

# AI Art Is in Legal Greyscale

The legal ambiguity of art created by artificial intelligence adds confusion to controversy.

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Jan 24, 2023 | Elizabeth Penava

A picture may be worth a thousand words. But what about a picture generated entirely by a machine?

That is the question scholars, advocates, and internet users have been considering lately, as art generated by [artificial intelligence](#) (AI) has [exploded](#) in popularity. Some commentators have [asked](#) who regulates this digitally created art and whether the courts can prevent theft of creative ideas and techniques in the process of its generation.

But the reality is that little regulation [protects](#) the copyrighted works used to train these AI-based technologies, and privacy protections for images used in the creation of AI-based art are scant. Advocates have called for regulatory solutions rooted in [copyright](#) and [privacy](#) law.

Toward the end of last year, popular use of the Lensa AI app, which generates stylized portraits based on users' uploaded selfies, [spurred](#) the latest round of controversy over the ethics of AI-generated art. Debate over AI art had been [raging](#) since earlier last year, when other popular AI models such as DALL-E 2 and Stable Diffusion rapidly [gained](#) popularity.

Some commentators have [noted](#) that these programs have made art more accessible. Stable Diffusion [generates](#) images for free based on strings of text entered by users, and Lensa [sells](#) its portraits for as little as \$3.99. Queer users of Lensa have [shared](#) that the avatars created by the app, which allows users to specify their gender, have made them feel joyful and aligned with their true gender identity.

But many others have [voiced](#) concerns that [stem](#) from the mechanisms that such algorithms use to generate new images. Their creators [collect](#) and use captioned images to train the AI algorithm on the relationships

between textual and visual representations. For example, Stable Diffusion [trained](#) its algorithm on data sets collected by the German nonprofit [LAION](#), which has [collected](#) billions of captioned images from art shopping sites and websites such as Pinterest.

And it has [done](#) so without consent, causing artists and advocates to raise copyright concerns.

One artist, Greg Rutkowski, has reportedly [complained](#) that AI-generated images mimicking his art are drowning out his own work. Users had apparently [prompted](#) Stable Diffusion with text including Rutkowski's name nearly a hundred thousand times as of September 2022.

But LAION [disclaims](#) copyright liability for its use of the images—and whether it is correct is unclear. The [Copyright Act of 1976 provides](#) copyright owners of artistic works with exclusive rights to reproduce and adapt their works. But for someone to be liable for violating the right to reproduce images, they must [create](#) copies that are [fixed](#).

And courts have [found](#) that intermediate copies generated for only 1.2 seconds to be insufficiently fixed, raising questions as to whether the intermediate copies used to train the machinery in AI programs can give rise to liability.

Copyright owners may not have better luck alleging violations of adaptation rights because of the doctrine of [fair use](#). Fair use [allows](#) for the creation of a new work based on a copyrighted work—without the copyright owner's permission—if the work is sufficiently [transformative](#), meaning it somehow changes the work's meaning or message or carries a different purpose.

Traditionally, fair use has [presented](#) a relatively low bar for those claiming it. Soon, however, the U.S. Supreme Court will decide a fair use case, and it could [adopt](#) a stricter standard.

In addition to expressing concerns about copyright, commentators have also [expressed](#) privacy concerns over the use of personal and private images to train the AI.

DALL-E 2 recently [began](#) allowing users to upload real people's faces, and Stable Diffusion has [operated](#) without any limitations or moderation since its inception. Users have [expressed](#) concerns about personal data being used. One person, for example, found out that LAION had [collected](#) her personal medical images when she looked herself up on [Have I Been Trained](#), a website built by German artists to help identify any artwork or personal images used by AI.

Lensa has also [garnered](#) scrutiny over its privacy policy, which allowed its technology to rely on user-uploaded images to train its algorithms. Prisma, the company that owns Lensa, [claimed](#) that it permanently deletes user images after creating avatars. In December 2022, it [updated](#) its privacy policy to state that it does not use personal data to train Prisma's other AI tools.

Individuals with personal privacy concerns do not have many options. European Union residents can file [General Data Protection Regulation](#) (GDPR) complaints to request the takedown of images used in LAION. But this only prevents the images from being used in the future—it does not reverse past usage or training. And U.S. users [are](#) without even such limited recourse. The LAION website only [permits](#) users to request image takedowns via email, with the same limitation, and no federal privacy protections akin to the GDPR [exist](#) in the United States.

Advocates have proposed a variety of regulatory solutions. To address copyright concerns, some experts have [argued](#) that the U.S. Congress should pass legislation aimed specifically at AI. Others have likened the problem to illegal file-sharing in the early 2000s and have [suggested](#) that legislators pursue a broad licensing scheme for underlying works.

To mitigate privacy risks, companies running AI generators could self-regulate to prevent the use of personal data. But some commentators have [argued](#) that relying on this strategy is insufficient.

Other experts have [pushed](#) for federal statutory privacy protections that would allow people to protest the use of their images by these platforms. Still others have [suggested](#) that the Federal Trade Commission employ algorithmic destruction, an enforcement tool that it has [used](#) to address illegal or bad faith collection of personal data.

Regulation often lags behind technology. Even now, just a few months into AI-generated art's explosion in popularity, the regulatory path ahead remains hazy.