectable elements, which are proven through an abstraction test. Lastly, there must be substantial similarity between the valid copyright and the alleged infringing work.

Andersen and the other artists in their complaint have alleged Stability and the other Defendants committed direct and vicarious copyright infringement under 17 U.S.C. § 501.\textsuperscript{68} For both contributory and vicarious liability, there must be a direct infringer. Vicarious liability applies when “the right and ability to supervise coalesce with an obvious and direct financial interest in the exploitation of the copyrighted materials—even in the absence of actual knowledge that the copyright monopoly is being impaired.”\textsuperscript{69}

A. Unauthorized Copies and Derivative Work

Copies, as defined under § 101 of the Copyright Act, “are material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”\textsuperscript{70} As aforementioned, derivative works under the Copyright Act are works based on a previous valid copyrighted work.\textsuperscript{71} One type of derivative work is an unauthorized copy of the original work. As each output image from Stable Diffusion is based exclusively from the latent images, which are

\textsuperscript{65} 
\textsuperscript{66} Id. § 501(a)–(b).
\textsuperscript{67} \textit{Mills Music}, 126 F. Supp. at 65.
\textsuperscript{68} Id. § 501(a)–(b).
\textsuperscript{69} Complaint, supra note 2, at 1.
\textsuperscript{70} Shapiro v. H. L. Green Co., 316 F.2d 304, 307 (2d Cir. 1963).
\textsuperscript{71} See id.
all unauthorized copies of copyrighted work Stability scraped from the web, the output images Stable Diffusion creates are derivative works. Ultimately, each hybrid image that results from a Stable Diffusion user inputting a text prompt is a derivative work. Additionally, while a human artist could illustrate a combination of text prompts with no problem, the latent-diffusion system cannot because the system can never exceed the limitations of its training images. Therefore, these resulting images arguably contain no new original input as the system cannot extend beyond the bounds of the training images it has been trained on.

The source of the Stable Diffusion training data is a point of contention. Plaintiffs discuss in the Complaint, and the images’ source is imperative in resolving the present copyright infringement claim. The initial source of images stemmed from LAION, the Large-Scale Artificial Intelligence Open Network. LAION is a non-profit organization whose goal is to “make large-scale machine learning models, dataset and related code available to the general public,” and all its projects are made available to the public for free. However, Stability ultimately compensated LAION to create a larger dataset, based on 5.85 billion training images, for Stable Diffusion. The CEO of Stability, Mr. Mostaque, admitted Stable Diffusion needed a bigger set of training images to run properly. Although Mr. Mostaque admitted future versions of Stable Diffusion would be based on “fully licensed” training images, the Complaint states Mr. Mostaque made no attempts to obtain or negotiate suitable licenses for the current version of Stable Diffusion—which other companies have based their own machine learning programs after. Additionally, Getty Images has also raised issue regarding the lack of licensing Stability attempted to pursue when Stability decided to scrape and copy images. Moreover, Defendant DeviantArt is an online gallery that houses images of Plaintiff’s which Stability allegedly used to train Stable Diffusion. When asked whether consent was received from the creators of the training images, the founder of Midjourney stated “No. There isn’t really a way to get a hundred million images and know where they’re coming from.”

