

**A Step Ahead of Europe: The Ukrainian Sui Generis
Regulation of AI-Generated Works – A Comparative
Legal Analysis with Polish and EU Law**

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Abstract

This paper is devoted to the analysis of the Ukrainian regulation of *sui generis* protection of non-original objects generated by a computer program against the background of Polish and European copyright law. The aim of the research is to evaluate the effectiveness of the Ukrainian model and identify potential solutions for Polish and European Union legislation. A dogmatic and comparative legal method was applied. The conducted analysis confirms that the Ukrainian solution, consisting in the introduction of economic rights for generated objects, effectively fills the legal loophole in the transitional period, protecting investment outlays without diluting the traditional concept of a human author. The formulated conclusions indicate the need to consider implementing a similar model of *sui generis* protection in Poland and the EU, noting, however, that the Ukrainian solution requires further refinement.

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Introduction

For over a century, copyright law has been based on a single, seemingly indisputable premise: that the author is a human being. The rapid development of generative artificial intelligence (AI) seems to challenge this assumption. In the Polish legal system, both doctrine and jurisprudence consistently assume that an author can only be a natural person, whereas objects generated by AI systems with negligible human involvement remain outside the sphere of copyright protection, regardless of their artistic or market value. This fact creates a significant legal loophole that has not yet been filled by either the Polish or the European legislator. In August 2024, the EU AI Act (Regulation (EU) 2024/1689) entered into force, becoming the world's first comprehensive legal act dedicated to AI systems. However, this act does not resolve the issue of rights to objects created by AI.

Meanwhile, two years earlier, the Ukrainian legislator decided to fill this legal loophole by introducing a specific *sui generis* protection for non-original works generated by AI, created without the creative involvement of a human. The aim of this paper is to analyze the Ukrainian regulation of *sui generis* protection of AI-generated objects against the background of Polish and European law. The underlying thesis of the study is that Ukraine, despite certain structural flaws, has created a functioning model of AI object protection that can serve as a point of reference for the European legislator. The analysis primarily utilizes the dogmatic and comparative legal method.

I. Protection of AI Output vs. Traditional Copyright

1.1. Concept of an AI-generated object

First and foremost, determining the copyright status of AI technology outputs requires a precise establishment of the meaning of the concept of an "object generated by artificial intelligence", as well as an objective assessment of the degree of human involvement in the process of its creation. In the literature on the subject, a dichotomous division is widely accepted. As A. Bar indicates, when assessing the copyright status of such objects, two main categories are distinguished: "computer-assisted" works (created "with the use of AI") and "computer-generated" objects (created "by AI"). This classification allows for a clear demarcation between a situation in which a human retains an area of creative freedom and exercises control over the process, using the machine as an auxiliary tool, and

a situation in which the user's role is reduced merely to initiating the system's operation process, precluding the possibility of their direct creative contribution.

Fundamental legal consequences arise from the difference between the autonomous operation of an algorithm and the instrumental nature of its use. Computer-assisted works are defined as the results of the work of technological systems in which a human creative contribution can be noticed, thanks to which they retain space for creative freedom and exercise minimal control over the course of the creative process. For this reason, as researchers emphasize, such works may *de lege lata* be subject to classical copyright protection. In turn, computer-generated objects are those results in which the specificity of the system's work in a sense precludes the possibility of a direct manifestation of human creative contribution. This leads to a discussion on the extent to which such outputs can be protected *de lege lata* under other legal institutions, such as collective works or databases, since the classic copyright regime does not fully secure the capital invested in their creation.

1.2. Traditional model of authorship and its limits

The lack of protection for objects generated completely autonomously by computer programs is conditioned by the fact that the axiom of global copyright law remains unconditional anthropocentrism. The creative process requires the reflection of a unique personality, intuition, or emotions, which computer systems do not possess due to their technological nature. Traditionally, in Polish copyright doctrine, this anthropocentric point of view is adopted as the only possible foundation of protection. Despite its historical justification, in the era of generative AI, such a dogmatic approach is rigidly limited because it *a priori* excludes any protection of objects lacking direct human origin, and consequently leaves the market without instruments to protect invested capital.

As a result, outputs generated autonomously by AI do not fall under the traditional concept of copyright law and from the moment of creation pass into the public domain. This state of affairs, although justified by the lack of capacity of systems for creative action, entails negative market consequences. On the one hand, the free and uncontrolled use of unprotected AI objects displaces traditional authors from the market, as they cannot compete in price with free resources from the public domain. On the other hand, the lack of exclusive economic rights to generated objects deters entrepreneurs from investing in advanced projects based on generative AI, depriving them of the possibility to defend against inevitable copying of results by competitors. This two-sided dysfunction confirms the necessity of creating a separate exclusive right that would regulate the market without diluting traditional copyright law. In the search for a way out of this economic and legal stalemate, an innovative, though requiring refinement, solution became the recent initiative of Ukraine, which was the first to decide on systemic regulation of this sphere at the legislative level.

