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Tort Liability Analysis of Generative Artificial Intelligence in Judicial Application

-- An Example of Generative Large Models

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ABSTRACT

The judicial application of generative artificial intelligence technology has triggered core legal issues such as subject matter eligibility disputes, definition of service attributes and allocation of tort liability. This paper takes Tencent Dreamwriter case and other typical cases as an entry point to systematically explore the difficulties in determining the tort liability of generative artificial intelligence under the current legal framework, focusing on the disputes over the liability of service providers, the dilemma of determining the negligence caused by algorithmic defects, and the ambiguity of defining the infringement behaviours. Through comparative analysis of domestic and international legislative practices, the study reveals the "instrumental" nature of generative AI and the core of the dispute over its legal nature: service providers, as the controllers of the technology, are required to undertake the legal obligations of data compliance review, generation of content labelling, and filtering of illegal information. The study further proposes a functionalist approach to the determination of tort liability, combining the "equivalent causation theory" with the principle of judicial classification to provide a dynamic framework for the division of liability. At the level of risk regulation, China has formed a governance system that combines policy guidance and technical regulation, and has strengthened algorithmic transparency and content traceability through the Measures for the Labelling of Artificial Intelligence-Generated Synthesised Content. The purpose of this paper is to provide both theoretical support and practical guidance for the judicial discretion and institutional improvement of generative AI infringement disputes.

KEYWORDS

Artificial Intelligence; Tort Liability; Legal Framework; Tort Risk Avoidance; Algorithmic Regulation.

1. DISCUSSION OF THE LEGAL NATURE OF ARTIFICIAL INTELLIGENCE

1.1. Background of Technology Development and Typical Case Studies

With the booming development of artificial intelligence technology, especially in the field of justice, intelligent assistants, represented by deepdeek, Chat GPT and others, have increasingly become the focus of legal professionals' support tools. However, the role and legal status of these intelligent systems have become blurred in the face of increasing technological advances, triggering a series of legal controversies and challenges regarding AI tort liability. The Tencent Dreamwriter case is an example of the complexity and importance of this issue.

The Tencent Dreamwriter case occurred in 2018, when Dreamwriter software developed by Tencent automatically generated a financial report on the stock market and posted it on the Tencent Securities website. This seemingly unusual operation triggered a copyright dispute with Yingxun. On the face of the case, Dreamwriter is not a human author in the traditional sense of the word, and its creation relies on a large amount of data input and complex algorithms, which may come from a variety of sources, including public market information, historical data, and licensed or unlicensed data sources. This raises a key question: how should the legitimacy of Dreamwriter-generated articles be defined when the data sources are diverse and may be at risk of infringement?

A deeper look into the development of the Dreamwriter software reveals a significant investment from Tencent behind it. Between 2017 and 2018, Tencent's investment in content generation AI projects increased significantly. These investments cover algorithm development, data collection and processing, functional testing, and other aspects, so that Dreamwriter has the ability to generate articles with a certain degree of originality. However, is this ability sufficient for Tencent to fully enjoy the copyright of the articles it generates? This is a preliminary consideration of the legal nature of artificial intelligence.

From an international perspective, a similar case is the class action lawsuit filed against OpenAI by American author Sarah Silverman in conjunction with a number of writers . Comparison of these two cases can be found in different countries in the legal system, judicial practice maturity and other aspects of the differences. For example, in the Tencent Dreamwriter case, China explicitly ruled that AI-generated works are protected by copyright and belong to the developer[1], while the OpenAI case in the US is still in the controversial stage. This difference is due to a number of factors, including cultural, economic and technological development.

Analysed from the theoretical level, the natural law theory stresses that law should conform to the principles of morality and justice. In the Tencent Dreamwriter case, the court ruled that the AI did not have the qualification of a legal subject, perhaps based on the idea of the unshakeable core position of human beings as moral subjects. Positivist jurisprudence, on the other hand, focuses on the actual operation of existing legal rules and systems, and in this case, the provisions of China's Copyright Law on the originality of works and the attribution of copyright became an important basis for the court's judgement.