72 Complaint, supra note 2, at 22.
73 Id. at 22–24.
74 Id. at 22–23.
75 Id. at 23.
76 Id. at 22.
77 Id. at 25; Emad Mostaque (@Emostaque), TWITTER (Dec. 15, 2022, 9:03 AM), https://twitter.com/EMostaque/status/1603390169192833027.
79 Complaint, supra note 2, at 25.
80 Id. at 29.
There is currently a circuit split on whether an unauthorized copy qualifies as infringement.\textsuperscript{81} There has been some debate between the circuit courts regarding whether the action of solely copying a copyrighted work is infringement. The Seventh, Ninth, and D.C. Circuits have all held that “any intermediate reproduction on a computer is sufficiently fixed to constitute an infringing copy.”\textsuperscript{82} The Ninth Circuit in \textit{MAI Systems Corp. v. Peak Computer, Inc.} held downloading a party’s software onto a computer’s random access memory (“RAM”) is considered actual copying.\textsuperscript{83} In \textit{MAI Systems}, the software manufacturers licensed to its customers the ability to download MAI’s software on the client’s computer’s RAM.\textsuperscript{84} However, Peak, the defendant, was a third party who repaired MAI computers, and Peak employees would download MAI’s software onto a computer’s RAM while making repairs—which fell outside of MAI’s licensing agreement with clients.\textsuperscript{85} The Ninth Circuit in \textit{MAI Systems} affirmed the district court’s finding that when software “is transferred from a permanent storage device to a computer’s RAM . . . and that in the absence of express permission by license or by ownership of the copyrighted software such acts constitute copyright infringement.”\textsuperscript{86} The D.C. Circuit in \textit{Stenograph L.L.C. v. Bossard Associates, Inc.}, agreed with the Ninth Circuit’s holding in \textit{MAI Systems} that downloading copyrighted work results in “fixing” and subsequently results in a “copy” being made.\textsuperscript{87} The Seventh Circuit in \textit{NLFC, Inc. v. Devcom Mid-America, Inc.}, likewise held that downloading software onto a computer instantly created a copy under the Copyright Act.\textsuperscript{88} Courts following the Seventh, Ninth, and D.C. Circuits therefore recognize an infringing copy.\textsuperscript{89}

In contrast, the Second and Fourth Circuits have held that mere downloading is not sufficient to constitute a copy under copyright law.\textsuperscript{90} In \textit{CoStar Group, Inc. v. LoopNet, Inc.}, the Fourth Circuit held that a provider’s passive storage of copied photographs is not copyright infringement if its users downloaded an image onto the provider’s RAM oblivious of its content or copyright status.\textsuperscript{91} In \textit{CoStar}, the plaintiff, CoStar, owned a large database of images of homes, which real estate agents were allowed to use as long as

\textsuperscript{81} See Gillotte, \textit{supra} note 6, at 2674.

\textsuperscript{82} Id. at 2679.

\textsuperscript{83} See MAI Sys. Corp. v. Peak Comput., Inc., 991 F.2d 511, 518 (9th Cir. 1993); Gillotte, \textit{supra} note 6, at 2675.

\textsuperscript{84} MAI Sys., 991 F.2d at 517; Gillotte, \textit{supra} note 6, at 2674.

\textsuperscript{85} MAI Sys., 991 F.2d at 513, 518; Gillotte, \textit{supra} note 6, at 2674–75.

\textsuperscript{86} Gillotte, \textit{supra} note 6, at 2675; MAI Sys., 991 F.2d at 518.

\textsuperscript{87} Stenograph L.L.C. v. Bossard Assocs., Inc., 144 F.3d 96, 101–02 (D.C. Cir. 1998).

\textsuperscript{88} NLFC, Inc. v. Devcom Mid-Am., Inc., 45 F.3d 231, 235 (7th Cir. 1995) (citing MAI Sys., 991 F.2d at 519).

\textsuperscript{89} See Gillotte, \textit{supra} note 6, at 2676.

\textsuperscript{90} See id.

