

## OpenAI To Bar Users From Copying Living Artists, Atty Says

By **Bonnie Eslinger**

*Law360 (June 9, 2023, 9:25 PM EDT)* -- Speaking Thursday at a San Francisco conference that explored the intersection of art and the law, OpenAI's deputy general counsel discussed the difficult legal questions around copyrighting artificial intelligence-generated art and said, "even though it's not legally necessary," OpenAI will soon prohibit users from creating works in the style of living artists.

Sponsored by the University of California, Berkeley School of Law, the symposium looked at recent developments in art, finance, law and technology and offered perspectives from attorneys with Morrison Foerster LLP and Sullivan & Cromwell LLP, along with artists, academics, museum officials and law enforcement.

During a panel entitled "War of the Worlds: Human Creativity vs. Machine," the deputy general counsel of OpenAI, the company behind the popular artificial intelligence chatbot ChatGPT and the AI-powered image generator DALL-E, said working out the copyrightability of AI-generated works will be challenging.

"'Copyrightability' is essentially how much control did the person exercise over it, versus the machine doing all the work, and I think that's going to be much more case by case," said OpenAI's Che Chang.

There are talented artists today using AI tools to create works that are special and unique, Chang said.

"That should be recognized somehow whether it's through a full copyright, or whether through a lighter degree of copyright," Chang said. "There's lots of variation and places it can go."

Artificial intelligence can create text, images, and code, and the way it does that is fairly straightforward, Chang said.

"It seems very esoteric and magical, but it's essentially like a large-scale statistical mathematical analysis," he said. "They look at a bunch of existing content of whatever form you want to take, text or images or whatever, they analyze the content [and] they learn how to predict."

Berkeley Law Assistant Dean Adam Sterling asked Chang how the company is responding to artists who complain that DALL-E enables others to make unlawful iterations of their work.

Chang said that's a hot topic right now and said some artists have said they don't want their art used to train AI programs, and some don't want those programs creating works similar to their art.

"We definitely do not want to replace the role of artists — that's not the goal of this. The goal of this is to help people create," Chang said. "One thing that we will be announcing in the near future is that we're not going to allow generation in the style of living artists, even though it's not legally necessary."

OpenAI, however, hopes to keep the option open for using their art to teach its AI machines.

"When you're teaching these [machines] to perform whatever the task is, you need a lot of models," Chang said.

OpenAI is speaking to creators, policymakers, law professors and members of other industries to determine the direction of the products it creates, Chang said.

"We're having a lot of conversations ... about what is the best way to be a useful part of this overall creative ecosystem, rather than just replace it or take over it as a tech company," Chang said.

The popularity of ChatGPT and similar artificial intelligence tools shows that the public wants them and they can be useful, the OpenAI attorney said.

"But they want it to be done in a way that's fair, and fairness is a very elusive, hard concept to define," Chang said.

The company is actively working through those concerns, he said.

Chang also acknowledged during the discussion that AI "has a pretty bad brand problem," due to people's fears about the potential consequences if adoption of the technology becomes widespread and unregulated. That's why public dialogue is needed, he said.

"These systems are going to get more powerful, TBD where that caps out but as they get more powerful, it's important that [as a] society we all have a chance to think about what we want to do with this type of technology," Chang said. "But there's not really a chance of existential crisis or end-of-humanity worries."

Also participating in the discussion was Heather Whitney of Morrison Foerster, who is a member of the firm's artificial intelligence group.

Whitney agreed with Chang that when it comes to establishing ownership models for works involving artificial intelligence, there won't be a one-size-fits-all model.

"I think it would be wonderful if there was a case-by-case analysis once we got clear on what we mean by authorship," Whitney said.

When it comes to art, AI will likely become a tool that artists use, like Adobe Photoshop, the Morrison Foerster attorney said. She also compared the current concerns with the copyrightability of AI-generated art to the legal cases that emerged with the advent of photography.

"We were asking and debating, 'Is this an art form?' ... 'Is there any human creativity? You're just taking a picture of the world'," the lawyer said. "If you just apply those cases to visual works like DALL-E, then it's hard to see why it shouldn't be copyrighted."

Another panel discussion Thursday looked at a recent decision by the U.S. Supreme Court finding that Andy Warhol's portraits of music icon Prince do not fall under copyright's fair use doctrine.

UC Berkeley Law Professor Peter Menell spoke favorably about the decision, calling it a "watershed case," that "will have tremendous importance."

In particular, Menell said the court was right to focus its analysis on the specific use of the Warhol portrait in question as a commercial product and how that weighed against fair use.

"The use-analysis is important," Menell said. "The use goes to how we're going to balance the transformative versus the commercial or other character aspects."

Thursday's discussion about the use of artificial intelligence in art comes amid growing litigation and regulatory discussion related to copyright.

Earlier in the week, Getty Images accused the company behind the artificial intelligence art platform Stable Diffusion of using millions of copyrighted images from its website.

In addition, a putative class of artists are claiming artificial intelligence art platforms are massively misappropriating their protected imagery.

Back in May, the former general counsel of the U.S. Copyright Office told members of the House Judiciary's intellectual property subcommittee during a hearing that copyright law is generally equipped to handle artificial intelligence, but that some concerns might be beyond its scope.

And an artist who used artificial intelligence platform Midjourney to create illustrations for their comic book illustrations received a limited copyright registration on their work after the U.S. Copyright Office determined in February that only some parts of the book can be protected by copyright.

--Additional reporting by Tiffany Hu. Editing by Linda Voorhis.