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“SYNTHETIC CREATIVITY” OF GENERATIVE ARTIFICIAL INTELLIGENCE POSES CHALLENGES FOR LEGAL PROTECTION OF COPYRIGHT AND RELATED RIGHTS

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This article explores the influence of developing and disseminating generative artificial intelligence technologies on the copyright and related rights system governing the creation and use of works in science, literature, and art, as well as objects of related rights. One prominent example of these technologies is ChatGPT, which can generate texts that could become part of literary works. Additionally, generative artificial intelligence systems are designed to create other types of content, including images, audio, and video files. Despite internal contradictions regarding whether creativity is solely a human trait, this article examines the concept of “synthetic creativity” from the standpoint that an artificial intelligence system can combine individual elements into a whole that becomes original. This capacity arises from training on vast amounts of data, which may include works that are legally protected by copyright and related rights laws. However, “synthetic creativity” raises several questions regarding legal consequences. Firstly, whether it is legitimate to use both previously published works or earlier released phonograms and videograms in the wording of the Law of Ukraine on Copyright and Related Rights for training artificial intelligence models. Secondly, whether “synthetic creativity” leads to the creation of new copyrightable works and protected objects of related rights. The chosen topic addresses the urgent and very multifaceted issue of the development of intellectual property law influenced by technological advancements. On the one hand, it necessitates the interpretation of existing rules within the context of generative artificial intelligence, and on the other hand, it allows for the enhancement of the framework of the copyright and related rights system. The author references specific legislative provisions from the United Kingdom and Japan and also illustrates the approaches adopted in modern legal systems through notable cases, such as *Li v. Liu* and *Zarya of the Dawn*. This article also discusses the comprehensiveness of the Ukrainian legislation on copyright and related rights protection about generative artificial intelligence, highlighting areas where it can be modernized.

Keywords: generative artificial intelligence, generative artificial intelligence technologies, artificial intelligence and copyright, copyright protection, related rights, *Li v. Liu* case, *Zarya of the Dawn* case.

Formulation of the problem. Advancements in technology have led to the emergence of a form of artificial intelligence (AI) that creates new content – known as generative artificial intelligence (GAI). Although GAI has made significant strides, it is still premature to consider it delivering error-free results. Furthermore, there is no widely accepted stance on whether AI can engage in creativity in the sense of intellectual property law. At the same time, the use of GAI systems has increased dramatically since the first half of 2022, particularly with the introduction of tools like Google Bard, Midjourney, and DALL-E 2. It is not accidental because GAI provides new opportunities to meet diverse needs across various fields, including education, healthcare, art, management, journalism, and law. The immense popularity of ChatGPT, one of the standout applications based on AI, further fuels this trend.

The rise of GAI technologies entails several consequences for the copyright and related rights system, which governs the creation and use of works in science, literature, and art, as well as allied objects (performances, phonograms, videograms, and broadcasting organizations' transmissions in the wording of the Law of Ukraine on Copyright and Related Rights). Existing norms need to be reinterpreted within the context of GAI to resolve disputes effectively. However, existing norms may also prove insufficient to regulate novel phenomena unfamiliar to the law. Therefore, improvements to copyright and related rights laws will be necessary through the introduction of new provisions.

This article focuses on the problem of the development of copyright and related rights system under the influence of technological progress, particularly examining GAI as a challenge.

Analysis of the study of the problem. The relationship between copyright and advancements in technology has been extensively explored in Ukrainian legal science by numerous researchers, including V. Antonov, V. Baranovska, E. Kharytonov, O. Kharytonova, E. Kovalenko, L. Tarasenko, I. Vashchynets, K. Zerov. The impact of AI on copyright and related rights has been highlighted in the works of Y. Bysaha, D. Bielov, V. Zaborovskiy [1], S. Kolb [2], K. Militsyna [3], D. Prylypko [4], O. Taranenko [5], D. Valchuk [6], and H. Androshchuk, who authored the book “Artificial Intelligence and Intellectual Property: Problems of Regulation” [7]. We want to add that other Ukrainian researchers have also contributed to these discussions: U. Andrusiv, D. Chervanova, M. Dubniak, N. Fomina, M. Hrusheva, Y. Karpenko, O. Kovalchuk, A. Nievienhlovskiy, O. Petriv, A. Prokopchuk, I. Puchkovska, O. Spesyvtseva, N. Vashchuk, and V. Yakymiv.