\textsuperscript{91} CoStar Grp., Inc. v. LoopNet, Inc., 373 F.3d 544, 546 (4th Cir. 2004).
proper credit was provided.\footnote{Id. at 546–47.} However, several of the defendant’s subscribers copied the images from CoStar’s database and uploaded them to LoopNet.\footnote{Id. at 547.} The Fourth Circuit held that because LoopNet was only the owner of the system others used to infringe on CoStar’s copyrighted images, and not the actual copier itself, LoopNet was not directly liable for copyright infringement.\footnote{Id. at 550.} The court in CoStar reasoned that 17 U.S.C. § 106 requires “volitional conduct” by the alleged infringer, where the infringer only needs to know that she acted, but does not require the infringer to know her actions were infringing.\footnote{CoStar Grp., 373 F.3d at 550.} Additionally, the Fourth Circuit held “[t]here must be actual infringing conduct with a nexus sufficiently close and causal to the illegal copying that one could conclude that the machine owner himself trespassed on the exclusive domain of the copyright owner.”\footnote{Id. at 551; Gillotte, supra note 6, at 2677.} In the future, AI companies may attempt to argue that they are passive conduits for the infringers, the users entering text prompt which actively generate a latent image, and therefore not liable for copyright infringement using CoStar as precedent.

The Second Circuit similarly held that a brief download of content was not sufficiently fixed to constitute a copy.\footnote{See Cartoon Network LP, LLLP v. CSC Holdings, Inc., 536 F.3d 121, 130 (2d Cir. 2008).} In Cartoon Network LP, LLLP v. CSC Holdings, Inc., the defendant, a cable television provider, provided DVR services which permitted customers to record and playback copyrighted work from networks such as Cartoon Network without requiring additional licensing.\footnote{Id. at 124.} However, the DVR stored a buffered stream of the copyrighted work for up to 1.2 seconds before being routed back to the defendant’s storage facility where the copyrighted work was usually stored for future retrieval.\footnote{Id. at 124–25.} The court held the 1.2 second buffered stream was not an unauthorized copying constituting infringement, as the transfer of content was too transitory to satisfy the fixation requirement of a copy.\footnote{Id. at 130.} In Cartoon Network, the Second Circuit further established there is a difference between a user “issuing a command directly to a system, which automatically obeys commands and engages in no volitional conduct,” versus a person who actively “operates the copying system to make a copy.”\footnote{Id. at 131.} Here, the training
data is the foundation of Stable Diffusion and other AI systems and therefore not routed back to another storage facility or erased.\(^{102}\)

Edward Lee created a potential framework addressing the fair use doctrine in technology related cases.\(^{103}\) Following Professor Lee’s theory, a user inputting a text prompt would constitute a use during the operation of an AI program that has already been created, which should be considered a non-volitional use.\(^{104}\) These non-volitional uses appear on the lower side of the spectrum of potential infringement framework created by Professor Lee.\(^{105}\) However, uses that involve transferring a portion of copyrighted input directly into an output are known as “output uses” and should be considered inherently infringing.\(^{106}\)

Recently, a federal judge ruled that the scanning of a copyrighted work for the purpose of being lent is copyright infringement.\(^{107}\) Internet Archive, IA, attempted to argue that making an unauthorized copy from a book that was legally obtained is fair use; however, the court considered all four fair use factors and found they all weigh in favor of the publishers.\(^{108}\) As a result, the court held and reasoned that a party lawfully acquiring a copyrighted print book does not entitle the recipient to make an unauthorized copy and distribute it in place of the print book.\(^{109}\) Distinct from *Hachette v. Internet Archive*, where the initial book that was eventually scanned had been obtained legally, here, Stability did not consent or compensate the artists who Stable Diffusion based its entire dataset on.\(^{110}\) Ultimately, Stability not only failed to lawfully acquire the copyrighted works, but it also made unauthorized copies similar to IA’s controlled digital lending program.

**B. Shifting Liability**

In *Viacom International, Inc. v. YouTube, Inc.*, the court held that YouTube is not liable for infringing activity of its users only if YouTube did not have knowledge or awareness of the infringing action—which falls under the safe harbor protection under the Digital Millennium Copyright Act.\(^{111}\) In *Viacom International*, YouTube allowed users to upload personal video clips,

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\(^{102}\) See Complaint, supra note 2, at 3–4.


\(^{104}\) See id. at 843.

\(^{105}\) Id.

\(^{106}\) See id. at 844.


\(^{108}\) Id.

