

The Ethics of A.I. Art: Applying Critical Questions about A.I. to a New Breed of Visual Artists

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Popular webcomic artist Sarah Andersen, a longtime victim of intellectual theft, explained the beginning of her relationship with artificial intelligence in a 2022 *New York Times* opinion piece. In the article, she expressed fear in the idea that her name could be entered into an A.I. image generator and a comic in her style would be available in seconds.¹ Andersen amplified her engagement with A.I. when she, along with artists Kelly McKernan and Carla Ortiz, filed a class-action lawsuit against A.I. companies Stability A.I., Midjourney, and Deviant Art in 2023. The introduction of artificial intelligence as a widely accessible tool has provoked several debates regarding the originality of its output material. Because programmers build A.I. engines using the vast amount of information available on the internet, highly specialized requests may result in outputs based on a small portion of that information. The more specialized a request is, the smaller the information pool, and the smaller the number of possible creators of that information. With the potential for an output derived from the work of a limited number of people comes the potential for intellectual theft. A.I. art poses a host of problems, one of which is the strong possibility of intellectual theft. A similar controversy has emerged since the introduction of accessible A.I. image generators around artists who use A.I. as part of their artistic process. Examining these artists in light of recent legal happenings regarding A.I. engines and copyright infringement as well as historical philosophical questions regarding machine consciousness reveals that A.I. art is unethical and should not be promoted as a new art form.

To understand the proposed issue with A.I. art, a basic understanding of the process behind A.I. image generators is required. These models obtain information through a process called “web-scraping,” in which programs comb websites to gather data—in this case, in the

¹ Sarah Andersen, “The Alt-Right Manipulated My Comic. Then A.I. Claimed It,” *New York Times*, December 31, 2022, <https://www.nytimes.com/2022/12/31/opinion/sarah-andersen-how-algorithm-took-my-work.html>.

form of “images with accompanying text descriptions”² which are associated with one another. When the finished model receives a text prompt from a user, it uses the algorithm developed by finding images with associated text to invert the process, generating the most accurate image based upon the text input. This process means that the output image “can never exceed the limitations of its training images,”³ or that there is no creativity or ingenuity involved. The algorithm makes a cocktail of existing images to spit back out to the user. *Andersen et al v. Stability A.I. Ltd. et al* specifies that the company Stability AI’s model Stable Diffusion uses more than five billion scraped images, all unlicensed. Midjourney founder David Holz, whose model relies on Stable Diffusion, “has admitted that Midjourney has not sought the consent from creators for Midjourney’s training images.”⁴

The three plaintiffs of *Andersen et al v. Stability A.I. Ltd. et al* based their lawsuit on the notion that A.I. engines “perpetrate copyright infringement on an unprecedented scale,”⁵ copyright infringement that extended to their work among many other artists. A particularly egregious instance of copyright infringement described in the case filings is the use of an artist name in the prompt, which allows A.I. models to create an image based directly on artwork created by that artist. Andersen addresses this issue: “It’s undeniable; the A.I.s know me. Most have captured the outlines and signatures of my comics—black hair, bangs, striped T-shirts.”⁶ Not only can the A.I. model draw information from artists, but it can also mimic their style at the request of a human. Inputting the prompt “Sarah Andersen Comic” into DeepAI’s online image

² Mehran Sahami, “AI Art Is Theft: Labour, Extraction, and Exploitation, or, on the Dangers of Stochastic Pollocks,” *arXiv (Cornell University)*, January 1, 2024.

³ “Opposition/Response for Andersen Et Al V. Stability AI Ltd. Et Al,” Justia Dockets & Filings, June 5, 2023, accessed April 22, 2024, <https://docs.justia.com/cases/federal/district-courts/california/candce/3:2023cv00201/407208/67>.

⁴ Ibid

⁵ Ibid

⁶ “The Alt-Right Manipulated My Comic. Then A.I. Claimed It.”

generator quickly yields results with her characters' signature striped shirts and short black hair (Figure 1). A question arises here: who is the perpetrator of the intellectual theft? While humans may use available resources in the A.I. models to create images in a specific artist's style, the companies developing these models provide those resources to the public for profit, which makes them the primary perpetrator. Andersen successfully argued that the defendants committed direct copyright infringement on her work despite their counterargument that she failed to provide specific works infringed upon by the A.I. models. The plaintiffs also alleged "that the MidJourney Product is made available to users for payment, thereby disseminating those copies to customers,"⁷ addressing the perceived profiteering committed by the defendants. Two primary concerns regarding the use of AI image generators emerge in the plaintiff's argument: first, the worry that their work, if not in this moment, will inevitably be copied and sold by users of A.I. engines; and second, that A.I. engines could magnify the problem of co-opted artwork depicting a set of beliefs inconsistent with the artist's. Andersen addresses the latter problem with the example of artist Greg Rutowski, whose name is often entered into A.I. generator prompts: "Now, his name is no longer attached to just his own work, but it also summons a slew of imitations of varying quality that he hasn't approved."⁸ Artists globally worry about how their image will be altered and/or harmed by AI creations in their style.

