

Artificial Intelligence and Copyright Protection --Judicial Practice in Chinese Courts

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In China, artificial intelligence (“AI”) has been widely used in innovative applications in many fields, resulting in tremendous efficiency and productivity. Not surprisingly AI related lawsuits arise and are being brought to Chinese courts for adjudication. Thanks to the kind invitation from the WIPO, I am honored to have the opportunity to talk about some latest court cases in China in this area. The key case I will highlight is a copyright dispute between Shenzhen Tencent Computer System Co., Ltd. (“Shenzhen Tencent”) and Shanghai Yingxun Technology Co., Ltd. (“Shanghai Yingxun”), which was adjudicated by Nanshan District People's Court, Shenzhen, Guangdong Province on December 24, 2019 (*Shenzhen Tencent v. Shanghai Yingxun*). A core issue here is whether AI-generated content is copyrightable or not? When analyzing this case, other related cases will also be mentioned.

A. Basic facts

Tencent Technology (Beijing) Co., Ltd. (Beijing Tencent) has independently developed a set of data and algorithm-based intelligent writing assistance system called "Dreamwriter" to meet the needs of large-scale and personalized content businesses. Beijing Tencent has licensed the Dreamwriter computer software to the Plaintiff Shenzhen Tencent in this case. On August 20, 2018, Shenzhen Tencent first published a financial reporting article on the Tencent Securities website and noted at the end that: “This article was automatically written by Tencent's robot Dreamwriter”. The Defendant in this case, Shanghai Yingxun, without Tencent's permission and authorization, reprinted the article on its website on the day it was published. The Plaintiff, Shenzhen Tencent, sued Shanghai Yingxun Company to the Court on the grounds of copyright infringement and unfair competition.

The Court held that the article in question generated by the Dreamwriter software was a written work protected by the *Copyright Law of China*, and the Plaintiff owns the copyright. The Court ruled that the defendant provided the alleged infringing article to the public on the website it operated without permission, infringing the plaintiff's right to spread the information on the Internet. Therefore, the Court ordered the defendant to compensate the plaintiff for economic losses of RMB 1,500.¹ After the first-instance judgment was made, the defendant did not file an appeal, and the first-instance judgment in this case has come into effect.

B. Two issues

Shenzhen Tencent v. Shanghai Yingxun raised two legal issues regarding AI in terms of copyright:

1. Whether an AI-generated work can become a work protected by the *Copyright Law*

¹ Nanshan District People's Court, Shenzhen, Guangdong Province, (2019) Yue 0305 Min Chu No. 14010 Civil Judgment. November 24, 2019.

Based on the *Revised Statement on Intellectual Property Policy and Artificial Intelligence*² prepared by the World Intellectual Property Organization Secretariat for the meeting, "AI-generated", i.e. "autonomously generated by an AI", is to be distinguished from "AI-assisted".³ As for whether the output under these two circumstances can constitute a work protected by the *Copyright Law*, Chinese courts have made their own efforts and contribution.

(1) Artificial intelligence-assisted product

According to the usual view, copyright refers to the rights that intellectual creators enjoy in their creations.⁴ If the author's work is protected by the *Copyright Law*, it must come from the author, that is, they must be generated by the author's labor.⁵ Article 2 of the *Implementation Regulations of the Copyright Law* (2013) stipulate: "The work referred to in the Copyright Law refer to the intellectual achievements that are original and can be reproduced in a tangible form in the literary, artistic and scientific fields." In other words, the work enjoying the protection of the *Copyright Law* must be the result of intellectual creation, which should reflect the author's personal judgment and choice. So how do courts deal with the new problems posed by AI in practice?

In *Shenzhen Tencent v. Shanghai Yingxun*, the Court found that the content generated by Dreamwriter software constituted a written work, but the Court did not break the general legal rule that the work must be the result of the author's intellectual creation. In order to argue that the A.I. generated object constituted a work, the Court specifically emphasized that the article in question was generated by the creative team of the plaintiff Shenzhen Tencent using Dreamwriter software. The arrangement and selection of the creative team in terms of data input, trigger condition setting, template and corpus style choices are intellectual activities that have a direct connection with the specific expression of the article involved. The article's presentation was dictated by the individualized arrangements and choices made by the relevant personnel of the plaintiff's creative team, and thus the work in question involves a certain degree of originality and belonged to the written works protected by China's *Copyright Law*.⁶

That is to say, the work identified by the Court in the case was not completely detached from human intellectual activities and was generated purely by AI. The textual content was not created autonomously by an AI, but merely the result of a human intellectual activity assisted by an AI. In this sense, products formed with the participation of AI are of course protected by the *Copyright Law*.

(2) Autonomously generated products of artificial intelligence

It is well known that AI refers to machines and systems that can perform tasks that are considered to require human intelligence to complete with limited or no human intervention.⁷

² WIPO/IP/AI/2/GE/20/1 REV., May 21, 2020.

³ WIPO/IP/AI/2/GE/20/1 REV., May 21, 2020, paragraph 12.

⁴ WIPO, *WIPO INTELLECTUAL PROPERTY HANDBOOK* (Second Edition), 2004, WIPO PUBLICATION No. 489 (E), §2.163. (Original text: Copyright deals with the rights of intellectual creators in their creation.)

⁵ WIPO, *WIPO INTELLECTUAL PROPERTY HANDBOOK* (Second Edition), 2004, WIPO PUBLICATION No. 489 (E), §2.175. (Original text: To be protected by copyright law, an author's works must originate from him; they must have their origin in the labor of the author.)