\(^{109}\) Id.

\(^{110}\) Id.

\(^{111}\) Viacom Int’l, Inc. v. YouTube, Inc., 676 F.3d 19, 30 (2d Cir. 2012).
which led to users uploading clips from copyrighted works and YouTube ultimately had become a harbor for infringing material.\textsuperscript{112}

While the Stable Diffusion users are the ones who ultimately put in the text prompt, which generates an image, the final image is based on Stable Diffusion’s training images that are unauthorized copies of copyrighted artwork.\textsuperscript{113} Distinct from \textit{Viacom International}, where YouTube itself was not actively contributing to the infringing material, here, Stable Diffusion’s entire dataset is already infringing on Plaintiff’s work.\textsuperscript{114} Additionally, distinct from \textit{CoStar Group, Inc. v. LoopNet, Inc.}, where the users were responsible for uploading copies of the plaintiff’s protected works, here, Stability, the owner of Stable Diffusion, is allegedly responsible for uploading the training images—copies of pre-existing work from artists—to the AI system and plays a significantly more volitional role than a mere owner.\textsuperscript{115} Therefore, the Court in the instant case would ultimately find Stability liable of direct or secondary infringement.

Additionally, many AI generated art companies have begun to include sharing and publication policies, which allow users to reprint and even sell the creations based off their text prompts. DeviantArt updated its terms of service on November 11, 2022, to include a paragraph about “Data Scraping & Machine Learning Activities,” which explicitly permits Stable Diffusion and future generative AI services to scrape DeviantArt for images.\textsuperscript{116} The provision further elaborates that even though data scraping may be an unauthorized use, “owners of the works are responsible for policing their own works.”\textsuperscript{117}

\section*{V. Potential Defenses}

\subsection*{A. Fair Use}

One affirmative defense Stability and the other Defendants may attempt to argue is that the use of Plaintiffs’ copyrighted works qualifies as fair use. Under 17 U.S.C. § 107, the fair use of a copyrighted work (by any means in § 106), “for purposes such as criticism, comment, news reporting, teaching, scholarship, or research is not an infringement of copyright.”\textsuperscript{118} There are several different methods of fair use; one example is parody.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{112} Id. at 26, 28.
\item \textsuperscript{113} Complaint, supra note 2, at 13.
\item \textsuperscript{114} See \textit{Viacom Int’l}, 676 F.3d at 28.
\item \textsuperscript{115} \textit{CoStar Grp., Inc. v. LoopNet, Inc.}, 373 F.3d 544, 547 (4th Cir. 2004).
\item \textsuperscript{116} Complaint, supra note 2, at 26–27.
\item \textsuperscript{117} Id. at 27.
\item \textsuperscript{118} 17 U.S.C. § 107.
\end{itemize}
\end{footnotesize}
There are four factors that courts consider when determining whether the use of preexisting work is “fair.”119 The first factor is regarding the purpose and character of the use and whether such use is of commercial nature or for nonprofit educational purposes.120 The second factor is the nature of the use of the copyrighted work.121 The third factor pertains to the amount and substantiality of the portion used in relation to the copyrighted work as a whole.122 The fourth factor focuses on “the effect of the use on the potential market for or value of the copyrighted work.”123 Judges take these factors into consideration and determinations are usually very fact specific.

1. Transformative Fair Use

One example under the fair use doctrine regarding the nature of use factor that AI companies will attempt to argue is transformative use. Transformative use broadly refers to the exploitation of an existing work in a new and novel way the existing work was not intended for. One example of transformative use is parody. To have a successful parody, the work must successfully evoke the essence of the copyrighted work while simultaneously conveying the imitating work is not actually the protected work.124 The Supreme Court’s decision in Campbell v. Acuff-Rose Music, Inc., focuses on “whether the new work merely supersedes the objects of the original creation or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.”125 The Supreme Court additionally held that the fair use factors should be reviewed holistically, and no single factor should be dispositive over another.126

