Protecting AI-Generated Images as Works of Fine Art in China: Magnifying the Legacy of Art to Copyright

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Abstract

Generative artificial intelligence (AI) challenges copyright by raising questions about whether AI-generated content (AIGC) qualifies as protectable works and who should own the associated rights. The Chinese judiciary addressed these issues in *Li Yunkai v Liu Yuanchun* (*Li v Liu*), a landmark case where the Beijing Internet Court ruled that an AI-generated image qualified as a work of fine art, with authorship vested in the user who entered the original prompts. This article evaluates the validity of the first holding within the judicial narrative about generative AIs. It argues that the Chinese judiciary maintains a policy to treat generative AIs as ordinary tools for creation. On this basis, while protecting AI-generated images as works of fine art aligns with China's copyright system, the legal rationale must derive from artistic narratives of originality and aesthetics rather than the court's reasoning in *Li v Liu*. Specifically, China should adopt a zero-originality threshold for works of fine art, recognising aesthetic effects as sufficient for protection, provided human intervention occurs through the refinement of AI outputs.

Keywords: Artificial intelligence; work of fine art; creation; originality; aesthetics

1. Introduction

On 27 November 2023, the Beijing Internet Court issued its judgment in *Li Yunkai v Liu Yuanchun* (*Li v Liu*),[1] marking the first judicial decision in China to address copyrightability and authorship of AI-generated images. The case centred on text-to-image generation, where the plaintiff used Stable Diffusion by entering tailored prompts to produce an image later appropriated by the defendant. The court held that the AI-generated image constituted a work of fine art under Chinese copyright law, with authorship attributed to the user for their original textual input. This ruling diverges from prevailing academic narratives, which often reject copyright protection for AI-generated content (AIGC)[2] due to its perceived lack of human creativity. By framing generative AI as a mere tool akin to a paintbrush or camera, the judiciary sidestepped debates about AI autonomy, instead focusing on user agency in shaping outputs.

This article presents the split between the academic and judicial narratives under the background of *Li v Liu*. Based on the judicial narrative, it further investigates the legal bases for protecting AI-generated images as works of fine art in the Chinese copyright system, chiefly the Chinese Copyright Law[3] and its Implementation Regulations.[4]

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[1] *Li Yunkai Su Liu Yuanchun* (李昀锴诉刘元春) [*Li Yunkai v Liu Yuanchun*] (Beijing Internet Ct. Nov. 27, 2023 北京互联网法院（2023）京0491民初11279号).

[2] AIGC refers to the contents arising from using generative AI upon a user's instruction; Cao, "A Comprehensive Survey," 111:2.

[3] Chinese Copyright Law (2020).

[4] Regulations for the Implementation of the Chinese Copyright Law.

The investigation found that protecting AI-generated images as works of fine art requires copyright to keep up with the development of artistic narratives. The legal bases in the Chinese copyright system come from a *lex specialis* that admits aesthetic effects as originality. The reference to aesthetic effect adopts a zero-originality threshold. Additionally, in the context of fine art, the Chinese copyright system should accept that creating a work of fine art with generative AIs begins with tweaking the AIs' initial outputs.

After this introduction, this article presents an overview of *Li v Liu* and the general narrative about the protectability of AIGC and the assignment of their rights. It then examines the validity of its holding by first looking into the originality requirement to recognise works of fine art. It continues the examination by probing whether and how directing generative AIs with prompts could amount to human creation. Eventually, the article concludes by presenting its findings and implications.

2. *Li v Liu* in the Copyright Narratives of AIGC

Overall, the holdings of *Li v Liu* do not fit well in the academic narratives of AIGC in copyright. In academic narratives, copyright should not protect AIGC and the exclusive rights of AIGC should not be vested in users. Notwithstanding the collision, the holdings of *Li v Liu* should not be dismissed as they represent the judicial narrative of AIGC in Mainland China.

2.1 Facts and Holdings of Li v Liu

Artificial intelligence (AI) systems are known to generate various outputs, including literature, images, music, films and software. In *Li v Liu*, the dispute centred exclusively on AI-generated images. The plaintiff utilised Stable Diffusion, an open-source generative AI model, to produce images through text-based prompts. After implementing a third-party fine-tuned model within the Stable Diffusion framework, the plaintiff input a series of keywords as prompts as shown in Figure 1.

Positive prompt (19): (ultraphotorealistic:1.3), extremely high quality high detail RAW color photo, in locations, Japan idol, highly detailed symmetrical attractive face, angular symmetrical face, perfect skin, skin pores, dreamy black eyes, reddish-brown plaits hairs, uniform, long legs, thigh highs, soft focus, (film grain, vivid colors, film emulation, Kodak gold Portra 100, 35mm, canon 50f 1.2), lens flare, golden hour, HD, cinematic, beautiful dynamic lighting

Added positive prompt (10): shy, elegant, cute, lust, cool pose, teen, viewing at camera, masterpiece, best quality

Negative prompt (120/75): (3D, render, CG, painting, drawing, CN, anime, comic: 1.2), bad anatomy, bad hands, text, error, missing fingers, extra digit, fewer digits, cropped, worst quality, signature, watermark, username, blurry, artist name, (long body), bad anatomy, liquid body, malformed, mutated, bad proportions, uncoordinated body, unnatural body, disfigured, ugly, gross proportions, mutation, disfigured, deformed, (mutation), (child:1.2), B&W, fat, extra nipples, minimalistic, NSFW, low-res, bad anatomy, bad hands, text, error, missing fingers, extra digit, fewer digits, cropped, worst quality, low quality, normal quality, JPEG artifacts, signature, watermark, username, blurry, disfigured, kitsch, ugly, oversaturated, grain, low-res, Deformed, disfigured, poorly drawn face, mutation mutated, extra limb, ugly, poorly drawn hands, missing limb, floating limbs, disconnected limbs, malformed hands, blur, out of focus, long neck, long body, ugly, disgusting, poorly drawn, childish, mutilated, mangled, old, surreal, text, B&W, monochrome, conjoined twins, multiple heads, extra legs, extra arms, meme, elongated, twisted, fingers, strabismus, heterochromia, closed eyes, blurred, watermark, wedding, group, dark skin, dark-skinned female, tattoos, nude, low-res, bad anatomy, bad hands, text, error, missing fingers, extra digit, fewer digits, cropped, worst quality low quality, normal quality, JPEG artifacts, signature, watermark username, blurry

Figure 1. Prompts used to generate the image in *Li v Liu*

The plaintiff devised and entered 20 terms as the initial positive prompt. For the negative prompt, he input 120 terms, of which only the first was original; the remaining 119 were copied from third-party sources. After removing duplications, the negative prompt contained 75 unique terms. The plaintiff generated an initial image using these prompts, then added more keywords to the positive prompt to achieve various effects. He produced the image in dispute, shown in Figure 2,[5] after including ten more additional terms in the positive prompt. This image, along with others, was uploaded to his social media account and labelled with tags such as 'AI' and 'AI illustration'.
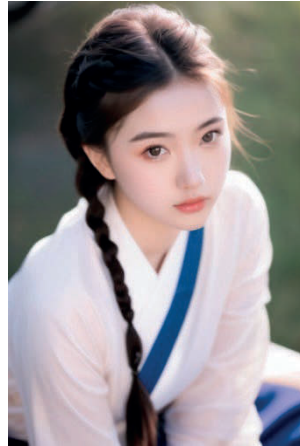

Figure 2. Image in dispute in *Li v. Liu*

The defendant saw those tags, downloaded the disputed image from the plaintiff's social media account, removed the identifying watermark and repurposed it as an illustration of his own poem on another platform. The plaintiff subsequently filed a lawsuit, alleging infringement of his right of authorship and right of communication through information network.

