
Generative Artificial Intelligence and Copyright

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Abstract

The rise of generative artificial intelligence has intensified the debate on whether AI generated content qualifies for copyright protection. In legal systems that define a copyright work as an original intellectual or spiritual creation of an author, the question is whether AI generated outputs satisfy the core requirements of authorship, originality, and expression in a specific form. This paper examines the concept of a copyright work under the Law on Copyright and Related Rights and relevant European Union case law, particularly the standard of “the author’s own intellectual creation” developed by the Court of Justice of the European Union.

The analysis argues that originality in copyright law requires free and creative choices made by a human author. While generative AI systems can produce statistically novel and formally structured outputs, such outputs lack the personal intellectual contribution necessary for copyright protection unless a human exercises decisive creative control. The paper concludes that copyright protection cannot be extended to purely AI generated content without undermining the conceptual foundations of authorship and originality in copyright law.

Key words: copyright law, generative artificial intelligence (AI), originality, spiritual creation, authorship.

Introduction

The development of generative artificial intelligence systems (hereinafter: AI) in recent years has led to the mass production of texts, images, music, and audiovisual content which, by their outward appearance, may seem artistic or at least creative in nature. This development raises a number of legal questions, which, in their most concise form, may be reduced to the following: can the output of AI qualify as a copyrighted work, and if so, under what conditions? These questions are not primarily technical but normative in nature. They concern the very concept of a copyrighted work, its foundations, and its limits.

In aesthetic theory, it is emphasized that works of art do not have an immediate purpose and are not usable objects, and that art is not artistic production in the sense of manufacturing products that serve some function, but rather art based on independent and free artistic creation (Grubor, 2022, p. 16).

Similarly, Gadamer’s interpretation stresses that art does not produce something that is merely usable, but something that is, or that points to something that could have been otherwise something that deviates from and stands apart from the ordinary (Grubor, 2022, p. 16). These insights are legally significant because they demonstrate that an artistic work and, consequently, a copyrighted work, cannot be equated with the functional production of content. On the contrary, it presupposes free formation oriented toward meaning revealed within the work itself, rather than toward external utility.

It is precisely at this point that space opens for a more precise determination of the concept of form as one of the two key elements of originality. The form of a work is not tied to the material embodiment as such, but to the specific shaping of spiritual content. Within the work, spirit itself is materially objectified and realized, meaning that the elements of the work are not organized according to chance, but according to principles of internal coherence, affiliation, and homogeneity (Đukić, 2022, p. 57). Likewise, a living

artistic form posits a specifically artistic content, given in one single, unique, and unrepeatable manner (Đukić, 2022, p. 57).

While AI systems are capable of producing visibly different, even “unique,” forms, it remains questionable whether such forms represent the shaping of spiritual content or merely the product of data processing. If the “spirituality” of a work is understood as presupposing the existence of a subject who acts creatively through free will, intention, self-expression, or at least an internally coherent meaning arising from the subject then the question arises: what, exactly, is being “objectified” in AI generated content?

This issue is further illuminated by Hegel’s conception of art as the free representation of the world which, together with religion and philosophy, expresses “the deepest interests of humanity” and “the most comprehensive truths of spirit,” with art functioning as a mediating element between sensuous immediacy and finite reality on the one hand, and the infinite freedom of conceptual thought on the other (Hegel, as cited in Grubor, 2022, p. 26). This is complemented by the view that art has its ultimate purpose “in representation and revelation themselves,” rather than in external aims such as instruction, profit, or utility (Hegel, as cited in Grubor, 2022, p. 26). If the function of art and, more broadly, of the aesthetic is self-knowledge and self-understanding, then the copyrighted work becomes a medium through which the subject recognizes itself and comes to know itself anew. From a normative standpoint, this leads to the following thesis: without a subject, there can be no spiritual originality, because there is no “self” capable of recognizing itself within the work.