Stability and similarly positioned AI companies are likely to base their argument within transformative use and cite to Author’s Guild v. Google as precedent.127 In Author’s Guild, Google scanned thousands of books and then showed excerpts of books as previews available to users and created an index of copyrighted works.128 At the core of Google’s argument was transformative fair use.129 Google argued the excerpts were complementary and not a replacement itself for the book, and therefore fair use—even though

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119 Id.
120 Id. § 107(1).
121 Id. § 107(2).
122 Id. § 107(3).
123 Id. § 107(4).
125 Id. at 579.
126 Id. at 577–78.
127 See Authors Guild v. Google, Inc., 804 F.3d 202 (2d Cir. 2015).
128 Id. at 208.
129 Id. at 206.
people had unauthorized copies of whole chapters. In the end, the court held that Google’s use of copyrighted works constituted fair use. The court found that fair use is less likely to be found where an entire work is distributed. Here, Stable Diffusion’s dataset is based on entire works, not portions of artists’ works. Stability’s active pursuit of hiring LAION to curate an even more vast database of images weighs against Stability’s fair use argument.

In *Hachette v. Internet Archive*, the court held that the transformative argument of Internet Archive (IA) had failed, stating “[t]here is nothing transformative about IA’s copying and unauthorized lending of the Works in Suit.” Additionally, the court in *Hachette v. Internet Archive* stated:

IA does not reproduce the Works in Suit to provide criticism, commentary, or information about them. IA’s e-books do not ‘add something new, with a further purpose or different character, altering the with new expression, meaning or message.’ IA simply scans the Works in Suit to become e-books and lends them to users of its website for free.

The judge found the first three fair use factors strongly weighed in favor of the publishers. Lastly, the judge considered the fourth factor, the market impact of the use. IA attempted and ultimately failed to argue the publishers were not being financially harmed by IA’s digital lending program. Similarly, in the instant case, the fourth fair use factor weighs against Stability because the AI generated art—based on scraped works—is arguably directly competing with the artists of the original works.

A case that was recently deliberated by the Supreme Court, which may become the keystone to future transformative fair use arguments, is *Andy Warhol Foundations for the Visual Arts, Inc. v. Goldsmith*. In 1981, famous photographer Lynn Goldsmith, famous for her portraits of famous icons, took some portrait photos of Prince. Goldsmith, through her agency, licensed the photograph to Vanity Fair who commissioned famous artist Andy Warhol to create an artwork about Prince based off Goldsmith’s

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130 Id. at 216–17.
131 Id. at 229.
132 Id. at 221.
134 Albanese, *supra* note 133.
136 Id. at 33.
photograph of Prince.\textsuperscript{137} Warhol then created an additional fifteen works, which all became known as the “Prince series.”\textsuperscript{138} The Second Circuit reasoned that both works should be reasonably perceived, and a secondary work is transformative where the “secondary work stands apart from the raw material[s],” meaning the pre-existing work, “used to create it.”\textsuperscript{139} If a lay person could still recognize the pre-existing work within the secondary work, then the secondary work has failed to add a new meaning or purpose and it is therefore, not transformative.\textsuperscript{140}

The Andy Warhol Foundation, AWF, filed a petition for certiorari before the Supreme Court. The petition for certiorari argued the Second Circuit’s decision contradicts Supreme Court precedent—\textit{Campbell v. Acuff-Rose Music, Inc.}—and establishes a bright line rule regarding transformative fair use rather than the holistic approach the Supreme Court has already established in \textit{Campbell}.\textsuperscript{141} The Supreme Court granted certiorari on March 28, 2022; oral arguments were heard on October 12, 2022, and the matter was decided on May 18, 2023.\textsuperscript{142} The sole question certified before the Court was whether “the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes,” weighed in favor of the Andy Warhol Foundation.\textsuperscript{143} The Supreme Court ultimately affirmed the Second Circuit’s decision, finding that the purpose and character did not weigh in favor of the Andy Warhol Foundation; therefore, a secondary work that visually resembles a pre-existing work may not immediately constitute transformative use.\textsuperscript{144} It subsequently follows that the secondary work could potentially fail the third fair use factor as well regarding the substantiality of the portion taken if the secondary work still resembles the pre-existing work. Therefore, any AI generated art that visually resembles the original copyrighted Training Image may not be considered transformative use where the AI generated art fails to present a new meaning or purports the same purpose as the original work. Moreover, based on the Supreme Court’s opinion, AI generated art companies may face a substantial hurdle regarding the commercialization of their services—which will further hurt their claims for fair use.\textsuperscript{145}