The plaintiff clearly assumed that the image should be a work of fine art within the meaning of copyright and that he had created the image by entering the prompt. The Beijing Internet Court fully supported these assumptions. It held that the AI-generated image should be a work of fine art within the meaning of copyright because the plaintiff created it by entering an original prompt. The judgment has taken effect in the absence of appeal.

2.2 AIGC in the Academic Narrative of Copyright

The ruling in *Li v Liu* appears to conflict with prevailing academic discourse on copyright protection for AIGC, which generally opposes classifying AIGC as protectable works or vesting exclusive rights in users. Central to this discourse is the principle that copyright law remains inherently anthropocentric. If AIGC is produced through autonomous machine processes devoid of direct human agency, it should fall outside the scope of copyright protection, which requires human authorship.

A work eligible for copyright protection must originate from a human creator. This requirement is rooted in anthropocentric philosophical foundations, such as personality theory. Hegelian philosophy posits that creative works embody the externalisation of an author's personality,[6] which justifies granting moral and economic rights. Early copyright advocacy, exemplified by Victor Hugo's campaign for copyright legislation[7] and the Berne Convention,[8] institutionalised copyright protection as a balance between safeguarding the public domain for the human race and sustaining the livelihood of individual creators. Legal frameworks further reflect this anthropocentrism through mechanisms such as moral rights,[9] posthumous terms of protection[10] and *droit de suite*,[11] all predicated on human authorship.

Another branch of the anthropocentric tone of copyright is the labor theory and utilitarianism, represented by the United States. Historically, the copyright law of the United States is not based on the personality theory but a mixture of the labour theory and

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[5] Zhichanli 知产力, "'AI wen sheng tu' zhuzuoquan an yishen shengxiao."
[6] Hegel, Philosophy of Rights, para 65.
[7] Hugo, "Discours de M. Victor Hugo," 15.
[8] Ricketson, "The Birth of the Berne Convention," 18–20.
[9] Berne Convention, art. 6bis(1).
[10] Berne Convention, art. 6bis(2).
[11] Berne Convention, art. 14ter.

utilitarianism, both relating to economics.[12] Property rights are a mechanism to administer scarcity, which is the premise for human labour and utility exchange. Copyright fulfils this task by tying the scarcity of content to the scarcity of copies[13] so authors can garner rewards and have incentives to create.[14] The labour theory and utilitarianism are also anthropocentric because they cater to humans' needs and wants for incentives.

Regional legal systems codify the requirement of human creation. The European Union, despite sectoral harmonisation of copyright, implicitly mandates human creation through rulings by the Court of Justice of the European Union (CJEU) and most of the member states' adherence to personality theory.[15] In the United States, the *Naruto v Slater* (2018) precedent explicitly restricts copyright to human authors, as statutory language references heirs such as 'widows' or 'children'.[16] Even works attributed to deities require human execution for protection.[17] Consequently, US administrative bodies refuse to register AIGC as works,[18] exclude AIGC from the protectable scope of works[19] and require disclosing the use of AI in the registration of work.[20]

AIGC does not fit well into the anthropocentric narrative of copyright. The crux of the problem is the overestimation of AI's autonomy. While legal scholars often characterise AI content generation as 'autonomous',[21] computer scientists[22] and artists[23] describe it as 'automated' or 'automatic', emphasising human oversight in training, prompt engineering and output curation. True autonomy would require AI to self-define tasks and the fulfilment thereof, which are absent in current systems.[24] By conflating automation with autonomy, scholars risk misrepresenting AI as a rival to human autonomy.[25]

A solution to incorporate AIGC into the anthropocentric narrative of copyright is granting legal personhood to AI. As a sole incident, Saudi Arabia granted full citizenship to a robot equipped with AI, but such practices have not been institutionalised.[26] Further down this lane, it was proposed that partial personhood could be (re)introduced to accommodate AI as an intelligent agent to a human principal in copyright and other fields of law. In a sense, granting legal personhood to corporations reflects partial personhood, as their personhood is limited to certain capacities compared with natural persons,[27] analogous to slaves and other discriminated-against groups.[28]

Some legislative endeavours have acknowledged AI's legal personhood. The European Parliament has adopted a resolution to legislate the legal personhood of robots so that at least the most sophisticated robots, empowered by AI, should have the civil capacity to be liable for the damage they cause.[29] Compounded by the conflation of automation with autonomy, granting AI legal personhood may not be sound. The error in programming and the negligence in supervising their operation may materialise as civil liability or crime. The AIs' legal personhood would breed moral hazards for the developers and owners as it would shield them from the responsibilities arising from their operation.[30]

As an alternative to granting legal personhood to AIs, AIGC can be attributed to a human creator.[31] The candidate doctrines are the work-made-for-hire rule and the admission or relevance of creation in the recognition of work. The US Copyright

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[12] Chatterjee, "Lockean Copyright," 137.
[13] Faraci, "Do Property Rights Presuppose Scarcity?," 533; Sag, "Copyright and Copy-Reliant Technology," 1614.
[14] Cabral, "Artificial Intelligence," 119.
[15] Fritz, "The Notion of 'Authorship'," 553–555.
[16] *Naruto v Slater*, 888 F.3d 418, 426 (2018).
[17] *Penguin Books USA Inc v New Christian Church of Full Endeavor Ltd*, No. 96 CIV. 4126(RWS), 2000 WL 1028634, *11 (S.D.N.Y. 2000); Bridy, "The Evolution of Authorship," 400.
[18] Second Request for Reconsideration for Refusal to Register A Recent Entrance to Paradise; *Thaler v Perlmutter*, 687 F.Supp.3d 140, 148–149 (2023).
[19] US Copyright Board, Zarya of the Dawn.
[20] Copyright Registration Guidance.
[21] Militsyna, "Human Creative Contribution Enough," 939–940; Dornis, "Of 'Authorless Works'," 578.
[22] Xu, "Unleashing the Power," 6–7; Wu, "Investigating American and Chinese Subjects' Explicit and Implicit Perceptions," 3.
[23] Cetinic, "Understanding and Creating Art," 66:13; Bridy, "The Evolution of Authorship," 396–397.
[24] See Gervais, "The Machine as Author," 2098.
[25] Scheuerer, "Artificial Intelligence and Unfair Competition," 837–838.
[26] Cuthbert, "Saudi Arabia Becomes First Country."
[27] Schirmer, "Artificial Intelligence and Legal Personality," 134.
[28] Schirmer, "Artificial Intelligence and Legal Personality," 134; Kurki, Legal Personhood, 1.
[29] Resolution of 16 February with recommendations to the Commission on Civil Law Rules on Robotics No. 2015/2103(INL), at 59(f).
[30] Kurki, "The Legal Personhood," 188–189.
[31] Škiljić, "When Art Meets Technology," 1348–1349.

