

Artificial Intelligence Cases in China: Feilin v. Baidu and Tencent Shenzhen v. Shanghai Yingxin

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In 2019, two court rulings in China on the issue of copyrightability of AI creations received international attention. It was reported that in Feilin v. Baidu, known as the first AI case, the Beijing Internet Court denied copyright of AI creations, whereas the Shenzhen Nanshan District People's Court acknowledged copyright of AI creations in the Tencent Dreamwriter case. The two cases, however, were quite similar, as they acknowledged copyright of AI-assisted, not AI-generated, written works and recognized these works as a work of a legal entity. The difference between the two judgments is that the Beijing Internet Court regarded originality as an independent requirement and judged it according to the objective standard, whereas the Shenzhen Nanshan District People's Court regarded human creation as part of the requirement of originality. In this sense, it was the Beijing Internet Court that actually made the more favorable judgment on an AI-generated work.

Keywords: AI, Feilin v. Baidu, Tencent Shenzhen v. Shanghai Yingxin, Beijing Internet Court, Shenzhen Nanshan District People's Court

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All the websites cited in this article were last visited on February 15, 2021.

1. Introduction

“It’s the transformative phenomenon that’s going to reshape the world as we now know it.” This was one of the verbatim responses when artificial intelligence (AI) won “Word of the Year” in a vote conducted by the Association of National Advertisers (ANA) in 2017.¹

Then, what changes will AI bring to the field of intellectual property? For example, how will we treat works created by AI? Are such works in the public domain?² Or should the copyright or equivalent rights be recognized? These questions have been discussed in the World Intellectual Property Organization (WIPO)³ as well as in countries around the world,⁴ but we do not yet have a clear answer.

While the nature of AI creations is still ambiguous, in 2019, there were two court rulings in China on the issue of copyrightability of AI creations that received considerable international attention. Given that China has adopted AI development as a national future strategic industry and has been one of the leading countries in AI development,⁵ it is not surprising Chinese courts had the first opportunities to judge legal disputes over AI creations. These rulings received even more attention because of their different judgments. In *Feilin v. Baidu*, the Beijing Internet Court, on April 25, 2019, denied copyright of AI creations,⁶ whereas in the *Tencent Dreamwriter* case, the Shenzhen Nanshan District People’s Court, on November 25, 2019, acknowledged copyright of AI creations.⁷ In fact, these two cases were quite similar, as they acknowledged copyright of AI-assisted,⁸ not AI-generated,⁸ written works and recognized these works as a work of a legal entity, not as a work of a natural person(s). This article will examine how the two courts addressed the issue of AI and copyright.

2 Feilin v. Baidu⁹

A. Facts

On September 9, 2018, Beijing Feilin (菲林, meaning “film” in Chinese) Law Firm (hereinafter Feilin) posted “Analysis Report on Judicial Big Data of the Entertainment Industry - Film Volume·Beijing,” which was written using legal

statistical data software, the Wolters Kluwer Database, on its WeChat official accounts. The next day, an internet user published without permission the report, with some parts omitted - namely, the preface, retrieval overview, annual trend chart of the number of cases in the film industry, and the “note” part at the end - on the Baijiahao platform operated by Baidu. Feilin brought a lawsuit against Baidu before the Beijing Internet Court alleging that Baidu had infringed its right of authorship, right of integrity, and right of communication of information on networks.¹⁰ The defendant argued that the Feilin Report was not original but had been generated by the Wolters Kluwer Database and the Chinese Copyright Law only protects creations of natural persons, not content generated by AI.¹¹

B. Court Proceedings and Decisions

The key issue in this case was whether the Feilin Report was a work protected by the Chinese Copyright Law. The Beijing Internet Court reviewed whether the graphics and text constituting the Feilin Report could be classified as graphic work and written work, respectively, as stipulated in the Chinese Copyright Law.

To determine whether the graphics and text of the Feilin Report had sufficient originality to be recognized as a copyrighted work and whether they had been generated automatically by Wolters Kluwer Cases, the Beijing Internet Court, with the consent of Feilin and Baidu, produced two reports using the Wolters Kluwer Database and compared them with the Feilin Report. To produce these two reports, Feilin’s representative entered data according to Baidu’s instructions: For the first report (hereinafter Report 1), the representative entered as the Wolters Kluwer Cases search criteria “film” for the keyword, “Beijing courts” for the trial court, and “from January 1, 1995 to December 31, 2017” for the trial date. For the second report (hereinafter Report 2), the representative entered as the search criteria “film” for the keyword, “Beijing courts” for the trial court, “from January 1, 1995 to December 31, 2017” for the trial date, and “copyright ownership and infringement dispute” for the cause of action. Then, the representative clicked “Search” and “Visualization” to generate each report.¹²