Technology ethics also provides a unique perspective for understanding the legal nature of AI. During the development and use of Dreamwriter, Tencent followed a number of technological ethical guidelines, such as ensuring the legality of data sources and respecting users' privacy, which translated into legal relationships of rights and obligations. At the same time, the prevailing social value of protecting original works also influenced the court's judgement in the case.

In summary, the Tencent Dreamwriter case, as a typical case, vividly shows the tip of the iceberg of the legal nature of artificial intelligence. It not only reveals the many challenges of artificial intelligence in the field of intellectual property, but also lays the foundation for the subsequent exploration of the path of artificial intelligence infringement liability, case analysis and infringement risk avoidance and other issues.

1.2. The Central Debate on the Nature of Law

Generative AI is significantly different from traditional analytical AI in that it has the powerful ability to simulate human intelligence. Through an in-depth discussion of the Tencent Dreamwriter case, we found that generative AI involves a number of links and subjects in the creation process, such as data providers, algorithm designers, software developers, and end-users, etc., and that these complex interactions make the issue of its legal nature particularly complicated.

At the end of 2022, the launch of ChatGPT by OpenAI in the US marked a new milestone in generative AI, which has undergone an evolution from professionally generated content (PGC) to

user-generated content (UGC) to artificially intelligent generated content (AIGC) . Subsequently, on 6 November 2023, OpenAI released GPT4-Turbo, followed by Google Inc.'s Gemini model on 6 December. These new models have made significant advances in terms of data size and scalability of generated content, pushing generative AI towards "generalised AI". However, with the rapid development of generative AI, its inherent flaws also bring potential risks, especially in the training and generation phases, which may involve model flaws, data infringement and misuse, and these problems are particularly prominent in commercial applications. As some scholars have pointed out, the key to solving these problems lies in clarifying the legal nature of generative AI and the legal status of its service providers[1].

There are several main arguments against the legal nature of generative AI:

(1)Generative AI does not qualify as a subject of law

The formalist position generally adopted by the academic community is that generative artificial intelligence essentially belongs to the category of "instrumentalism" [2]. Whether generative artificial intelligence or general artificial intelligence, do not have legal personality, its legal status can only be positioned as an auxiliary tool for human activities. As scholars have proposed, artificial intelligence, regardless of the stage of development, is still essentially the object of human use, can not be obtained through the legal system to obtain the subject qualification. 错误!未找到引用源。 Other scholars emphasise that artificial intelligence systems, as a product of technology, are always dependent on human control for their design and operation, and therefore do not have the ability to independently assume legal responsibility [4].

International legislative practice further supports this view. 2020 EU Legislative Initiative on Liability for the Operation of Artificial Intelligence Systems, Part B, Article 5, explicitly denies the legal personality of AI, stating that it has "neither subjective will nor moral judgement, but only serves the needs of human beings". Article 1, Part 2 of the draft United States National Artificial Intelligence Initiative (NAI) makes it clear that AI is only a tool.

It is worth noting that China's Interim Measures for the Administration of Generative Artificial Intelligence Services does not directly define the subject status of AI, but indirectly denies its possibility of being an independent subject by defining the nature of its services as "information services". Article 5 of the Interim Measures for the Administration of Generative Artificial Intelligence Services requires generative AI service providers to "undertake network information security obligations", and Article 12 makes it clear that "service providers shall mark generated content to safeguard users' right to know", both of which take the human subject as the bearer of responsibility. Human subjects are the bearers of responsibility. From the perspective of technical definition, AI, as "the theory and method of simulating, extending and expanding human intelligence", always serves human goals as its core function, rather than forming independent will.

(2) Granting limited legal personality to generative artificial intelligence

Some scholars have argued that generative AI should be given limited legal personality given its high intelligence and decision-making capabilities[5] . There is also the Proposal for a Directive on Liability for Artificial Intelligence issued by the European Union in 2024, which further clarifies the legal liability of AI systems and puts forward the principle of requiring the developer or operator to bear strict liability under specific circumstances. This legislative trend reflects international concern and exploration of the legal status of generative AI. Nevertheless, Likun Yang, Meta's chief AI scientist, pointed out that it will take decades to achieve AI systems with truly human-like perception and common sense judgement, which means that the current generative AI is not yet able to free itself from human control and gain fully independent autonomy[6].