The primary aim of the paper is to examine whether, and under what conditions, AI generated outputs may qualify as copyrighted works within the framework of copyright law, relying on a normative and comparative approach. In particular, the paper will analyze: 1) whether originality is legally relevant as a property of the result or as a property of the creative process in which free creative choice is exercised; 2) whether the form of a work, understood as the shaping of spiritual content, can be attributed to the outputs of generative AI; and 3) whether extending the concept of a copyrighted work to AI generated content would undermine the fundamental principles of copyright law.

Normative Framework

The following section of the paper analyzes the general conditions for copyright protection under the Law on Copyright and Related Rights (Narodna skupština Republike Srbije [Narodna skupština], 2019), with particular attention to the concepts of authorship, spiritual content, originality, and the form of the work.

Conditions for the Protection of a Copyrighted Work

Pursuant to the Law on Copyright and Related Rights (Narodna skupština, 2019, Art. 2(1)), a copyrighted work is defined as “an original spiritual creation of the author, expressed in a specific form, regardless of its artistic, scientific, or other value, its purpose, size, content, or manner of manifestation, as well as the permissibility of its public communication.”

From the above, it follows that the legislator establishes several cumulative conditions that a work must satisfy, which may be summarized as follows:

1. that the work is created by an author, that is, by one or more natural persons;
2. that the work constitutes an intellectual (spiritual) creation;¹
3. that it is original; and
4. that it is expressed in a specific form.

In copyright theory, it is emphasized that the concept of a copyrighted work is based on general constitutive elements, which relate to the existence of an author as a natural person, the spiritual character of the creation, its originality, and its expression in a specific form (Popović & Marković, 2020).

Authorship of the Work

Pursuant to Article 9(1) of the Copyright and Related Rights Act, an author is a natural person who has created the copyrighted work (Narodna skupština, 2019). This statutory solution is directly linked to the understanding of creation as a spiritual, that is, psychological process, which excludes the possibility for legal persons to be considered authors. The act of creating a copyrighted work constitutes a legal fact rather than a legal transaction, meaning that copyright arises by the very act of creation itself, irrespective of the author's will to be recognized or publicly known as such.

In this sense, a person is regarded as the author regardless of whether the work has been published, whether the author appears anonymously or under a pseudonym, or regardless of the reasons for concealing authorship. The author is the original holder of subjective copyright, which arises *ipso iure*, by the mere coming into existence of the copyrighted work.

Therefore, all works that are not created by a human being, that is, by a natural person as an author, cannot be regarded as copyrighted works within the meaning of the Copyright and Related Rights Act (Narodna skupština, 2019). This conclusion is of crucial importance for the further analysis of generative artificial intelligence, as it establishes an initial and insurmountable boundary of copyright protection: the existence of a human being as the bearer of the spiritual creative act.

Authorship and AI-Generated Outputs

The solution adopted by the Copyright and Related Rights Act (Narodna skupština, 2019) is not accidental, but is based on the understanding that the creation of a copyrighted work is the result of the spiritual, intellectual, and creative activity of a human being, as a being capable of intention, meaning, and self-expression.

From the perspective of copyright law, it is crucial that the author is not the entity that merely constitutes the technical cause of the emergence of a particular form, but rather the one who is the bearer of creative decisions that have led to the shaping of the intellectual content of the work. Contemporary generative models, including large language models, function as statistical systems that predict the next element in a sequence based on patterns extracted from large quantities of data, without possessing

¹ In Serbian copyright doctrine, the term "intellectual creation" is traditionally rendered as "spiritual creation" (*duhovna tvorevina*), reflecting the continental legal understanding of authorship. It does not denote any metaphysical or religious dimension, but refers to the human capacity for intentional, meaningful, and self-reflective creative activity. In this context, "spiritual" emphasizes the personal and subjective origin of the work in the human author, rather than a purely technical or computational process.

consciousness, intention, or the capacity for free choice in the human sense (Goodfellow et al., 2016; Bender et al., 2021; Vaswani et al., 2017).

Even in cases where a human provides instructions to the system or exercises a certain degree of control over the generation process, authorship cannot be automatically attributed to the system itself. Instead, it must be examined whether, and to what extent, the human contribution has reached the level of creative activity necessary to justify the status of an author.