Review Board is against using the work-made-for-hire rule to justify the copyright protection of AIGC because it is not a human creation, which prevents it from being a work and then forecloses the attribution of authorship.[32]

In comparison, attributing AIGC to human candidates seems more promising in terms of integrating AIGC into the anthropocentric narrative of copyright. A realistic evaluation of the level of automation of present-day generative AI suggests it is still a tool for humans to operate behind, and the right question is whose creation its output should be:[33] the user, the developer or the owner.

The answer to the question of attribution varies depending on the legal tradition. Following the personality theory, the creator of AIGC should be the person who controls the creative process – that is, the conception and execution of a creative plan. This theory is helpful where it is clear the developer or the user demonstrates adequate control over the creative process.[34] However, in many cases the developers decide how to formulate the output and the users decide what the output should display, such as Stable Diffusion in *Li v Liu*. Under such circumstances, neither the developer nor the user conceives a complete creative plan individually, nor do they communicate to jointly develop a complete creative plan.[35] Therefore, protecting AIGC as works requires revising the admission of creation or the requirement of co-authorship.

Following utilitarianism, AIGC can be attributed to AI developers or owners as their works. The protection of AIGC may take the analogy to the computer-generated work in the United Kingdom, which is also yielded in an automated process.[36] The author of computer-generated work is 'the person by whom the arrangements necessary for the creation of the work are undertaken" – usually the investor.[37] The attribution of authorship is a legal fiction to incentivise the development of information technologies. Accordingly, the developer and the owner should have a much bigger claim than the user because they need incentives to invest in the development of AI.[38]

In parallel, the attribution of AIGC to the developers and owners may also refer to the copyright protection of the footage arising from operating early video games. The user's intellectual contribution to the video was marginal compared with the programmer's because the program would generate the same video regardless of who the user might be.[39] In the interest of facilitating the exploitation of and investment in AI, such rights should be assigned to the owner of the AI to make the exercise of rights efficient.[40]

Since AIGC does not fit well in the anthropocentric narrative of copyright, it may well be protected by a *sui generis* right or a neighbouring right.[41] This proposition is feasible, but not without a problem. AIGC can be the subject matter of a *sui generis* right because such right aims to incentivise investments rather than creation. In this spirit, if such a right subsists in AIGC, it should be awarded to the investor in the generative AI.

Providing AIGC with a *sui generis* right can maintain the scarcity of consumable cultural goods, or at least keep the abundance of AIGC at bay with exclusivity. Copyright-free does not warrant that the access is free of charge because producing the access to carry out works in the public domain inflicts costs.[42] Neighbouring or *sui generis* rights have been proven to bring exclusivity to disseminating the works in the public domain. Furthermore, the condition to admit the subject matter of copyright and neighbouring rights is fluid. For example, Japan used to protect phonographic recordings as work – the subject matter of copyright instead of a related right.[43]

The downside of protecting AIGC with a *sui generis* right is that it creates a binary standard in protecting human creation and AIGC. *Sui generis* rights may level the grounds between human creators and AI or AI users regarding the competitiveness of producing new content.[44] They do not, however, provide an equal footing for human creation and AIGC in determining

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[32] Second Request for Reconsideration for Refusal to Register A Recent Entrance to Paradise, 6–7.
[33] Ginsburg, "Authors and Machines," 392.
[34] Lu, "A Theory of 'Authorship Transfer'," 12–13; Grimmelmann, "There's No Such Thing," 404.
[35] Ginsburg, "Authors and Machines," 415–416.
[36] Lee, "Computer-Generated Works," 189.
[37] *Copyright, Designs and Patents Act* c. 48 Section 9(3).
[38] See Hristov, "Artificial Intelligence," 443–444.
[39] See Samuelson, "Allocating Ownership Rights," 1205–1207.
[40] See Ginsburg, "The Concept of Authorship," 1088–1089.
[41] See Ramalho, "Will Robots Rule?," 20–21.
[42] See Dusollier, Scoping Study on Copyright, 8–9.
[43] Heath, "All Her Troubles," 678.
[44] See He, "The Sentimental Fools," 218.

infringement. Generative AI cannot function without source material – that is, human creation. Using human creations to produce AIGC is more likely to be exempted than making new human creations due to non-expressive use or the exception of text-and-data mining.[45] Therefore, *sui generis* rights are not a panacea for regulating AIGC.

2.3 AIGC in the Judicial Narrative in China

On the map of the academic narrative of AIGC, Chinese judges adopt the narrative that generative AIs are their users' tools for creation. This narrative differs from the prevailing academic viewpoint by treating generative AI as a tool assisting human creation without distinguishing between the intellectual contributions of developers and users. Under this approach, AI functions as a mere tool, akin to a pen or Photoshop, and AIGC should not be treated differently from content created with conventional tools.

The Chinese judicial authority officially announced this narrative at the WIPO Conversation on Intellectual Property (IP) and AI in 2020.[46] On behalf of the Supreme People's Court (SPC), China's highest judicial authority,[47] Senior Judge Zhou Bo cited *Gao v Youku* to demonstrate China's stance on how copyright should accommodate AIGC.[48] The plaintiffs in this case set off a balloon with a camera attached at a time and place of their choice. The camera recorded video according to a pre-installed program. The dispute concerned whether some frames taken from the recording could be protected as works of photography. The photos in dispute were slightly edited before they were made publicly accessible on the internet. The publicly accessible photos were then appropriated by the defendants as they were.

The significance of *Gao v Youku* lies in both its legal rationale and its role in shaping regulations concerning generative AI. The trial court and appellate court differed in their interpretation of the minimal originality threshold required for copyright protection. The trial court applied the 'personal touch' standard, which requires a work to bear the author's personality or individuality.[49] It ruled that the photographs lacked originality because they were automatically recorded and did not reflect the plaintiffs' personality over the captured images.

In contrast, the appellate court adopted a threshold higher than the 'sweat of the brow' doctrine but lower than the 'personal touch' standard.[50] The 'sweat of the brow' doctrine grants copyright based on labour alone, without necessitating a distinct personal imprint.[51] The appellate court determined that the photographs met the minimal originality requirement. The originality was demonstrated by the intellectual labour devoted to their creation, which consisted of choosing the time and place, setting the parameters on the camera, and selecting and editing the photos. The reversal thus suggests that the minimal originality threshold in Mainland China aligns closely with the modicum of originality threshold.

Referring to *Gao v Youku* in the context of regulating generative AI, however, denotes another significance: the constitution of creation. Creators must exercise control in the process of creation. The court of appeal rebutted the trial court in this regard when commenting on the originality of the photos. It held that the photos were original instead of random because the plaintiffs could repeat the process of setting off a balloon and recover the camera until they were satisfied with the results. Under this background, the plaintiff's choice of time and place, as well as the selection and editing of frames, must be interpreted as exercising control. Such control was not affected by using an automated tool. Thus, the process of creation extends beyond the initial fixation of results; creators make choices not only through action but also through inaction, such as discontinuing the creative process.

