Research on the Copyability of AI-generated Image in the Context of the Copyright Law of the PRC

- Based on the First Copyright Infringement Case of AI-Generated Image

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Abstract. The first copyright infringement case of AI-generated images was concluded in the first instance, but the related disputes have not been settled. The core issues focus on two aspects: First, whether the works generated by AI should be protected by the Copyright Law of the PRC; Second, under the framework of the Copyright Law of the PRC, how to characterize AI-generated images. From a factual perspective, users of AI models are not creators of AI-generated image; From a value perspective, AI cannot also be considered an author within the meaning of the Copyright Law of the PRC. Therefore, AI-generated image are not copyrightable and should not be included in the object scope of protection by the Copyright Law of the PRC. From the perspective of cost and benefit, there is no need for AI-generated image to be protected by the Copyright Law of the PRC. It will not affect the AI industry to deny the copyability of AI-generated image, but will deal a blow to the commercial art industry, which is conducive to reducing social costs and protecting public interests.

Keywords: AI-generated Image; Copyright; Copyability.

1. Proposal of the Question

Since the concept of Artificial Intelligence (AI) was formally proposed at the Dartmouth Conference in the United States in 1956, after nearly 70 years of development, AI technology has gradually transformed from an abstract concept into a real technology, and with the continuous progress of information technology, it has rapidly developed and been integrated into various fields as well as people's real life. In the big data era, AI technology has gradually shown new characteristics: high learning, cross-border integration, man-machine collaboration, group intelligence openness and autonomous control. In 2022, with the birth of ChatGPT, AI-generated content (AIGC) received widespread attention in the world, which broke through the basic threshold of content learning and intelligent generation. AIGC can directly participate in the production and distribution process of human-machine collaboration, with a direct impact on human priority and autonomy. Among them, AI drawing technology has realized the function of generating high-quality images according to text based on the diffusion model, which is increasingly applied in people's lives.

According to Article 3 of the Copyright Law of the PRC, a work is a "creative intellectual achievement in the fields of literature, art and science that can be expressed in a certain form." By learning massive data and undergoing large-scale data training, AI-generated Image (AIGI) are difficult to distinguish from human works in external expression form, and can fully meet the originality requirements of traditional works in appearance. Whether AIGI can be protected by the Copyright Law of the PRC and how to identify its rights have become urgent issues to respond to. In November 2023, the first instance trial of the Beijing Internet Court concluded the first case of copyright infringement of AIGI (hereinafter referred to as "the BIC case"), which has made a useful exploration. The court held that AIGI involved in the case belonged to the work, and its copyright should be protected by law. The court found that the plaintiff, who set the relevant AI model according to the need and finally selected the image, had the copyright of the image involved in the case. The judge in the case pointed out that recognizing the "work" attribute of AIGI and the "creator" identity of the user will not only encourage the enthusiasm of AI users, achieving the goal of encouraging creation under the Copyright Law of the PRC, but also promote the development and innovation of AI technology. Although this case has made a positive response to the legal attributes
and copyright ownership of AIGI, there are still large differences between the theoretical and practical circles. The theoretical disputes mainly focus on two points: First, whether AI products should be protected by the Copyright Law of the PRC; Second, from the perspective of the Copyright Law of the PRC, how to identify the legal attributes of AIGI. The following will focus on the two issues, trying to deeply explore the copyright-ability and legal nature of AIGI.

2. Arguments on the Copyability of AI-generated Image

2.1 AIGI is not a Direct Expression of Users' Free Will.

According to the provisions of Paragraph 1, Article 3 of Regulations for the Implementation of the the Copyright Law of the PRC, the term "creation" in the the Copyright Law of the PRC refers to intellectual activities that directly produce literary, artistic and scientific works. According to the general theory, creation is a process in which the actor chooses the symbol independently and presents it in a certain tangible form. However, AIGI is not a direct expression of users' thoughts, but the achievement of third-party intelligence factors, which is the product of indirect effects. The choice, selection, arrangement and design of the users' input keywords cannot be equated with the direct arrangement of the generated images. The AI users do not personally conceive the layout of the pictures, control the direction of the brush, and decide the choice of colors, but merely send highly general instructions to AI with keywords, and AI directly generates the final images.