\begin{footnotesize}
\begin{enumerate}
\item Id. at 34.
\item Id.
\item Id. at 42.
\item Id. at 53.
\item Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 1, 1 (2023). The majority of the analysis of this paper was conducted prior to the Supreme Court’s decision.
\item Id. at 2 (quoting 17 U.S.C. § 107(1)).
\item Id. at 12–13.
\item Id. at 33, 35–38. The majority opinion heavily focused on the Andy Warhol Foundation’s commercial gain of using Goldsmith’s photograph.
\end{enumerate}
\end{footnotesize}
Additionally, AI generated art presents a unique conundrum regarding purpose and artistic intent. While a human user enters a text prompt into a system such as MidJourney or Stable Diffusion, the AI system ultimately chooses the specific arrangement and final image. The diffusion technique is based on the mathematical extrapolation of a specific dataset and does not have the concept of intent. Therefore, AI generated art may not be able to overcome a transformative use analysis that considers artistic intent or purpose in regarding a secondary work. Additionally, in Andy Warhol, the Second Circuit discussed how AWF’s monetization of the Prince series, even if for public benefit, does not support a fair use defense argument.

2. Nature of Use

The second factor of a fair use analysis focuses on the nature of the pre-existing work and whether it has a more imaginative and creative use or factual use. The second factor also considers the publication status of the pre-existing work. Typically, the nature of use factor does not carry heavy weight in determining the success of a fair use defense. In Author’s Guild v. Google, the court reasoned the more creative the pre-existing work, the less likely a court is to find a successful claim of fair use; however, even though a work is factual, it does not automatically boost a party’s fair use defense.

3. Substantiality Taken

The third fair use factor pertains to the amount and substantiality of the portion used in relation to the copyrighted work as a whole. Author’s Guild recognizes that a finding of fair use is “more likely when small amounts, or less important passages, are copied than when the copying is extensive, or encompasses the most important parts of the original.” The Second Circuit in Andy Warhol, focused on not only the quantity of materials used in copying, but the quality and importance to the original work. Copyright law does not protect ideas, but rather the expression of those
ideas. Therefore, where the secondary work copies a pre-existing work such that the purpose and essence of the original is still the same, the use is not fair. The Second Circuit in *Andy Warhol* determined that the Prince series borrowed heavily from the Goldsmith Photograph as the screen-print is still readily identifiable as being based on the specific Goldsmith photograph, and not merely a random photograph of Prince.

*Google L.L.C. v. Oracle America, Inc.* is another case AI-generative art companies may use in support of a fair use defense. In *Google L.L.C.*, Google based its programming language on Java—which is owned by Oracle—for its Android Operating System, or Android OS. Google used the same organizational scheme, naming structure and function as Java, and Oracle consequently sued Google for copyright infringement. The Supreme Court ultimately held the limited copying of Java’s programming interface constituted fair use and found that the third factor weighed in Google’s favor as Google only copied 0.4% of Java’s Application Programming Interfaces, or APIs. Additionally, the Supreme Court reasoned that the substantiality factor “will generally weigh in favor of fair use where . . . the amount of copying was tethered to a valid, and transformative purpose.” Here, the substantiality taken from a pre-existing work of art is ultimately determined by the AI system and guided by a user’s initial text prompt. Therefore, if the Supreme Court were to reject the Second Circuit’s holding in *Andy Warhol* and maintain a holistic approach to the fair use factors, a significant portion of any fair use analysis will be devoted to the third factor and will be an incredibly fact intensive inquiry determined on a case-by-case basis.