⁷ "Opposition/Response for Andersen Et Al V. Stability AI Ltd. Et Al."

⁸ "The Alt-Right Manipulated My Comic. Then A.I. Claimed It."

well-known thinkers, Jean Baudrillard and Walter Benjamin, will be helpful in addressing this question. Baudrillard, in his book *Simulacra and Simulation*, references the famous example of the map that becomes so detailed that it covers all the territory that it intends to depict. This hyperrealistic form of copying, argues Baudrillard, is what postmodern society has produced; and so what, he asks, is reality anymore?¹¹ The total destruction of the boundary between reality and simulation is what characterizes his proposal, and can be useful as a framework through which to examine modern intellectual theft. A.I. models cannot yet form a completely accurate depiction of an artist's style, but each day they are closer to this capability. Once they can consistently copy an artist of their choice, what differentiates their artwork from the creator's? Given that the style is identical, the artwork, a simulation of the artist's, essentially becomes the artist's. Walter Benjamin's *The Work of Art in the Age of Mechanical Reproduction* explains that a piece of artwork has an "aura"¹² and each reproduction of that piece of artwork lessens that aura, effectively lowering its value. Both scholars, then, loosely believe in a theory of reproduction that involves lessening the value of the original in some way, either relative to the increased value of the simulation, or relative to the growing number of identical pieces.

Another question raised: how could this case have been handled differently? Victoria Young's article "An Unauthorized Renaissance? An Analysis of Artists' Claims for Copyright Infringement Against A.I. Generated Art and Possible Defenses"¹³ takes a practical approach to this question by examining possible defenses against A.I. copyright infringement that could be made in court. Young argues that the court could rule against the use of A.I. to reproduce an

¹¹ Jean Baudrillard, *Jean Baudrillard, Selected Writings*, ed. Mark Poster (Stanford University Press, 1988).

¹² Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, ed. Hannah Arendt, trans. Harry Zohn (1935; repr., Schocken Books, 1969).

¹³ Victoria Young, An Unauthorized Renaissance? An Analysis of Artists' Claims for Copyright Infringement Against AI Generated Art and Possible Defenses, 18 FIU L. Rev. 521 (2024).

artist's work as fair use because of an essential factor at play: “the market impact of the use.”¹⁴

According to Young, in the 2023 case *Hachette vs. Internet Archive*, Internet Archive attempted but failed to argue the publishers were not being harmed financially by their digital lending program. Similarly, A.I. generated art, which is based on scraped works, is plausibly competing with the artists of the original works.¹⁵ Artificial intelligence, above other harms such as plagiarism and theft of style, directly harms artists by becoming a viable competitor to their work. A successful litigation process, therefore, could be constructed from a basis of fair use. Second, and more philosophically, can an algorithm have a “creative” process? This question is derivative of the popular philosophical query as to whether an algorithm can think, as the ability to think would indicate a capacity for a creative process. Popular thought experiments in this realm include the Turing Test, a test of indistinguishability which asked a human to determine which participant of a conversation between another human and a machine was the former. This test still has not been passed by a computer.¹⁶ Alternatively, there is the argument from consciousness, which asserts that while mental states cannot be identified from behavior, there is no way of knowing if anything person or thing is conscious, so our assumptions about human consciousness apply to a machine. 2022 article “Understanding and Creating Art with AI: Review and Outlook” explores this question through the new breed of “A.I. artists” and finds that GANs, a notable machine learning framework, “have a very limited capacity for autonomy because they synthesize images that mimic the latent space of the training data... its capacity for autonomy is not significantly higher than the one of prior generative systems.”¹⁷ Clearly,

¹⁴ Young, “An Unauthorized Renaissance?”

¹⁵ Ibid

¹⁶ Amy Kind, *Philosophy of Mind: The Basics* (Taylor & Francis Group, 2020), <https://ebookcentral-proquest-com.proxy048.nclive.org/lib/davidson/reader.action?docID=6121568>.

¹⁷ Eva Cetinić and James She, “Understanding and Creating Art With AI: Review and Outlook,” *ACM Transactions on Multimedia Computing, Communications and Applications/ACM*

machines, while possessing the ability to learn, do not seem to be capable of “thinking” as the term is defined by humans. This reality may change given the exponential acceleration of technological progress occurring right now, but at this moment, artificial intelligence cannot think; therefore it cannot be creative.

