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How to Understand Expression: In the Context of Copyrightability of AI-Generated Content

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Abstract. The development of AI in recent years has led to the emergence of the problem of whether AI-generated content is copyrightable. A sound & widely accepted standard for this problem is still pending. This paper adopts the perspective of Idea-Expression Dichotomy to explain why prompts provided to AI should be regarded as ideas rather than expression. It further discussed that the substantial human modification is the fundamental factor for AIGC to obtain copyrightability. Based on which, this paper proposes that the human use of corresponding artistic language serves as the basis for determining whether "Expression" is realized in works based on AIGC. This criterion regards the human substantial modification as the key factor for judging the intellectual contribution reflects in the works, which synchronized with the legislative purpose of the Copyright law to encourage creation. Meanwhile, this paper argues for how to apply technical approaches in the judgement, so as to reduce the judicial burden.

Keywords: Generative AI, Copyright, Expression, Idea, Artistic Language

1. Introduction

The generative AI is a heated branch with regard to the development of AI in recent years. How to legally analyze the artificial intelligence generated contents (or "AIGC") has become a subject drawing wide public interest. In 2023, China issued and made effective the Interim Measures for the Administration of Generative Artificial Intelligence Services to offer initial guidance, including articles discussing that AI should be developed with respect for intellectual property and business ethics. However, this document did not provide explanations or regulations for specific issues, including the copyrightability of AIGC.

By now, several cases involving the copyrightability problem have been heard by Chinese courts with some judgements rendered. Including the Li vs. Liu case and Feng vs. Dongshan Company case [1,2]. The judgement in the former case holds that the AIGC involved in this case reflects the original intellectual contribution of the plaintiff, who adjusted the prompts, selected the results, and performed multiple rounds of further generation to refine the work. The AIGC involved was thus regarded as a copyrightable work of art. By contrast, the judgement in the latter case holds that there lacks evidence demonstrating the intellectual contribution of the plaintiff, because very few prompt keywords were applied, plus only a single round of generation was performed when generating the AIGC involved in this case, which was thus confirmed to be not copyrightable.

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A comparison of the judgments in the above-mentioned cases reveals that whether original intellectual contribution is reflected in the AIGC has become the material criterion for Chinese courts in judging AIGC copyrightability. However, it should be noticed that these judgements, as moving forward to discuss the intellectual contribution, have presupposed that submitting prompts to generative AI could be viewed as “expression.” This premise is not beyond dispute.

The Regulations for the Implementation of Copyright Law of the People's Republic of China gives definition to “creation", being “the intellectual activities that directly result in literary, artistic and scientific works.” From the perspective of artistic creation activities, equating the prompts, which is presented in textual language, with the AIGC, which is presented in visual, aural or some other language, is arguable. Because there is an apparent gap separating prompt and final results, which makes it difficult to believe that one can easily establish an equivalence between them [3]. And it is also disputable to reckon the “creation activities,” where the black box nature of AI is highly involved as “directly result in.”

Viewing the problem from the perspective of the Idea-Expression Dichotomy better fits the situation. Take the AIGC involved in the Li vs. Liu case, which was generated using hundreds of prompt keywords, as an example. Experiment revealed that even if multiple rounds of selection, adjustment and generation were performed, different generative AI still gave out distinctly different AIGCs with the same prompt keywords [4]. This clearly indicates that submitting prompt keywords (even in a large number) is not enough to guarantee the final results. Likewise, many different works of arts may result from one single idea. At the same time, the current development of AI should also be taken into consideration. The leading generative AI models allow and encourage users to submit prompt using natural language. Users don’t need to submit a large number of complex prompt keywords to give instructions, as the plaintiff in the Li vs. Liu case did. With a simple sentence presented in natural language as prompts, generative AI could generate countless images and videos that meet the instructions. One can hardly argue that an equivalence could be established between a certain result and its prompts.

Then, here comes the question of how “expression” rather than “idea” could be realized in the context of AIGC. What steps must be taken for AIGCs to be copyrightable? This is the question this paper will address below.

2. “Expression” depends on the human use of artistic language

2.1. Comparison between AI and other creative instruments

The plaintiffs of the two above-mentioned cases contributed to the AIGC by submitting prompts. Comparison of the judgements in the two cases reveals that the courts take the number of prompt keywords & rounds of generation as key factors for deciding if “original intellectual contribution” is involved. This will easily lead to a Sorites Paradox. In the case of Feng v. Dongshan Company, one round of generation was held to be insufficient for establishing “original intellectual contribution.” Then the question is, is there a clear boundary for “original intellectual contribution” to appear? This is why this paper opposes the judgement of the two cases. The courts laid emphasis on the level of intellectual contribution, the standard of which is too vague to be quantitatively analyzed, while neglecting a more fundamental problem, that whether “idea” has been mistaken for “expression” in the two cases.