The judicial narrative does not seem to consider that the AI developer may interrupt the user's intellectual contribution to the output. Ranking automation from high to low, the tools for creation can be categorised into ordinary tools, fully generative

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[45] Bonadio, "Can Artificial Intelligence Infringe Copyright?," 248–249.

[46] See Zhou Bo, Artificial Intelligence and Copyright Protection.

[47] Mainland China maintains a unitary judicial system. The SPC is the highest judicial authority. It oversees the practices of people's courts and the specialised courts. The people's courts exercise territorial jurisdiction. They are further divided into high people's courts, intermediate people's courts and basic people's courts from high to low in the judicial hierarchy. The specialised courts have jurisdiction over subject matter such as intellectual property rights, maritime disputes, finance, railway transport and martial law. Relevant to intellectual property rights, the Beijing Internet Court that rendered *Li v Liu* belongs to the basic people's courts in the branch of people's courts. Intellectual property courts in the branch of specialised courts are on par with intermediate people's courts in the judicial hierarchy.

[48] Gao Yang Su Youku Xinxi Jishu (Beijing) Youxian Gongsi, Beijing Momo Keji Youxian Gongsi Deng 4 Ren (高阳诉优酷信息技术（北京）有限公司、北京陌陌科技有限公司等4人) [*Gao Yang v Youku Info Tech (Beijing) Co Ltd*, *Beijing Momo Sci & Tech Co Ltd, and 2 Others*] (Beijing Intellectual Prop. Ct. Apr. 2, 2020 北京知识产权法院（2017）京73民终797号).

[49] See Dreier, Urheberrechtsgesetz, § 2 UrhG, Rn. 18.

[50] See He, "The Sentimental Fools," 223.

[51] See Stamatoudi, Copyright and Multimedia Product, 56.

tools and partially generative tools.[52] The level of automation is the developers' constraints on the users' intellectual contribution to the output. The policy to regard AIGC as AI users' creation is native to ordinary tools. Ordinary tools rely entirely on their user's creative contribution, and their developer's creative contribution is negligible in the resulting output.[53] The camera in *Gao v Youku* was a case of an ordinary tool.

Fully generative tools solely depend on their developer's creative contribution and do not require their users to make creative choices.[54] In the academic narrative of creation, the output of fully generative AIs should be created by the developers. Chinese judges have so ruled in *Tencent v Yingxun*.[55] The defendant reposted a news article generated by Dreamwriter, a generative AI developed by the plaintiff. Dreamwriter gathered statistics from designated websites, organised them into sentences and paragraphs, and published the article on the plaintiff's website.

Consistent with *Gao v Youku*, the court in *Tencent v Yingxun* held that the process of creation extends beyond the automatic formulation of the content. It held that the article was the plaintiff's creation because, on the one hand, the AI itself had no autonomy in determining its tasks or operation. On the other hand, the plaintiff adequately controlled the creative process. It directly caused the existence of the article by determining that the data input, the triggering conditions and templates amounted to the direct intellectual activity that caused the existence of the article.

The holding of *Tencent v Yingxun* is compatible with the policy to treat AIGC as AI users' creation. *Tencent v Yingxun* was a case where the AI user overlapped with the AI developer. When a fully generative AI is leased to a third party, the leasing party can become the right holder by contractual agreement or based on employment work, similar to the work-made-for-hire doctrine in the United States.

Partially generative tools combine their users' and developers' creative contributions and fuse them inseparably in the output.[56] In the academic narrative of creation, the output cannot be the individual creation of the AI developer or the AI user because no one conceives a complete creative plan. Nor can it be a joint creation because the developer and the user do not communicate to achieve a specific effect. Without a creator, the output could not be a human creation. The policy to protect AIGC as the AI users' creation is not compatible with this academic narrative.

Chinese judges changed their stance on the output of partially generative AI. Before the policy of treating AIGC as AI users' creation was officially announced, they adhered to the academic narrative. In *Feilin v Baidu*,[57] the Beijing Internet Court held that the output should not be a human creation. In this case, the plaintiff generated a report using a database and a generative AI service provided by Wolters Kluwer. The plaintiff set search and filter terms, then verified and corrected the statistics before publishing the report online. The defendant reuploaded the report, arguing that it was not a human creation, thus denying secondary liability. The court agreed, despite recognising that both the plaintiff and Wolters Kluwer had made intellectual contributions to the report. The same court later rendered *Li v Liu*, which diverged from the academic narrative. If the rationale of *Feilin v Baidu* were to prevail in *Li v Liu*, the AI-generated image should be a non-creation.

The judicial narrative that generative AI should be its user's tool for creation is maintained in subsequent disputes. Almost a year after *Li v Liu*, the Changshu People's Court rendered *Lin v Gauss Inflatable*, the second judgment protecting an AI-generated image as a work of fine art.[58] The plaintiff entered textual prompts to generate an initial image with Midjourney, an AI that generates images based on text or imagery inputs. Finding the AI's adjustments unsatisfactory, he refined the image with Photoshop before using the refined image as the input to Midjourney to develop the final image, which was allegedly infringed.

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[52] See Ginsburg, "Authors and Machines," 392.

[53] See Ginsburg, "Authors and Machines," 405.

[54] See Ginsburg, "Authors and Machines," 405.

[55] Shenzhen Shi Tengxun Jisuanji Xitong Youxian Gongsi Su Shanghai Yingxun Keji Gufen Youxian Gonsi (深圳市腾讯计算机系统有限公司诉上海盈讯科技股份有限公司) [Shenzhen Tencent Comput. Sys. Co., Ltd. v. Shanghai Yingxun Sci. & Tech. Co., Ltd.] (People's Ct. Nanshan District of Shenzhen Dec. 24, 2019 深圳市南山区人民法院 （2019） 粤0305民初14010号).

[56] See Ginsburg, "Authors and Machines," 405.

[57] See *Beijing Feilin Lüshi Shiwusuo Su Beijing Baidu Wangxun Keji Youxian Gongsi* (北京菲林律师事务所诉北京百度网讯科技有限公司) [*Beijing Feilin Lawfirm v Beijing Baidu Netcom Sci & Tech Co, Ltd*.] (Beijing Internet Ct Apr 26, 2019 北京互联网法院（2018） 京0491民初239号).

[58] See *Lin Chen Su Hangzhou Gaosi Qimo Jishu Youxian Gongsi, Changshu Shi Qinhong Fangdichan Kaifa Youxian Gongsi* (林晨诉杭州高斯气膜技术有限公司、常熟市琴宏房地产开发有限公司) [*Lin Chen v Hangzhou Gauss Inflatable Tech Co, Ltd, and Changshu Qinhong Real Est Dev Co, Ltd*] (Changshu People's Ct Oct 18, 2024 常熟市人民法院 （2024） 苏0581民初6697号).

The process of creation in *Lin v Gauss Inflatable* revealed that Midjourney was not a Photoshop-like tool. However, the court held that the AI user's action amounted to creation and did not find it necessary to distinguish generating output with Midjourney from editing images with Photoshop. Even though the AI alone could not execute the plaintiff's creative plan, the plaintiff still had other means – that is, Photoshop – to reinforce the AI's operation to get the desired result. Essentially, the court perceived generative AI as a tool, albeit one requiring greater efforts to control than Photoshop.