The judgement on the legal nature of generative artificial intelligence should be shifted from formalism to functionalism. With the development of AI technology, the contribution theory under the functionalist perspective is more practical. This viewpoint put forward by Liang Yuangao

emphasises that the service providers and users of generative AI should be held responsible according to the proportion of their contributions to algorithmic rules, data feeding, keyword selection, and so on. Under the framework of functionalism, the mechanism of assuming legal responsibility for generative AI is similar to a gradual spectrum, in which each subject dynamically matches the corresponding responsibility according to the difference of its contribution. This way of responsibility allocation is not only more in line with the actual situation, but also can effectively deal with the various challenges brought by generative AI.

The above analysis shows that the debate on the legal nature of generative AI is a multi-dimensional issue involving theoretical discussions and specific case studies. Different views and debates have led to the continuous improvement and development of the relevant legal system in order to adapt to the rapidly changing technological environment. For example, recent legislative developments and judicial practice show that countries are actively exploring how to better define the legal status of generative AI to ensure that it can promote technological innovation while effectively protecting the public interest.

2. THE DILEMMA OF FINDING TORT LIABILITY FOR GENERATIVE ARTIFICIAL INTELLIGENCE

2.1. Ambiguity in the Definition of Legal Attributes

In the determination of tort liability, the definition of the legal attributes of generative artificial intelligence (AI) is the core controversy . From the perspective of comparative law, the provisions on product liability in China's Civil Code and Product Quality Law, as well as the European Union's Product Liability Directive or the United States Restatement (Third) of Torts[7], all take "products" as the object of application of the liability system, and services are usually excluded from the framework of product liability. This distinction stems from the logic of the product liability system in the context of industrial society: industrial products are standardised and replicable, and the risk of defects can be shared through the mass dispersion mechanism of market sales; whereas services are personalised and non-standardised, and it is difficult to allocate the risk of liability through a similar path.

Generative AI, as computer software, faces special challenges in defining its attributes. China's current laws do not explicitly include software in the category of "product", and this legal gap leads to the ambiguity of the identification of software attributes in judicial practice. For example, from the perspective of international experience, the Restatement (3rd) of Torts of the United States draws on the classification of the Uniform Commercial Code (UCC) to differentiate software into "packaged software" (considered as a product) and "customised software" (considered as a service) [8], but the generative AI's mode of operation is closer to service provision than to product sales. The reason is that its core features are reflected in the following aspects: (1) the system relies on continuous service support, and the functional iteration and data update are always controlled by the provider; (2) the source of revenue is subscription or payment for service rather than one-time sale of software; and (3) the output is non-standardised due to the human-computer interaction and algorithmic dynamic adjustment.

The above characteristics of generative artificial intelligence make it difficult for it to meet the conditions for dispersal of liability for "homogeneous products" in traditional product liability regimes. This trend is reflected in the Interim Measures for the Administration of Generative Artificial Intelligence Services, which explicitly characterises generative AI as a "service", further strengthening its distinction from traditional product liability regimes. However, there are still challenges in defining this attribute: when generative AI causes damage due to algorithmic flaws, the identification of the responsible party needs to be combined with technical logic and the principle of risk allocation, and the existing legal framework has not yet formed a unified standard. For example,

in the case of service contract dispute between Zuo Lizhi and Shanghai Wenhua Financial Information Co., Ltd, the court ruled that: "The plaintiff claimed that the software service provided by the defendant was defective and caused his property damage, regardless of whether the software service is included in the scope of product liability, it should prove the existence of the defect, the existence of property damage, and the causality between the defect and the damage. The facts of the elements shall be proved..." Thus avoiding the dispute over whether software services are included in the scope of product liability. This decision shows that judicial practice tends to respond to the ambiguity of legal characterisation through the allocation of the burden of proof, rather than directly addressing the dispute over the attributes of generative AI itself, further highlighting the lagging nature of the existing legal framework under the iteration of technology.