Some scholars compare prompts to conventional creative instruments such as pencils and gravers, and further liken Prompt Engineering to the process of artistic creation [5]. However, that artists expressing their ideas using their instruments is quite different from Prompt Engineering. A

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significant contrast is that the conventional instruments is non-autonomous. By no means would such instruments move by themselves, let alone add deciding elements to the works beyond the artist's control or intent. In other words, it is the artist who meticulously decides the form and result of the expression of their ideas.

By contrast, generative AI, based on its training data, training method, and algorithmic design, could largely decide the outputs. The final AIGC results usually contain a large amount of information generated by the internal mechanism of AI, which is a black box beyond human control or even understanding. Chances are high that the final results contain far more information and details than described in the given prompts. Furthermore, the textual language used to present prompts is so different from visual or aural languages in which art works are presented that one could hardly establish an equivalence [6]. It is common practice for writers to discuss a painting or a piece of music in their texts, but it does not mean a writer could thus claim to be the second author of or have recreated these works.

Therefore, the prompt could not be compared to conventional creative instruments. As prompts are no more than vague instructions to AI, while it is AI, after processing the prompts through complex calculation, that generates the work beyond the strict control of users, which is distinctly different for the conventional & non-autonomous instruments.

From the perspective of technical mechanisms, the development of AI models is lowering the complexity and threshold for users to do prompt engineering, as natural language is replacing complex keywords. Users could give instructions to AI with natural language, just like what they do when commissioning an illustrator. It is not convincing to name such process as “creation” or “expression.” Also, It is possible that a user could precisely describe a work of art by, for example, manually texting the color of each pixel of an image, and then asks AI to generate based on it. It’s true that in this case, AI is more likely to be another kind of instrument for painting pixels. However, the volume of texts required would be beyond imagination compared to natural languages.

2.2. The key factor of “expression” is the human use of artistic language

Looking back to the two cases discussed above, one core similarity is that both plaintiffs did not use the target artistic language (visual language) to modify their works, which this paper argues to be integral for delivering expression. Simply put, visual arts require human modification in visual languages, such as painting and photo editing, and so forth. The capability to express one’s idea in artistic language is highly valuable and equally rare. This is one of the reasons of the wide acceptance of the Idea-Expression Dichotomy in copyright law.

When it comes to AI, it is AI rather than the intellectual contribution of users that decides the AIGC results, or “expression.” As discussed, even when the same prompt keywords are submitted, different AI models may generate completely different images, while all meet the instructions of the prompt. The plaintiff in the Feng v. Dongshan Company case even admitted that he himself could not let the AI model generate an image similar to the ones involved in the case. Under such circumstances, the black box mechanism of AI is more likely to be the deciding factor of the results, while the “intellectual contribution” of the generative AI user failed to constrain the AI outputs.

Also, it is important to note that artists may have been influenced by some accidents when creating their works. But the major body of their work is still strictly controlled by them, which makes the elements of chance differ from the element of randomness in AIGC. The global judicial practices tend to confirm that works to a large extent affected by randomness are not copyrightable [7].

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2.3. Review of Lin v Gauss Inflatable case: how artistic language is applied in human modification

In the same period of the above-mentioned cases, another case concerning AIGC copyright: Lin v Gauss Inflatable, was also rendered by a court in China, in the judgement of which the work of the plaintiff was also regarded as copyrightable [8]. What makes this case different is that the plaintiff, besides prompt engineering, devoted much effort to manual refinement. Most importantly, the plaintiff used image editing software to refine the AIGC manually, through which he managed to decide the structure and details of the works using the visual language, and simultaneously mitigated the influence of AI randomness. As a result, the idea of the plaintiff has been well controlled and expressed in the final image. The plaintiff claimed that he tried his best to organize the composition and distribution of image elements, including details such as lamp lights and the placement of plants. These efforts embody the plaintiff's intellectual contribution, which makes the AIGC-based work copyrightable [9].

The comparison and analysis across the three cases suggests that, rather than focusing on prompt editing, which is vague and hard to quantify, judging the use of artistic language is much simpler.

