AI, Visual Art and Copyright

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Legal Counsel Maria Rehbinder

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Image by Generative AI Dalle

Image prompt this and next page: "a sea otter with a pearl earring" by the painterJohannes Vermeer

https://openai.com/policies/terms-of-use

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Copyright aspects

1) Text, images and other outcomes produced by AI , will they get copyright protection ?
2) Copyright and use of text, images and other works to train AI
 3) AI outcomes and infringement of the works used for training

Image by Generative AI Dalle

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Definitions

AI ACT: Artificial intelligence definition under discussion

Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL LAYING DOWN HARMONISED RULES ON ARTIFICIAL INTELLIGENCE (ARTIFICIAL INTELLIGENCE ACT) AND AMENDING CERTAIN UNION LEGISLATIVE ACTSCOM/2021/206 final

AI Act proposal is now being discussed by the co-legislators, the European Parliament and the Council. The Council has adopted its common position ('General approach') on the AI Act on 6 December 2022. The Council's text narrows down the definition of artificial intelligence to AI systems developed through machine learning approaches and logic- and knowledge-based approaches.

Carriages preview | Legislative Train Schedule (europa.eu)

Transparency of AI use will be a requirement in the proposal

Council: AI system definition proposal

Article 3 Definitions For the purpose of this Regulation, the following definitions apply: (1) ‘artificial intelligence system’ (AI system) means a system that is designed to operate with elements of autonomy and that, based on machine and/or human-provided data and inputs, infers how to achieve a given set of objectives using machine learning and/or logic- and knowledge based approaches, and produces system-generated outputs such as content (generative AI systems), predictions, recommendations or decisions, influencing the environments with which the AI system interacts;

Transparency obligation

The AI ACT will contain transparency obligations regarding the training data used and use of generative AI to produce content.

Artificial Intelligence Act: Council and Parliament strike a deal on the first rules for AI in the world
https://www.consilium.europa.eu/en/press/press-releases/2023/12/09/artificial-intelligence-act-council-and-parliament-strike-a-deal-on-the-first-worldwide-rules-for-ai/ 7.1.2024

Copyright original work definition CJEU

C-145/10 - Painer

Case C-5/08 *Infopaq International* [2009] ECR I-6569, paragraph 35, that copyright is liable to apply only in relation to a subject-matter, such as a photograph, which is **original in the sense that it is its author's own intellectual creation**.

88 As stated in recital 17 in the preamble to Directive 93/98, an intellectual creation is an **author's own if it reflects the author's personality.**

89 That is the case if the **author was able to express his creative abilities** in the production of the work by **making free and creative choices** (see, *a contrario*, Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* [2011] ECR I-0000, paragraph 98).

91 In the preparation phase, the photographer can choose the background, the subject's pose and the lighting. When taking a portrait photograph, he can choose the framing, the angle of view and the atmosphere created. Finally, when selecting the snapshot, the photographer may choose from a variety of developing techniques the one he wishes to adopt or, where appropriate, use computer software.

92

C-145/10 - Painer

By **making** those various **choices, the author** of a portrait photograph **can stamp the work created with his 'personal touch'.**

93 Consequently, as regards a portrait photograph, the **freedom available to the author to exercise his creative abilities** will not necessarily be minor or even non-existent.

Text, images and other outcomes produced by AI , will they get copyright protection ?

Images created with AI system not copyright protected

Court of Justice of the European Union has declared on several occasions that copyright only applies to original works and that originality must reflect the "*author's own intellectual creation*" (see case C-5/08 Infopaq International A/S v Danske Dagbaldes Forening). A human author is necessary for a work to enjoy copyright protection.

Generative Artificial Intelligence: US Copyright Office denies registration

On 21 February 2023, the US Copyright Office (USCO) issued a decision to a request to register *Zarya of the Dawn*, a graphic novel that includes images created with the assistance of Midjourney, a generative Artificial Intelligence (AI) system.