This discovery has numerous implications, some regarding the world of “AI artists.” The creation of accessible, functioning A.I. engines has led not only to debates in the world of visual art over plagiarism or copyright infringement of a traditional artists work, but also to a controversial new breed of artists who use A.I. engines either in their working process or to create new pieces of artwork. Some well-known examples include Mario Klingemann, based out of Germany, and Memo Akten of Turkey. It is important to make a distinction to preface this section: between AI used in the process of analyzing existing art, and AI used in the process of creating new art.¹⁸ Another distinction that may seem relevant is between artists who use an already developed A.I. model and those who create their own A.I. model for personal use when working. This distinction, however, is largely irrelevant because artists’ models use larger models in order to avoid a colossal-scale web scraping process, meaning the potential image pool is identical for their smaller models. It is also necessary, before examining two specific A.I. artists, to explain the code of ethics that will determine whether the use of A.I. in art creation is ethical. This paper will view the morality of A.I. art through a Kantian lens—specifically utilizing Kant’s categorical imperative, which has two parameters: first, the universal law formulation, which states that an action is moral only if it can be accepted by all as a universal law. Second, the humanity formulation, which holds that an action is moral only if it treats a human as an ends in themselves and not as a mere means to an ends.

Transactions on Multimedia Computing Communications and Applications 18, no. 2 (February 16, 2022): 1–22, <https://doi.org/10.1145/3475799>.

¹⁸ Ibid

A.I. artist Mario Klingemann writes that “If there is one common denominator it’s my desire to understand, question and subvert the inner workings of systems of any kind.”¹⁹ Klingemann’s goal is evidently to manipulate the algorithm itself in order to produce artwork. Klingemann falls into the category of artists using their own A.I. algorithm in their work—his own algorithm, named “Botto,” has earned him over \$1 million from only five auctions (see Figure 2).²⁰ Klingemann states that “while 'Botto' is very much a live project, its ultimate form will be when it transitions fully from algorithm to artist, community-driven creator to autonomous entity.”²¹ Klingemann sees Botto itself as his primary artistic creation, and expects (notice the use of the word “when”) that it will eventually transition into an artist. Botto, however, is rooted in OpenAI’s image generator model, which employs the same web scraping techniques as the aforementioned large algorithms. It essentially sends the output images through a longer and more involved process to reach the desired output. Each image, while perhaps mixed more thoroughly, remains a cocktail of existing images with photographers or artists behind each of them. In this way, despite the living status of the algorithm, its output images are still unoriginal. Under the belief that A.I. models are not conscious, and taking a Kantian approach to ethics, Klingemann’s use of Botto, which relies on web scraping algorithms and therefore others’ intellectual property to concoct an image *with a distinct lack of a creative process*, the use of this algorithm to create art violates the humanity formulation of Kant’s categorical imperative by using the creators of scraped images as a mere means in order to advance one’s own brand. The added factor of simulation or reproduction theory would only strengthen this claim, as A.I. ’s

¹⁹ “About | Quasimondo,” n.d., <https://underdestruction.com/about/>.

²⁰ Shraddha Nair, “German Artist Mario Klingemann on His Creation & ‘Botto’, an NFT Revolution,” March 10, 2022, <https://www.stirworld.com/see-features-german-artist-mario-klingemann-on-his-creation-botto-a-nft-revolution>.

²¹ Ibid

simulations of an artist's work lessen the original work's value, clearly morally wrong under deontology.



Figure 2. Klingemann's 2018 work *Memories of Passerby I* clearly draws on surrealist artwork²²

A reasonable counter argument to the claim that A.I. art is unethical because of a lack of a creative process is that the A.I. model, drawing on billions of images to create an output, is comparable to the human brain, which also uses inspiration drawn from the millions of gigabytes of information stored in the brain. However, this argument crumbles in the face of creativity. The human brain has the capacity not just to blend images, but to add something novel, to create something that, while it may have inspirations, has some completely *new* aspects. A.I. does not yet have this capacity—it cannot think, it is not autonomous. It is also important to offer a disclaimer that I subjectively like A.I. artwork as a form. I think it is intriguing not only because

²² *Memories of Passerby I*, December 29, 2018, *UnderDestruction*, December 29, 2018, https://underdestruction.com/wordpress/wp-content/uploads/2020/08/03_Memories_of_Passersby_I%C2%A9_Mario_Klingemann_Courtesy_Onkaos-scaled.jpg.

of its different process but also because its products are often very interesting to look at. My opinion, however, is separate from my perception of the art form's morality, in which it stands as immoral. *Andersen et al v. Stability A.I. Ltd. et al* resulted in a lawfully correct but morally incorrect outcome that could be appealed with the right litigation strategies. This court case can serve as a stepping-off point for debates regarding the morality of A.I. art as a form, especially surrounding A.I. artists, because it offers a legal framework through which the use of A.I. is considered acceptable. Clearly, at this point in time, the court sees A.I. artwork as enough of a combination of intellectual property that its process is not considered theft. Applying philosophical work and a moral code to the same question, however, reveals a different interpretation of the ethics of A.I. art use—another chasm between what is legal and what is moral. A.I. Art will inevitably become more ubiquitous as technological advancements accelerate, so it is up to us to decide whether to support this new art form or to return to our reliance on our own, unenhanced, creativity.

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