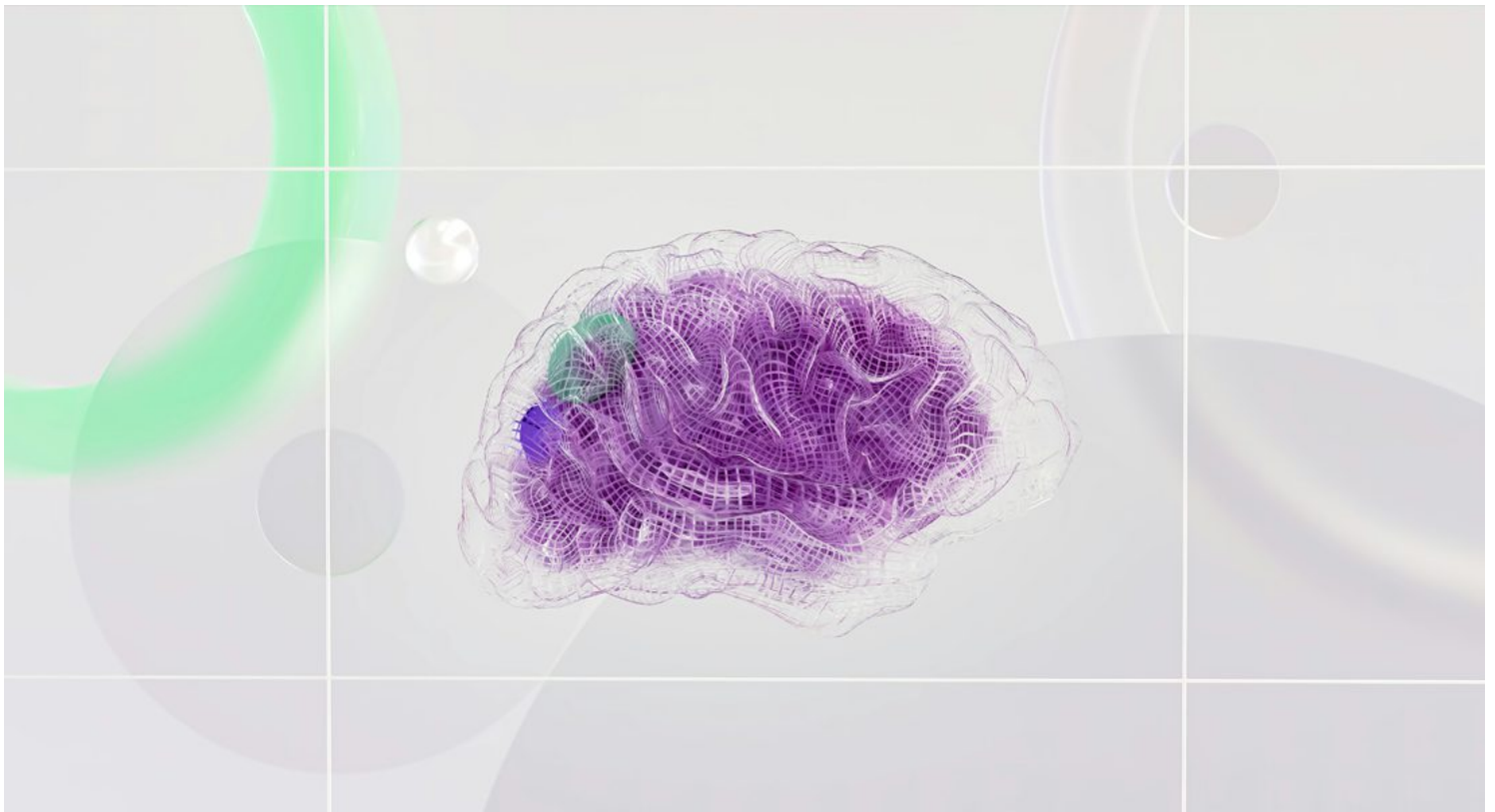


NEWS & INSIGHTS

To boldly define an artist

BY: [STEVEN L. O'DONNELL, PH.D.](#) | [INSIGHTS](#) | [ARTICLE](#)

JANUARY 23, 2024



The controversy surrounding the copyrightability of art created by artificial intelligence (AI) revolves around the fundamental question of authorship and creative agency. Proponents argue that AI-generated works should be eligible for copyright protection, citing the intricate algorithms and unique outputs that AI systems can produce. They contend that the act of programming the AI constitutes a form of human creativity, deserving recognition and legal safeguards.