⁶ People's Court of Nanshan District, Shenzhen, Guangdong Province, (2019) Yue 0305 Min Chu No. 14010 Civil Judgment. November 24, 2019.

⁷ WIPO/IP/AI/2/GE/20/1 REV., May 21, 2020, paragraph 11.

When discussing whether the artificially generated products of AI can become works protected by the *Copyright Law*, we first need to exclude the process that generate the machine or system. As we are speaking of AI, there is certainly a process to create the AI software from the beginning to the completion. The participation of humans in this process should be excluded from the discussion of whether or not the autonomously generated products of AI constitute works. Otherwise, there would be no true autonomously generated product of AI.

For the existing AI that appears in the form of a combination of machines and systems, it includes many pre-programmed human algorithms. If the generation is obtained through these algorithms, whether or not its data is actively provided by humans, it is difficult to argue that it is free of human interference factors. However, due to machine learning and deep learning capabilities, AI may form new, autonomously generated algorithms in addition to algorithms previously set by humans. The products obtained by this artificially formed algorithm of AI seem could be called autonomously generated products of AI.

According to the current judicial practice of the Chinese courts, there have been no cases involving whether the autonomously generated products of AI constitute works protected by the *Copyright Law*. Of course, some courts have emphasized in the judgment that “The creation of a natural person should still be a necessary condition for a work to be copyrighted under the Copyright Law.”⁸ Overall, it remains to be seen whether the autonomously generated product of AI can be a work protected by the *Copyright Law*.

2. Ownership of Copyright in AI-generated works

(1) In the case of works completed by artificial intelligence-assisted applications

Article 11 of the *Copyright Law* stipulates:

“Except where otherwise provided in this Law, the copyright in a work shall belong to its author. The author of a work is the citizen who has created the work. Where a work is created according to the will and under the sponsorship and the responsibility of a legal or entity without legal personality, such legal person or entity without legal personality shall be deemed to be the author of the work. The citizen, legal person or entity without legal personality whose name is indicated on a work shall, in the absence of proof to the contrary, be deemed to be the author of the work.”

In *Shenzhen Tencent v. Shanghai Yingxun*, the Court believed that the article in question was a work created by the overall intelligence of multiple teams and multiple divisions of labor presided over by the Plaintiff, which reflects the needs and intentions of the Plaintiff as a whole, and the Plaintiff bears responsibility externally. Therefore, the article in question is considered to be a legal person work created by the Plaintiff. Accordingly, the copyright of the work completed by the AI in the case is enjoyed by the user of the AI software, i.e. the Plaintiff.

The handling of this case is in full compliance with the general rules of judicial practice of copyright in China. It reflects the creative intention of human beings, and the copyright of the works formed by it belongs to the corresponding natural or legal person, and the distribution of

⁸ Beijing Internet Court (2018) Jing 0491 Min Chu No. 239 Civil Judgment. April 25, 2019

the right among natural or legal persons can be adjusted in accordance with the existing legal norms.

b. In the case of works created by autonomous generation of artificial intelligence

As there is no set answers to copyrightability of the autonomously generated products of AI, we have no basis to discuss copyright ownership. A definite answer cannot be given yet.

C. Discussions on the case of photographic works involving AI technology

We also take the opportunity to discuss a more recent copyright case involving AI technology.

On April 2, 2020, the Beijing Intellectual Property Court concluded a case that is also of helpful to analyze whether AI generators are protected by copyright: *Gao Yang v. Youku*.⁹ In this case, the plaintiff attached a sports camera to a hot air balloon, and by releasing the balloon, the camera automatically took pictures of the outer space of the earth surface, and then select appropriate screenshots from the video automatically captured by the camera for processing.

When discussing the copyrightable issue, the Court finally determined that:

- (1) Although the camera was out of human control during the automatic overhead recording process, there was human intervention, selection of and judging factors such as camera and shooting angle selection, video recording mode, video display format, sensitivity and other shooting parameters.
- (2) All are considered to be set in advance, therefore, screenshots selected from videos taken automatically by the camera constitute photographic works, and the unauthorized use of this picture by others constitutes an infringement of the copyright of the Plaintiff's photographic work.

According to WIPO report, AI emphasizes “the ability of machines and systems to perform tasks that are thought to require human intervention with limited or no human intervention”.¹⁰ In *Gao Yang v. Youku*, whether the image generated by a camera that automatically takes images at high altitudes without human control can be protected by copyright can be dealt with under the existing copyright law framework. Even if the factor of AI is involved, as long as the factors of human intervention are not completely ruled out, then the essence of the legal issues will not change fundamentally.

Until the day comes that the technology evolves to the extent machines and systems, including AI, can completely be immune from human factors and operate independently, there is no necessity to adjust the existing copyright legal system. In *Shenzhen Tencent v. Shanghai Yingxun*, the Court solved the new problems brought by AI by emphasizing factors of human intervention, choice and judgment.

D. Conclusion

⁹ Beijing Intellectual Property Court (2017) Jing 73 Min Zhong No. 797 Civil Judgment. April 2, 2020.

¹⁰ WIPO/IP/AI/2/GE/20/1 REV., May 21, 2020, paragraph 11.

From a technical point of view, AI has not yet developed to a level where it is truly free from human involvement in the generation of relevant products. Humans are still more or less involved in the use of AI applications. In the cases we have encountered in the courts, AI-related generative products are in nature results of human intellectual activities, performed with the assistance of AI outcomes. Thus, it is still quite possible to adapt the current legal copyright framework to the needs of copyright protection for those AI generated products. As for the copyright protection for those autonomous generated products of AI without any human intervention, we have to be patiently monitoring the progress of technology. It is still a bit early to draw conclusions.