Generative Artificial Intelligence: US Copyright Office denies registration - The IPKat (ipkitten.blogspot.com)

The determination of the USCO

USCO examined the different elements of the work: individual images generated through AI, text and selection and arrangement of images and text. With regard to individual images, the USCO examined in depth how Midjourney works, underling that users operate through "*prompts*" (text commands) which include the image and text description of what Midjourney should generate. After that, the technology generated four images in response.

According to the USCO, Midjourney does not interpret prompts as specific instructions to create a particular expressive result, but simply converts words and phrases into smaller tokens that are used for the training of data and to generate an image. The main finding of the Office is that the process is not controlled by the user because it is not possible to predict what Midjourney will create ahead of time. This process is not the same as that of a "*human*" artist, writer, or photographer.

Based on this, the USCO concluded that the images generated by Midjourney contained within the work are not original works of authorship protected by copyright, since Midjourney generates images in an unpredictable way. The fact that Midjourney specific output cannot be predicted by users makes Midjourney different for copyright purposes than other tools used by artists (e.g. editing tools, assistive tools) which allows the choice of specific changes and includes specific steps to control the final image "*such that it amounts to the artist's own original conception*" (on digital art and copyright protection see the recent Italian Supreme Court decision commented by IPKat). Also, time and efforts by the applicant in working with Midjourney do not imply authorship under copyright.

In sum, the USCO denied the registration for the images generated through the AI system concluding that "*text prompts*" were insufficient to qualify as "*human authorship*".

Human authorship requirement for copyright

show_public_doc (uscourts.gov) Thaler v- Perlmutter Human authorship requirement for copyright claim

Copyright is designed to adapt with the times. Underlying that adaptability, however, has been a consistent understanding that human creativity is the *sine qua non* at the core of copyrightability, even as that human creativity is channeled through new tools or into new media.

