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Artificial Intelligence vs Copyright Law – a Question about the Result of a Clash between Them. Is it Mere Futurology or the Imminent Future?

Sztuczna inteligencja vs prawo autorskie – pytanie o finał starcia. Futurologia, a może to już jutro?

ABSTRACT

This research paper concerns the copyright-law consequences of generating literary and artistic creations resulting from the "creative activity" of artificial intelligence (AI). The essence of the problem that rapidly gains practical significance boils down to the question whether, at present (*de lege lata*) and in the future (*de lege ferenda*), such creations can be protected under copyright law and who should possibly be considered to be the author. The legal-dogmatic analysis of the normative matter, the current state of science and the case law in force applicable here, shows that under the current legislation the creations generated by AI do not fall within the definition of creative work and do not form the subject of copyright as they were not created by human being. Therefore, the AI may not be considered to be the author and thus endowed with a copyright and even more a moral right to the work. In the *de lege ferenda* perspective, the proposals to cover AI-generated assets by protection outside the copyright law area, e.g. through related rights or the institution of work made for hire, are not fully convincing for axiological reasons, i.e. the difficulty of identifying a person who deserves to benefit from such protection. Nor can the proposal to grant subjective rights to AI itself be supported, since this would mean changing the axiom of the copyright law, namely that only a human being can be the author. If copyright is to survive as a right of a human creator, which should be advocated, then in the light of this regulation the literary and artistic creations generated by AI should remain in the public domain.

Keywords: artificial intelligence; copyright; creative work; author

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INTRODUCTION

In 2016, a new painting appeared at an exhibition in the Rembrandt House Museum in Amsterdam, unknown until that time, which should be included without reservation as a work of the outstanding painter Rembrandt van Rijn – a portrait titled *The Next Rembrandt*. In 2017, poetry connoisseurs and enthusiasts were particularly interested in the poems of Chinese poet Xiao Bing, included in the volume *Sunlight Has Lost Its Glass Windows*. The offer for readers provided a surprisingly substantial output of this writer, amounting to approx. 10,000 texts. On 9 October 2021, the performance by the Beethoven Orchestra of the entire Tenth Symphony of Ludwig van Beethoven previously described as "unfinished", long awaited with great interest, was broadcast live worldwide.

With today's easy access to an enormous amount of information, it is not difficult to find a common denominator of these events. It turned out that poet Xiao Bing is not human,[1] as the poems, were created, although in my opinion it would be more appropriate to use the term "generated", by artificial intelligence (AI).[2] Ludwig van Beethoven did not complete his Tenth Symphony, leaving several handwritten drafts, fragments and notes. It was done by AI – an artificial neural network based on a huge database containing not only all the compositions of the artist himself, his drafts, notes, but also the achievements of those composers

[1] For more details on this topic, see E. Musiał, *Światło odbite słów. Czy algorytm można (po)lubić*, 6.4.2021, https://pisarze.pl/2021/04/06/elzbieta-musial-swiatlo-odbite-slow-czy-algorytm-mozna-polubic (access: 14.6.2023).

[2] The term "artificial intelligence" used herein, which involves serious definitional differences, deviates from the complex technical context of its meaning, pointing to, intentionally for the purposes of the considerations undertaken, a slightly more futurological subjective aspect of that concept. The simplest and most accurate definition of AI appears to have been that formulated in 1956 by John McCarthy who said it was about creating a machine that can actually duplicate human intelligence. See M. Andruszkiewicz, *John McCarthy – prawdziwy ojciec sztucznej inteligencji*, 21.1.2021, https://whatnext.pl/john-mccarthy-prawdziwy-ojciec-sztucznej-inteligencji (access: 29.4.2023). See also M. Jankowska, *Podmiotowość prawna sztucznej inteligencji?*, [in:] *O czym mówią prawnicy, mówiąc o podmiotowości*, ed. A. Bielska-Brodziak, Katowice 2015, pp. 171–178; K. Biczysko-Pudełko, D. Szostek, *Koncepcje dotyczące osobowości prawnej robotów – zagadnienia wybrane*, "Prawo Mediów Elektronicznych" 2019, no. 2, pp. 10–12; A. Bar, *Prawo autorskie w erze sztucznej inteligencji. Uwagi na tle historii „Portret Edmonda de Belamy"*, "Prawo Mediów Elektronicznych" 2022, no. 1, pp. 18–20; A. Konieczna, *Problematyka sztucznej inteligencji w świetle prawa autorskiego*, "Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Prawa Własności Intelektualnej" 2019, no. 4, p. 105. In Article 3 (a) of the draft regulation of the European Parliament and of the Council on liability for the operation of Artificial Intelligence-systems annexed to the European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence (2020/2014(INL)) (OJ EU C 404/107, 6.10.2021) "AI-system" has been defined as a system that is either software-based or embedded in hardware devices, and that displays behaviour simulating intelligence by, i.a., collecting and processing data, analysing and interpreting its environment, and by taking action, with some degree of autonomy, to achieve specific goals.

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who inspired Beethoven.[3] The portrait *The Next Rembrandt* was not painted with the hand of this great master – this work, which is not a copy of existing ones, as mentioned above, was also generated by AI.[4] The Internet is full of photographs, artworks, literary forms, statements and texts on various topics, spatial designs, musical compositions, sculptures and even films generated by AI.[5] It cannot be overlooked that their number is increasing rapidly and owing to their nature and quality the emergence of such assets is becoming increasingly spectacular.[6]

It should be said that AI, once an obvious and necessary motif in science fiction, has already been born and exists in the real world. While looking with surprise and awe at its current capabilities during its early stage, we contemplate with excitement, hope, but also serious anxiety what AI will become when it grows up, i.e. reaches or even exceeds the level of human intelligence.[7]