On the flip side, critics maintain that AI lacks the intrinsic creativity and intent associated with human authors. They argue that AI merely processes data and produces outcomes based on pre-programmed instructions, making it a tool rather than a true creative entity. This dispute raises complex legal and philosophical questions about the nature of authorship in the digital age, challenging traditional copyright paradigms. As the conversation evolves,

legal frameworks will need to adapt to strike a balance between acknowledging AI's role in creative processes and preserving the rights of human creators.

The above was written (generated, regurgitated?) by ChatGPT from the prompt "Write 150 words on the controversy concerning whether artificial intelligence can create copyrightable art," I think it did an OK job for an intro. Thanks Ultron!

The rest of what you're about to read, though, [taps chest] that's all Steve.

As ChatGPT suggested, what AI does is scrape data created by someone (or, in a Vincent Price imitation "someTHING") and process it through an algorithm along with other data and spit out some result. So, for example, my prompt instructed ChatGPT to do something like grab a bunch of articles written about AI and copyright, pull the first sentence out of each paragraph, grab some replacement words from a thesaurus to obscure source material, shake and pour. Sounds rather cold and impersonal.

Contrast with how I may have written a report on Ohio in middle school: grab the "O" volume of an encyclopedia and look up Ohio, pull a few sentences out of each significant subheading, reword to obscure source material, and hand it in.

Does AI copy, or does it transform?

Picasso is credited with saying, "Good artists copy, great artists steal." That quote is often misunderstood to encourage blatant idea theft, but what it really means is the mediocre do something like I did in my report on Ohio and copy what someone else created, but a great student would have taken pre-existing material on Ohio and transformed it into something new, making it their unique work.

This thought of transformation isn't new in copyright law. It's probably the most fun prong of a fair use analysis. Fun for copyright nerds, at least.

Fair use says that some uses of copyrighted works aren't infringing, and a court should look at four factors:

- The nature of the use
- The nature of the work
- The amount used
- The effect of the use on the market of the original in making a fair use determination.

Falling under the heading "the nature of the use" is whether the work is "transformative." Does the new work merely supersede the use of the original work and substitute itself for it, or does the new work alter and imbue the original with a new expression or message?

If the new work is sufficiently transformative, it doesn't infringe on the underlying work, although one might be able to trace a line to the original. "West Side Story" doesn't infringe on *Romeo and Juliet*, although it's an adaptation (there are other reasons too, one being *Romeo and Juliet* was written over 400 years ago, but it's a well-worn copyright example suited for many uses).

Presumably, AI will continue to improve, so if AI is acting like a “good artist” now, at what point will it create something sufficiently transformed to be a “great artist?”

I don’t know.

“Star Trek” shows us the way ... maybe

Whenever confronted with puzzling moral, ethical, or legal questions, I, like so many before me, turn to science fiction. In particular “Star Trek.”

This issue was addressed in the “Author, Author” episode of “Star Trek: Voyager.”

For the uninitiated, in the first episode, the *USS Voyager* is flung way out in unexplored space so far that the trip back to Earth would take about 75 years (they eventually get back after 26 years, but then...wait, I don’t want to spoil it). The medical crew is killed in the first episode and an emergency holographic doctor program is activated.

Throughout the series, the Doctor develops as a character, and in one episode, he writes a holonovel (which we’ll call a novel). The Doctor has a publisher lined up but hasn’t submitted a final copy. The publisher goes forward without authorization and publishes the novel anyway, and because AI holograms have no rights, the publisher can do whatever he wants with the novel.

The Doctor argues that he should have the rights of a person to control his art and an arbitrator is brought in to decide the issue. There is testimony about how the Doctor has been teaching others to be his medical assistants, how he’s disobeyed direct orders, and how he paints and composes music, all presumably uniquely human actions.

The arbitrator ultimately refuses to extend personhood to the Doctor, but agrees that he’s more than just a hologram, fits within the legal definition of “artist,” and is covered by their version of copyright law.

Was “Star Trek” right?

I would have expected years of litigation and several appeals before a decision from the Federation’s court of last resort, but we’re working within a 43-minute running time, so some shortcuts are expected.

I’m not sure I agree with the arbitrator’s analysis, even if I agree with the outcome. The question seems to be less of whether the AI is an artist but whether the AI is a “good” artist that merely copies or a “great” artist that transforms. Something like that might help differentiate the rights of fleshy artists and holographic ones. But no one asked me.

Unfortunately, our legal system does not officially recognize Star Trek as legal authority ... yet. However, the episode proposes that an AI could produce copyrightable art. Whether we’ll make such a finding before we become a warp-capable species is yet to be seen.

If your business has any questions about ChatGPT or any other generative AI application and copyright law, [reach out to me](#) or any of the attorneys in the [Saxton & Stump Intellectual Property Group](#).

Related People

[Steven L. O'Donnell, Ph.D.](#)

Related Services and Industries

[Intellectual Property](#)