AI as artist: Applause, yes—but sorry, no copyright

From cave paintings to AI, the tools used in the creative process continue to evolve

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For The Straits Times

The art world has been thrown into a frenzy by the apparent invasion of artificial intelligence (AI) into high-brow realms. News that the prize for emerging digital artists at the Colorado State Fair went to work created by an AI program, MidJourney, set off a backlash from artists who saw this as cheating.

Today, rapid advancements in AI capabilities are now seen to continue to redefine the human role in the creative process. Most of these works are not held back by the underlying algorithm and creative input of the programmers; the computers are mimicking painters or chisels—they are tools used in the evolution of the art forms.

Now tools like MidJourney mean even amateurs can create “art” by inputting words into a text box. This raises many questions, including who is determined as the painter or author—does the “tool” or program get a credit, what is originality, and extension, where does the legality of theAI stand at all?

In Singapore, the relevance here is that the new Copyright Act that came into effect in November last year is aimed at whether AI-generated works are protected. However, a number of sections in the legislation make it clear that only a human individual can be an “author.” For instance, the duration of copyright is pegged to 70 years after the death of the author (section 14A), and copyright in authorial work vests only in the author or a qualified individual where “he or she” is a Singapore citizen or a Singapore resident (section 27). The Singapore Court of Appeal also ruled that for copyrights to exist in any literary work, the authorial creator must conclusively connect with the engagement of the human intelligence, which a non-human author is deemed to be unable to provide.

HOM ART EVALED

In April 2016, advertising executive Ben Kominsky unravelled The Next Rembrandt, a computer-generated 3D painting created by an algorithm with facial recognition software that spent three months examining 346,000 paintings by the Dutch painter, using 832 gigabytes of data to render the image. In 2016, Okin, a Paris-based collective, developed the painting Portrait of Emilie du Châtelet through Generative Artistic Networks, which used a sample set of 7,000 images to create a portrait of the French enlightenment philosopher. Similarly, in 2018, the first AI-generated art auction was sold at Christie’s—US$432,500 (S$586,000), over 40 times its initial estimate. Although the market is still in its infancy, in comparison with traditional masterpieces like Caravaggio’s Madonna of Loreto, the painting was nonetheless for its claimed artist: It was not a person but an algorithm.

WHO IS THE CREATOR?

Many commentators do not make a clear distinction between the AI as a “tool” used by a human individual for the AI itself independently and autonomously producing a work without supervision or significant human intervention. The former category is usually called AI-aided works, while those in a consistent term used to define the latter category. But let’s call them AI-generated works.

Examples of the former include the work of internationally renowned artist Saamag Chow who uses hand-drawn and computer-generated marks in her drawings, sculptures and instalational works, and Scott Eaton, who creates art with an AI to render his drawings and animation into photographs, sculptures and woodcarved panels.

Civil law countries such as France and Germany regard authorship of works as emanations or extensions of the personality of the author, based on the 19th-century European doctrine of droit moral, or moral right, reflecting the personal rights of the author.

Similarly, the Berne Convention for the Protection of Literary and Artistic Works, most of which has been incorporated into the WIPO Copyright Treaty and the Agreement on Trade-Related Aspects of Intellectual Property Rights, was drafted with a focus on the rights of human authors in literary, dramatic, musical and artistic works.

The economics literature justifies for copyright does not explicitly mandate human authorship. However, it does suggest that the delicate balance of various goals would be upset if copyright were conferred on AI-generated works.

Copyright and Creativity

Artists much think that copyright laws are designed primarily to protect the creators of works, but that is not the sole purpose of copyright law outside of the civil law countries. It is widely accepted by policy makers and judges that the primary purpose of copyright is to protect the public good by protecting authors and other holders of a use of their works that unfairly分工s the commercial value, and to incentivize the production of more works for the public benefit.

There are two competing arguments against granting copyright to AI-generated works.

First, from an economic viewpoint, AI is an amoral algorithm, not incentivized to produce new works by copyright, which is an economic monopoly right. Second, from the creativity perspective, the fundamental of copyright demand an intellectual creation reflecting the freedom of choice and personality of the author and/or the holder to produce a new work by copyright, composition of music or competent or characterizable of dance performance. For AI-generated works, there is significant human intellectual input that contributes to the production process. Granting copyright protection to only AI-aided works incentivizes the effort necessary to encourage creativity and promote the creation of new works. For AI-aided works, the use of the AI systems as tools or agents that aid the human author to render ideas into expression. In an English court, the works that satisfied the conditions of the author were not original, while the holder of the copyright in the AI-generated works was entitled to the same protection.

REDEFINING THE MEANING OF “TOOL”

Copyright is about a matter of beauty or taste, not about encouraging and rewarding human creativity. Throughout history, humans have always relied on and even produced paintings and other artistic works. The older AI-generated works were created with paintbrushes in the 2010s, paintings by Leonardo da Vinci’s Mona Lisa were created with paintbrushes. In the 1600s, artist Velasquez used a retouching tool to erase or add elements to a canvas. In the 1990s, Damien Hirst created his famous works by pouring different color pigments on canvas with rotating cameras. More recently, David Hockney created his famous “bathers” by printing them on paper with a camera moving around the model.

In 2019, Taiwan artist Ai Weiwei used AI to create his painting “the boiling sea,” which was transformed into a work of art by the creators of the program. The AI’s skill in creating art should be recognized, AI creators should have equal rights to the commercial value of the works created by AI. The development of AI technology should be recognized, and the artists should have equal rights to the commercial value of the works.

Further, in determining whether the use of AI is a valid copyright law should look closely at the role of the programmer of the algorithm, the data supplier who licenses the output of the relevant data, and the users of the AI as a tool, and their contribution to the final creative work.

Singapore’s Copyright Act does not recognize work derived from artificial intelligence (section 15). In circumstances where the AI is used as an assistive tool, at the time of each individual’s contributory input, they must be aware of and influence the output of the specific AI contributions. Thus, the law should systematically evaluate the relative weight of the contribution of each individual to the final work to determine whose role or joint authorship ought to be recognized.

The advent of expected and unanticipated AI generated works by very much welcomed, but there is unfortunately no mechanism for the AI author. Perhaps the next US Copyright revision will be awarded to an AI author—but who knows, no one could say.

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