There is no official explanation for why Chinese judges decided to hold generative AI users as the creators of the output. Some factors could be indicative. First, protecting AIGC as work is compatible with social perception. A survey has revealed that the reception of AIGC is much more positive among Chinese subjects than American subjects, both implicitly and explicitly.[59] Due to the positive reception, the public may not feel the need to distinguish AIGC from conventional creation. It is possible that judges share this sentiment.

Second, when an AI is partially generative, appointing its users as the creators of its output can integrate AIGC into the regulation of user-generated content (UGC). UGC is the digital content made by internet users, characterised by amateurism.[60] The feature of amateurism distinguishes UGC from professionally generated content (PGC). PGC is the digital content made by individuals or organisations with professional skills, knowledge and expertise in a particular field, such as advertisements and maps.[61] Compared with UGC, PGC is high in quality but costly to produce. In this regard, AIGC combines the advantages of both PGCs and UGCs, as generative AI improves the quality of UGC.[62] As *Li v Liu* fixed the non-creation gap left by *Feilin v Baidu*, there is always a human content user responsible for creating AIGC, and the partially generative tool should be treated as if it were an ordinary tool. Accordingly, AIGC can be regulated as UGC.

Lastly, protecting AIGC may suit future policies. China is still on the path of raising the awareness that IP rights should be protected. Denying copyright protection to AIGC, especially when they are indistinguishable from human-created works, could send a conflicting message. If AIGC were deemed ineligible for protection, users might withhold information about their reliance on AI, leading to uncertainty about the copyright status of seemingly creative works.

Moreover, as generative AIs develop, users may take on some of the developers' roles in training the corresponding algorithms. For example, AI personal computers allow users to train and run AIs on local data instead of transmitting the request and data to a server.[63] Hence, in an optimistic light, generative AI may indeed become an ordinary tool for creation in the future, just as many ordinary tools for creation by contemporary standards, such as the camera, were regarded as highly autonomous centuries ago.

3. Originality Requirement

The ruling in *Li v Liu* faced criticism for recognising an AI-generated image as a work of fine art. The critique comprises two main prongs: (1) the image should not be considered a human creation; and (2) it should not meet the minimal originality threshold. Assuming the image in *Li v Liu* qualifies as a human creation, this section examines the applicable minimal originality standard and whether the image satisfies it.

3.1 Work in General

As a general observation, the Chinese Copyright Law is a product of legal transplant. Mainland China transplanted established copyright rules without much commitment to the underlying philosophies. The transplanted rules and their application in China exhibit a postmodern character compared with their source jurisdictions. On one hand, Chinese legal philosophies are more attuned to the unique dynamics of IP development in China[64] than Western legal traditions. On the other hand, from a Western perspective, Oriental philosophies were incorporated into postmodernism as a means of critiquing modernity, including the philosophies underlying copyright law.

The definition of a 'work' exemplifies this phenomenon. Following the 2020 revision, Chinese copyright law defines a work as an 'intellectual achievement with *duchuang xing* in the literary, artistic, and scientific domains' that 'can be presented in a

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[59] See generally Wu, "Investigating American and Chinese Subjects' Explicit and Implicit Perceptions."
[60] See OECD, Measuring User-Created Content, 15.
[61] See Xu, "Unleashing the Power," 6.
[62] See Wu, "AI-Generated Content," 3.
[63] See Entegart, "What is an AI PC? What will Your PC Look Like When It's Infused with AI? And What is the Intel Advantage?"
[64] Yu, "Intellectual Property."

certain form'.[65] The term *duchuang xing* encompasses both the originality requirement and the need for human creation. While often translated as 'originality', it literally means 'the nature of being independently created'. This concept aligns with the originality standard in US copyright law, which recognises works based on independent creation combined with a modicum of originality. Therefore, for an object to be considered a work under Chinese copyright law, it must be a human creation, minimally original and capable of being presented in a tangible form.

Understanding the originality requirement needs to contextualise it with the other two requirements. The requirement of human creation relates to originality because creation is a process, but it does not always lead to originality. It is generally accepted that human creation imparts originality, but there may also be other conditions to admit originality, such as the form of presentation regarding the definition of work.

The requirement that a work be presented in a tangible form is another crucial but often overlooked criterion in assessing originality. This requirement is generally interpreted as a 'soft' fixation standard, meaning that a work does not need to be permanently fixed but must be *capable* of being fixed to delineate its scope of copyright protection. More importantly, the Implementation Regulations define works based on their forms of presentation, particularly in the case of fine art. Consequently, the form of presentation can serve as an additional source of originality beyond human creation.

The postmodern nature of the Chinese understanding of originality comes from weighing between human creation and forms of presentation as its source. The CJEU clearly revealed that human creation is the only source of originality. It ruled in *Cofemel* that copyright aims to protect the expression of free and creative choices – that is, originality.[66] In *Brompton Bicycles*, it further held that aesthetic effect is not necessarily original because it may also arise from technical function rather than the author's free and creative choices.[67] The emphasis that originality must come from the creator's free and creative choices is based on legal traditions established before modernity.

Limiting originality to human creation induces a dilemma between the uniform protection of art and the protection of art with established and new aesthetic tastes. Only admitting the author's own intellectual creation as originality reflects the *unité de l'art* theory. In the context of copyright, the theory advocates applying the same originality threshold to works of applied art and works of fine art alike,[68] treating them as indivisible. However, the *unité de l'art* theory was principally a theory of art, which was proposed to advocate that all arts should be indivisible in their aesthetic merits, but only insofar as they conform to a certain taste. Equally importantly, it was advanced as a theory to exclude new art and aesthetics from the scope of art and denounce such things as 'false art'.[69] Therefore, limiting the source of originality to human creation could entail an exclusion of art based on aesthetic taste.

Chinese legislators took an aesthetic stance to list the form of presentation as a plausible source of originality. Ideally, copyright should refrain from judging creations based on their artistic merits.[70] In practice, however, even though lacking aesthetic merit should not be a ground to withhold copyright, the presence of such merit is a factor for granting copyright among member states.[71] The reason is that aesthetic merit demonstrates the uniqueness of creation – the creator's individuated choice – which separates the creation from the generic or commonplace arrangement.[72]

Recognising the form of presentation as a parallel source of originality has its basis in postmodern art and philosophy. The role of presentation in defining artistic importance is evident in the theories of Jacques Lacan, the French psychologist and psychoanalyst known for critiquing premodern and modern philosophical frameworks, including those underlying copyright law. Lacan's engagement with artists led him to conceptualise presentation as an act of framing – that is, an effort to impose aesthetic order, commonly referred to as 'gazing'.[73] Conventionally, gazing does not constitute creation as it does not generate something new. By acknowledging the form of presentation as an alternative source of originality, the legal framework becomes more inclusive in its recognition of creative works.

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[65] Before the 2020 revision, these criteria were specified in Regulations for the Implementation of the Chinese Copyright Law, art. 2.

[66] See Case C-683/17, *Cofemel – Sociedade de Vestuário SA v G-Star Raw CV*, ECLI:EU:C:2019:721, para 30 (Sept. 12, 2019).

[67] See Case C-833/18, SI and *Brompton Bicycle Ltd v Chedech/Get2Get*, ECLI:EU:C:2020:461, paras. 26, 27, and 33 (June 11, 2020).

