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The Reconstruction of Portrait Recognizability Standards under the Impact of Artificial Intelligence Technology

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Abstract. The deep synthesis, replacement, and generation capabilities of artificial intelligence technology have fundamentally impacted traditional portrait recognizability standards centered on facial features. The existing "comprehensive judgment method" relies excessively on judicial discretion, lacking objectivity and stability, which often leads to inconsistent rulings in similar cases. Accordingly, a "dualistic" identifiability standard based on popularity should be established: for celebrity portraits, the "general public" standard should be adopted; for ordinary individuals, the "familiar person" standard should apply, with differentiated requirements for the degree of recognition certainty. Furthermore, several innovative dimensions should be introduced to form a multi-dimensional judgment system. These include a dynamic spectral model that treats popularity as a continuous spectrum, a graded approach to recognition certainty with three levels of confidence, consideration of the degree of AI technology intervention as a moderating variable, scenario-based judgment incorporating factors such as purpose of use, scope of dissemination, and accompanying textual cues, and integration with a "dual-track recognition" framework for personal information protection that distinguishes between human visual recognition and machine-readable identification. This comprehensive system aims to achieve a dynamic balance between the protection of personality rights and technological innovation.

Keywords: AI face-swapping, Portrait rights, Identifiability, popularity

1. Introduction

The protection of portrait rights takes "identifiability" as the core element, that is, whether a certain image points to a specific natural person. Traditional judicial practice usually uses facial features as the main basis for identification. However, the introduction of artificial intelligence deep synthesis technology has brought about a fundamental change in the formation mechanism and usage of portraits, thus putting traditional recognizability standards in a double blow.

In the case of Liao v. a certain technology and culture company for online infringement liability, the defendant used the ancient-style short video of the plaintiff without permission as a face-swapping template for users. The court, after hearing the case, held that since the plaintiff's face had been replaced, the elements retained in the template video, such as makeup, hairstyle, and clothing, were not inseparable personality marks of a specific natural person, and the general public could not identify the plaintiff by this, and therefore did not constitute an infringement of the plaintiff's portrait

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rights. But the court also pointed out that the defendant's act of collecting videos containing the plaintiff's facial information and fusing them through algorithms constituted an infringement of personal information rights [1]. Similarly, in the case of Zhao v. a company over portrait rights, the face-swapping software operated by the defendant used short videos of Chinese style styling posted by the plaintiff as element templates for users to achieve face-swapping effects. The court held that although the video containing the plaintiff's face and body image had been processed, ordinary people could still easily identify the identity of the subject based on features such as face and body appearance. Therefore, the defendant's act of using the plaintiff's portrait to make the video without consent by means of artificial intelligence technology constituted an infringement of the plaintiff's portrait rights. Both cases point to a core issue: artificial intelligence technology is reshaping the boundaries of identifiability. On the one hand, technological processing easily undermines recognizability, rendering the traditional face-centered portrait rights protection path ineffective; On the other hand, the same technical processing leads to completely opposite evaluations in different cases, exposing the ambiguity and uncertainty of the established criteria.

In existing studies, the mainstream approach to the problem of portrait identifiability can be summarized as the "comprehensive judgment method", which considers objective elements such as the method, characteristics, occasion, and relevant textual description of the disputed image to determine whether it is identifiable [2]. Although it can deal with most portrait rights disputes, it has increased judicial uncertainty due to its excessive reliance on the judge's discretion and lack of objective standards. As scholars have pointed out, this criterion is somewhat vague in terms of "the general public" and "difficulty in identification", and needs to be combined with the particularity of the application scenarios of AI face-swapping to reinterpret the specific connotation of this criterion. In view of this, this paper attempts to first distinguish ordinary people from celebrities based on popularity, construct a binary structure of identifiability standards from the two dimensions of identifiability subject and identifiability certainty, and then introduce innovative dimensions such as dynamic spectral model, gradient identifiability certainty, artificial intelligence technology intervention, scenario-based judgment, and integration with "dual-track identification" for personal information protection, To form a multi-judgment system of identifiability standards.