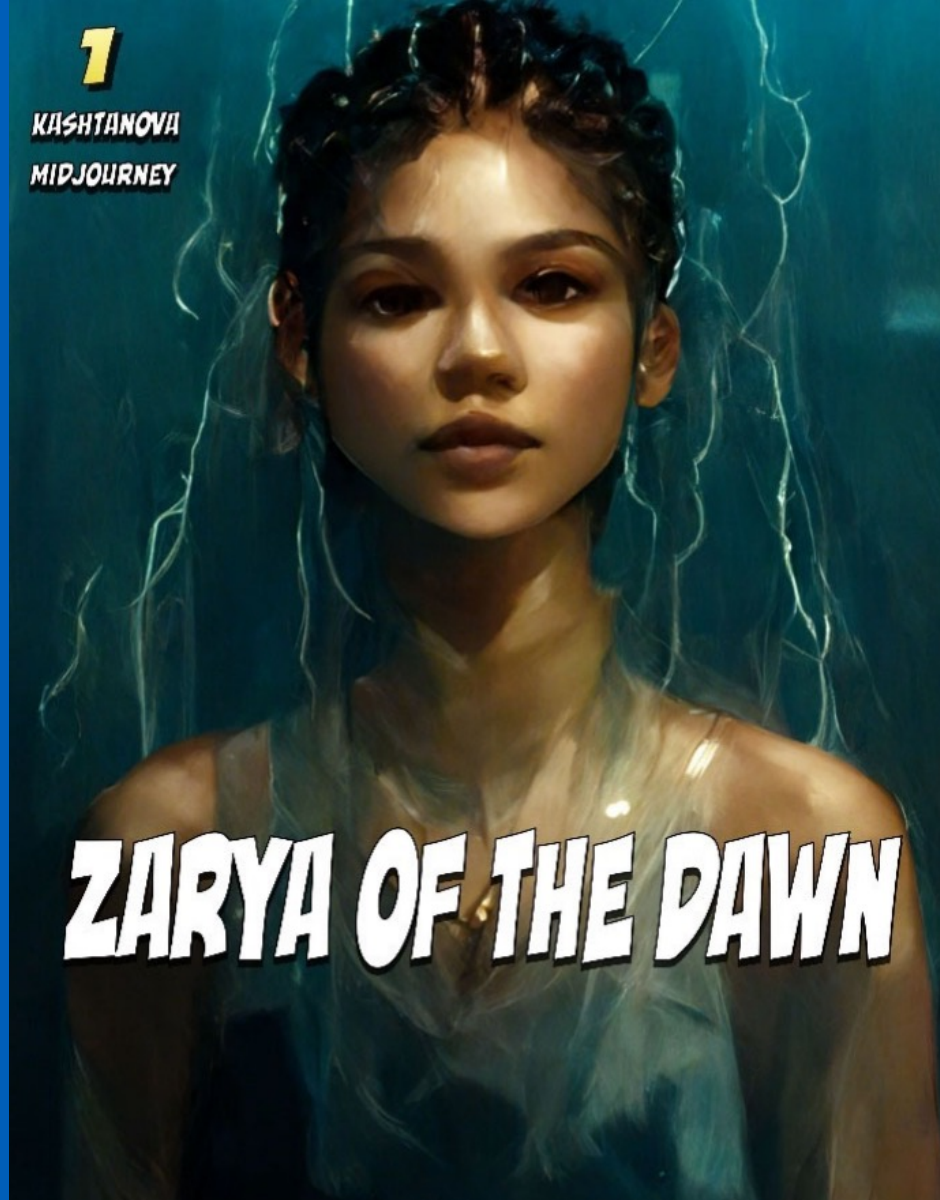
Sources

Vesala, Juha: Developing Artificial Intelligence-Based ContentCreation: Are EU Copyright and Antitrust Law Fit for Purpose?
ICC - International Review of Intellectual Property and Competition Law
IIC 54, 351–380 (2023). https://doi.org/10.1007/s40319-023-01301-2

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
STEPHEN THALER, Plaintiff, v. SHIRA PERLMUTTER, Register of Copyrights and Director of the United States Copyright Office, et al. Civil Action No. 22-1564 (BAH) https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2022cv1564-24

USCO Registration Decision on Zarya of the Dawn 21.2.2023
https://www.copyright.gov/docs/zarya-of-the-dawn.pdf

In September 2022, Ms. Kristina Kashtanova applied and obtained copyright registration for the work “Zarya of the Dawn”. The work is a “comic book”, cover page consists of an image of a young woman, the work’s title, and the words “Kashtanova” Midjourney”. The remaining pages consist of a mix of text and visual material. The application did not disclose that the author used AI to create part of the work. The USCO then became aware of statements on social media that the applicant had used the AI system Midjourney to create the book and asked the applicant for clarification due to the application being incorrect or, at least, incomplete.



Copyright and use of text, images and others works to train AI

Preparation of copies of works for text and data mining Section 13 b (3.3.2023/263)

Whoever has legal access to the work may make copies of it for use for text and data mining and keep copies exclusively for that purpose, unless the author has expressly and appropriately reserved this right.

Research organizations and cultural heritage institutions that have legal access to the work may make copies of it for text and data mining in scientific research and keep them for scientific research, including for later verification of research results, provided that copies of the work are only available to those entitled to do so. What is stipulated in this subsection cannot be deviated from by agreement, nor can it be prevented by technical means.

Digital Sigle Market directive Art 2

Definitions

For the purposes of this Directive, the following definitions apply:

….

(2)

‘text and data mining’ means any automated analytical technique aimed at analysing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations;

Exception or limitation for text and data mining

Article 4

Exception or limitation for text and data mining

1. Member States shall provide for an exception or limitation to the rights provided for in Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, Article 4(1)(a) and (b) of Directive 2009/24/EC and Article 15(1) of this Directive for reproductions and extractions of lawfully accessible works and other subject matter for the purposes of text and data mining.