II. The Ukrainian Sui Generis Regulation of AI Output

2.1. Genesis and main premises of the *sui generis* protection

The adoption of the Ukrainian law "On Copyright and Related Rights" (Law of Ukraine No. 2811-IX) in December 2022 became an important breakthrough. Until January 1, 2023, there was a lack of any regulation in Ukraine regarding non-original objects generated by computer programs, although the need for its existence had been maturing for a long time. As researchers emphasize, the Ukrainian legislator took this innovative step to remove the legal loophole, responding to the interests of software creators. From an economic point of view, the main reason for establishing protection for autonomous objects, which otherwise could be freely and gratuitously used by anyone, was the need to stimulate innovation and protect large-scale capital expenditures of companies from the IT sector and creative industries.

2.2. Concept of a "non-original object generated by a computer program"

To delineate the boundary between human creativity and the results of a system's work, the Ukrainian legislator applied a specific conceptual construction. According to Art. 33 sec. 1 of Law No. 2811-IX (2022), a "non-original object generated by a computer program" is considered to be an object differing from existing objects of this kind, created exclusively as a result of the functioning of an algorithm, without the direct creative participation of a natural person. This norm excludes from this definition classic works in whose creation a human only used technology as an auxiliary tool. The choice of the concept of "non-originality" as the main legal distinguishing criterion is not accidental. As O. M. Taranenko and Yu. V. Yatsenko emphasize, the results of the autonomous work of a program are secondary in relation to human creativity and by their nature lack the trait of originality inherent to humans. The lack of this element does not allow considering them as works in the traditional sense, which justifies their classification into the category of "non-original" objects and the extension of a *sui generis* right to them (see Art. 33 sec. 1 of Law No. 2811-IX (2022)).

2.3. Prerequisites for *sui generis* protection

The development of this concept is a strict definition of the conditions of protection in the law itself. According to Art. 33 sec. 1 of Law No. 2811-IX (2022), an object generated by an AI system obtains *sui generis* protection only if three key prerequisites are met: (1) it must differ from existing objects, (2) be the result of a computer program's work, and (3) be created automatically, without the direct participation of a human in the process of its formation. In doctrine, it is rightly emphasized that the requirement of "difference" (Ukr. відмінність) in this case establishes a condition of conventional but mandatory "novelty", which means that an object recreating or copying other existing outputs is not subject to *sui generis* protection, while the condition of a lack of human interference in the generation process itself clearly confirms that the Ukrainian legislator consciously abandoned the criterion of "creative character" (Ukr. творчий характер) in favor of protecting a result of a purely technical and investment nature.

2.4. Subject entitled to the *sui generis* right to a generated object

The technical nature of generated objects also becomes the reason for specific regulation defining which entities hold *sui generis* rights. These rights never belong to the artificial intelligence itself, because Ukrainian legislation does not grant it legal personality. Consequently, it also does not

possess legal capacity. According to Art. 33 sec. 2 of Law No. 2811-IX (2022), *sui generis* rights belong to subjects possessing economic rights or licensing rights to the computer program. These include the creators of this program, their legal successors, as well as legal users of the software. In practice, the detailed division of these rights between the creator and the user of the program, who formulates the prompt for the program, depends on contractual conditions, in particular on the content of end-user license agreements or terms of service. Nevertheless, in doctrine, there are disputes regarding the automatic acquisition of *sui generis* rights by regular users. As O. Doroshenko and L. Tarasenko argue, granting economic rights to persons using a program solely on the basis of a non-exclusive license is problematic, because the essence of *sui generis* rights should boil down primarily to the protection of investments made by software developers. The position of I. Yakubivskyi also enters this discussion, who emphasizes that the condition for the emergence of a *sui generis* right for a user should be the generation of an object in the process of legal exploitation of a computer program.

2.5. Content and characteristics of the *sui generis* right and duration of protection

Defining the circle of entitled subjects leads directly to determining the scope and period of protection granted to them (Art. 33 sec. 3 and 6 of Law No. 2811-IX (2022)). Because objects generated by AI systems are created without the creative participation of a human, the Ukrainian legislator rightly explicitly excluded the emergence of any moral rights in relation to them. Protection in the *sui generis* regime is reduced exclusively to the economic sphere, granting the entitled person the exclusive right to authorize other persons to use the generated object on the basis of an appropriate agreement (Art. 33 sec. 8 of Law No. 2811-IX (2022)). The purely economic nature of this right makes it fully transferable and inheritable, which is directly confirmed by Art. 33 sec. 2 and 9 of Law No. 2811-IX (2022). Thus, according to Art. 33 sec. 9 of Law No. 2811-IX (2022), it is possible to transfer this right to another person on the basis of an agreement, in accordance with the principles set out in Art. 49 of Law No. 2811-IX (2022). In turn, Art. 33 sec. 2 of Law No. 2811-IX (2022) includes heirs in the circle of entitled persons, which confirms the inheritable nature of the *sui generis* right.