It is right, therefore, to refer to this as a revolution, also, obviously, in the field of copyright law, which defines the juridical scope of this paper. As we can see, AI is already capable – gaining worldwide fame – of writing poems, composing music, producing paintings. It can be assumed that this ability, brought to perfection from a technical point of view, will also include in the future the production of all forms of literature (novels, plays), journalism (commentaries, columns, reports), science (articles, monographs, commentaries on judicial decisions, studies, expert opinions), design (architecture, urban planning, industrial design), as well as graphic, photographic, audiovisual creations, not to mention computer software, in a universally accessible manner. A question and a reasonable doubt of a general nature arise as to whether such intangible goods will still be created by humans in such a situa-

[3] A. Elgammal, *How a Team of Musicologists and Computer Scientists Completed Beethoven's Unfinished 10th Symphony*, 24.9.2021, https://theconversation.com/how-a-team-of-musicologists-and-computer-scientists-completed-beethovens-unfinished-10th-symphony-168160 (access: 25.4.2023); K. Bielińska, *AI wskrzesza dzieła sztuki, których nie ma*, https://www.pcformat.pl/AI-wskrzesza-dziela-sztuki-ktorych-nie-ma,a,5886 (access: 25.4.2023).

[4] The painting is layered and three-dimensional, fixed using a 3D printer applying consecutive layers of a special paint to the canvas. See K. Sulikowski, *Sztuczna inteligencja, druk 3D i Rembrandt jak żywy*, 28.8.2018, https://www.centrumxp.pl/Aktualnosci/Sztuczna-inteligencja-druk-3D-i-Rembrandt-jak-zywy (access: 25.4.2023).

[5] For examples of the use of AI in generating pieces of art, see A. Bober-Kotarbińska, *Sztuczna inteligencja a prawo autorskie*, [in:] *Prawo autorskie w praktyce. O prawach twórców i odbiorców utworów*, ed. E. Szatkowska, Warszawa 2022, p. 5.

[6] Cf. the case of the painting *Portrait of Edmond de Belamy* which, as the first one to be generated by AI, was sold at auction in 2018 for almost half a million dollars. The motto associated with the event is characteristic and worth recalling: "Creativity isn`t just for humans". See A. Bar, *op. cit.*, p. 17.

[7] "(…) there is a possibility that in the long-term, AI could surpass human intellectual capacity" (European Parliament resolution of 16 February 2017 with recommendations to the Commission on civil law rules on robotics (2015/2103(INL)) (OJ EU C 252/239, 18.7.2018), introduction, para. P).

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tion?[8] Will the process of "humanisation of robots" result in the "dehumanisation of humans",[9] or perhaps definitively end the existence of humans as a species?[10]

These considerations – which join the increasing number of statements made by science and jurisprudence – concern the copyright-law consequences of the literary and artistic "creative activity" of AI. The examples presented at the outset herein show the importance of the problem.

At present, there is an unquestionable rule, universal in terms of national and international legislation, that the goods listed by way of example are subject to copyright protection and that this protection is for the benefit of their creator – a human being. The essence of the problem addressed herein boils down to an answer to the question, entailing a number of difficult nuances, whether or not assets generated by AI can be nowadays or in the future (even in the further futurological temporal perspective) the subject of copyright protection and who, if any, should be recognised as their author. The dilemma thus formulated has been metaphorically depicted as a clash between AI and the copyright law, and although the outcome seems to belong to futurology, we should not be surprised if we bear the consequences of the verdict as soon as tomorrow. Regarding the issue thus defined, my preliminary research hypothesis is expressed in an unequivocally negative answer to the question asked above.

The solution of a specific juridical problem requires a dogmatic analysis of the normative matter in force and applicable here, learning about the achievements of science and jurisprudence, and taking into account suggestions for changes proposed in this matter. To the necessary extent, this research must go beyond Polish law, and generally must take into consideration, at least in a simplified manner, technical aspects of AI.

ARTIFICIAL INTELLIGENCE VS COPYRIGHT LAW – ORIGINS OF THE CLASH

Scholars in the field of copyright law raise more and more often the fundamental problem of granting AI the status of author within the meaning of the rules governing this field. In my opinion, however, this is a secondary issue, since the dilemma concerning the assessment of whether under the current legislation the

[8] For example, see M. Mazurek, *Proszę szukać innej pracy pani redaktor. Gazetę będą tworzyć roboty. Wywiad z R. Tadeusiewiczem*, 2019, https://www.academia.edu/39651246 (access: 27.4.2023).

[9] E. Musiał, *op. cit.*

[10] As Stephen Hawking stated, "the development of full artificial intelligence could spell the end of the human race". See M. Błoński, *Hawking ostrzega przed sztuczną inteligencją*, 3.12.2014, https://kopalniawiedzy.pl/Stephen-Hawking-sztuczna-inteligencja-czlowiek,21508 (access: 9.6.2023).

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assets generated by AI can be regarded as creative works should be indicated as primary and fundamental.[11] Only a positive resolution of this issue will give rise to the question of who is their author, i.e. the subject who, in principle, is entitled to a copyright (Article 8 (1) ACRR). A negative answer to this primary, basic question will situate the creations of AI – from the point of view of the current regulation of copyright law – in the sphere of public domain covered by full freedom of use, free from copyright restrictions.

It can be considered that legal sciences and jurisprudence have already dealt with cases where creations of this kind are not man-made.[12] The Court's resolution of the widely known *Naruto* case rightly confirmed that an intangible good created by an animal cannot be a creative work, and therefore the subject of copyright.[13] The Court stated that "the Copyright Act does not 'plainly' extend the concept of authorship or statutory standing to animals", therefore animals may not file copyright suit and animal rights protection activists cannot represent them as legal representatives.[14] Serious doubts also did not arise in the case of creative works (e.g. musical, architectural, photographic or audiovisual) created with the use of computer software understood as a specialised tool used by a person in the creation process.