From the foregoing, it follows that the outputs of generative artificial intelligence, insofar as they are not the result of the independent and creative activity of a specific natural person, cannot be attributed to an author within the meaning of the Copyright and Related Rights Act (Narodna skupština, 2019). This does not imply that such outputs cannot possess practical, economic, or cultural value, but rather indicates that they fail to satisfy the fundamental subjective requirement for copyright protection.

Intellectual (Spiritual) Content

In the continental tradition, a work qualifies for copyright protection only if it constitutes a *geistige Schöpfung*, that is, a creation arising from the personal intellectual and creative activity of a human author, rather than from a purely technical or mechanical process (Ulmer, 1980). One of the key conditions for the protection of a copyrighted work under the Copyright and Related Rights Act is the existence of spiritual content within the work (Narodna skupština, 2019.).

It is precisely this capacity to shape and convey meaning through the creative act that forms the basis of the spirituality of a copyrighted work. A copyrighted work originates from the human spirit and addresses the human spirit, and its spiritual content may possess rational, emotional, symbolic, or aesthetic dimensions (Lucas & Lucas, 2012). This spiritual content gives the work its meaning and enables it to function as a means of communication among individuals, that is, as a social creation that transcends its material embodiment.

Accordingly, spiritual content implies that the work carries a certain meaning that is the result of the author's creative activity and that is accessible to the perception of others. Such meaning need not be unambiguous, nor must it be rationally articulated, but it must constitute an expression of the human spirit objectified within the work. For this reason, a copyrighted work cannot be regarded as a mere accumulation of signs, symbols, or data, but rather as a whole in which spiritual content is inseparable from its expressed form.

The spiritual content of the work therefore represents the link between the author as subject and the work as object of protection, with the author being the bearer of the meaning manifested in the work. Without such a connection between the subject and the spiritual content, one cannot speak of a copyrighted work within the meaning of the Copyright and Related Rights Act.

Although AI generated content may contain structures, symbols, or forms that are intelligible to humans and that may appear meaningful, the question remains whether such creations can be said to possess spiritual content in the copyright sense. If spiritual content presupposes the existence of a subject who attributes meaning to the work and communicates through it with others, then creations produced without a human creative act cannot be regarded as copyrighted works, regardless of their external complexity or apparent creativity. Nevertheless, it is necessary to distinguish between the effect a work produces and the source from which it originates.

On the basis of the foregoing, it may be concluded that spiritual content constitutes a fundamental and indispensable element of a copyrighted work, deriving from the human spirit and required to manifest in the work as meaning and significance.

Spiritual Nature of Content and AI-Generated Output

The distinction is of fundamental importance: the spiritual content of a copyrighted work is not identical to the meaning that an audience may recognize in it. Rather, it presupposes that the work has arisen as the result of the creative self-expression of a specific author. Where there is no subject who, through the creative act, introduces a personal spiritual contribution into the work, the component that qualifies the work as a “spiritual creation” within the meaning of the law is likewise absent.

Even in situations where a human provides prompts or instructions to a generative system, it is necessary to examine whether the human contribution has reached the level of creative shaping of spiritual content, or whether the human remained at the level of an initial stimulus while the specific form and structure of the output were produced through automated model processing. In the latter case, it is difficult to speak of spiritual content originating from the author’s inner world, as there exists a discontinuity between the human and the final result in the process of creative formation.

It may therefore be argued that generative artificial intelligence is capable of producing a form that invites interpretation, but not spiritual content in the legal sense.

Originality

Pursuant to Article 2(1) of the Law on Copyright and Related Rights (Narodna skupština, 2019), a copyrighted work must constitute an “original spiritual creation of the author.” In both theory and practice, originality is interpreted as the result of the author’s personal creative activity (Court of Justice of the European Union [CJEU], 2009). The subjective theory of originality emphasizes that personal creativity and the author’s individual expression form the foundation of originality in copyright law, meaning that originality does not depend solely on the novelty of form, but on the author as a creative subject (Zhang & Zhao, 2023).