Although AI has already possessed the "intelligence" of independent symbol selection by simulating human perception, thinking, judgment and action, at this stage, AI still cannot create independently without human instructions. Some scholars compare the situation generated by AI to the components of cooperative works, believing that the behavior of users inputting keywords into the AI model only belongs to auxiliary work, and they do not make intellectual input in the actual formation process, lacking substantive contribution, which proves that the use of AIGC does not belong to the behavior of "directly producing" works. For collaborative works, although dictators of autobiographical literary works have not written the works themselves, they can still be the co-authors of the final works. That is because although not presenting the content of oral works in the form of text, the dictators contributed considerable intellectual labor to the substance of the final work. Meanwhile, there is an agreement between the dictators and the writers to co-create, and the two cooperate, complement and coordinate together to complete the creation. Although in form, the relationship between the AI model and the users is similar to the relationship between the co-authors, the AI users only guide AI unilaterally, allowing AI to make its own choice and image expression, and the users can not reach a subjective agreement with AI. There is also no intellectual input into the final product comparable to AI's contribution. Thus, it is not appropriate to use cooperative works to compare the relationship between AI and users, and then evaluate whether users input keywords directly generate images.

Therefore, to determine whether the criterion of "directly generated" is met, we should still focus on the facts. The process of AIGI generally goes through two stages: the first is the process of AI converting text into text vectors, and the second is the final image by using the diffusion model through mapping potential space, and matching and combining based on the previous deep training content. Although the time cost of AIGI is much lower than that of manual painting with the same amount of work, this is only the result of high-speed computer operation, which does not mean that the degree of AI autonomous selection for images is lower than that of human painters at the same level. It can be seen that the process of AIGI is out of the control of the operator, and after the operator inputs the keywords, the work of how to express the image and how to combine the elements is completely handed over to AI, which does not directly participate in the drawing process of the final image. the Copyright Law of the PRC protects "expression," not "thought." However, the high degree of AI autonomous selection has diluted the connection between the users' thoughts and the final pictorial expression. Therefore, AIGC involved in the BIC case cannot be identified as the result of user creation, but only the result of users' simple selection of ready-made images directly generated
by AI according to their aesthetics. Only seeing that the users’ behavior of inputting keywords is related to AIGI, no matter how distant this "connection" is, it is believed that the generated content comes from the users, and it is a disregard for the legal connotation of "creation." Therefore, we cannot simply take the degree of human intervention as the criterion to judge whether originality is satisfied. No matter how many times AI users enter keywords and how frequently they adjust parameters, they only reflect the value needs of users rather than value contributions, and the users' behavior has only changed quantitatively, while its fundamental nature has not changed, that is, it is only the general use of AI, rather than the "creation" behavior.

2.2 The AI Model is not the Author in the Context of the Copyright Law of the PRC.

2.2.1 The Distinction Between the Necessity and Reality of the Author

The act of creation is the link between the author and the work, as well as the key to judging the copyright ownership of the work. AI directly generates images through autonomous selection, so based on the judgment criterion of "direct generation theory", it seems reasonable to identify the AI model as the author. However, whether the AI model can be evaluated as the author in the context of the Copyright Law of the PRC is not a simple matter of fact, but of value judgment. The judgment of the BIC case held that the AI model itself cannot become the author stipulated in the Copyright Law of the PRC, and made a negative evaluation on the above-mentioned issues.

According to the provisions of Paragraphs 2 and 3, Article 11 of the Copyright Law of the PRC, authors are limited to "natural persons, legal persons or unincorporated organizations," so excluding AI models as authors is conducive to maintaining the stability of the right confirmation and infringement system. It should be noted that the response to this question still requires a strong argument to make the case have a more far-reaching value for similar cases. With the extensive implementation and development of generative AI technology, the question of whether AI enjoys the legal status of the author needs a more precise conclusion and more in-depth demonstration.

Before discussing this issue, we should first make clear a key premise that legal norms regulate the relationship between people, and once the law is separated from people, it loses its value of existence. Even if it is admitted that the AI model enjoys the author status, as long as the relevant interests are reasonably distributed, it can still ensure that the ultimate beneficiary is a person. Article 2 of the Copyright Law of the PRC stipulates that legal persons or other organizations can also become authors and enjoy the copyright like natural persons. Therefore, there is no necessary relationship between "intellectual achievement" and "natural person." From the point of view of legal doctrine, the conclusion that only a natural person can be the subject of creation cannot be drawn directly from the analysis of legal texts and legislative history. But does this mean that the Copyright Law of the PRC leaves room for the AI model to be the author?

The answer is no. As mentioned above, legislative activity is essentially the result of value judgment and value choice, and law is a tool to reconcile the conflicts of diverse interests in society. Thus, it is necessary to distinguish between concepts in laws and the general sense of life. In other words, it is the definition or distinction of necessity and reality. Taking the concept of "work" as an example, the creations with just a few strokes by ordinary people can become works in the sense of life, but whether they can be further protected by law needs to be examined whether they meet the legal requirements like originality. Although the AI model can be identified as "author" in the perception of the general meaning of life, it does not mean that the Copyright Law of the PRC can recognize its author status. The key is whether this character from the perspective of value is necessary to be protected by the law.