It should be stressed, however, that the problem concerning AI is of a different nature and is more complex – AI cannot be compared to an animal, for in its germs it was created by a person and it is a person who stimulates its development through appropriate programming of continuous evolutionary "self-learning" without the need for further human intervention. In its expected "adult" form it will cease (or has it already ceased?) to be merely a tool of man – it will gain autonomy and the ability to generate creations, which in their final form will not be the result of human creative activity, but merely the fulfilment of a task required by the user. Such creations will not, of course, be the result of just direct, but even also indirect human creative activity – neither of the activity of the person who has created the

[11] Article 1 (1) of the Act of 4 February 1994 on copyright and related rights (consolidated text, Journal of Laws 2022, item 2509; hereinafter: ACRR) provides that the object of copyright, defined as a creative work, is any manifestation of creative activity of an individual character, determined in any form, whatever the value, purpose and manner expression. In addition to the above-mentioned synthetic definition, the legislature has included for illustrative purposes an example list of protected categories of creative works, including, i.a., literary, journalistic, scientific, art, photographic, architectural and urban design works, musical, audiovisual works and computer software (Article 1 (2) ACRR).

[12] See R. Markiewicz, *Sztuczna inteligencja i własność intelektualna*, 2018, https://www.uj.edu.pl/documents/10172/140821974/SI_prof_Markiewicz.pdf/35aa8d83-c295-44d4-b470-5e13888f09ea (access: 15.5.2023), p. 42.

[13] See *Naruto v. David John Slater et al.*, No. 3:2015cv04324 – Document 45 (N.D. Cal. 2016), https://law.justia.com/cases/federal/district-courts/california/candce/3:2015cv04324/291324/45 (access: 26.2.2024); A. Konarska, *Prawa autorskie do „selfie" małpy Naruto*, 25.4.2018, https://kruczek.pl/prawa-autorskie-do-selfie-malpy-naruto (access: 26.4.2023); A. Konieczna, *op. cit.*, pp. 106–107.

[14] See *Naruto v. David John Slater et al.*, No. 3:2015cv04324 – Document 45 (N.D. Cal. 2016).

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seeds of AI (as it seems impossible to definitively identify all those people) or who, by their commands, intensifies its development (AI will enter a stage of rapid self-development), nor that of the person who assigns it a task to perform. Further considerations concern just such a "mature" state of development and operation of AI with unpredictable consequences for humans in the sphere of literary and artistic creation.

ARTIFICIAL INTELLIGENCE VS COPYRIGHT LAW – THE STATE OF THE CLASH *DE LEGA LATA*

There is no doubt that, to the extent analysed, the optimum result of AI action from a phenomenological (phenomenon-focused) point of view will not contain any characteristics to distinguish it from a work created by human being.[15] There will thus be no grounds for denying the existence in AI products of one of the two elements that define creative work under Polish copyright law: an objectively identifiable attribute of the individual nature of the work (Article 1 (1) ACRR), understood herein in a simplified way as a distinction from other goods of this type, assessed generally according to the concept of statistical individuality by M. Kummer.[16] It is therefore reasonable to argue that literary and artistic creations generated by AI may meet that requirement. This feature of objective novelty is verifiable, of course taking into account practical limitations, more and more effective over time as it is based on the use of special computer algorithms. In this aspect, however, one can anticipate the emergence of an essential problem. Since AI will generate an intangible good using access to a huge database – as it cannot be *creatio ex nihilo*, after all – the requirements of statistical individuality assessment, perhaps also assessed by AI, will have to be subject to a review initiated and directed by humans.

Another dilemma related to the classification of AI "creativity" is whether the asset generated by AI (a poem, article, novel, music, photography, design, film), different from the previous ones (individual, objectively new, statistically singular), will meet the statutory requirement of originality contained in the statutory definition of creative work, i.e. whether it will turn out to be a "manifestation of creative activity" (Article 1 (1) ACRR). It can be agreed here that such an item will be able to evoke unambiguous opinions of the audience about having artistic

[15] Cf. European Parliament resolution of 20 October 2020 on intellectual property rights for the development of artificial intelligence technologies (2020/2015(INI)) (OJ EU C 404.129, 6.10.2021), recital J.

[16] See J. Błeszyński, *Prawo autorskie*, Warszawa 1988, pp. 33–34; J. Barta, R. Markiewicz, [in:] *Prawo autorskie i prawa pokrewne. Komentarz*, eds. J. Barta, R. Markiewicz, Warszawa 2011, p. 24; eidem, *Prawo autorskie*, Warszawa 2016, p. 50 ff.; M. Poźniak-Niedzielska, A. Niewęgłowski, [in:] *System Prawa Prywatnego*, vol. 13: *Prawo autorskie*, ed. J. Barta, Warszawa 2017, p. 15 ff.

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(aesthetic), cognitive or scientific values, and even to cause emotional reactions in them, especially as the principle of protection of creative works applies regardless of their value and purpose (Article 1 (1) ACRR). In this context, the fundamental problem of the clash between AI and the copyright law, which is rooted in the "cornerstone" of this field of law: the dogma that, by its very nature, a creative work is to be a manifestation of creative activity, which is only attributable to a human being, is revealed.[17] In fact, regardless of the historically and culturally diverse theories as to the *ratio legis* of the copyright law, the protection of human creativity is the aim of this regulation and the protection granted under it.[18] In this perspective, the attempt to undermine this dogma can therefore rightly be seen as negating (rejecting) the essence of the currently applicable copyright law. The term "manifestation of creative activity" (Pol. *przejaw działalności twórczej*), as understood herein, means the "spiritual stigma" of the artist, the emanation of their personality, the psychophysical act of creation, the expression of their emotional experiences, the effect which is a "subjective novelty" – hence the result being related only to human activity and qualities.[19] The term generally refers to the concept of creativity (Pol. *twórczość*) and the etymologically related term "creative work" (Pol. *utwór*), pointing in the Polish legislation to the subject of copyright protection. The problem in question, therefore, refers to the axiology of copyright law – the very essence of activity defined as creative activity, its ontological relationship with human action.