In writing this article, the author believed that GAI posed the need for a reinterpretation of existing legislative provisions on copyright and related rights. This would help assess whether the law met the conditions that had emerged as a result of advancements in technology, and if needed, enhance legislation through the introduction of new provisions. The author's orientation underscores the scientific novelty of this article by elucidating the legal consequences of “synthetic creativity”.

The purpose of the article to explore the influence of GAI on the copyright and related rights system, considering that recent AI systems following user instructions can create outputs that, according to intellectual property law, satisfy the criterion of novelty. In this article, such capability is referred to as “synthetic creativity”.

Presenting main material. The term “generative artificial intelligence” refers to a modern form of AI that can create content. The essence of GAI lies in its ability to generate new information of a special kind under intellectual property law – such as text, graphics, sound, and video – based on user instructions (prompts). In contrast, “pre-generative” artificial intelligence also produced information that primarily

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provided conclusions and predictions based on data analysis. However, this information did not claim to be original. Consequently, there were no prerequisites for considering it a work or an object of related rights.

Today, de facto new works alongside phonograms or videograms (in terms of the Law of Ukraine on Copyright and Related Rights) are being created using GAI, including literary pieces, computer programs, artworks, and even musical compositions. Legal systems are cautious about recognizing these “AI creations” de jure as objects of intellectual property rights. Moreover, this may raise the pertinent question of authorship: Who should be considered the right holder of these AI-generated works?

Unlike human creativity, which is still not entirely understood and can be unpredictable, “AI creations” are to some extent logically explainable. By recognizing patterns and identifying relationships among elements, GAI analyzes vast amounts of data to produce texts, images, audio, and video content. Its results often resemble in some measure training materials. For example, an AI model can be trained to emulate the style of a famous artist or perform the most trending songs in the voice of a classic jazz icon. This type of creativity is somewhat synthetic, as it involves combining different elements into a whole (“synthetic” in one of the meanings in Ukrainian is “connecting separate elements, parts into a single whole” [8]).

The primary goal of this “synthetic creativity” is often centered around generating new content. Nevertheless, the term “content” itself is a neologism borrowed from English, where it denotes “the principal substance (such as written matter, illustrations, or music) offered by a website” [9]. In practice, the role of GAI goes far beyond merely generating new content for websites as information resources. Japanese author R. Kudan received a prestigious literary award for a novel that included text written by AI a year ago, comprising five percent of the entire manuscript submitted without changes [10]. Additionally, a song featuring the voices of popular Canadian artists, The Weeknd and Drake, was uploaded on social media using AI just six months prior [11].

While AI primarily generates new content within the parameters of a specific GAI model, the implications of its “synthetic creativity” are evident in published books, produced CDs, and printed artworks. Therefore, the term “content” does not adequately encompass the full range of created objects. We suggest that the results of “synthetic creativity” should not be restricted to content meaning the substance of websites.

To recognize patterns involved in creating “synthetic creativity”, AI processes datasets prepared by software developers, which include existing texts, images, audio, and video. Through the intellectual analysis of these training materials, AI enhances the capability to generate new creations.

However, an interesting legal question arises regarding the legitimacy of such processing without the consent of copyright or related rights holders, unless the training materials have entered the public domain. The answer to this question relies on legislative provisions or court precedents, particularly concerning unrestricted use of works or related rights objects and the role of text and data mining (TDM). Different positions regarding the permissibility of such use are adopted by various high-tech nations, including Japan and the UK, the global leaders in the field of AI.

Japan’s Copyright Law, amended in 2018, allows extensive use of other people’s works for data analysis and other purposes (Article 30-4) [12, pp. 39–40]. An important exception stipulates that such use cannot be for the purpose of enjoying the thoughts or sentiments expressed in a work. This leniency has led to the label of Japan as a “paradise of machine learning” [13, p. 1].

In contrast, the UK’s Copyright, Designs and Patents Act 1988 establishes specific conditions for lawful reproduction, including the requirement of non-commercial research as a goal, legal access to the work, and the acknowledgement of using a work of others [14]. In 2023, proposals were made to bring UK law closer to the more flexible Japanese approach by allowing unintentional use of pirated copies under certain conditions (clause 35 [15]). The government published a response in 2024 stating that the working group, comprising of rights holders and AI developers, had not reached a consensus on the development of an appropriate code of conduct (para. 29 [16]).