2. Recognizability is a necessary condition for the protection of portrait rights

Article 1018(2) of the Civil Code defines a portrait as "the external image of a specific natural person that can be identified through images, sculptures, paintings, or other means on a certain carrier." Accordingly, a portrait comprises three elements: external image, carrier fixation, and identifiability. Identifiability is the most essential, determining whether an image establishes a legal connection with a specific individual. Literally, "identifiable" is the key qualifier; without it, any external image could qualify as a portrait, leading to overbroad protection. Systemically, Article 1019 prohibits "using information technology to forge" portraits, targeting acts that undermine identifiability. Thus, identifiability serves both as a constituent element of a portrait and a criterion for infringement.

Academics largely agree on the centrality of identifiability. As a symbol-based personality right, the portrait right fundamentally serves to identify a natural person; without identifiability, its symbolic function fails. Regarding protected interests, portrait rights encompass dignity, identity, and property interests—all premised on a stable link between image and subject. Dignity interests require the image to represent the right holder, identity interests require accurate attribution, and property interests depend on public recognition. All three rest on identifiability, without which portrait right protection collapses.

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In the AI era, identifiability demands renewed interpretation. Scholars suggest assessing recognizability through two dimensions: the recognizing subject (whether the general public or those familiar with the subject) and the degree of difficulty (whether the image retains core external features). This framework offers guidance for addressing AI challenges. It breaks identifiability into two operational dimensions, providing clearer direction for judges. It also accommodates differences in recognition based on the subject's popularity, allowing distinct recognition scopes for celebrities and ordinary individuals, thereby avoiding the unfairness of a uniform standard.

3. The flaws of the current "comprehensive judgment method" for identifiability

The comprehensive judgment method determines identifiability by considering multiple factors such as presentation method, characteristics, context, and accompanying text. While flexible in traditional disputes, its flaws are increasingly exposed in the AI era.

First, standard ambiguity leads to inconsistent rulings. The method lacks clear weighting and sequencing of factors, leaving much to judicial discretion. This often results in contradictory outcomes, as seen in the "Zhao" and "Liao" cases. Vague concepts like "the general public" and "difficulty of identification" offer little operational guidance, trapping courts in case-by-case discretion.

Second, cognitive bias undermines objectivity. The method is prone to the "anchoring effect"—when judges compare a real portrait with a disputed image, the first image may anchor their perception, increasing the likelihood of finding similarity. This deviates from how the general public independently assesses the disputed image alone, weakening objectivity.

Third, conflation of legal interests obscures distinct identifiability standards. The method applies the same framework regardless of whether the protected interest is dignity, identity, or property. Dignity interests call for lenient standards, identity interests for moderate ones, and property interests for the strictest. Failing to differentiate these undermines precise legal protection.

Fourth, technological lag limits adaptability. Developed in traditional portrait disputes, the method relies on elements like facial or physical features, which are less relevant in AI contexts such as face-swapping and deep synthesis. Where images are algorithmically generated or facial features entirely replaced, existing elements fall short. Moreover, the method focuses only on final outputs and does not address identifiability arising from data processing itself.

In sum, while the comprehensive judgment method offers a basic framework, its vagueness, subjectivity, lack of typification, and insufficient technological adaptability hinder its ability to resolve emerging AI-era disputes, highlighting the need for more refined standards.

4. Construction of the justification for the dualistic identifiability standard of portrait rights

4.1. Establishing the legitimacy of the dualistic identifiability standard

First, respond to the internal tension of the "general public" standard. There is an inherent contradiction in the traditional "general public" standard: due to significant differences in popularity and exposure between ordinary people and celebrities, the difficulty faced by the general public in identifying these two types of subjects is not exactly the same. If the same standard is applied to portrait recognition, there will be significant differences in the extent and scope of protection of portrait rights between ordinary people and celebrities. This disparity does not stem from the inequality of legal protection, but from the differences in the social influence of the right holders themselves, which needs to be addressed and addressed at the level of standard construction.

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Second, meet the differentiated needs of legal interests protection. As mentioned earlier, portraits of celebrities carry more significant property interests and identity interests, while portraits of ordinary people mainly carry dignity interests. The difference in the type of legal interest determines that the criteria for identifiability should be differentiated: for portraits of ordinary people that mainly carry the interest of dignity, the criteria for identifiability should be relatively lenient in order to include as many controversial images as possible within the scope of protection; For celebrity portraits that carry both identity interests and property interests, the criteria for identifiability should be stricter to ensure that only images that can truly identify the right holder can claim identity interests and property interests.