[17] As regards the question discussed, see R. Markiewicz, *Sztuczna inteligencja…*, p. 43; P.P. Juściński, *Prawo autorskie w obliczu rozwoju sztucznej inteligencji*, "Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Prawa Własności Intelektualnej" 2019, no. 1, pp. 11–12; A. Bar, *op. cit.*, pp. 20–22; J. Wojewódzka, *Podmiotowość sztucznej inteligencji w kontekście praw autorskich*, "Prawo Nowych Technologii" 2022, no. 2, p. 44 ff. For example, see also judgment of the Polish Supreme Court of 14 February 2014, II CSK 281/13; judgment of the Court (Third Chamber) of 12 September 2019 in case C-683/17, *Cofemel – Sociedade de Vestuário SA v. G-Star Raw CV.*, ECLI:EU:C:2019:721 (regarding the first preliminary ruling); judgment of the Court (Fourth Chamber) of 16 July 2009 in case C-5/08, *Infopaq International A/S v. Danske Dagblades Forening*, ECLI:EU:C:2009:465. In the opinion of U.S. Copyright Office, Library of Congress (*Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence*, Federal Register (vol. 88, no. 51), Thursday, 16 March 2023 (Rules and Regulations), p. 16191-2), it is firmly accepted, also in the case law, that copyright can only protect creations that are the result of human creativity. The unquestionably fundamental position is that the term "author", as used in both the US Constitution and the Copyright Act, excludes non-humans from its scope.

[18] See P.P. Juściński, *op. cit.*, pp. 15–20.

[19] It is characteristic that the Polish legislature, when defining creative work as a subject of the copyright law used the expression "a manifestation of spiritual activity" – Article 1 of the Act of 29 March 1926 on copyright law (consolidated text, Journal of Laws 1935, no. 36, item 260). See also S. Ritterman, *Komentarz do ustawy o prawie autorskim*, Kraków 1937, p. 2 ff.; S. Grzybowski, [in:] S. Grzybowski, A. Kopff, J. Serda, *Zagadnienia prawa autorskiego*, Warszawa 1973, p. 74 ff.; J. Błeszyński, *op. cit.*, p. 29 ff.; J. Barta, R. Markiewicz, *Prawo…*, p. 48 ff.; M. Poźniak-Niedzielska, A. Niewęgłowski, *op. cit.*, p. 8 ff.

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After all, in the context of creations generated by AI, an attempt can be made to distinguish such creative works, e.g. in the categories of architectural, cartographic, scientific or databases, which are created mainly, or perhaps even entirely, using human intellectual capabilities. The lack of a "manifestation of creative activity" suggested here is also extended to works generated completely randomly (accidentally), e.g. in the field of musical, photographic and artistic activity. This also concerns so-called applied arts (e.g. timetables, bank forms, manuals, calorie counters, vigil lights), where finding an expression of creative activity is particularly difficult, but necessary to give it the status of a creative work.[20] In the latter case, however, it should be noted polemically, that copyright protection does not arise due to the useful value of the intangible asset.

In view of the above reservations, the question arises as to whether, in the situation of generation by AI of these categories of items, its action is of the same nature as that of a human being and can thus be considered as a "manifestation of creative activity"? An affirmative answer would imply the need to recognise such items as creative works and, consequently, to grant AI – assuming the autonomy of its action – the status of author within the meaning of copyright law. This issue may be debatable, but it is correctly, in my opinion, pointed out that the creative activity of a human being, also in these cases, is not identical in its nature to the activity of AI, as it is not fully deprived of the elements of intuition, emotion (also unconscious), imagination, reason or spirituality attributable to humans.[21]

The problem contains also a specific legal issue, in fact already of great relevance,[22] of the legality of the use of other people's creative works by AI by their reproduction and inclusion in its own database and processing (adaptation) and the first presentation to the public in this form. The activities mentioned here are covered by the legal monopoly of the authors of such works, which, in principle, require their consent in the form of acquiring an appropriate right or obtaining a license (see Articles 2, 17 and 41 ACRR). Here arises a problem of determining the entity who would be liable for any infringement of copyrights and also personal

[20] In this context, referring to the statements of scholars on the proposal to modify the requirement of "manifestation of creative activity" (sometimes wrongly identified with the condition of individual character) towards its objectification, see approvingly P.P. Juściński, *op. cit.*, pp. 12–15.

[21] It is worth noting that science (mainly psychology and medicine) has not definitively explained what human intelligence is, what are the determinants of thought processes, their interrelationships and the sensory interaction of man with the external world. It is concluded that AI does not actually possess intelligence, but merely imitates it. See M. Jankowska, *op. cit.*, pp. 180–186; A. Bober-Kotarbińska, *op. cit.*, pp. 2–3.

[22] J. Wyczik, *Pozew zbiorowy przeciwko twórcom Stable Diffusion, Midjourney oraz DeviantArt – czyli co mogło pójść nie tak?*, 18.1.2023, https://pl.linkedin.com/pulse/pozew-zbiorowy-przeciwko-tw%C3%B3rcom-stable-diffusion-oraz-jakub-wyczik?trk=pulse-article (access: 15.5.2023); Z. Okoń, *Generative AI: pozwy przeciwko Stability AI i fair use*, 19.2.2023, https://pl.linkedin.com/pulse/generative-ai-pozwy-przeciwko-stability-i-fair-use-zbigniew-oko%C5%84 (access: 15.5.2023).

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rights at the first dissemination of the adaptation without indicating the author of the work adapted (Article 78 ACRR). Would it be the person who manages and controls the AI, offers its services and benefits from this? One can reasonably doubt in this regard, because in the classical system of civil liability currently in force, the actions of such persons do not constitute a direct infringement of copyright – this is, in fact, done autonomously by AI.[23] The basis for their possible liability would therefore have to be different.[24] On the other hand, it is of course possible to make an effective attempt to situate such AI activities within the framework of existing statutory licenses (permitted use) or those to be introduced for this purpose, and even to prove their presence outside the limits of the author's right.[25] There is no doubt, however, that under the current rules it is the person distributing the work processed in this way by AI that would be held liable, e.g. the user upon whose order the item

[23] "(…) the opacity, connectivity and autonomy of AI-systems could make it in practice very difficult or even impossible to trace back specific harmful actions of AI-systems to specific human input or to decisions in the design" (European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence, introduction, item 7).