When determining at the legislative level whether copyright and related rights objects can be used for training GAI models, the interests of various stakeholders should be considered. These include the desire of

copyright holders to benefit from their works while also serving the public good, which encompasses fair use allowed by the law and the entering in of their works into the public domain. Additionally, the state's interest in promoting technological progress and collecting taxes must also be taken into account.

Finding a balance among these interests requires careful consideration of various factors within each legal system and depends on the established paradigm of intellectual property rights. Three fundamental principles should be reflected in copyright and related rights legislation concerning GAI.

1. Right holders should receive fair remuneration for the commercial use of their intellectual property.
2. When property rights expire and a work or an object of related rights enters the public domain, its use becomes unrestricted. However, the personal rights associated with it remain valid, and their protection should be ensured.

3. The first and second principles are closely related to the fair use under specific conditions, which typically do not apply fully in non-commercial contexts as defined by the law.

Moreover, when training AI models for commercial purposes, which is becoming increasingly common today, consent from a right holder should be given, even for AI systems that were previously exploited non-commercially. It is also necessary to indicate the ownership of personal rights.

Ukraine's Law on Copyright and Related Rights of 2022 outlines specific conditions for the fair use of works in Article 22. However, it does not explicitly address the legitimacy of training AI models using existing copyright and related rights objects. Nonetheless, it permits the reproduction of multiple works with appropriate attribution (author's name and indication of a source), provided this reproduction occurs for scientific research, in places of scientific activity, or through a secure electronic (digital) environment, in the proper amount. It should not have any independent economic value (Article 22, paragraph 2 [17]). Legal provisions on the fair use of related rights are defined in Article 43 and they are less suitable for AI training.

Therefore, using a work without obtaining permission from copyright holders is allowed, as long as an author's name and a source of a work are cited. This raises the question of whether this provision can justify training AI models. We suggest that including "and technological progress" alongside "scientific research" could enhance the argument.

Regarding the recognition of AI as an author or performer of a work (or other holder of copyright or related rights), we support the traditional stance that AI does not possess legal personality. However, cases like *Li v. Liu* and widespread perspectives asserting that copyright and related rights emerge when an object meets the criterion of novelty contribute to ongoing discussions about potential legal recognition for AI. Advocates of the traditional position may face a dilemma: Who owns the rights to a work and a phonogram or a videogram created by AI?

This dilemma needs further exploration. Any possible conclusions should acknowledge that the emergence of AI-generated works often involves software companies or individual software developers writing a code, as well as users influencing the outcome through their instructions. These instructions of GAI systems users qualify for legal protection as works. Nevertheless, software companies or individual software developers typically do not intend to create specific objects with AI; their goal is to produce a GAI system itself. One more category, right holders, consists of those whose works and related rights objects are utilized for training AI models. They may encounter situations where the output results produced by AI show coincidental similarities to their works or related rights objects. The nature of synthetic creativity has previously explained the origin of these coincidences. However, these instances are not as obvious as when GAI directly copies the style of novel writing or musical compositions.

The question of the similarity between AI creations and existing works or objects of related rights often arises when using GAI systems. We have already found that by recognizing patterns, such systems create new texts, images, audio, and video. At the same time, users can adjust settings, thus showing a certain level of creativity. "Generative artificial intelligence tools allow anyone with access to the Internet to create personalized written, audio, or visual content [18]".

To address this question, we can apply the same rules as those for situations where a newly created work copies part of a pre-existing work or even the entire work. Such situations often occur in plagiarism

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cases. If plagiarism is jokingly referred to as the only type of theft where thieves disclose their identity, then when GAI systems engage in copying, it becomes unclear who the thief is.

The issue of copyright protection in the use of GAI will be raised more often in court cases. Among those that have already received a special resonance, we would like to mention two: *Li v. Liu* and the case of copyright registration known as “Zarya of the Dawn”. The case of *Li v. Liu* was resolved by the Beijing Internet Court in 2023. The plaintiff used the Stable Diffusion web service, a popular AI content creation platform, to create an image by making certain settings (primarily the selection and input of hint words, as well as choosing one of the options). The defendant used it in a post on his blog without the consent and indication of the plaintiff, removing the watermark. The court ruled that the image was a work subject to copyright protection. Due to the existing “intellectual achievements” in the wording of the People’s Republic of China Copyright Law, the plaintiff, not the developer, owned the infringed rights to authorship and distribution in a social media [19, pp. 10–17].