2.2.2 The AI Model should not be Recognized as the Author in the Context of the Copyright Law of the PRC.

To judge whether the AI model can be evaluated as an author in the context of the Copyright Law of the PRC, we need to discuss the following three dimensions:
First, whether the the AI model has the ability of legal subject. It has become a consensus that AI models cannot enjoy rights, fulfil obligations and assume responsibilities, so they cannot become independent legal subjects. At the same time, due to ethical considerations, AI models still do not qualify as legal subjects. On the contrary, according to Kant's philosophical thought "man is not a means, but an end," the the AI model is the product of human research and development, so it cannot be an end, but only a means. Despite being different from traditional robots, AI already has a certain level of "intelligence," as well as a similar understanding and judgment to humans, this is still not the reason for AI models to become the subject of rights. The original intention of researching and developing AI is to improve social productivity, human living standards and life quality, therefore, the the AI model itself cannot be the subject of rights and obligations.

Second, whether the the AI model has the value of a legal subject. In other words, whether AI can be used as a means of assigning rights and obligations. The reason why a legal person can have a legal personality and bear legal responsibility independently is that the legal person is composed and operated by countless individuals. The legal person is not the end of the distribution of rights and obligations, and the ultimate rights and obligations are implemented to individuals through the layers of rules and regulations within the legal person. Fundamentally, the legal person is just a tool used to adjust the relationship between people. Unlike the legal person, AI is only an objective and real program composed of data, and does not have the function of assigning rights and obligations to individuals. The way AI takes responsibility is mainly based on the necessary property or funding sources, and is performed by natural persons. The statement of "fictitious legal personality" is to take it as the "transfer station" of rights and obligations, and the final destination of rights and obligations can only be the individual natural person.

Third, whether the authorship of AI models is in line with the legislative purpose of the Copyright Law of the PRC. Encouraging creation is always the core legislative value of the law. According to the provisions of the Copyright Law of the PRC, the author has the right to license others to use works and obtain remuneration. By licensing, the author can obtain reasonable profits, and then generate the enthusiasm to protect innovation and continue to create. However, AI models are not motivated by copyright. In addition, at this stage, AIGI relies on the instructions issued by humans, and if humans do not input any keywords, the the AI model will not enter the stage of image generation. As mentioned above, the behavior of the user input keywords to the AI model, that is, the creation behavior, cannot be identified as the behavior of "directly creating" the work, so it is not to mention the law to protect and encourage the AI user to "create." The generation process of AI is only a humanized creation behavior. The legislative and judicial costs related to the author status of the AI model are far higher than the value of AIGI protected by the law, so the the AI model should not be evaluated as an author in the context of the Copyright Law of the PRC beyond life.

3. Approaches to AIGI's Nature Identification

From the perspective of fact, AIGI is not directly drawn by the natural person who uses the model, and it does not belong to the creative behavior of "directly producing" works. From the perspective of law, although the AI model directly generates images and formally meets the logic of "direct generation," the model itself cannot be evaluated as an author in the law due to value considerations. To sum up, AIGI is not an author in both the factual and legal sense, and it is considered that the work has logical defects.

Article 5 of the Copyright Law of the PRC stipulates that laws, regulations, resolutions, decisions, orders of state organs and other documents of legislative, administrative and judicial nature, as well as their official translations, simple factual information, calendars, general numerical tables, charts and formulas, are not subject to the protection of the law. Thus, the paper believes that based on comprehensive logic and value considerations, AIGI should also be excluded.
3.1 Reduce Justice and Enforcement Costs

AIGI mainly uses the Internet as the communication media, which usually has the characteristics of fast speed and wide range. If it is listed as the protection object of the Copyright Law of the PCR, and the infringement case occurs, it will greatly increase the rights protection and judicial costs. Moreover, AIGI presents an oversupply situation with low prices in the market. Although the first AIGI work "Le Comte de Belamy" was auctioned at a high price, it does not represent the market value of most AIGI works. The judgment of the BIC case believed that recognizing the copyability of AIGI can encourage people's use of AI, and is conducive to adapting to the industry development. However, it is convenient enough that anyone only needs to input a few prompt words or parameters to generate high-quality images in a short time. AI users themselves have a great willingness to use it, and there is no need to stimulate users' enthusiasm with low market income. Denying the copyrights of AIGC will not have an impact on the development of the AI industry. At the same time, giving AIGI to private law protection will increase the high cost of law enforcement to the judicial and enforcement agencies. Only when the benefit is greater than the cost, the intellectual achievements are worthy of protection, should be protected, and need to be protected. Therefore, AIGI does not yet have the realistic need to be protected by the Copyright Law of the PCR, and failure to protect it is conducive to reducing judicial and enforcement costs.