[24] Pursuant to draft regulation of the European Parliament and of the Council on liability for the operation of Artificial Intelligence-systems annexed to the European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence, the operator of the AI system is responsible for the damage caused by the operation of the AI system (Article 1), both as a "frontend operator" (a person to some extent controlling the risks associated with the operation of the AI system and benefiting from its operation) and as a "backend operator" (a person who defines on a continuous basis the characteristics of the technology, providing data and essential support services and thus exercising to a certain degree control over the risks of the system; Article3 (d), (e), (f)). Control is any action of an operator that influences the operation of an AI-system (Article 3 (g)). In the case of AI systems considered to be at high risk, the operator shall be liable on a risk basis and may not evade liability by claiming, i.a., that the harm or damage was caused by the autonomous operation of the system (Article 4 (1)). A "harm or damage" is an adverse impact affecting, i.a., "the property of a natural or legal person" or "causing significant immaterial harm that results in a verifiable economic loss" (Article 3 (i)). On this topic, see the insightful study by A. Michalak, *Projekt rozporządzenia Parlamentu UE o odpowiedzialności cywilnej za działania systemów sztucznej inteligencji – krok w dobrym kierunku czy niepotrzebne odstępstwo od zasad?*, [in:] *Prawo sztucznej inteligencji i nowych technologii*, eds. B. Fischer, A. Pązik, M. Świerczyński, Warszawa 2021, p. 41 ff.

[25] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (OJ EU L 130/92, 17.5.2019) introduces in Article 3 (for the purposes of scientific research) and Article 4 (for commercial purposes) exceptions (statutory licences), mandatory for Member States, also in the area of copyright for reproductions by artificial intelligence systems in the process of so-called TDM, i.e. text and data mining on creative works or other protected items. See E. Traple, *Granice eksploracji tekstów i danych na potrzeby maszynowego uczenia się przez systemy sztucznej inteligencji*, [in:] *Prawo sztucznej inteligencji i nowych technologii*, eds. B. Fischer, A. Pązik, M. Świerczyński, Warszawa 2021, p. 19 ff.; R. Markiewicz, *Prawo autorskie na jednolitym rynku cyfrowym. Dyrektywa Parlamentu Europejskiego i Rady (UE) 2019/790*, LEX/el. 2021, subchapter 2.2 *Eksploracja tekstów i danych (art. 3 i 4)*. Cf. Z. Okoń, *op. cit*.

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was generated. However, it seems that the importance of this problem will decrease proportionally to the size of the database available for AI – perhaps in the further future it will be the entire technically achievable creative output of humankind, *ad casum* in a given field, or perhaps even generally. In addition, appropriate AI programming is, as one may think, able to lead to a radical reduction or even the practical elimination of the possibility of infringement by disseminating someone else's creative work. Moreover, as practice indicates, AI can often be tasked to generate creations that imitate the style of a specific author. This is important in the context of the principle that the copyright protection does not cover, among other things, the procedures and methods (including the style) applied by the author (see Article 1 (2^1) ACRR).

As a consequence of the above findings, it is reasonable in my opinion to propose a thesis that creations generated by AI do not and will not acquire – presumably also at the future stage of its optimal development – the features of a creative work that are currently accepted by the legislature (*de lege lata*), and thus are not[26] and will not become the subject of copyright as it is now understood.[27] However, it should be clearly stated that this conclusion is justified only within the axiological and normative paradigm that has been in force so far, which ontologically links the subject of copyright protection exclusively with human creativity.[28]

[26] European Parliament, in para. 15 of the resolution of 20 October 2020 on intellectual property rights for the development of artificial intelligence technologies (2020/2015(INI)) (OJ EU C 404.129, 6.10.2021), has considered that works autonomously produced by artificial agents and robots might not be eligible for copyright protection, in order to observe the principle of originality, which is linked to a natural person, and since the concept of "intellectual creation" addresses the author's personality. The United States Copyright Office on 21 February 2023 finally refused to grant copyright protection to the images contained in a creative work (comic book) on the grounds that they were created by AI. See R. Lawler, *The US Copyright Office Says You Can't Copyright Midjourney AI-generated Images*, https://www.theverge.com/2023/2/22/23611278/midjourney-ai-copyright-office-kristina-kashtanova (access: 15.5.2023); A. Piechocki, K. Gorzkowska, *Problematyka stosowania prawa autorskiego do dzieł stworzonych przy udziale tzw. generatywnej sztucznej inteligencji*, "Prawo Nowych Technologii" 2023, no. 1, p. 24 ff.

[27] As P.P. Juściński (*op. cit.*, pp. 22, 27–28) claims, "there are no grounds that under current regulations (whether Polish law or international law) it is possible to recognise artificial intelligence as the author of a product generated by it". However, according to A. Konieczna (*op. cit.*, p. 110) the concept of creative work in Article 1 ACRR is "quite broad, and it seems that it could also include AI creations, which often do not differ from those created by humans". A different point is made by P. Księżak and S. Wojtczak (*Prawo autorskie wobec sztucznej inteligencji (próba alternatywnego spojrzenia)*, "Państwo i Prawo" 2021, no. 2, pp. 18–33), according to which "artificial intelligence may have creative capacity, i.e. the capacity to be an author within the meaning of copyright law"; this view is based on an incorrect, in my opinion, interpretation of the word *creative* from the definition of creative work (Article 1 (1) ACRR – "a manifestation of creative activity") as "to a simplified extent", "bringing something new", "new".

[28] This paradigm is invariable in the light of various theories of the emergence of copyright protection. See a similar view on the issue in question: P.P. Juściński, *op. cit.*, pp. 15–20.

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In the current legal realities, a serious problem arises and is going to be aggravated, resulting from the practical impossibility of distinguishing between human-created works subject to copyright protection and AI-generated creations deprived of such protection. The consequences of the inability to make such a distinction may encourage people to take credit for AI-generated creations – paradoxically, therefore, if AI were to be recognised as an author, it would be an act referred to today as plagiarism, constituting both a civil tort (see Article 78 ACRR in conjunction with Article 16 (1) ACRR) and a crime (see Article 115 (1) ACRR). Such an act would enable users, who are not the authors of such creations, to benefit from copyright protection in terms of both personal (e.g. fame, career) and material (remuneration) gains. This would lead to a distortion of the essence of such protection, an erosion of the foundations of the system and its disintegration. The copyright law would *via facti* lose its current nature – it would cease to protect the results of human creativity, limiting itself at most to indirectly rewarding human ideas expressed in the form of formulation of tasks assigned to AI.