2.2. The Logic of Identifying the Subject of Tort Liability

In the current judicial practice, it is temporarily considered that the generative artificial intelligence does not have independent civil subject qualification. In view of the generative artificial intelligence does not have independent civil subject qualification, its tort liability must be directed to the service provider. The operation of generative artificial intelligence relies on the corpus constructed by the service provider, the algorithmic model and the text, image and other data input by the user, and generates synthetic content that meets the needs through model training. In this process, the tool attribute of AI occupies a central position [9], and its behaviour is essentially controlled by the technical design and operational management of the service provider. The EU AI Act defines AI systems as "systems designed by humans and developed using specific technologies", while Article 4 of China's Interim Measures for the Administration of Generative Artificial Intelligence Services emphasises that service providers are responsible for the legality of data sources, the safety of model training, and the compliance of generated content. compliance.

Existing generative AI is dominated by the service provider in terms of the scope of data collection, model optimisation paths and user interaction rules. If the generated content infringes on the rights and interests of others, the service provider should be held liable for the infringement of rights and interests due to its failure to fulfil the necessary auditing obligations or technical control measures. This logic has already been reflected in judicial practice: the Kaifu District Court in Changsha held in the case of the AI editing of Qing Yu Nian that the service provider's failure to establish an effective infringement prevention mechanism and subjective fault constituted an infringement of the right to disseminate information on the Internet.

In the determination of causation of tort liability, China's judicial practice usually follow the "equivalent causation", the judgement of equivalent causation is mainly divided into two steps, that is, the judgement of factual causation and legal causation judgement [10]. Regarding the benchmark for judging equivalent causality, Professor Wang Zejian believes that "without such an act, although it must not give rise to this damage, with such an act, it is usually sufficient to give rise to such a damage, there is a causal relationship [11]," "without such an act, although it must not give rise to such a damage" points to "the harming act and the right infringed upon. The causal relationship between the harm and the consequences of the infringement of rights", i.e., the judgement of factual causality [12], this point and the "depth of the Internet information service synthesis of management regulations", article 10 "service providers should take technical measures to identify illegal information" requirements directly echoed. "With this act, usually enough to generate such damage" points to "the causal relationship between the fact that the right is infringed upon and the damage suffered by the victim", which is the judgement of legal causality. When AI-generated content infringes on portrait rights or copyrights, if the service provider fails to strictly examine the legality of the model training data (e.g., by using unauthorised material libraries), the equivalence between its fault and the damage is established, and this logic is reflected in Article 1195 of the Civil Code, which states that "upon receipt of a notification, the network service provider shall promptly forward the notification to the relevant network users and, based on the preliminary evidence of the

infringement and the service provider's knowledge of the infringement, the network service provider shall notify the relevant network users of the infringement. The network service provider, upon receipt of the notification, shall promptly forward the notification to the relevant network user and take the necessary measures based on the prima facie evidence of infringement and the type of service; if it fails to take the necessary measures in a timely manner, it shall be held jointly and severally liable with the network user for the extension of the damage...". This is evidenced by the provisions of the Law of the People's Republic of China on the Prevention of Copyright Infringement of the Internet. From the jurisprudential basis, service providers, as the actual controllers of generative AI, shall undertake security obligations that match their capabilities based on the principle of technological control and the allocation of responsibilities in line with risks and benefits: according to Article 27 of the Data Security Law, a full-process security management system covering data collection, storage and use shall be established; according to the Interim Measures for the Administration of Generative Artificial Intelligence Services According to Article 12 of the Interim Measures for the Administration of Generative Artificial Intelligence Services, the generated content should be marked and the illegal information should be filtered and intercepted; in judicial practice, the gist of the decision in the "AI Ultraman Case" embodies the above rules - the court found that the service provider had failed to filter the infringing user-generated images effectively and had neglected to respond to the complaint of the right holder. The court found that the service provider had failed to effectively filter the user-generated infringing images and had been negligent in responding to the complaint of the right holder, and that the causal relationship between its inaction and the consequences of the damage had been established, and that its subjective fault was obvious, and it was ultimately ruled that it should bear the corresponding legal responsibility.