[68] Kur, "Unité de l'art Is Here to Stay"; Tréguier, "Copyright, Art and Originality."

[69] de Lacaze-Duthiers, L'unité de l'art, 1 ("Art is eternal. It does not progress. It is the same in the past and in the present. It will be, in the future, what it is today, what it was yesterday. What we call progress or decadence of art are improper terms. We must stop using them.").

[70] *Bleistein v Donaldson Lithographing Co*, 188 U.S. 239 (1903).

[71] van Gompel, "Quality, Merit," 38.

[72] Güven, "Eliminating 'Aesthetics'," 220.

[73] Lacan, Le séminaire: Livre XI, 85–89.

3.2 Works of Fine Art in Specific: A Legacy of Artistic Narratives

The admission of works of fine art is special within the Chinese copyright system. The Implementation Regulations define works of fine art as:

> two- or three-dimensional works of the plastic arts comprising lines, colors or other media which impart aesthetic effect, such as paintings, works of calligraphy and sculptures.[74]

This definition is a *lex specialis* because it conditions the recognition of works of fine art upon aesthetic effect. If we subsume this definition into a definition of works that states works of fine art are works, the aesthetic effects in lines, colours and other media in two or three dimensions must be taken as the contextualised originality requirement. Such reference is a *lex specialis*, as it only happens to works of fine art and architecture.[75] Hence, protecting AI-generated images as works of fine art should be distinguished from protecting other forms of AIGC in the Chinese copyright framework.

The reference to aesthetic effect is specific to works of fine art due to the development of art theories from modernism to postmodernism. Dada and its legacy in Lacanian theory opened a gateway to approaching the Chinese view of fine art and aesthetics from a Western background. Dada, or Dadaism, refers to 'a movement of art and literature based on deliberate irrationality and negation of traditional artistic values' that emerged after the outbreak of World War I or 'the art and literature produced by this movement'.[76] It is a bridge between Eastern and Western art theories because Dada, in its infancy, drew from the Daoist concept of change and the Buddhist idea of impermanence to criticise the pre-modern and modern paradigms of Western art and aesthetics.[77]

Among other things, Dada challenged the Kantian theory of art and aesthetics. Immanuel Kant used the term 'interest' to mean the delight connected with the representation of an object's existence and defined beauty – or pure aesthetics – as pure disinterested delight.[78] Fine art is a scheme in the empirical judgement of taste as it evokes charm in addition to the delight of beauty.[79] Therefore, Kantian fine art is always an aesthetic order made of symbols representing pleasure.

Dada rejected the Kantian theory by making or calling pieces that do not represent anything 'art'. A notable example is *The Fountain* by Marcel Duchamp, a Dada artist. He made *The Fountain* as a sculpture in 1917 and its 1964 replica is shown in Figure 3.[80] Duchamp transformed a standard urinal into a sculpture by purchasing the object, signing the pseudonym 'R. Mutt' on it and placing it on a pedestal to resemble a traditional sculpture. His manipulation aimed to show that aesthetics is everywhere in daily life.[81] In his defence that the sculpture was aesthetic in the Kantian understanding, he called the sculpture 'the Buddha of the bathroom'.[82]

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[74] Regulations for the Implementation of the Chinese Copyright Law, art 4(8).
[75] See Regulations for the Implementation of the Chinese Copyright Law, arts 4(8) and (9).
[76] Merriam-Webster.com Dictionary, "Dadaism."
[77] Lochmann, "The Art of Nothingness," 26.
[78] Kant, Critique of Judgement, 36–37.
[79] Kant, Critique of Judgement, 55–56.
[80] Duchamp, *The Fountain*. Image credit: © Succession Marcel Duchamp/ADAGP, Paris and DACS, London 2024.
[81] Richter, Dada, 207–208.
[82] Apollinaire, "Le Cas de Richard Mutt," 764.

Figure 3. 1964 Replica of *The Fountain* (1917)

The perception of the aesthetic effect of *The Fountain* evolved over time. Initially, critics condemned the piece as vulgar, a Kantian judgement of taste.[83] Decades later, it was accepted as a work of sculpture with aesthetics based on visual merits.[84] Lacan's theory explains the evolution. In his framework, human cognition consists of three orders: the symbolic, the imaginary and the real emphasised.[85] The symbolic has supremacy over the imaginary and the real, and the order of the symbolic is the mechanism underlying human cognition.[86] In this sense, aesthetics is the result of framing a symbolic order. Duchamp established the aesthetic effect with *The Fountain* by presenting the urinal as a symbol that does not represent anything else.

Since all effects framed in a piece are aesthetic, referring to aesthetic effect as originality denotes that Mainland China operates a *de facto* zero-originality threshold to admit works of fine art. The minimal originality threshold is generally considered a gatekeeper preventing copyright from protecting trivial objects. Dropping the minimal originality threshold to zero does not risk excessive protection. The real issue delineating the scope of copyright's exclusivity is the determination of infringement, not the admission of work.[87] Beyond litigation, copyright is usually asserted and presumed because formality is not a prerequisite for protection. During litigation, judges compare two works to see whether they are substantially similar to establish infringement. Infringement can be dismissed when the similarity arises from the same commission requirement, public domain, commonplace arrangement or functionality.[88]

4. Requirement of Human Creation

This section examines the requirement of human creation in relation to protecting AI-generated images as works of fine art. The Chinese copyright system includes a *lex specialis* that recognises aesthetic effects as a criterion for originality in works of fine art. Accordingly, assessing the validity of the above argument necessitates evaluating whether this *lex specialis* exempts works of fine art from the human creation requirement before examining whether and how text-to-image generation can constitute creation.

4.1 Authorship by Creation

The definition of works of fine art raises the question of whether the requirement of human creation remains relevant to their admission under copyright law. The answer should be affirmative. Article 3 *chapeau* of the Chinese Copyright Law requires that works must have *duchuang xing* – that is, possessing the nature of being original and created by humans. This requirement is stipulated in law and applies to all works. In comparison, the reference to aesthetic effects as the originality is provided in the Implementation Regulations subordinate to the Chinese Copyright Law, and it applies specifically to works of fine art. Therefore, the reference to aesthetic effects only means the originality of a work of fine art may arise from aesthetics subsisting

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[83] Apollinaire, "Le Cas de Richard Mutt," 764.

[84] Richter, Dada, 207–208.

[85] Lacan, Écrits, 11.

[86] Lacan, Écrits, 11.

[87] Motoarca, "Farewell to Nichols"; Cohen, "Copyright Law," 196.

[88] *Chen Xingbiao Su Shenzhen Feima Jiqiren Keji Youxian Gongsi* (陈行彪与深圳飞马机器人科技有限公司) [*Chen Xingbiao v Shenzhen Feima Robotics Co, Ltd*] (People's Ct of Nanshan District of Shenzhen, Guangdong Province Sept 11, 2018 广州省深圳市南山区人民法院 （2017） 粤0305民初6528–6538号).

in the form of presentation. It does not, however, eliminate the fundamental requirement of human creation as part of *duchuang xing*.