At best, protection would relate to the creative adaptation (reworking) by a human of creations generated by AI – according to the general rule, the creative work would only cover the creative input of the person who made the adaptation.[29] It is understandable that in such a case, due to the absence of the original work, there is no so-called derivative work therefore there would be no obligation to identify AI as the "author" of the resulting asset (see Article 2 (5) ACRR). The creative work developed by a human in such circumstances could also not be classified as a work inspired (Article 2 (4) ACRR) by an AI creation due to the lack of the work that caused inspiration. Indeed, it would be a fully independent creative work. An analogous situation would consist of a modification by AI of a man-made creative work – the result of such an adaptation (reworking) would not constitute a derivative work and only the "original" work would be protected.[30] This would be the case if the very task formulated for AI by the user met the characteristics of creative work (e.g. contained a precise description of the architectural design, plot of a novel, drama or film) or if the text, drawing, photography or music attached, e.g. for verification or modification by AI, had such features. Copyright protection would not cover the "modification contribution" of AI as it is not a creative work i.e. "a manifestation of creative activity" of man, and thus the subject of copyright (see Article 1 (1) ACRR).[31]

[29] As in R. Markiewicz, *Sztuczna inteligencja…*, pp. 46–47. As in also U.S. Copyright Office, Library of Congress, *op. cit.*, pp. 16192–16193.

[30] As in R. Markiewicz, *Sztuczna inteligencja…*, pp. 44–45.

[31] A different opinion is proposed by A. Auleytner, M.J. Stępień, *Prawnoautorska ochrona rezultatów działalności intelektualnej człowieka obejmujących wytwory sztucznej inteligencji*, "Monitor Polski" 2020, no. 20 (appendix).

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In cases such as those mentioned above, it is not possible to talk about the co-creativity of AI and human being.[32]

It can be argued that in the situation presented above, the phenomenon of human creation of works, which requires effort and time, will disappear, displaced by AI "creativity", especially in those cases where the value of a work is determined by its practical, technical and scientific values (architectural designs, expert opinions, maps, scientific studies, etc.). The inability to distinguish genuine authors from those who claim ownership of creations generated by AI will trigger a mechanism of a kind of "unfair competition", placing the former in a worse position, primarily due to the costs and time of creation.[33]

It seems that it would be helpful to properly solve the identified problems to create and widely apply (by a statutory requirement) a reliable technical (IT) tool for marking creations generated by AI. This would allow, on the one hand, the identification of those man-made intangible property that have the attributes of a creative work, and on the other hand, the preservation of the current essence/nature of copyright law, which only protects this type of property.

ARTIFICIAL INTELLIGENCE VS COPYRIGHT LAW – EFFECT OF THE CLASH FORECAST ABOUT THE FUTURE LAW (*DE LEGE FERENDA*)

The above conclusions were formulated with the caveat that the foundation of the axiological and normative paradigm that has been in force so far, inextricably linking the subject of copyright protection with human creativity, is preserved. However, it cannot be ruled out that the legislature – having such a competence – will modify this axiom, either directly or indirectly.

This first method of modification (indirect), softer in its expression, would be based on a normatively adopted legal fiction prescribing that creations generated by AI should be treated as creative works under copyright law. From a formal point of view, the axiology and terminology of the field would not be altered – the concept of "creative activity" would *ex definitione* continue to be exclusively associated with humans. However, from a substantive perspective, the legal status between the two categories would be equated. A *sine qua non* condition for considering the introduction of such a solution as rational would be the existence and practical application of the above-mentioned technically reliable possibility to verify whether the item has been created by a human and is a creative work or whether it has been generated with AI. Otherwise, the use of such a legal fiction would have to be judged not only pointless, but also harmful, as it would threaten to destroy the

[32] As in P.P. Juściński, *op. cit.*, pp. 25–26.

[33] Cf. A. Bar, *op. cit.*, p. 23.

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foundations of the copyright protection system. It is reasonable to assume that this way of including AI-generated goods in the objective space of copyright protection will not be able to prevent the problems identified above and those that will be pointed out in the next paragraph.

This direct modification of the axiom that perceives the work as the result of a purely human creation, would consist of a lawmaker's decision that a creation generated by AI is also a creative work, i.e. the subject of copyright law. This means a complete revision of the essence of modern copyright law as regards the subjective aspect of "creative activity" and boils down either to renouncing this identifier or to changing the way it is understood. In the first case, the classification of an asset as a subject of copyright would therefore be determined only by its individual character – distinction from others, novelty in an objective sense, statistical individuality. On the other hand, the nature of the activity of creating such item would be legally indifferent: it would be both the creative activity of man and the generative action of AI. In the second case, the concept of creative activity would, by definition, be clearly detached, as exclusive, from human activities.[34] In both cases, the definition of a creative work would be significantly transformed.

Apart from the above-mentioned, logically predictable and thus credible social effect, namely the regression of human artistic, scientific and design creativity, etc., the modification of the definition of creative work would have to entail far-reaching changes to the regulations, as regards other issues of copyright law – the subject of the law, the nature and content of rights, their exercise, liability for violations and sanctions. From today's perspective, the challenge of making such an amendment involves gigantic problems, primarily concerning the identification of the author, i.e. the entity whose interests related to the creation and exploitation of a differently defined creative work are to be protected by copyright law. The contemporary juridical instrument for this kind of protection of both personal interests (see Article 16 ACRR) and property interests (see Article 17 ACRR) is a civil individual right. While copyright may also be initially granted *ex lege* to an entity other than the author, moral rights are inextricably used only by the person who created the work. A problem arises here whether as such a creator should be considered the AI constructor (author, developer) or AI producer or administrator (operator) or the user assigning the AI the task related to the generated "work", or – however, it seems absurd – the computer software itself, referred to as AI.[35] It is difficult to indicate among the aforementioned

[34] See in particular P.P. Juściński, *op. cit.*, p. 14. The author surprisingly allows *de lege lata* for "the understanding of the condition of originality of a creative work as an objectively new creation, and individuality as its peculiarity and uniqueness in relation to the same manifestations of creative activity". In my view, however, a thesis thus formulated actually leads to the blurring of the distinction between the statutory requirements of "manifestation of creative activity" and "individual character".