Another case, *Zarya of the Dawn* (2022–2023), is related to the US legal system. The Copyright Office first registered the graphic novel “Zarya of the Dawn” as a work. It later narrowed the scope of protection to a literary work, excluding a work of art (comics). After discovering that the Midjourney GAI system was used to create the images, the absence of the required “original human authorship” was noted. This term refers to the unique creative input of a human author, which is a fundamental requirement for copyright protection in the US. Although the applicant claimed to be the author of each element, AI was just an “auxiliary tool” [20].

Conclusions. The capability of AI to create outputs that resemble the results of human intellectual creativity, which we call in this article “synthetic creativity”, has posed challenges for the copyright and related rights system. Its complexity is manifested in several aspects related to the scope and ownership of intellectual property rights. Each of these aspects, primarily whether it is possible to use other people’s copyright and related rights objects to train GAI models, may find different interpretations in the legal systems of today, depending on the existing paradigms of intellectual property law, the traditions that have been formed, the attitude of the state towards technological progress, and, of course, the presence of an element of commercial use. At the same time, today there are prerequisites for finding universal approaches at the level of international treaties for the similar treatment of these aspects, particularly taking into account the three rules that we have identified.

In addition, we assume that the term “synthetic creativity” is well suited at this stage for the results of the application of AI, as it is put in quotation marks because the legal personality of AI is not recognized. There is no consensus on the ownership of rights to the objects it generates (or should developers, rights holders and users be engaged). We also emphasize the potential for progress in Ukrainian legislation, particularly regarding the free use of copyright and related rights for the purpose of training non-commercial models of GAI (Articles 22 and 45 Ukraine’s Law on Copyright and Related Rights).

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**“СИНТЕТИЧНА ТВОРЧІСТЬ” ГЕНЕРАТИВНОГО ШТУЧНОГО ІНТЕЛЕКТУ
ЯК ВИКЛИК ДЛЯ ПРАВОВОЇ ОХОРОНИ
АВТОРСЬКОГО ПРАВА ТА СУМІЖНИХ ПРАВ**

У статті досліджено наслідки розвитку та поширення технологій генеративного штучного інтелекту для системи авторського права та суміжних прав, яка регулює відносини зі створення та використання творів науки, літератури і мистецтва, а також об'єктів суміжних прав. Найвідомішим прикладом цих технологій виступає ChatGPT, спроможний формулювати тексти, що можуть ставати фрагментами літературних творів. Системи генеративного штучного інтелекту призначені й для інших видів контенту, зокрема зображення, аудіо- та відеофайли. Поняття “синтетична творчість”, незважаючи на внутрішні протиріччя з приводу того, чи творчість як діяльність притаманна тільки людині, підлягає вивченню у цій статті з позиції того, що система штучного інтелекту, з'єднуючи окремі елементи, частини в ціле, спроможна створювати оригінальні об'єкти, будучи навченою на величезних масивах даних, зокрема об'єкти правової охорони авторського права та суміжних прав. Водночас це поняття породжує низку питань з позиції правової охорони авторських та суміжних прав, зокрема стосовно того, наскільки правомірним є використання раніше оприлюднених творів, фонограм, відеограм та ін. (відповідно до термінології Закону України “Про авторське право і суміжні права”) для навчання моделей штучного інтелекту, а також – чи є “синтетична творчість” підставою для появи нових об'єктів авторського права та суміжних прав. Обрана тематика пов'язана з актуальною та дуже багатогранною проблемою розвитку права інтелектуальної власності під впливом прогресу у сфері технологій, яка, з одного боку, стосується тлумачення вже прийнятих норм, виходячи зі сприйняття генеративного штучного інтелекту як виклику, а з другого – дає змогу виявити, як система авторського права та суміжних прав може бути вдосконаленою. Автор наводить положення окремих актів законодавства Великобританії та Японії, а також ілюструє наявні у правових системах сучасності підходи резонансними кейсами *Li v. Liu, Zarya of the Dawn*. У статті також з'ясовано, наскільки вичерпними є норми українського законодавства стосовно охорони прав на твори та об'єкти суміжних прав щодо генеративного штучного інтелекту (ст. Закону України “Про авторське право і суміжні права”) та показано, яким способом їх варто модернізувати.

Ключові слова: генеративний штучний інтелект, генеративні технології штучного інтелекту, штучний інтелект та авторське право, охорона авторських прав, суміжні права, кейс *Li v. Liu*; кейс *Zarya of the Dawn*.