First, regarding the graphs, the Beijing Internet Court found that differences among them were not due to creation but to differences in the data entered.¹³ Thus, neither the graphs in Reports 1 and 2 nor those in the Feilin Report met the originality requirement of graphic works.¹⁴

Next, regarding the text, the Beijing Internet Court found that not only the text of the Feilin Report but also the texts of Reports 1 and 2 had sufficient originality to be recognized as written works.¹⁵ However, regarding Reports 1 and 2, the court ruled that a work cannot be established solely by originality, but that a natural person(s) must have created and completed it. Therefore, the court said that as Reports 1 and 2 had been created by a user entering keywords and clicking the Search and Visualization buttons, they could not be said to be creative works expressing the user's thoughts and feelings, and they did not fall within the category of work as stipulated in the Copyright Law.¹⁶ However, the court added, the fact that Reports 1 and 2 did not constitute copyrighted works did not mean that they were the public domain and should be freely used by the public. The Beijing Internet Court stated that certain rights and interests related to such reports should be granted to the software user (who paid the software fee and generated the report by entering keywords), not the software developer (who had already earned revenue from developing the software).¹⁷

Regarding the Feilin Report, the Beijing Internet Court acknowledged that the report was, in terms of its content and expression, completely different from Reports 1 and 2, which had been automatically generated by the Wolters Kluwer Database, and therefore, concluded that the report had not been created by the Wolters Kluwer Database but by Feilin.¹⁸ Consequently, the court judged that the Feilin Report constituted a written work protected under the Chinese Copyright Law by satisfying both the originality and human-created requirements and acknowledged Baidu's infringement of Feilin's copyright.¹⁹

Feilin appealed to the Beijing Intellectual Property Court, claiming that the Beijing Internet Court had erred by failing to recognize the graphs in the Feilin Report as graphic works.²⁰ However, the Beijing Intellectual Property Court affirmed the ruling of the lower court. The difference between the rulings of the Beijing Internet Court and the Beijing Intellectual Property Court in this case was that the former only recognized Baidu's infringement of Feilin's rights of authorship and communication of information on networks, whereas the latter also acknowledged infringement of the right of integrity.²¹

3. Tencent Shenzhen v. Shanghai Yingxin²²

A. Facts

Dreamwriter computer software (hereinafter Dreamwriter) is a set of data and algorithm-based intelligent writing assistance systems. Since 2015, Tencent Technology (Shenzhen) Co. Ltd. (hereinafter Tencent) employees had used Dreamwriter to complete about 300,000 works each year.²³ On August 20, 2018, Tencent published a financial report titled, “Noon Review: Shanghai Stock Index rose slightly by 0.11% to 2671.93 points, led by telecommunication operations and oil extraction” (hereinafter the Article) on the Tencent Securities website.²⁴

The Article was a stock market financial review consisting of nine paragraphs with a total of 979 Chinese characters including the title.²⁵ On the same day, Shanghai Yingxin Technology Company (hereinafter Yingxin) copied the Article and posted it on the Internet Loan House website that it operates.²⁶ Tencent brought a copyright infringement lawsuit against Yingxin before the Shenzhen Nanshan District People’s Court alleging that Tencent was the author of the Article and thus the copyright holder.²⁷

B. Court Proceedings and Decision

During the trial, Tencent submitted relevant evidence supporting its claim, while Yingxin acknowledged the facts as claimed by Tencent.²⁸ Tencent explained the entire process that its employees, referred to as a “creative team,” used to generate and publish the Article with Dreamwriter. The process consisted of four steps: (1) forming a database with a certain format by collecting, analyzing, and combining data; (2) testing the database and drafting the text; (3) reviewing and proofreading it; and (4) publishing it.²⁹ According to Tencent, in the steps above, the input of the data type, processing of the data format, setting of trigger conditions, selection of the article frame template and setting of the corpus, and training of the intelligent verification algorithm model were all selected and arranged by relevant members of the creative team.³⁰

The Shenzhen Nanshan District People’s Court stated that regarding whether the Article fell within the category of a written work protected by the Chinese Copyright Law, the key was whether the Article had originality as stipulated in Article 2 of the Chinese Copyright Law.³¹ The court found the basis for judging

whether the Article was original in the generation process as well as the Article itself.³²