[35] The European Parliament, in para. 15 of the resolution of 20 October 2020 on intellectual property rights for the development of artificial intelligence technologies (2020/2015(INI)), has rec-

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actors the one whose interests would be clearly related to the third-party activities of recording, copying, disseminating or adapting (processing) an AI-made intangible good. Naturally, the legislature has powers to grant copyright to any of the above-mentioned entities, although the most difficult, if not possible at all, would be to identify the designer (creator) of AI.[36] However, a reasonable doubt arises: firstly, regarding the *ratio legis* behind such a move (after all, the lawmaker should be rational!), and secondly, whether the rights granted would still be of an authorship-related nature. On the other hand, due to the above-mentioned subjective reasons, the proposals to possibly situate the protection of AI creations as separate goods in the field of related rights or as part of an institution similar to the US legal institution of works made for hire are not fully convincing.[37] As far as moral rights are concerned, which according to the current paradigm can only be vested in the direct author, there are no grounds, and it is even inconceivable, that these moral rights would arise for any of the entities specified above.

There are also opinions that under copyright law, when updated, AI should be granted the status of the author in the analysed case; after all, it is the AI who directly and independently creates goods that will be creative works according to the assumed new understanding of this concept. Consequently, following this course of thinking, it is the AI that should be granted copyright and moral rights to the work. It should be noted, however, that the implementation of this view, revolutionary in juridical terms, requires equipping AI with legal personality that provides it with certain legal capacity and capacity to perform acts in law. Supporters of this move argue, pointing to legal personality, that there has long been in the virtual legal world a precedent of "establishing" an entity that does not physically exist in the

ommended that any and all rights to AI works created in the UE, if it is agreed that such works may be protected by copyright law, are only vested in natural or juridical persons. See also R. Markiewicz, *Sztuczna inteligencja…*, p. 51 ff. P.P. Juściński (*op. cit.*, pp. 22–25) rejects the view that the software developer or user may be the author in such a situation.

[36] By way of exception, the UK legislature adopted in Article 9 (3) of the Copyright, Designs and Patents Act of 1988 (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/957583/Copyright-designs-and-patents-act-1988.pdf, access: 26.2.2024), that, for a computer-generated work, the author is considered to be the person who took the necessary measures to create the work. That solution constitutes in essence a legal fiction, given that, as defined in Article 178 of this Act, a computer-generated work is a work generated by computer in circumstances such that there is no human author of the work.

[37] Theoretical possibilities for the protection of assets generated by AI also outside the copyright law: related rights, *sui generis* protection, unfair competition, however with special emphasis on related rights, are noticed by R. Markiewicz (*Sztuczna inteligencja…*, pp. 51–53). According to K. Grzybczyk (*Wyzwania dla prawa własności intelektualnej w dobie cyfryzacji*, "Przegląd Prawa Konstytucyjnego" 2020, no. 3, p. 66) "US researchers propose the protection and identification of the 'author' based on a special (*sui generis*) regulation or the recognition of the results generated by AI as 'work made for hire' by the 'employed' AI". A sceptical view on the issue, with reference to scholarly opinion on this matter, is presented by P.P. Juściński (*op. cit.*, pp. 35–40).

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real world.[38] It is in the context of AI that postulates have been proposed, or even announcements made, of the introduction of a new normative institution constituting a previously unknown legal entity – electronic (digital) person.[39] It should be noted, however, that the structure of juridical person actually serves people as a kind of instrument for the implementation or protection of specific legislature-accepted interests of a designated group of members or third-party users of services of a given person.[40] In the case of AI – possibly a future legal entity, normatively recognised as the author and equipped with copyright and moral rights – it is difficult to convincingly identify such people and their authorship interests that would be related to the exploitation of works created independently by AI.[41] Any statements identifying such persons and arguing that the use of this new subjective legal construct would be necessary for the implementation or protection of their authorship interests would seem to be deprived of credibility.[42] On the other hand, granting AI legal personality with the current understanding of the concept of "work" as described above would be pointless from the point of view of the statutory recognition of its status as the author.

Currently, it seems unacceptable to claim that it is about the AI's own authorship interests that will be exercised through some body composed of humans or – which sounds surreal – directly by itself, assuming that it may be able to do so in the future. The latter option includes the expression of will (but does AI have a will

[38] It will be "necessary" to confer legal capacity on AI – as argued by P. Księżak, *Zdolność prawna sztucznej inteligencji (AI)*, [in:] *Czynić postęp w prawie. Księga jubileuszowa dedykowana Profesor Birucie Lewaszkiewicz-Petrykowskiej*, ed. W. Robaczyński, Łódź 2017, pp. 70–71. See also K. Biczysko-Pudełko, D. Szostek, *op. cit.*, pp. 13–14.

[39] See in this matter the European Parliament resolution of 16 February 2017 with recommendations to the Commission on civil law rules on robotics (2015/2103(INL)), p. 239; M. Jankowska, *op. cit.*, p. 181 ff.; K. Biczysko-Pudełko, D. Szostek, *op. cit.*, pp. 9, 12–14; A. Konieczna, *op. cit.*, pp. 111–112; P.P. Juściński, *op. cit.*, p. 29 ff.

[40] See A. Wolter, J. Ignatowicz, K. Stefaniuk, *Prawo cywilne. Zarys części ogólnej*, Warszawa 2020, pp. 238 ff., 270–271.