This purely economic nature of the rights is also reflected in the shortened duration of their protection. In contrast to classic works, for which economic copyright is subject to protection for 70 years after the death of the author, the *sui generis* right expires after merely 25 years, counted from January 1 of the year following the year the object was generated (Art. 33 sec. 6 of Law No. 2811-IX (2022)). In doctrine, it is indicated that the lack of granting moral (non-economic) rights and the relatively short period of protection of these objects result from the purely economic nature of the *sui generis* right aimed at protecting investment. The theoretical justification for choosing the *sui generis* regime is the investment protection theory, analogously to the EU protection of databases under the Database Directive, in which this protection is granted regardless of the originality of the database, but is based on the criterion of incurring significant financial, time, or energy investments. However, as L. Maydanyk notes, the analyzed legislative proposals met with criticism as premature. The author points to the lack of prior empirical research justifying such protection, which could lead to excessive protection, for example in relation to machine translations, as well as the fact that modern technology does not yet allow for the recognition of the existence of fully autonomous artificial intelligence, whereby programs remain merely agents of humans.

Similar skepticism is discernible at the EU level, where the concept of *sui generis* rights for artificial intelligence outputs is currently rejected by the majority of Member States due to fears of disrupting competitive dynamics in the creative sector. The specificity of the *sui generis* right lies in its investment nature. Since AI does not possess legal personality, the law does not protect the creator, but the person who provided the financial and technical conditions to generate the object, which also justifies a shorter protection period.

III. Polish and European Law Regarding AI Objects

3.1. Status of AI objects in Polish law

To analyze the legal status of artificial intelligence outputs in Polish law, it is necessary to refer to the characteristics of the concept of a work. According to Art. 1 sec. 1 of the Act on Copyright and Related Rights, the subject matter of copyright is any manifestation of creative activity of an individual nature, expressed in any form, regardless of its value, destination, and method of expression. Although this norm does not directly indicate a human as the creator of a work, there is a consensus in Polish legal science on this issue. As A. Auleytner and M. J. Stępień emphasize, despite the lack of a direct requirement of human origin of a work in the legal definition, the majority of doctrine representatives take the position that creativity and individuality are traits exclusive to humans. The consequence of this is that the activities of artificial intelligence systems cannot be attributed these traits, hence the results generated by them are not recognized as works within the meaning of the Polish act and are not subject to copyright protection. As a result, a certain legal loophole arises in the Polish legal order: digital resources that are valuable from a market point of view, generated by AI, remain devoid of any economic protection.

This state of affairs calls into question the profitability of investments in the domestic high-tech sector.

3.2. Position of Polish legal doctrine regarding the protection of AI objects

In Polish legal literature, in the discussion on the legal status of AI objects, a deep divide is revealed between dogmatism and market needs. Representatives of the traditional current, such as J. Szczotka, argue that in order to save the humanistic nature of copyright law, all objects generated by AI should unconditionally pass into the public domain, and proposals for the possible placement of protection for AI outputs as separate rights in the field of related rights or within an institution analogous to American solutions are not fully convincing for subjective and axiological reasons. In this current, it is emphasized that the individual character of a work is a direct reflection of the creator's personality. Since artificial intelligence does not possess human traits that form the basis of personality, it cannot be a subject of copyright nor can it pursue legal claims. However, such a position ignores economic and market realities. As K. Grzybczyk rightly counters, the automatic and unconditional transition of generated objects into the public domain does not solve legal problems at all, but quite the contrary – it leads to filling the digital space with a new portion of data, not necessarily of high quality. The position of traditionalists reflects a passive approach to the problem, whereas a significant portion of researchers notices the need for investment protection.

3.3. Directive (EU) 2019/790 (CDSM Directive) and text and data mining (TDM)

According to Directive (EU) 2019/790 of the European Parliament and of the Council on copyright and related rights in the Digital Single Market, the European legislator regulated solely issues of data exploration, introducing in Articles 3 and 4 statutory licenses for text and data mining purposes. These norms legalize the reproduction of works for the purpose of their automated analysis both for scientific and commercial purposes.

However, this Directive in no way affects the legal status of objects generated by artificial intelligence. The lack of special norms regulating the protection of the results of generative models means that their legal assessment occurs exclusively on general principles, requiring the demonstration of a human's own intellectual creative contribution as an author. As a result, although the data collection stage is harmonized at the EU level, the results of the work of such systems themselves remain in a legislative loophole.