Originality does not relate to ideas, concepts, or methods as such, but to the manner in which they are expressed, that is, to the form in which the spiritual content is shaped. No copyrighted work arises in complete isolation, rather, it always develops in dialogue with preexisting expressions and forms. Consequently, when speaking of originality, one refers to the existence of certain elements that are autonomous, individual, and author-specific in relation to prior works. Copyright protection extends precisely to those original elements, while the scope of protection depends on the degree of originality achieved in the particular work.

In copyright theory and case law, originality is traditionally understood as requiring two cumulative elements: that the work be independently created and that it results from the author’s own creative choices, reflecting a minimum degree of intellectual creativity (CJEU, 2009; CJEU, 2011). It is emphasized in copyright scholarship that a work must bear the author’s personal imprint and represent the result of his or her creative choices.

Depending on the type of work, originality may manifest through different elements: in literary works through plot, style, composition, or characterization; in visual arts through the selection of subject matter, composition, color, and light; in photography through angle, framing, choice of moment, and artistic intervention.

It follows that originality cannot be reduced to mere difference or statistical uniqueness of the result. A work may be formally different from all others and yet fail to qualify as an original spiritual creation of the author if it does not reflect a personal and meaningful contribution of the creator. In this sense, originality presupposes conceptual and spiritual meaning, not merely novelty in the form or structure of the work. If originality presupposes the author's personal spiritual imprint and freedom of creative choice, then outputs generated without such choice cannot be regarded as original in the copyright sense, regardless of the degree of their formal novelty.

It may therefore be concluded that originality, as an essential condition of copyright protection, represents a synthesis of spiritual content and the author's free creative activity, manifested through the form of the work.

Originality and AI-Generated Outputs

In the case law of the Court of Justice of the European Union, originality is defined as the author's own intellectual creation, whereby the Court emphasizes that a work must reflect the author's personality through the free and creative choices made in the process of creation (CJEU, 2009; CJEU, 2011). A key element of the originality test is therefore the existence of free and creative choices.

Generative systems, however, do not operate on the basis of freedom. Their "choices" are not autonomous, but are the result of mathematical functions and optimization processes. They cannot depart from their own model in the sense of making an existential or creative decision to "be different", but instead produce an output that represents the statistically most probable configuration in a given context. The formal novelty of AI generated outputs is not sufficient to satisfy the requirement of originality.

This, however, does not exclude the possibility that, in certain cases, a human author, using a generative system as a tool, may shape the final result through creative decisions to an extent that fulfils the requirement of originality. In such situations, it is necessary to assess individually the degree and nature of the human contribution, since questions of authorship and originality do not depend on the mere use of technology, but on the creative role assumed by the human in the process of creation.

Expression in a Specific Form

Accordingly, copyright protection does not extend to ideas as such, but to their expression in a specific form, since form represents the manifestation of the author's creative and intellectual content that the law protects (Smith, 2024). While spiritual content refers to the meaning and significance embodied in the work, form constitutes the manner in which that meaning is made accessible to sensory perception and to the understanding of others. Ideas, concepts, and mental constructs, insofar as they remain solely within the author's mind, cannot be the object of copyright protection, as they are not susceptible to legal assessment, identification, or analysis.

Communication itself is a codified system of signs, and form likewise represents a codified system of signs used by humans in communication (Popović & Marković, 2020). Language, sound, movement,

visual elements, or their combination constitute the means through which the spiritual content of a work is conveyed and made accessible to reception. For this reason, the form of a copyright work may be understood as a communicative medium through which spiritual content becomes recognizable, analyzable, and interpretable.

Form is not a mere external shape (outer shell) of an idea, but the manner in which spiritual content is individualized and shaped through the author's creative choices. It is precisely through form that the spiritual content of a work is materialized and becomes the object of legal protection. As it is generally accepted in copyright theory that protection extends to the expression of an idea rather than to the idea itself, the form of a work represents the key link between spiritual content and legal protection, since it is through form that the author's creative contribution becomes legally relevant (World Intellectual Property Organization [WIPO], 2023).

Content generated by artificial intelligence undeniably possesses an expressed form in a sensorially recognizable sense. Nevertheless, the question arises whether such form is the result of the shaping of an author's spiritual content or merely a formal structure produced in the absence of a creative subject. This question will be addressed in the subsequent analysis.