3.2 Protect Traditional Industries, and Develop Emerging Ones

As mentioned above, the judge in the BIC case thought that denying the copyability of AIGI would affect the AI industry, but it is not true. Conversely, acknowledging the copyability of AIGI could deal a blow to the commercial art industry. Users of AI models include both non-art professionals and art industry practitioners. Different groups have great differences in the way and purpose of using AI. Most of the groups that use AIGI as the final "creative results" belong to non-art professionals. On the contrary, for professionals with certain attain in the field of art, AIGI is a reference or a source of inspiration for creation, and they will carry out the secondary processing, like choosing, selecting, arranging and designing directly, which is the "creative act" in the context of the Copyright Law of the PCR.

AIGI directly influence the commercial art industry. If AIGI can be directly protected by copyright, then compared with hiring professional artists to draw commercial manuscripts, to reduce production costs and improve efficiency, relevant enterprises will be more inclined to directly use AI, which will have a great impact on traditional commercial art industry. It will bring severe employment crisis in related fields. If the same copyright protection is given to AIGI and human-generated image, it will seriously hit the creative enthusiasm of practitioners in the traditional painting industry. The advent of the AI era is unstoppable, the transformation of traditional industries has been irreversible, and the integration of AI technology is an inevitable trend in the development of traditional commercial painting. However, denying the copyrights of AIGI will not only not discourage the enthusiasm of AI users, but also help to improve the acceptance of professional painters to emerging tools, and improve the efficiency of creation to collect painting inspiration, to realize the transformation of the traditional painting industry while ensuring the well-being of the people.

3.3 Respond to the Protection of the Public Interest

According to Paragraph 3, Article 5 of the Copyright Law of the PCR, "calendars, general numerical tables, charts and formulas" are not subject to copyright protection. The reason why lawmakers exclude them from the scope of law protection is to limit the exclusivity of private rights, reduce social costs and protect public interests. The nature of AIGI is similar to the above universal symbols, if it is included in the scope of law protection, it will also lead to the increase of social costs and affect the realization of public interests. The ability of AIGI is based on a lot of learning and training received at an early stage. Thus, without adequate learning, the generated results will be severely biased. Accordingly, because the same the AI model has the same deep learning content in the early stage, as long as the same parameters are entered in the same model each time, the resulting
images must be the same. The paper believes that AIGI can be regarded as a public image material library, the user does not form an accurate idea of the generated picture when entering parameters, and usually only inputs several groups of abstract instructions, in the final generated image to choose the most in line with their aesthetic picture. Therefore, the inclusion of AIGI in the scope of copyright protection essentially encourages the preoccupation with public material images, thereby excluding the generation and selection of the same or similar images by later people.

In addition, denying the copyability of AIGI does not mean denying the labor invested by the users of the models. Locke believed that by removing an object from its natural state through labor input, an individual acquires ownership of that object. The users do pay more or less labor for the production of AIGI, and despite not enjoying the copyright, they still can get reasonable remuneration through other means. At present, the common trading form is that users package and sell a large number of AIGI. According to the Rule of Autonomy of the Will, if there is a corresponding demand in the market, AI users can obtain material returns equivalent to the value of their labor activities.

4. Summary

AI increases the speed at which people gather information and greatly reduces creation costs. Based on comprehensive measurement of the country, society and individuals, encouraging people to use AI tools to improve the efficiency and quality of creation is also the goal of the law. Using property interests as leverage is also in line with the normative purpose of the Copyright Law of the PCR to reasonably distribute rights and obligations brought by works for encouraging creation and ensuring quality. As mentioned earlier, AIGI are neither logical enough to be recognized as works nor necessary to be covered by the Copyright Law of the PCR. With rapid development, the trend of AI technology being an important tool of social production and life in the future has been irreversible, and the BIC case has opened the curtain on how to deal with the copyright issues related to AI in judicial practice. In the future law formulation and implementation activities in the era of AI, we should recognize the nature of new things in essence, follow the principle of people-oriented, take into account the balance between cost and benefit, give AI and its generation map with appropriate legal evaluation, and promote the healthy development of the emerging industry.

References

[1] Information on: https://www.gov.cn/zhengce/zhengceku/2017-07/20/content_5211996.htm
[3] Information on: https://mp.weixin.qq.com/s/AzhPYHqLCCXHiWwL2AuKjn
[5] Information on: https://mp.weixin.qq.com/s/U0CCqtsjRj3n15p2OMGpKg