Third, overcome the certainty of the "comprehensive judgment method". Although the "combined judgment" approach is flexible, it lacks certainty and stability, which can lead to different judgments in similar cases. Using popularity as the base variable for identifiability judgments helps to refine and categorize individual case judgments.

4.2. Feasibility analysis of establishing binary identifiability criteria

Comparative law shows that portrait recognizability is shifting from a single standard to multiple standards, offering empirical support for a binary framework.

In the U.S., the right of image centers on "clear identification" without limiting who may identify. Courts adjust protection based on the right holder's popularity: a broader identifier pool for celebrities, a narrower one limited to the relevant public for ordinary individuals. This logic underpins a binary distinction by identifier type. The GDPR adopts a dual test of "identification" (whether information alone identifies a subject) and "association" (linking information to an identified individual), corresponding respectively to visual representation and identity interests in portrait rights [3].This suggests identifiability is multidimensional and should vary by the interest protected—core to a binary standard. German law's "discernibility" standard further differentiates direct identification (where image features are prominent) from indirect identification (requiring contextual aids), aligning with the celebrity-ordinary person binary proposed here.

Chinese practice reflects a similar evolution. In Liu v. Beijing Service Company, the court found recognizability even without facial features, relying instead on context and the plaintiff's fame, moving beyond a face-centric approach. While not explicitly adopting a binary standard, comparisons between the Zhao and Liao cases reveal implicit reliance on the right holder's popularity. Article 1018 of the Civil Code defines portrait by "external image" beyond the face, leaving room for expanded identifiability, while the Personal Information Protection Law's separate consent requirement for sensitive data supports differentiated protection in AI contexts. These developments suggest the binary standard from comparative law is feasible in China, supported by both institutional precedents and judicial practice.

4.3. Analysis of the necessity of establishing dualistic identifiability standards

The development of artificial intelligence technology has brought about fundamental changes in the formation mechanism and usage of portraits, presenting unprecedented challenges to the standards of recognizability.

First, AI face-swapping technology has rendered the traditional face-centered recognition path ineffective. In Liao's case, it was because the facial features were replaced that the court ruled that the template video did not constitute a portrait [4]. However, the dissolution of facial features does

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not necessarily mean the loss of recognisability; non-facial features such as body shape, movement, and makeup can still identify a particular natural person.

Second, the generation technology makes it impossible for the old standards of recognizability to fully realize the function of portrait protection. AI generation technology can generate entirely new virtual avatars based on the portrait data of the right holder, which may not directly replicate the facial features of the right holder but retain their core style or distinctive elements. In the case of Yin, the court ruled that if an AI-generated voice could enable the general public or a certain range of the public to identify a specific natural person based on timbre, intonation and pronunciation style, the natural person's voice rights could extend to that AI voice [5]. This rule of judgment is of reference significance for the determination of portrait recognizability.

Thirdly, the identifiability judgment node based on the final presentation result lags behind technological development. In the case of Liao, although the court denied the infringement of portrait rights, it determined that the defendant's actions violated personal information rights. This suggests that in the context of the intervention of AI technology, the judgment node of identifiability needs to move forward from the final presentation result to the data processing process. Some technically processed images may not meet the requirements of recognizability in the sense of portrait rights, but they may still be subject to the protection of personal information rights.

5. Paths to the realization of dualism in identifiability determination

5.1. Portrait of an ordinary person: the standard of a familiar person

For ordinary people with limited social activities, it is difficult for unspecified members of the public to identify their identities through photographs, videos, etc. Therefore, the identifiability of portraits of ordinary people should be based on the "familiar person" standard.

5.1.1. Definition of the subject to be identified

"Familiar people" refer to a group of people who have a certain social connection with the right holder, including relatives, friends, neighbors, colleagues, classmates, etc. This group forms a perception of the external image of the right holder based on everyday interactions and is able to identify the right holder through non-facial features. If other people living around can identify the natural person through a photograph, video or other means, the requirement for the recognizability of the portrait is met.