The "instrumental" nature of generative AI determines the logic of liability attribution: service providers, as technology controllers and benefit recipients, need to fulfil their legal obligations by improving the data compliance mechanism, strengthening the content auditing technology, and establishing a rapid response system for infringement. In judicial practice, the courts have balanced technological innovation and rights protection through "classified measures" (e.g., distinguishing between responsibility for the data input and output phases), while gradually building a framework for determining responsibility that adapts to the characteristics of the technology on the basis of norms such as Interim Measures for the Administration of Generative Artificial Intelligence Services. In the future, with the implementation of the Measures for the Marking of Artificial Intelligence-Generated Synthesised Content (effective 1 September 2025), the marking obligations and liability boundaries of service providers will be further clarified, providing more detailed operational guidelines for the determination of infringement liability.

3. RISK REGULATION PATHS FOR GENERATIVE ARTIFICIAL INTELLIGENCE

3.1. Current Status and Policy Framework for Risk Regulation

With the deepening and expansion of the application of artificial intelligence technology, China has gradually built up an all-round governance system covering policy guidance, institutional constraints and technical norms, and its milestones are mainly reflected in the following two aspects:

Firstly, the top-level policy structure continues to improve, forming a multi-sectoral collaborative governance pattern. At the national level, the State Council, the National Professional Committee on the Governance of the New Generation of Artificial Intelligence, the State Administration of Market Supervision, and the Ministry of Human Resources and Social Security have successively released the "New Generation of Artificial Intelligence Development Plan", the "New Generation of Artificial Intelligence Governance Principles-Developing Responsible Artificial Intelligence", and other important policy documents related to AI governance. documents[13]. Among them, the "Principles of Next-Generation Artificial Intelligence Governance - Developing Responsible Artificial

Intelligence" specifies the eight core principles of "safe and controllable, fair and inclusive, open and cooperative, agile governance, harmonious and friendly, inclusive and sharing, respect for privacy, and shared responsibility", which delineate the ethical boundaries of technology research and development and application. It defines eight core principles of "security, control, fairness and universality, openness and cooperation, agile governance, harmony and friendliness, tolerance and sharing, respect for privacy, and shared responsibility", and draws ethical boundaries for technology research and development as well as application. At the same time, the State Internet Information Office, together with the Ministry of Industry and Information Technology, the Ministry of Public Security and other four departments, issued the Measures for the Identification of Artificial Intelligence-Generated Synthesised Content (effective on 1 September 2025), which requires service providers to add explicit and implicit identification to AI-generated content, build a content traceability mechanism, and prevent the risk of dissemination of false information. In addition, the Provisions on Administration of Deep Synthesis of Internet Information Services further strengthen service providers' algorithmic audit and data security obligations, forming a full-chain regulatory framework from technology research and development to content dissemination, and providing strong support for the modernisation of the national governance capacity and system as a national top-level policy framework.

Secondly, China's current governance of generative AI mainly focuses on technical risk prevention and control, application transparency and ethical compliance constraints. At the level of technical risk prevention and control, Articles 16 and 17 of the Administrative Provisions on Depth Synthesis of Internet Information Services require the implementation of full-process traceability management for depth synthesis content that may cause public confusion (e.g., face replacement, immersive simulation scenarios) through a mandatory labelling system (e.g., the word "AI-generated" is prominently labelled) to prevent the risk of the proliferation of false information. The requirement is to implement full-process traceability management for deeply synthesised content (such as face replacement and immersive simulation scenes) that may cause public confusion, so as to prevent the risk of spreading false information. At the level of application transparency, Article 4 of the Interim Measures for the Administration of Generative Artificial Intelligence Services makes it clear that service providers should take effective measures to enhance the transparency of their services (e.g., disclosure of algorithmic design principles, user prompts on the nature of the generated content, etc.) in order to improve the accuracy and reliability of the generated content, and the subjective responsibility of the legitimacy of the source of the data, the safety of the model training, and the compliance of the generated content. Ethical compliance constraints are embodied in the "Principles for the Governance of the New Generation of Artificial Intelligence", which prohibit algorithmic discrimination, infringement of personality rights, and other risks, and build a framework for ethical review of technological research and development and application. These are important references for the regulation and governance of generative AI in the future.