Having affirmed that works of fine art must be human creations, the investigation should focus on what constitutes human creation. In this regard, article 2 of the Implementation Regulations defines 'creation' as 'the intellectual action that directly leads to the production of literary, artistic and scientific works'. The requirement of directness may be satisfied by directly conceiving and executing the creative plan because they are the two stages comprising of creation.[89]

Some scholars propose that redaction may be a third stage of creation for being a stage to finalise a work as one may change the creative plan and subsequently execute the change plan.[90] Nevertheless, since the formula of conception and execution accommodates revising the creative plan and executing the revised creative plan, the role of redaction should be understood as revising the creative plan and executing the revised plan, rather than extending the process of creation. The decision *Gao v Youku* supports this interpretation, as the Chinese judiciary recognised redaction as evidence of creation on the grounds that finalisation demonstrated the existence of a conceived and executed creative plan.

Other scholars postulated authorial intention as a condition for creation.[91] In the Chinese copyright framework, however, intention is not always necessary for the creation of works. For example, people with severe mental illness can still be the authors of their creations, despite being physically and legally incapable of forming intentions. The relevance of intention is thus limited to creating inseparable joint work, which requires creators to communicate and jointly develop a specific result. Two aspects must be examined to assess the validity of recognising the AI-generated image in *Li v Liu* as a human creation: (1) whether the rationale presented in the judgment convincingly establishes that the AI user's prompt sufficiently defined the expressive elements of the image; and (2) how the use of generative AI may satisfy the definition of creation. The following sections explore these issues in detail.

4.2 Prompt Sufficiency by Humans

In *Li v Liu*, the key argument for protecting the AI-generated image as a work of fine art was that the originality in the image came from the prompt. Therefore, the validity of this holding hinges on whether the prompt adequately defined the expressive elements of the image.

The technology underlying the generative AI determines how direct users' intellectual contributions may determine the expressive elements of the output.[92] *Li v Liu* featured text-to-image generation, a technology that takes in the user's textual command and delivers imagery results. In this content-generation mechanism, users directly provide a textual prompt rather than an image. If the aesthetic effects in lines, colours or other media in two or three dimensions hold the originality of works of fine art, then to create a work of fine art, one must directly define such effects.

In text-to-image generation, the crux of admitting the users' operation of generative AI as creation lies in the sufficiency of their prompt formulation. It is questionable whether language – written or spoken – can formulate expressive visual elements because it is more abstract than images as a means of expression. The abstract nature of language is reflected by the faculty enabling linguistic communication. Animals can process images,[93] but processing language needs much greater cognitive faculty, which remains exclusively a human faculty.[94]

The abstract nature of language in spoken and written forms makes it difficult to define the expressive elements of images with text. The challenge comes from the idea–expression dichotomy, which limits copyright to expressions and forbids it to extend to 'ideas, procedures, methods of operation or mathematical concepts as such'.[95] The term 'as such' reveals that ideas become expressions through concrete formulation.[96] Literary formulation can rarely define imagery expressive elements. The protection of fictional characters in the United States provides ample examples in this regard as they migrate in forms.

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[89] Ginsburg, "Authors and Machines," 346–347.
[90] Hugenholtz, "Copyright and Artificial Creation," 1203.
[91] Buccafusco, "A Theory of Copyright Authorship," 1261.
[92] Militsyna, "Human Creative Contribution," 941–942.
[93] Jackendoff, "The Nature of the Language Faculty."
[94] Hauser, "The Faculty of Language"; Tajima, "A Humanized NOVA1 Splicing Factor."
[95] TRIPS Agreement, art 9.2.
[96] Masouyé, Guide to the Berne Convention for the Protection of Literary and Artistic Works, 12.

For example, in *Gaiman v McFarlane*,[97] on behalf of the Court of Appeals for the Seventh Circuit in the United States, Judge Posner elaborated on why copyright should differentiate the protection of literary and graphic characters as follows:

> A reader of unillustrated fiction completes the work in his mind; the reader of a comic book or the viewer of a movie is passive. That is why kids lose a lot when they don't read fiction, even when the movies and television that they watch are aesthetically superior.[98]

If the prompts in *Li v Liu* defined all expressive elements, they should have produced a result with a reasonable degree of certainty regarding the image's appearance. In this regard, AI users are not required to define the exact result. For example, creation should be recognised in cases making photographs of the views of a kaleidoscope[99] or setting, and placing a camera in the wild that is to be triggered by passing animals.[100] Nevertheless, the same verbal instruction may correspond to various expressions; settling on a particular expression calls for making choices, thereby evidencing the existence of creation. Subsequently, in a text-to-image generation, an AI user should formulate the prompt in a sufficiently concrete manner to create a work of fine art.

Chinese judges have identified the volume of literary formulation as an indicator of concreteness in defining visual expressive elements. In *Zhao Jikang v Qujing Cigarette Factory*, the Yunan High People's Court had to decide whether '*wuduo jinhua*' contained originality.[101] The term literally means 'five pieces of golden flowers', and it figuratively means 'five women with honorable characters'. It carries three significances in the dispute: the play co-authored by the plaintiff, the title of the play and the five figures in the play. The plaintiff sought protection of the term to exclude the defendant from using the term as a trademark.

The Yunan High People's Court held that the play and the characters in the context of the play were original because they conveyed the authors' ideas, emotions, personalities and styles. However, a viewer could not perceive originality by reading the short title alone. The literary formulation of the title did not accumulate to a degree that was sufficiently concrete to admit originality.

Although the Chinese courts have not explicitly outlined how to determine whether literary formulation is sufficient to establish originality in works of fine art, insights can be drawn from jurisprudence in other jurisdictions. For example, the German Federal Court recognised the literary character Pippi Longstocking as a protected work under copyright law.[102] Pippi Longstocking is the central character of a series of novels by Astrid Lindgren, which have been adapted into graphic and cinematic works. The court held that the character should be protected as a work independent of the novels because she was 'an unmistakable combination of external features, characteristics, abilities, and typical behaviours, thus being shaped into particularly distinct personalities and occurring in the story in a particular characteristic manner'.[103] The court's reasoning suggests that the literary formulation of a character must be extensive to yield graphic expressions, as Lindgren devoted a series of novels to characterise her.

By analogy, the formulation of the prompt in *Li v Liu* should not have justified holding the AI user as the creator of the AI-generated image. The prompts in Figure 1 were simply too short and too abstract to define the expressive elements of an image. Furthermore, most terms were allocated to the negative prompt to define what the output should not contain. The fact that such terms were mostly copied from third parties shows that they do not directly cause the expressive elements of a particular image. Subsequently, the rationale given in *Li v Liu* should not justify holding the generative AI user as the creator of the AI-generated image.

4.3 Prompt Sufficiency by Machines: Another Legacy of Artistic Narratives

While prompts alone may not define all expressive elements of an AI-generated image, their implementation in the circumstances may constitute creation. The application of new technology may require reevaluating the process of creation.

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[97] *Gaiman v McFarlane*, 360 F.3d 644 (2004).

[98] *Gaiman*, 360 F.3d, 661.

[99] Ginsburg, "Authors and Machines," 376.

[100] Ginsburg, "Authors and Machines," 371–372.

[101] *Zhao Jikang Su Qujing Juanyan Chang* (赵继康诉曲靖卷烟厂) [*Zhao Jikang v Qujing Cigarette Factory*] (Yunnan High People's Ct. Sept. 26, 2003 云南省高级人民法院（2003）云高民三终字第16号).