Form of a Copyright Work and Generative Artificial Intelligence

The mere existence of a formal structure is not sufficient, in itself, to qualify as form in the copyright law sense. The decisive criterion is not whether something has a form, but how that form came into being.

In this sense, it is possible to speak of formal expressiveness without copyright form. In other words, form exists here as a technical fact, but not as a legally relevant manifestation of authorial creativity. Copyright form is not the mere consequence of a functional or optimal arrangement of elements, but the result of creative choices.

This, however, does not exclude the possibility that the form of a copyright work may arise in a process in which a human uses generative artificial intelligence as a tool. Where a human, through selection, modification, and arrangement of generated outputs, assumes an active and decisive creative role, the form of the final work may reflect that person's spiritual or intellectual contribution. In such cases, form is not the product of the system itself, but the result of a human creative process in which technology functions as a subordinate instrument.

From the foregoing, it follows that, in the context of generative artificial intelligence, a clear distinction must be drawn between the existence of a formal structure and the existence of form in the copyright-law sense. Only form that arises as an expression of the spiritual or intellectual content and creative choices of an author can be the object of copyright protection. By contrast, form that results exclusively from automated generation remains outside the scope of copyright law.

Conclusion

Copyright work can be understood exclusively as an original spiritual creation of a human being, expressed in a specific form. The analysis of generative artificial intelligence shows that, although such systems may produce outputs that are formally complex, semantically coherent, and aesthetically persuasive, they do not fulfil the fundamental prerequisite of a copyright work: the existence of a subject whose spiritual content is expressed in the work.

In this respect, the paper highlights the necessity of clearly distinguishing between the existence of a formal structure and the existence of form in the copyright law sense.

The more closely AI-generated outputs resemble human works, the more difficult it becomes, based solely on the expression itself, to determine whether a particular form originates from the spiritual content of an author or from purely technical generation.

This leads to the conclusion that the distinction between formal structure and form in the copyright law sense cannot be established solely on the basis of the external characteristics of the result, but requires an analysis of the process by which it was created. The decisive question becomes not how the work appears, but how it came into being and who made the creative decisions in the process. Where a human assumes an active, free, and creative role through selection, modification, arrangement, and editing, it is possible to speak of form in the copyright sense. Conversely, where the result is exclusively the outcome of an automated process, form remains legally irrelevant, regardless of the degree of aesthetic or semantic persuasiveness.

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Generativna veštačka inteligencija i autorsko pravo

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Sažetak

Razvoj generativne veštačke inteligencije intenzivirao je raspravu o tome da li sadržaji generisani veštačkom inteligencijom mogu uživati autorskopravnu zaštitu. U pravnim sistemima koji autorsko delo definišu kao originalnu intelektualnu ili duhovnu tvorevinu autora, postavlja se pitanje da li rezultati generisani veštačkom inteligencijom ispunjavaju osnovne uslove autorstva, originalnosti i izraženosti u određenoj formi. U radu se analizira pojam autorskog dela u skladu sa Zakonom o autorskom i srodnim pravima, kao i relevantna praksa Evropskog suda pravde, posebno standard „autorovo sopstveno intelektualno stvaranje“ razvijen u praksi Suda pravde Evropske unije. Analiza pokazuje da originalnost u autorskom pravu podrazumeva slobodne i kreativne izbore koje donosi ljudski autor. Iako generativni sistemi veštačke inteligencije mogu proizvoditi statistički nove i formalno uobličene rezultate, takvi rezultati ne sadrže lični intelektualni doprinos neophodan za autorskopravnu zaštitu, osim ako čovek ne preuzme odlučujuću kreativnu ulogu u procesu. Rad zaključuje da se autorskopravna zaštita ne može proširiti na isključivo sadržaje generisane veštačkom inteligencijom, a da se pritom ne ugroze pojmovni temelji autorstva i originalnosti u autorskom pravu.

Ključne reči: autorsko pravo, generativna veštačka inteligencija (VI), originalnost, duhovna tvorevina, autorstvo.