3.2. Algorithmic Transparency and the Challenge of Generated Content Regulation

In the regulation of algorithms, there is a very important concept of "algorithmic black box", the concept of algorithmic black box is very critical to the impact of algorithmic regulation [14]. The metaphor of the black box not only points to the non-interpretability of the internal logic of the algorithm, but also metaphorically represents the dilemma of "uncontrolled decision-making" faced by human beings under the technological hegemony - when the algorithm generates the results that affect the rights and obligations of the individuals based on the huge amount of data and complex models, the decision-making process is like a closed physical device. Like a closed physical device, the outside world can only observe the inputs and outputs, but cannot trace the logical path. Some scholars have analogised it as a force of nature that can only be tamed, not controlled. The algorithmic veil is perhaps a more appropriate metaphor than the algorithmic black box, veiling the human

decisions and value judgements behind automated decision making. The benefit of the veil is that it invites humans to remove it at any time, thus revealing the true nature of the algorithm [15].

However, algorithms are not absolutely closed systems, and their decision-making nature is still a visualisation of human preconceived values and code rules. The current challenge to algorithmic transparency focuses on three obstacles: subjective intentional secrecy, lack of understanding due to lack of experience and technical knowledge, and opacity due to the complexity of the system. Algorithmic transparency has different connotations and is not only possible but also feasible, ranging from the obligation to inform about the algorithm's use, reporting parameters, disclosure of parameters, to the disclosure of the source code [16]. Algorithmic transparency is of great significance for the protection of citizens' rights, which guarantees their right to know and prevents users from being passive data objects. Algorithmic transparency itself is a mechanism for correcting the imbalance between users and companies, and between citizens and the state [17]. Algorithmic transparency is not about pursuing an "omniscient view" of technology, but ultimately about reducing algorithms from an "unknowable force" to an "accountable tool", and ensuring that the evolution of technology always serve human dignity and social justice.

4. CONCLUSION

Artificial intelligence technology represented by generative models is reshaping judicial practice, but it also raises the risk of infringement due to the mismatch between technical characteristics and the existing legal framework. The complexity of generative AI in terms of data feeding, algorithm iteration, and content output makes it difficult to completely avoid the generation of infringing information, and how to reasonably allocate the risk of damages and define the boundary of responsibility of service providers has become a core issue that needs to be resolved urgently.

In current legal practice, the contradiction between the "service" attribute of generative AI and the traditional "product" liability system has led to multiple dilemmas in the determination of tort liability. Judicial decisions need to deal with disputes over attributes, causality and the distribution of the burden of proof, and there is an urgent need to enhance the predictability of the rules through legal interpretation. At this stage, there are already some relevant documents at home and abroad, such as China's Interim Measures for the Administration of Generative Artificial Intelligence Services, which clarifies the obligations of service providers in terms of data compliance, generated content auditing and labelling, and the EU's Artificial Intelligence Act, which emphasises the strict liability of developers and operators, and these norms provide preliminary guidelines for the division of liability.

From the perspective of liability allocation, it is not optimal to incorporate generative AI into the traditional product liability framework. Based on the functionalist perspective, it is more appropriate to adopt the general tort liability system and supplement it with the presumption of fault rule: service providers, as technology controllers and benefit recipients, should bear the fault liability for the risks of algorithmic defects and data infringement, and at the same time, balance technological innovation and rights protection through the dynamic adjustment of the burden of liability. In judicial practice, the use of "comparable causation", etc., provides a flexible path for the determination of liability.

Future governance needs to focus on risk-benefit balance and strengthen algorithmic transparency and content traceability mechanisms. These issues can be resolved through upcoming or existing documents such as the "Measures for the Labelling of Artificial Intelligence-Generated Synthesised Content", which will refine the labelling obligations of service providers, and combined with technological measures, will effectively curb the expansion of damage. The essence of the tort liability of generative AI is a microcosm of the synergistic evolution of technology and law, and the only way to promote the development of technology while building the cornerstone of the rule of law and realising the benign interaction between innovation and safety is to clarify the main body of responsibility and improve dynamic supervision.

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