4. Effect on Market

The fourth fair use factor considers the effect of the copying upon the potential market for or value of the copyrighted work and whether “the copy brings to the marketplace a competing substitute for the original, or its derivatives, so as to deprive the rights holder of significant revenues because of the likelihood that potential purchasers may opt to acquire the copy in preference to the original.” In *Authors Guild v. Google*, the court reasoned that the excerpts offered by Google do not serve as an adequate substitute for

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153 *Id.* at 46.
154 *Id.* at 47.
156 *Id.* at 1190–91.
157 *Id.* at 1193–94.
158 *Id.* at 1205–06.
159 *Id.* at 1205. Google also argued it only copied what was necessary for programmers to work in a different programming environment but with a familiar programming language. *See id.* at 1205.
160 *Authors Guild v. Google, Inc.*, 804 F.3d 202, 223 (2d Cir. 2015).
a book, and the excerpt is for the purpose of selling the book. Here, depending on the text prompt a user puts into Stable Diffusion, the resulting latent image still could potentially strongly resemble one or more training images and act as an adequate substitute to the pre-existing copyrighted work of art.

The fourth fair use factor may also weigh heavily against AI generated art companies should artists be able to provide evidence that AI generated art and the copyrighted works occupy the same or relevant markets. Fair use is an affirmative defense, and the burden will fall upon the proponent of the fair use defense to demonstrate favorable evidence about relevant markets.

VI. POLICY CONSIDERATIONS

The determination of this case will have wide implications in several sectors where AI is at the forefront. Not only do artists face economic harm from AI generated Art, but there is also a concern regarding human innovation and creativity, which may be put at risk by permitting AI generated art to proliferate. The use of machines in creating art also raises new questions regarding the nature of creativity. Although these innovations illustrate a monumental feat in science, these scientific advancements pose a very real risk of market-destabilization in several sectors and a “profound impact on innovation and the growth of the U.S economy.”

The Supreme Court in Twentieth Century Music Corp. v. Aiken held that the Copyright Act “must be construed in light of [its] basic purpose” where “technological change has rendered its literal terms ambiguous.” This basic purpose is “[t]o promote the [p]rogress of [s]cience and useful [a]rts, by securing for limited [t]imes to [a]uthors and [i]nventors the exclusive [r]ight to their respective [w]ritings and [d]iscoveries.” These rights are meant to incentivize the production and dissemination of human authors’ works.

There has also been growing support among artists against the commercialization of AI generated arts and concerns about the future of

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161 Id.
163 Google L.L.C., 141 S. Ct. at 1208.
165 Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).
166 U.S. CONST. art. I, § 8, cl. 8.
167 Gilliotte, supra note 6, at 2658.
creativity in art. Moreover, as the Complaint states, a latent-diffusion system “can never exceed the limitations of its training images.” Therefore, the quality of the resulting AI generated image is always limited by the breadth of the training images the AI system has to pull from. Plaintiffs argue, “[t]he harm to artists is not hypothetical,” and that images generated by AI have already been sold online, “siphoning commissions from the artists themselves.” Not only have companies used copyrighted images to train machine learning systems, but the companies have also actively profited through charging fees from users for access to these systems. Defendant DeviantArt charges subscriptions from $3.95 to $14.95 for access to DreamUp—the commercial product of DeviantArt which relies on Stable Diffusion as the underlying system to generate images—which allows members a certain number of text prompts per month. Customers of one of DeviantArt’s member plans can purchase additional text prompts through purchasing package points. Midjourney also has several paid subscription plans, with the “Standard” plan costing $30 a month for unlimited text prompts and subsequent resulting images.