5.1.2. Requirements for recognition certainty

The identifiable certainty of a portrait of an ordinary person should reach the level of "reasonable certainty" rather than "instant recognition". This is because the external image features of an ordinary person may not be prominent enough, and a comprehensive judgment needs to be made with the help of auxiliary information such as the scene and captions. In judicial practice, it is possible to prove through witness testimony that acquaintances within a certain range can identify the disputed image pointing to the right holder.

5.1.3. Determination of core features

For portraits of ordinary people, identification should be based mainly on facial features, supplemented by non-facial features such as posture and movement. Only when the disputed image

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retains distinctive features sufficient for a familiar person to identify the right holder can it be recognized as recognizable. If the disputed image retains only non-distinctive elements such as hairstyle and clothing, and the facial features have been completely replaced or blurred, it should not be recognized as a portrait.

5.2. Celebrity portraits: general public standards

For celebrities, their portraits carry significant property and identity interests, and the judgment of identifiability should be based on the "general public" standard.

5.2.1. Definition of the subject of identification

Celebrities include entertainment stars, sports stars, well-known entrepreneurs, Internet celebrities and other groups with a certain degree of social recognition. For such subjects, the identification subject should be the general public, that is, unspecified members of the general public. Some scholars have pointed out that the range of portraits of film and television celebrities should also include "the artistic image of the character played in the drama".

5.2.2. Requirements for recognition certainty

The recognizability of celebrity portraits should be such that they are recognizable at a glance. This is because the external image features of celebrities are highly recognizable, and the public can quickly associate them with specific natural persons based on visual impressions alone. If a disputed image requires supplementary information such as caption caption or scene description to identify the right holder, it indicates that the image is less recognizable and cannot carry the corresponding identity interest and property interest.

5.2.3. Expansion of core features

For celebrity portraits, the basis of identification is not limited to facial features; it can also be extended to non-physical features such as identifiable posture, movement, makeup, and clothing. For example, the signature opening move of a particular live-streamer and the classic character look of a particular actor can all serve as identifiability.

5.3. Construction of dynamic spectral models

Although the binary standard has the advantage of typification, the binary division of "celebrities" and "ordinary people" may face the problem of blurred boundaries in practice. Dynamic changes such as "Internet celebrities", "up hosts", etc., which may be highly well-known within a certain circle but unknown outside the circle, and "ordinary people going viral", all challenge the extensiveness of the binary division. For this purpose, dynamic spectral models need to be introduced as a supplement.

5.3.1. Introduction of the profile spectrum

View popularity as a continuous spectrum, not a bipartite variable. One end of the spectrum is the completely unknown ordinary person, the other end is the household name top star, and in between are all kinds of niche well-known figures. The range of the identified subject varies with popularity:

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the higher the popularity, the closer the identified subject is to the "general public"; The lower the profile, the closer the subject is to "familiar people"; For well-known figures in a particular field, such as voice actors or e-sports players, the "public of that field" should be the subject of identification.

5.3.2. Gradient recognition certainty

Recognition certainty can be divided into three levels: High certainty means that the public can recognize at a glance without the need for any auxiliary information, in typical scenarios such as a frontal portrait of a celebrity or a signature gesture, in which portrait rights infringement can be directly determined; Moderate certainty refers to the situation where the public needs to combine the scene, caption and other supporting information to identify, such as face-swapping templates without facial features or film and television stills, in which case a judgment needs to be made based on the elements of the case. Low certainty refers to situations where the public cannot directly identify and needs to rely on technical comparison methods to confirm. Typical scenarios include a profile photo of an ordinary person or a blurry image, in which case it may only constitute an infringement of personal information rather than an infringement of portrait rights.

5.3.3. Adjustment of technical intervention

The extent to which AI technology intervenes directly affects identifiability judgment and should be included as a moderating variable in the analytical framework.

Mild intervention only replaces facial features and retains the rest of the external appearance such as body shape, movement, and makeup. At this point, non-facial features can still independently serve as a basis for identification, and the disputed image is more likely to be identified as the right holder and may constitute a portrait. Moderate intervention involves replacing facial features while partially adjusting elements such as physical appearance, movement, and makeup, while retaining core features that are sufficient to point to the right holder. In such cases, the disputed image is difficult to be recognized at a glance, and it is necessary to make a comprehensive judgment on whether it constitutes a portrait in combination with supporting information such as the scene and caption. Heavy intervention completely generates a virtual image, retaining only the stylized features related to the right holder (such as specific color schemes, composition styles, etc.), without retaining recognizable physical features or movement features. In such cases, the disputed image is usually not recognizable and does not constitute a portrait. In general, the higher the degree of technical intervention, the lower the degree of restoration of the disputed image to the external image of the right holder, and the less recognizable it is. Higher requirements are needed for the retention of core features if it is to be determined to constitute a portrait.