2. Reproductions and extractions made pursuant to paragraph 1 may be retained for as long as is necessary for the purposes of text and data mining.

3. The exception or limitation provided for in paragraph 1 shall apply on condition that the use of works and other subject matter referred to in that paragraph has not been expressly reserved by their rightholders in an appropriate manner, such as machine-readable means in the case of content made publicly available online.

4. This Article shall not affect the application of Article 3 of this Directive.

Images and other works used for training artificial intelligence

Use of works is allowed as training material for artificial intelligence by data mining exception, as data mining is a analytical technique aimed at analysing data in digital form in order to generate information, for example large foundation models.

Rightholder can prohibit the use of their images as training materials for companies, prohibition needs to be spefific and machine readable. Commercial use is limted by Infosoc Directive Art 5(3) subsection 5).Universities and research organisations can use works for text- and data mining by mandatory exception.

Three step test limits copyright exceptions

Infosoc directive 5(5) The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder. (Finland: HE 43/2022 p.7-8)

“DALL·E 3 is designed to decline requests that ask for an image in the style of a living artist”; https://openai.com/dall-e-3 . Creating images in the style of a living artists would unreasonably prejuridice the legitimate interests of that artist

Invasive Diffusion: How one unwilling illustrator found herself turned into an AI model: https://waxy.org/2022/11/invasive-diffusion-how-one-unwilling-illustrator-found-herself-turned-into-an-ai-model/

Not fair use ? Court cases

Getty Images licensing to AI use, for example BRIA
https://investors.gettyimages.com/news-releases/news-release-details/bria-partners-getty-images-transform-visual-content-through

One company used Getty Images without a license
https://www.theverge.com/2023/2/6/23587393/ai-art-copyright-lawsuit-getty-images-stable-diffusion

- myös Midjourney on haastettu samanlaisessa tapauksessa:
https://www.theverge.com/2023/1/16/23557098/generative-ai-art-copyright-legal-lawsuit-stable-diffusion-midjourney-deviantart

Text and Data Mining is a building block for machine and deep learning, which play a foundational role in the development of Artificial Intelligence

Without the ability of computers to access and analyse very large amounts of data, employ cognitive technologies to allow the learning of patterns, AI would simply not be possible.

TDM is now used by organizations of all sizes and in every sector of the economy to analyse enormous volumes of data, in line with EU data protection rules, and generate insights that would have been unimaginable just 10 years ago. With the current COVID pandemic, the **medical world** turned to TDM and AI to review massive amounts of data to advance the search for a vaccine and a cure. **Librarians and teachers** are using TDM to identify better ways to educate students or inform the public. **Businesses** are using TDM to better understand the needs of consumers of their products and services while and startups use TDM to build new tools and develop innovations that create new jobs and unlock new opportunities. And **governments** all over the world are turning to TDM to improve the environment, transportation systems, public services and safety.

The right exceptions to copyright to conduct **Text and Data Mining** are required to support the development and training of **Artificial Intelligence** applications. **Text & Data Mining - European Alliance for Research Excellence (eare.eu)**

THE NEW TDM EXCEPTION IN EUROPE'S COPYRIGHT DIRECTIVE

Broad text and data mining exception in the 2019 Directive for Copyright in the Digital Single Market generates opportunities for the power of data. This new exception allows all Europeans, public researchers and commercial entities to perform text and data mining activities on materials they have lawful access to.

Articles 3 and 4 of the new copyright Directive provide much needed clarity for all entities that are at the forefront of the research and innovation ecosystem in Europe, including researchers, libraries, start-ups, SMEs and technology companies.

This new legislative framework will:

•Enable successful research, which is often the result of effective public-private partnerships;

•Support the development and growth of Artificial Intelligence (AI) in the European Union;

•Promote applications of data analytics and big data and therefore unlock many new business opportunities for innovators in Europe;

•Give Europe the tools to compete globally with countries such as the U.S, Japan, and Singapore that have all already adopted TDM-friendly copyright laws.