VII. CONCLUSION

On April 18, 2023, Stability, Midjourney, and DeviantArt all filed separate Motions to Dismiss. DeviantArt argues in its Motion to Dismiss that Plaintiffs have wrongfully included DeviantArt in the suit when DeviantArt was not the entity that brought about the alleged liability, and Plaintiffs’ claims fail as a matter of law. Stability argues that Stable Diffusion is not a “collage tool” and rather allows users “to create entirely new and unique images.” A commonality between the Motions to Dismiss

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168 Laurie Clarke, When AI Can Make Art—What Does It Mean for Creativity, GUARDIAN (Nov. 12, 2022, 11:00 AM), https://www.theguardian.com/technology/2022/nov/12/when-ai-can-make-art-what-does-it-mean-for-creativity-dall-e-midjourney.
169 Id.
170 Id. at 2; Feldman, supra note 46.
171 Complaint, supra note 2, at 24–25.
172 Id. at 25.
173 Id. at 28.
174 See Andersen v. Stability AI Ltd., No. 3:23-cv-00201 (N.D. Cal. filed Jan. 13, 2023). The majority of the analysis of this paper was conducted prior to Defendants’ response.
175 Motion to Dismiss of Defendant DeviantArt, Inc. at 1–2, Andersen v. Stability AI Ltd., No. 3:23-cv-00201 (N.D. Cal. filed Jan. 13, 2023) [hereinafter DeviantArt’s Motion to Dismiss].
176 Motion to Dismiss of Defendants Stability AI, Ltd and Stability AI, Inc. at 1, Andersen v. Stability AI Ltd., No. 3:23-cv-00201 (N.D. Cal. filed Jan. 13, 2023) [hereinafter Stability’s Motion to Dismiss].
is that Plaintiffs allegedly failed to state with any specificity the images infringed upon.\textsuperscript{178}

The core conduct at issue here, which has been the subject of law review articles, news reports, and blog posts, is the use of pre-existing work to create novel AI generated art. While AI generated art may not be able to acquire copyright protection, the AI generated art can still potentially infringe upon pre-existing works. Artists and writers have a strong pathos argument, as Matthew Butterick, Counsel for Plaintiffs, has stated in a blog post, that artists and writers alike from around the world have voiced concerns regarding AI systems being trained on copyrighted works with “no consent, no credit, and no compensation.”\textsuperscript{179} From a pure legal argument perspective, if the AI generated art is so transformative that the pre-existing work is not recognizable at all, the secondary works may not constitute copyright infringement. The success of AI generated art companies’ fair use defenses may ultimately rely upon the Supreme Court’s decision in Andy Warhol.\textsuperscript{180} Regardless of moral or economic considerations of the use of copyrighted works for AI systems, AI is cutting-edge technology that courts will eventually need to address to determine the legality of AI systems.\textsuperscript{181}

\textsuperscript{178} See Motion to Dismiss of Defendant Midjourney, Inc., Andersen v. Stability AI Ltd., No. 3:23-cv-00201 (N.D. Cal. filed Jan. 13, 2023); DeviantArt’s Motion to Dismiss, supra note 176, at 13; Stability’s Motion to Dismiss, supra note 177, at 8. However, Plaintiff Sarah Andersen’s attached copies of registration for sixteen collections of her work as reflected in the Copyright Office’s records as Exhibit 1 through 16. Complaint, supra note 2, at 6.

\textsuperscript{179} Matthew Butterick, We’ve Filed a Lawsuit Challenging Stable Diffusion, a 21st-Century Collage Tool that Violates the Rights of Artists. Because AI Needs to Be Fair & Ethical for Everyone, STABLE DIFFUSION LITIG. (Jan. 13, 2023), https://stablediffusionlitigation.com (last visited Oct. 7, 2023); Feldman, supra note 46.


\textsuperscript{181} See Lee, supra note 103, at 798.