[102] "Urheberrechtsschutz für literarische Figur – Pippi-Langstrumpf-Kostüm."

[103] "Urheberrechtsschutz für literarische Figur – Pippi-Langstrumpf-Kostüm" 262, Rn. 44.

Just as art helps to interpret the Chinese originality threshold for works of fine art, it may also systematically reveal the meaning of direct causality to constitute creation according to the Chinese Copyright Law.

The major obstacle to recognising that generative AI users directly caused the originality of the generated images comes from the randomness in the AI's functioning. Randomness implies that a person has diminished control in creation, and therefore weakens the claim that a user has defined all expressive elements.[104] This unpredictability also contributes to the perception of AI as possessing intelligence. For example, AlphaGo Zero randomly predicts the next few moves based on the existing moves rather than exhaustively predicting all scenarios because that is beyond the current computational capacity.[105] Each modal of generative AI has its own mechanism to introduce randomness. The following gives a very streamlined illustration of the mechanism of Stable Diffusion, as it was the AI involved in *Li v Liu*.

Stable Diffusion generates images based on the diffusion model, which conceptually reverses the random Brownian motion when drops of colour diffuse in water.[106] Stable Diffusion starts image generation with a random tensor,[107] like the diffused solution. The tensor is a collection of data noise in latent space, which a user cannot see or decipher information from.[108] The user's prompt instructs the modal to predict what the noise should be.[109] The noise predicted is subtracted layer-by-layer from the tensor.[110] The cycle of predicting and removing noise from the tensor stops when the schedule reaches the user's request.[111] Eventually, the decoder translates the remaining data of the tensor from the latent space to an image in the foreground the user can see.[112]

In the artistic practice, methodological randomness does not prejudice an artist's conception and execution of a creative plan. A touchstone in this regard is Jackson Pollock's painting *One: Number 31*, shown in Figure 4.[113] Pollock was an American painter in the school of Abstract Expressionism. He was known for his 'action painting', dripping and splattering paint onto the canvas, as embodied in *One: Number 31*.[114] The random quality is the very reason why it is a masterpiece and a recurring theme in copyright.

Figure 4. *One: Number 31*

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104 See Barron, "Copyright Law," 384.
105 Mitchell, Artificial Intelligence, 204.
106 Sagio Development LLC, "How Does Stable Diffusion Work?"
107 Sagio Development LLC, "How Does Stable Diffusion Work?"
108 Sagio Development LLC, "How Does Stable Diffusion Work?"
109 Sagio Development LLC, "How Does Stable Diffusion Work?"
110 Sagio Development LLC, "How Does Stable Diffusion Work?"
111 Sagio Development LLC, "How Does Stable Diffusion Work?"
112 Sagio Development LLC, "How Does Stable Diffusion Work?"
113 Pollock, *One: Number 31*.
114 Chused, "Randomness," 628–629.

Randomness is a part of Pollock's painting methodology. According to Pollock, when he started creation, he only had a general idea of how the result would turn out.[115] He could not envision where exactly a drop of paint would land on the canvas, although he chose paints in certain colors and of particular consistency. Furthermore, it is also questionable whether he could repeat the moves he made to create *One: Number 31*.

The randomness was inherent in his creative plan because, to him, the canvas is an arena where actions happen, and the paintings are only the records of those events.[116] Accordingly, by planning how to act, Pollock defined the expressive elements of *One: Number 31*. The randomness that should prevent him from being recognised as the creator should rather be accidents such as unexpected forces of nature.[117] If those events should happen, Pollock could reclaim the creative plan by undoing the traces of those events.

The randomness in Pollock's methodology is comparable to the functioning of generative AI. Using generative AI to derive images essentially uses Pollock's methodology of action painting to produce a less avant-garde result. When users choose a generative AI or a model to generate images, they settle on the methodology to incorporate unknown randomness into creation, like Pollock. The correlation between text and image integrated into the automation of generative AI is a symbolic order. In Lacan's cognitive theory, the symbolic order is the unconscious beyond individuals.[118] Since such randomness is an external factor to each individual self, the automation should not prejudice the conception of a creative plan.

The conception and execution of the user's creative plan begins by tweaking the AI's initial outputs. When users enter the initial prompts, they put forward a general idea of what to present and how to present that is not concrete enough to conceive a creative plan because the initial prompts could not define all expressive elements. Since the users cannot conceive a creative plan with the initial prompts, the initial output cannot be the execution of a creative plan.

Regarding Stable Diffusion, the generative AI in *Li v Liu*, the same initial prompt could give rise to multiple results depending on the random tensors in the latent space. Accordingly, the initial prompt particularises the latent space. Analogous to action painting, the AI's response to the initial prompts helps the user discover a canvas to record creative actions that are about to happen. The conception and execution of the user's creative plan should commence from the tweaking of the initial output. The tweaking of the initial output should justify the creation of the entire outcome, just as redaction justifies recognising the creation of the whole.[119]

Users must document the effectiveness of tweaking. Documenting the tweaking ensures that users are directly responsible for all expressive elements in the output. Analogous to Pollock's creation of *One: Number 31*, such redaction should be comparable to Pollock determining whether the effect of an accident or his movement should be undone or kept due to improving the creative plan he conceived. Nevertheless, if the documentation shows too much tweaking, it may well indicate that the user did not know how to control the AI to execute the creative plan, so had to make up with chances.

5. Conclusion

Li v Liu in Mainland China is a case where new technology magnifies the artistic legacies to copyright. It held, among other things, that the user of a partially generative AI should be the creator of the image arising from the generative AI's operation due to the originality of the prompt. This holding marked that the judicial narrative diverges from the academic narratives in Mainland China that AIGC should not be works because they do not contain originality or they are not human creations.

The Chinese judiciary adopts the policy that generative AIs are ordinary tools for creation. Without challenging this policy, this article demonstrates that the Chinese copyright system provides a legal foundation for recognising AI-generated images as works of fine art, although on different grounds than those presented *in Li v Liu*.

Regarding the originality requirement, the definitions of works and works of fine art point to the holding that the originality of works of fine art includes aesthetic effects. The *lex specialis* referring to aesthetic effects as originality maintains a zero-originality threshold in view of the influence of Dadaism. Regarding the human creation requirement, the randomness in the

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[115] Ross, Abstract Expressionism, 144.
[116] Macadam, "Top Ten ARTnews Stories."
[117] See Burk, "Thirty-Six Views of Copyright Authorship," 269.
[118] Lacan, Écrits, 53.
[119] Hugenholtz, "Copyright and Artificial Creation," 1203.

process of image generation is analogous to the creation of Abstract Expressionist artwork. Subsequently, users' operation of generative AI can amount to creation by effectively tweaking the initial output of the AI.

The connection between artistic theories and the legal justification for protecting AI-generated images as works of fine art should preclude the blanket extension of copyright protection to all forms of AIGC. The assessment of originality and authorship should be made according to the specific characteristics of each category of AIGC. Consequently, China's approach to copyright protection for AIGC is likely to evolve into a framework that applies differentiated treatment based on the distinct nature of various types of AIGC.

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