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**DISTINGUISHING WORKS CREATED USING COMPUTER
TECHNOLOGIES FROM NON-ORIGINAL OBJECTS
GENERATED BY A COMPUTER PROGRAM: AN EXAMPLE
OF IMAGE CREATION/GENERATION BASED
ON TEXTUAL PROMPTS**

Article 33 of the Law of Ukraine 'On Copyright and Related Rights' provides legal protection for non-original objects generated by a computer program, granting them *sui generis* rights [1, art. 33]. It is important to note that, according to this article, such objects should be distinguished from works created by natural persons using computer technologies, which are protected under general copyright rules [1, art. 33 (1) (2)]. This distinction makes it essential to explore the methodology for evaluating an object in order to determine whether it is a non-original object generated by a computer program or a work created by a natural person using computer technologies.

The paper aims to analyse the possibilities of determining the originality — or absence thereof — of an object, using examples of image creation and generation based on textual prompts.

Article 33 (1) of the Law of Ukraine 'On Copyright and Related Rights' establishes: 'A non-original object generated by a

computer program is an object which differs from existing similar objects and was created as a result of the functioning of a computer program without direct participation of a natural person in the object creation. Works created by natural persons using computer technologies are not considered non-original objects generated by a computer program' [1, art. 33 (1)]. Thus, the legislation defines two groups of objects — non-original objects generated by a computer program and works created by natural persons using computer technologies. The line between these groups is drawn based on the presence or absence of originality in an object [2; 3].

According to the art. 1 of the Law of Ukraine 'On Copyright and Related Rights', 'originality of a work is a feature (criterion) which characterises a work as a result of the author's own intellectual creative activity and reflects creative decisions made by the author during the work creation' [1, art. 1]. Such a definition allows one to conclude that non-original objects generated by a computer program should include those generated without creative decisions by a natural person in the generation process. At the same time, works created by natural persons using computer technologies should include objects expressing creative decisions made by an author [2].

It is worth mentioning that the issue of whether creative decisions can be expressed in an output in case of using AI technologies is under doctrinal debates. For example, some scholars argue that AI technologies do not allow for the expression of creative decisions in an output at all. According to this point of view, even in case of a creative nature of a prompt, an output should still be considered non-original [4]. The matter is that copyright law protects only a form of expression, but not ideas, and in case of AI technologies use, the fixation of an output in an objective form is made by the AI system itself, not by a programmer or a user [5, p. 398].

Along with that, there is another point of view according to which if creative decisions made by a person are expressed in an output obtained using AI, the output can be considered original [6, p. 1212]. For example, if a prompt submitted by a person contains a detailed understanding of a future object and if the output meets the instructions, the relationship between an authorial

intent, instructions, and the output are kept [7, p. 948]. Further, even if the instructions are not of a creative nature, the originality of an object may still be determined if there are creative decisions made by a person in the editing phase [7, p. 948]. The paper supports the latter approach.

Considering a possible methodology for evaluation of originality of images created / generated based on textual prompts, it is worth mentioning the following. If a person submits a general prompt (for example, 'cat', 'house', 'flower', etc.), of course, such a prompt is not of a creative nature. It means that an AI system will have an unlimited number of options for generating a relevant image. As a result, the decision regarding how an output will look like, will be 'made' by the AI system itself, not by a person. However, the 'decisions' of AI can never be creative, simply because only humans can make creative decisions. Therefore, an object in such a case will be a result of non-creative AI's 'decisions', i.e., a non-original object generated by a computer program.

In contrast, if person's instructions contain a detailed description of a future object (for example, they specify the exact colouration of a cat, the colour of its eyes, its pose, size, position, background parameters, image style, and so on), an AI system will have a very limited number of options because it simply will need to follow the instructions. Thus, a person, submitting detailed instructions, does not transfer his freedom of choice to an AI system, and in this case, such instructions themselves can be considered creative decisions. If an output meets the instructions, i.e., reflects them, the output should be considered a work created by a natural person using computer technologies.

To sum up, AI technologies aimed at the transformation of textual prompts into images make it possible to obtain both non-original and original objects. In cases where an output is not a result of creative decisions made by a person, it should be considered a non-original object generated by a computer program. In contrast, if an output reflects creative decisions made by a person, including those made in the process of providing a prompt, such an output should be considered a work created by a natural person using computer technologies.

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