[41] As put rightly against the granting of legal personality to artificial intelligence, with reference to literature and a number of arguments also of copyright law nature, in A. Kappes, *Podmiotowość prawna sztucznej inteligencji. Rzeczywista potrzeba czy kreacjonizm prawniczy?*, [in:] *Non omne quod licet honestum est. Studia z prawa cywilnego i handlowego w 50-lecie pracy naukowej Profesora Wojciecha Jana Katnera*, eds. S. Byczko, A. Kappes, B. Kucharski, U. Promińska, Łódź–Warszawa 2022, p. 327 ff. Also critically with reference to other such opinions: P.P. Juściński, *op. cit.*, pp. 31–35. "It is not necessary to give legal personality to AI-systems" (European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence, introduction, item 7).

[42] Likewise M. Jankowska (*op. cit.*, p. 192). The European Parliament, in the resolution of 20 October 2020 on intellectual property rights for the development of artificial intelligence technologies, concluded that it would not be appropriate to seek to impart legal personality to AI technologies and pointed out the negative impact of such a possibility on incentives for human creators.

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of its own?) in a number of complex "everyday life" activities such as deciding on exploitation of one's works, agreeing the content of contracts, entering into them and monitoring their performance, disposing of author's remuneration, seeking claims and being liable for one's own infringements with possible involvement in legal proceedings. At this point, the vision of such an autonomously operating AI, which is a self-aware, sentient and reflective entity, clearly sounds almost like science fiction, and may therefore give rise to astonishment and disbelief. However, we should agree that while the development of AI is unstoppable, the fundamental question is where its natural limits are, independent of human desires and capabilities.

CONCLUSIONS

However platitudinous it may sound, it is true that the future is unknown, and that it constantly surprises to some extent, and in the long term it is unpredictable even for the most imaginative people. There are always events, often suddenly emerging, including discoveries and inventions that were even previously unimaginable, and which rapidly or gradually change the "history of the world", the fate not only of individuals or nations, but of all humankind. Each such case stimulates people to introduce new non-standard solutions, including in the sphere of legal structures. This may also apply to AI – its origin, development and the effects of the action mentioned above in the context of copyright law.

Concluding this discussion, it should be assumed, in my opinion, that under the law currently in force, AI must recognise the supremacy of copyright law. Intangible assets generated by AI, even those having objective literary or artistic qualities different from others, cannot be considered as creative works and acquire the status of subject of copyright. This is so because they were not created by man and therefore do not constitute – as required by the legislator – "a manifestation of creative activity". In view of this, in the current legal context, not only Polish, AI cannot be considered the author and thus granted copyright, even less moral rights. Evaluating the further course of the clash between AI and copyright law in the *de lege ferenda* perspective (for the law as it should stand), I believe that the halfway postulates of granting protection to AI creations outside the area of copyright law, e.g. under the institutions of related rights or work made for hire, are not fully convincing. The doubts arise out of the difficulty of finding an axiology permitting convincing identification of a person who deserves to benefit from such protection. For this reason, proposals to change the axiom underlying the copyright law, postulating that subjective rights may only be granted to people associated with AI (designers, operators, users) but definitely not to AI itself. If copyright is to survive as a human author's right – which I strongly advocate for – then from

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this perspective the literary and artistic assets generated by AI, in practice with the necessary possibility of their identification, should remain in the public domain.

Perhaps there will be completely new legal solutions to be possibly adopted, which we are unable to imagine at all or fully today, including those which, in a different form, will provide legal protection for AI creations. One thing seems certain to me: human being is not the creator of himself and will not be able to perform an act of creation of another human being, also of a hybrid nature. Artificial Intelligence, even matching humans in the field of intellectual efficiency or surpassing them in some aspects of it, even learned to recognise and imitate human instincts and emotions, will not become a sentient, spiritual human being, and thus also an author. A digital code will not become a genetic code,[43] even if technology "improves" people by implanting additional intellectual capabilities and enhanced physical parameters into human beings. We should hope that the drive for creation is deeply, intrinsically embedded in the emotional and spiritual nature of man, and that AI will not be able to take it away from us.

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[43] E. Musiał, *op. cit.*

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ABSTRAKT

Niniejsza wypowiedź o charakterze naukowo-badawczym dotyczy prawnoautorskich konsekwencji powstawania dóbr o cechach literackich i artystycznych, będących rezultatem „twórczości" sztucznej inteligencji (AI). Istota problemu – gwałtownie zyskująca znaczenie praktyczne – sprowadza

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się do odpowiedzi na pytanie, czy obecnie (*de lege lata*), a także w przyszłości (*de lege ferenda*) dobra tego typu mogą stanowić przedmiot ochrony prawa autorskiego i kto ewentualnie powinien być uznany za ich twórcę. Przeprowadzona analiza dogmatyczna obowiązującej i znajdującej tu zastosowanie – nie tylko krajowej – materii normatywnej, dorobku nauki i orzecznictwa wskazuje, że *de lege lata* dobra niematerialne wygenerowane przez AI nie mieszczą się w definicji utworu i nie stanowią przedmiotu prawa autorskiego z tej racji, że nie zostały stworzone przez człowieka. W związku z tym sztuczna inteligencja nie może być uznana za twórcę i przez to wyposażona w podmiotowe prawa autorskie – majątkowe, a tym bardziej osobiste. W perspektywie *de lege ferenda* postulaty przyznania dobrom AI ochrony poza obszarem prawa autorskiego, np. w ramach praw pokrewnych czy instytucji *work made for hire*, nie przekonują w pełni ze względów aksjologicznych, tj. trudności związanych ze wskazaniem osoby zasługującej na czerpanie korzyści z takiej ochrony. Nie można też wesprzeć propozycji przyznania praw podmiotowych samej AI, albowiem oznaczałoby to zmianę aksjomatu prawa autorskiego, że twórcą może być tylko człowiek. Jeżeli prawo autorskie ma przetrwać jako prawo twórcy-człowieka – za czym należy się opowiedzieć – to w świetle tej regulacji dobra literackie i artystyczne wygenerowane przez AI powinny pozostać w domenie publicznej.

Słowa kluczowe: sztuczna inteligencja; prawo autorskie; utwór; twórca