3.4. EU AI Act (Regulation (EU) 2024/1689) — scope of regulation and copyright

Another important regulatory instrument at the EU level is Regulation (EU) 2024/1689, known as the Artificial Intelligence Act. It introduces a horizontal legal framework for the design, implementation, and use of artificial intelligence systems in the European Union.

In the context of the legal status of such systems, the European legislator excluded the possibility of granting them legal personality. Both in the indicated regulation and in other European norms, a model of liability of humans, as well as organizations creating, deploying, or operating artificial intelligence, was adopted. Although the negation of AI's legal personality and the preservation of anthropocentrism prevent the dilution of the concept of the creator, the complete disregard in this act of the issue of rights to AI outputs perpetuates the regulatory loophole. The European Union focused solely on issues of safety and risk control, without touching upon the need to protect the economic rights of investors, placing European entities from the technology sector in a very disadvantageous market situation.

3.5. Position of the Court of Justice of the European Union (CJEU)

The jurisprudence of the Court of Justice of the European Union (CJEU), which harmonized the concept of a work, is of key importance for the limits of copyright protection in EU law. In the judgment in the *Infopaq* case, the CJEU ruled that an object is subject to copyright protection only if it is its author's own intellectual creation. In subsequent judgments, this standard was refined. In the judgment in the *Painer* case, the CJEU indicated that an intellectual creation is an author's own if it reflects the author's personality, which happens through them stamping the work created with their personal touch. In turn, in the judgments in the *Football Dataco* and *Cofemel* cases, the CJEU emphasized that for a work to be considered original, it is necessary and sufficient that it reflects the author's personality as an expression of their free and creative choices. In this way, this jurisprudence raises the barrier of human creativity to a level unattainable for AI systems, which unconditionally excludes autonomously generated objects from the scope of copyright protection.

The jurisprudence presented above unequivocally indicates the necessity of the existence of a human factor in the creative process. As P. B. Hugenholtz and J. P. Quintais note, it is precisely thanks to making creative choices at various stages of the creation of a work that the author can leave their personal touch on it. In the case of processes carried out by artificial intelligence completely autonomously, these criteria cannot be met, because a computer system does not possess personality or the ability to make a conscious choice. Such a strict and dogmatic interpretation, although it protects the traditional model of copyright law, creates a serious legal loophole regarding the protection of investment outlays for the development of new technologies. This situation becomes a direct source of proposals to introduce new regulatory solutions of an innovative nature.

Conclusions

Currently, at the level of the European Union, including Poland, there is a lack of legal protection for objects generated by artificial intelligence, and the resulting uncertainty hinders investment in new technologies, especially in conditions of high dynamics of modern market competition. In this context, the Ukrainian law sets an example of a practical solution to the problem. Despite some flaws, this model fulfills its basic task at a stage that can be called transitional. The main advantage of the Ukrainian approach lies in the protection of investment in content generation, while preserving the classic model of copyright law and its protection, leaving the status of author exclusively to a natural person. Therefore, the Ukrainian act can be perceived as a point of reference for Poland and the European Union as a whole, offering a ready and pragmatic solution. Such a model can serve as a basis for removing loopholes in the law without the need to change basic legal concepts or grant legal personality to machines.

However, the proposed approach definitely requires refinement. First of all, it is advisable to shorten the protection period of such outputs, because the applicable 25-year period is economically unjustified. In a dynamic digital market, commercial content quickly loses relevance. As industry research indicates, websites unupdated for just two years are already in a structurally worse competitive position, which makes the 25-year period of *sui generis* protection economically unjustified. Moreover, Ukrainian legislation does not unequivocally resolve the issue of the burden of proof when delineating the boundary between autonomous generation and AI-assisted creativity. Although the theoretical division into these two categories is widely accepted in doctrine, in practice, demonstrating where the role of the machine ends and the individual contribution of a human begins poses a serious evidentiary challenge. This problem becomes particularly burning in a situation where artificial intelligence increasingly acts in the role of an advanced tool supporting the creative process, similar to what graphic programs did in their time. This is confirmed by the results of a survey conducted by Designer Fund and Foundation Capital among over 900 designers from over 60 countries, according to which the use of AI on a weekly basis in design tasks increased in one year from 54% to 91%, and 75% of respondents use it daily. In turn, leading providers of design software indicate that new AI features mainly serve to automate repetitive tasks, while the final creative direction remains under full human control. Therefore, the authors of such works should have the possibility of protecting their economic and moral rights, and future regulations should take into

account the creative contribution of a human, avoiding automatic deprivation of authors of their moral copyright.

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