5.4. Introduction of contextualized judgment

The recognizability of the same image may vary in different usage scenarios. Drawing on the "scenario theory" in the field of personal information protection, the judgment of identifiability should take into account the following scenario factors:

5.4.1. Purpose of application

There are essential differences between commercial use and non-commercial use in terms of the nature of conduct, benefit attribution, and risk level. Therefore, the corresponding identifiability

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criteria for different uses should be distinguished.

Commercial use aims to take advantage of the attention effect of the portrait to gain economic benefits. In such uses, whether the disputed image is recognizable directly determines whether it can achieve commercial purposes - only when the image can be recognized by the public as a specific right holder can it exert the marketing function of attracting attention and promoting consumption. Therefore, higher standards should be adopted for the identifiability of commercial use, requiring the image to be "recognizable at a glance" and avoiding the inclusion of images with only weak identifiability within the scope of portrait rights protection and the excessive expansion of the boundaries of the property interests of the right holders.

Non-commercial uses such as news reporting, art appreciation, personal study, etc., are not aimed at obtaining economic benefits, and the act itself has high social value or public interest attributes. In such scenarios, the requirement for identifiability should be relatively lenient. If an image can be recognized by a familiar person or, in combination with the context, caption and other supporting information, can point to a specific right holder, it can be recognized as a portrait. This reflects full respect for personal dignity and is in line with the system of fair use of the right to portrait as stipulated in Article 1020 of the Civil Code.

It should be noted that not all profit-making activities are commercial use, and not all non-profit activities are exempt from liability. The key lies in the core purpose of the use - whether it is to directly take advantage of the commercial value of the portrait for profit or to serve non-commercial purposes such as public communication and cultural creation.

5.4.2. Scope of dissemination

The wider the spread, the greater the range of the subject to be identified, and the higher the requirement for identifiability.

In private social circles, such as wechat group chats and private sharing on Moments, the image is mainly exposed to groups that have social connections with the rights holder. At this point, the range of the identified subjects is limited and only the "familiar person" standard needs to be met. If the right holder's relatives, friends or colleagues can recognize his or her identity through the image, it should be recognized as identifiable. This criterion matches the privacy of the dissemination range and avoids imposing an excessive compliance burden on non-commercial, small-scale daily sharing.

Spread widely on public platforms such as short video platforms, public display on social media, etc., and face an unspecified general public. At this point, the range of identifiable subjects expands significantly, and the requirements for identifiability increase accordingly. If the disputed image is recognizable only among people familiar to the right holder and not among the general public, it is difficult to determine that it constitutes a portrait. This is because in the context of public communication, the attention effect and commercial value carried by the image are more prominent, and the property interests and identity interests protected by portrait rights need to be based on a broader social recognition.

The scope of dissemination should be based on specific scenarios and should not be simply defined by the type of platform. The same platform can be used for both private sharing and public display, and it should be judged based on actual factors such as the publisher's Settings and audience range.

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5.4.3. Captions prompt

Captions, labels, titles and other captions are important contextual factors that affect identifiability judgments. Caption prompts can make up for the lack of visual image recognition, reduce the difficulty of recognition, and establish an association between an otherwise difficult-to-recognize image and a specific natural person. When the caption clearly points to a specific right holder, such as "the same makeup and styling as Liao", and has a logical connection with the disputed image, the public can establish a connection between the image and the right holder even if the facial features are missing. Note, however, that caption prompts cannot create recognisability out of thin air; they can only reinforce existing recognition possibilities; For an image that has completely lost its connection with the right holder, it is difficult to determine that it constitutes a portrait even if the caption indicates the name. In case studies, the clarity, relevance and purpose of the caption should be taken into account to avoid overrelying on textual cues to undermine the identification function of the portrait itself.

5.5. Integration with the "dual-track identification" of personal information protection

Some scholars have pointed out that in the AI era, the concept of portraits is overlapping and interweaving with the concept of personal information. This overlap poses an integration requirement for the construction of identifiability standards.