First, the court examined the external expression, content, and sentence structure of the Article and ruled that it had a certain degree of originality - the lowest degree of creativity differentiating the Article from existing works.³³ Next, the court stated that regarding the generation process of the Article, the presence of factors indicating the creator's individual selections, judgment, and skills needed to be confirmed.³⁴ After mentioning the actions allegedly performed by Tencent employees to generate the Article, the court, while admitting that the creation process differed from the creation process of ordinary written works in that a time gap existed between the actions performed by Tencent employees to create the Article and the completion of the draft, ruled that the actions of Tencent employees met the requirements of creation - that is, intellectual activities - in Chinese Copyright Law.³⁵ The court added that to judge whether an act is a creative act, it should be considered whether the act is an intellectual activity and whether there is a direct connection between the act and the specific form of expression in the work. The court further elaborated that the form of expression in the Article was individually determined and arranged by Tencent employees and, in light of the analysis of the process used to generate the Article, the form of expression had a certain originality, albeit not unique.³⁶

As mentioned above, the court, acknowledging that the Article was a written work protected by the Chinese Copyright Law, ruled that the Article was a work of a legal entity and Tencent was its copyright holder, and recognized the infringement of its copyright (i.e., the right of communication of information on networks) by Yingxin.³⁷ Yingxin did not appeal against the decision, which closed the case.³⁸

4. Review

The emergence of new technologies has not only caused controversies over copyright law and its interpretation, but also influenced the development of copyright law. The advent of cameras,³⁹ for example, raised the question of whether photographs should be recognized as work.⁴⁰ The advent of the Internet

also raised the question of what rights under copyright law should govern the dissemination of works online. Consequently, the right of making available to the public was adopted in the WIPO Internet Treaty 1996.⁴¹⁴²

The rulings of the Beijing Internet Court and the Shenzhen Nanshan District People's Court answered affirmatively the question of whether the current copyright law protects works generated using AI. However, there was a very subtle difference between the approaches of these two courts in judging whether a work generated using AI is copyrighted.

The Beijing Internet Court divided the requirements for recognition as a copyrighted work into two categories - the originality of the "work" and the creation of a "natural person" - and determined the two separately. The Beijing Internet Court decided that the graphs in the Feilin Report had no originality by themselves, whereas the text did have originality.⁴³ The court, as a dictum, elaborated that even Reports 1 and 2, generated by simply entering keywords into the Wolters Kluwer Database for comparison with the Feilin Report during the court proceedings, were recognized as original under the current copyright law.⁴⁴ In light of the above, some claim that the Beijing Internet Court determined originality on the basis of an objective standard.⁴⁵ The Beijing Internet Court ruled that although Reports 1 and 2 were original, they could not be recognized as copyrighted works because they had not been created by "natural persons." By contrast, the Beijing Internet Court decided that the Feilin Report was created by Feilin's employees - that is, "natural persons" - as Feilin claimed, which was not only based on the materials that Feilin submitted, but also the fact that the text of the report was different from that of Reports 1 and 2.⁴⁶ There is also a view that the Beijing Internet Court adopted a subjective standard in determining originality, focusing on the fact that the court investigated the AI generative process, not just the end result, while hearing the case.⁴⁷

In contrast, the Shenzhen Nanshan District People's Court regarded creation by a "natural person(s)" as one of the requirements for acknowledging the originality of a work and focused on whether there were creative activities of Tencent employees in the process of generating the Article in determining whether it had originality. In this respect, it can be said that the Shenzhen Nanshan District People's Court certainly applied a subjective standard in determining originality. It appears that the court acknowledged that Tencent employees undertook creative

activities on the basis of Tencent's claims and supporting materials - without demonstrating the process of generating articles using Dreamwriter during the court proceedings - because Shanghai Yingxin did not dispute any of Tencent's claims.⁴⁸

Although the Beijing Internet Court's ruling took an objective approach to determining originality and the Shenzhen Nanshan District Court took a subjective approach, the process of determining whether the works in question were protected under the copyright law was the same overall and the conclusions were the same. Further, these two rulings followed the prevailing view⁴⁹ of AI-assisted work. If so, is there a significant difference between the two judgments? My answer is yes.

The Beijing Internet Court stated that it would be inappropriate to break from the basic norms of civil subjects by recognizing the texts of Reports 1 and 2 - that is, "works" intelligently generated by computer software - as works protected by copyright law.⁵⁰ However, this does not mean that a "work" generated intelligently by software is not legally protected. As long as the work intelligently generated by computer software has creativity according to the objective standard - that is, as long as the work contributes to the society - it should be protected by law, according to the Beijing Internet Court.⁵¹ On the contrary, the Shenzhen Nanshan District People's Court eliminated any opportunity for further discussion on the legal protection of AI-generated work by determining originality according to a subjective standard.⁵²

Many people remember that the Beijing Internet Court's ruling was the first case that judged an AI-generated work but denied its copyright, while the ruling of the Shenzhen Nanshan District People's Court - although the misunderstanding was later corrected⁵³ - was the first to recognize the copyright of an AI-generated work. However, if we must choose the court that actually made the more favorable judgment on an AI-generated work, would it not be the Beijing Internet Court?

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