3. Why verifying the use of artistic language is a reasonable standard

The foregoing discussion has put the human use of artistic language at the core of deciding if a work of art is copyrightable. As for AIGC, this requires the author to apply manual modification to AIGC using the artistic language correspondingly, which manifests the author's control over the AI randomness and the intellectual contribution. Under this standard, the technical problems concerning AI, which are complex and usually vague, are not that important. Because the focus of the issue shifts to the human involvement of the creation activities, as manual modification/arrangement is regarded as the way for an author to express his idea.

Put simply, it's reasonable to expect an author to possess the basic skills of the art of the work they are working on. This doesn't suggest that the author is required to reach a high level of mastery of these skills, but rather to possess some basic sense of aesthetic and practical ability. The manual modification discussed in the Lin v Gauss Inflatable case reflects the plaintiff's overall control of his work, which makes a difference when comparing to the plaintiffs in Li vs. Liu and Feng v. Dongshan Company cases, who completely rely on the AI randomness in their "creative activities."

Some scholars holding opposing views argue that such a standard would unreasonably increase the creator's cognitive cost and bring troubles to self-proving [10]. It is notable that using generative AI itself has greatly benefited AI users. Even those who lack the most basic practical skills and sense of aesthetic are able to generate something "looks like a work of art." Therefore, the rise of self-proving cost should be raised to align with the interest one could obtain from the use of generative AI [11].

In fact, the legislative purpose of copyright law is intimately intertwined with the interests of the copyright holders. The standard of original intellectual contribution is incentive to the creators possessing a certain level of creative skills, even if many creators do not expect to earn any compensation but instead expect a sense of achievement [12].

That AIGC without manual use of artistic languages could be copyrightable means AI users could conduct mass production of copyrightable works, much quicker than skilled creators, which does not align with the common expectation that one should be compensated for the effort devoted. A reduced cost for acquiring copyright, plus the high AIGC generation efficiency, may together spark more disputes over copyrights.

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From another perspective, examining the human use of artistic languages is also a way to assess the level of intellectual contribution in works based on by AIGC authors. As the copyrightability is based on the manual modification of the final works. This is reminiscent of L.H.O.O.Q. by Marcel Duchamp, who drew a mustache onto the face of the Mona Lisa. The mark manifests Duchamp's anti-art philosophy and sense of humor, namely his expression of idea, his intellectual contribution. But no one would agree that Duchamp has suddenly become the second author of Mona Lisa. The human modification of AIGC presents a similar situation. This standard imposes a limitation on some AI users who lack the most basic skills to conduct any creative modifications, preventing them from applying non-substantial modifications in order to render their works copyrightable only.

Holders of the opposing view further argue that verifying the human use of artistic languages increases the difficulty and cost of judicial administration. This paper argues that this problem should be reviewed from the perspective of technical.

Taking oil painting as an example, a crucial method for authenticating an oil painting is to examine the layers of overlapped paint on the canvas, which reflects the process of painting and traces of alteration. Likewise, such traces could also be found in digital arts. The digital illustrations are always composed of multiple layers; editing audio-visual files means editing the multiple sound/video trackers. The layers and trackers could be likened to the overlapped paint on the canvas, which reflects the creative process and modification traces. Software developers are also developing new functions, such as timestamping, to better record the creative process. These traces are naturally generated during the creative process, which means no extra cost is required for artists. These features also work for works based on AIGC. By contrast, AIGC with no modification could easily be revealed due to the lack of traces.

The enactment of the copyright law reflects the expectation to encourage creative activities and help foster the prosperity of culture. However, any law should keep in pace with the development of the latest technology. AI-assisted work and AIGC are now emerging challengers to the present copyright law system and heated subjects to be discussed in this context. When integrating them to the current scale, a cautious attitude must be adopted.

4. Conclusion

As researches on the copyrightability of AIGC is still pending, further judicial practice is still needed. No one can predict how and when an emerging technology may impact the current law system. However, as long as the copyright law holds the principle of protecting authors and creative works, it is a must to face the challenges and address new critics.

On the problem of how to define expression, this paper believes that a reasonable solution is to verify the human use of artistic languages. In fact, the rapid development of AI also requires the nutrition absorbed from human creations. To protect the interest of artists in return ensures the sustainable development of AI models, which requires continuous and abundant supply of high-quality training materials.

Meanwhile, protecting the human capability of using artistic language embodies a human-oriented essence, not only of copyright law, but of all laws.

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