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Choices and editing ? Could there be originality ?

Artwork generated using AI software Midjourney won a state competition - The Verge

Allen said he's been telling people at the show that the piece is "digital art created using a.i. tools" and that he doesn't need to explain what Midjourney is any more than a digital artist might explain how Adobe Illustrator works. He also emphasizes the work he put into creating the image — "I made the prompt, I fine tuned it for many weeks, curated all the images" — and adds that his Photoshop editing constituted "at least 10%" of the work.

Rightholder can prohibit commercial use

If the right holder has expressly reserved the AI training use in appropriate manner, such as machine-readable means in the case of content made publicly available online, the AI training use is against copyright legislation

Getty Images Is Suing the Company Behind Stable Diffusion, Saying the A.I. Generator Illegally Scraped Its Content (artnet.com)

Article 3 Text and data mining for the purposes of scientific research

1. Member States shall provide for an exception to the rights provided for in Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, and Article 15(1) of this Directive for reproductions and extractions made by research organisations and cultural heritage institutions in order to carry out, for the purposes of scientific research, text and data mining of works or other subject matter to which they have lawful access.

2. Copies of works or other subject matter made in compliance with paragraph 1 shall be stored with an appropriate level of security and may be retained for the purposes of scientific research, including for the verification of research results.

AI outcomes and infringement of the copyright of works used for training AI

AI company copyright infringement

New YorkCNN — Getty Images suing the makers of popular AI art tool for allegedly stealing photos | CNN Business

Getty Images announced a lawsuit against Stability AI, the company behind popular AI art tool Stable Diffusion, alleging the tech company committed copyright infringement.

The stock image giant accused Stability AI of copying and processing millions of its images without obtaining the proper licensing, according to a press release issued Tuesday. London-based Stability AI announced it had raised $101 million in funding for open-source AI tech in October and released version 2.1 of its Stable Diffusion tool in December.

Discussion

Invasive Diffusion: How one unwilling illustrator found herself turned into an AI model - Waxy.org

EVA Statement on Artificial Intelligence - European Visual Artists - EVA (evartists.org)

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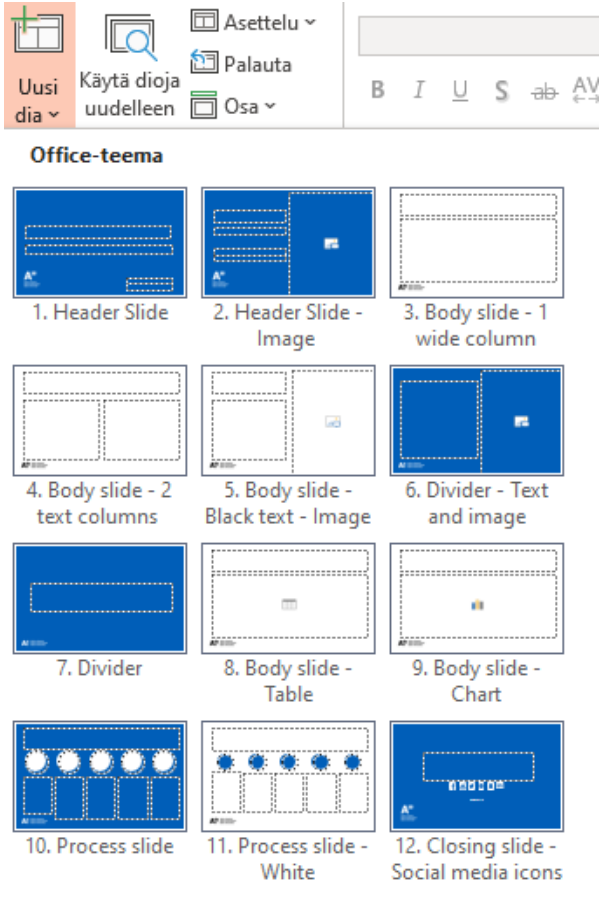

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