5.5.1. Distinction of identification logic

Tere is a difference in logic between portrait recognition and personal information recognition. Portrait recognition is "human intuitive recognition based on visual experience", emphasizing that an image can be associated with a specific natural person through visual observation, and the subject of judgment is an ordinary person with social cognitive ability. Personal information identification includes "machine-readable indirect identification", which does not require direct human eye identification, as long as a specific person can be identified through technical means (such as voiceprint comparison, facial recognition algorithms, gait analysis). This distinction forms the theoretical basis of "dual-track identification".

5.5.2. Construction of dual-track recognition

The human identification track is applicable to the determination of infringement of portrait rights. The portrait rights protection rules apply when the disputed image can be identified by the naked eye as a specific natural person. The subject of identification is the general public or a familiar person, and the method of identification is visual perception, which requires a high degree of certainty in identification. Under this track, the binary structure of identifiability standards that distinguish the identifiability subject based on popularity and the identifiability requirement based on the difficulty of identification has ample room for application.

The machine identification track is applicable to the judgment of personal information rights protection. Personal information protection rules apply when a disputed image cannot be identified by the naked eye of a human, but a specific natural person can be identified through technical means. In such cases, the image itself may not be recognizable in the sense of a portrait, but the biometric information, behavioral characteristic data, etc. it carries still fall under the category of sensitive personal information protected by law. In the case of Liao, the defendant's actions were

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identified as infringing upon personal information rights rather than portrait rights, which is a practical manifestation of this track.

5.5.3. Applicable logic of dual-track recognition

Two-track identification is not a simple "option-applicable" relationship, but should be understood as a progressive complementary relationship. Specifically:

First, human recognition of orbits takes precedence. When the disputed image meets the human identification criteria, the portrait rights protection rules shall apply first. Portrait rights, as legal and specific personality rights, are more mature and complete in terms of protection intensity and protection system than personal information rights, and can provide more adequate relief for rights holders.

Second, machine identification tracks as a supplement. When a disputed image fails to meet human identification standards but can still be identified by technical means, personal information protection rules cover it. This arrangement avoids overextending the scope of portrait rights due to overly broad identifiable standards and prevents technical means from circumventing legal protection.

Third, double claims are prohibited. When the disputed image meets both identification criteria at the same time, the right holder should not claim both rights simultaneously. The portrait rights protection rules already cover the full protection of personal dignity and property interests, and claiming the protection of personal information rights will lead to liability overlap and duplicate evaluation. The right holder should choose one to assert, and the court will guide the choice of a more appropriate remedy based on the specific circumstances of the case [6].

5.5.4. The institutional value of integration

The institutional value of the dual-track identification integration lies in: first, achieving the extensiveness of the scope of protection, so that images that cannot be recognized by humans but can be locked by technology are still protected by law; 2. Keep the rule system clear and avoid the confusion of the scope of application of portrait rights and personal information rights; Third, respond to the challenges of technological development and adapt to the extension of recognition methods in the AI era from "human eye" to "machine recognition". This integration mechanism provides an operational adjudication framework for the protection of new personality rights in the application of technologies such as AI face-swapping and deep synthesis.

6. Conclusions

The development of artificial intelligence technology poses a profound challenge to traditional standards of portrait recognizability. In the judicial confrontation presented in the case of "Liao" and "Zhao", we see the practical need for refined and typified judgment of recognizability. This paper advocates for the construction of a binary identifiability standard based on popularity, and innovatively expands from five dimensions: dynamic spectrum, certainty gradient, technical intervention adjustment, scenario-based judgment, and dual-track identification integration. This multi-judgment system can respond to the challenges brought by the diversification of portrait representation in the era of artificial intelligence, and achieve a more balanced institutional arrangement between the protection of personality rights and technological innovation.

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As Professor Zhao Jingwu puts it, in the sense of civil law, a portrait is the real image of an individual in real life, presented in various ways. A one-size-fits-all approach to identifying emerging information service models such as AI face-swapping as infringement does not help to address the balance between technological innovation and the protection of individual rights. Only through the scientific reconstruction of identifiability standards can a clear boundary be drawn between the protection of personality rights and the development of the digital economy.

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