



## 2019 Study Question

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**Copyright in artificially generated works**

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### I. Current law and practice

**Please answer all questions in Part I on the basis of your Group's current law and practice.**

**To answer questions 1 to 11, please base your answers on the Working Example in the full text of the Study Guidelines. If you believe that reference to other scenarios/examples is useful, please raise such scenarios/examples and their relevance to the questions presented.**

**1** Does your current law / practice contain laws, rules, regulations or case law decisions specifically relating to Copyright and/or Related Rights in artificially-generated works?

No

Please Explain

No, there is no current law, rules, regulations or case law decisions specifically relating to Copyright and/or Related Rights in AI-generated works.

Nevertheless, the regulation of AI-generated works has been discussed in some of the articles by legal scholars or practitioners (See Karmen Turk, Maarja Pild. „With, or Without a Kratt – That Is the Question. A Civil Law View of Robots and Artificial Intelligence“ Juridica 2019/1, p 43-55). They acknowledged that under the current law AI's legal capacity could be the closest to the one of an animal, *i.e.* it should be treated as a thing in the meaning of General Part of the Civil Code Act § 49 (1). It has also been considered to treat AI in some cases as an agent of natural or legal persons or to grant the AI restricted passive legal capacity or restricted active legal capacity.

### A. Application of general Copyright criteria to artificially-generated works

#### **Authorship**

**2** Does your current law / practice require that a work has to be created by an *identified author* (natural or legal person) to be protected by Copyright?  
\* By answering this question, don't take into consideration anonymous works and pseudonym works. Please also note that this question is independent from the question of the rights holder.

No

Please Explain

No, there is a presumption of authorship according to Copyright Act § 29 (1) and according to Copyright Act § 29 (2) that also applies to anonymous works.

**3** Does your current law / practice require that a work has to be created by a *human* to be protected by Copyright?  
\* Please note that this question is independent from the question of the rights holder.

Yes

Please Explain

Yes, according to Copyright Act § 28 (2) only natural person or persons who created the work can be authors of the work.

**4** Could one or more of the natural persons involved in the process of the following Working Examples be qualified as authors of the resulting work in your jurisdiction?

**4.a** The authors of the program or code that defines the AI entities?  
\* As noted in Paragraph 2 of the Discussion developed in the full text of the Study Guidelines, "AI entities" refers to the system(s) that creates the AI-created work and does not refer to a legal or juridical entity.

No

Please Explain

As under the current law there is no regulation related to AI-generated works, then it would be difficult to qualify any of the natural person below as authors of the resulting work.

Therefore, the answer is basically the same to questions 4(a)-4(d). Under described scenarios in theory human(s) could potentially qualify as (joint) author(s) of the work if the originality criteria are met. It would be most likely with the scenario described in question 4(a) and less likely in case of persons mentioned in other questions.

**4.b** A human who defines the particular goal or objective to be achieved by the AI entities?

No

Please Explain

As under the current law there is no regulation related to AI-generated works, then it would be difficult to qualify any of the natural person below as authors of the resulting work.

Therefore, the answer is basically the same to questions 4(a)-4(d). Under described scenarios in theory human(s) could potentially qualify as (joint) author(s) of the work if the originality criteria are met. It would be most likely with the scenario described in question 4(a) and less likely in case of persons mentioned in other questions.

**4.c** A human who selects the data or the data selection criteria (inputs)?

No

Please Explain

As under the current law there is no regulation related to AI-generated works, then it would be difficult to qualify any of the natural person below as authors of the resulting work.

Therefore, the answer is basically the same to questions 4(a)-4(d). Under described scenarios in theory human(s) could potentially qualify as (joint) author(s) of the work if the originality criteria are met. It would be most likely with the scenario described in question 4(a) and less likely in case of persons mentioned in other questions.

**4.d** A human who selects a particular artificially-generated work from multiple works generated by the AI entities?

No

Please Explain

As under the current law there is no regulation related to AI-generated works, then it would be difficult to qualify any of the natural person below as authors of the resulting work.

Therefore, the answer is basically the same to questions 4(a)-4(d). Under described scenarios in theory human(s) could potentially qualify as (joint) author(s) of the work if the originality criteria are met. It would be most likely with the scenario described in question 4(a) and less likely in case of persons mentioned in other questions.

**4.e** Someone else?

### **Originality**

**5** If, in your jurisdiction, originality is a requirement for a work to be protected by Copyright, could an artificially-generated work qualify as an original work in your jurisdiction?

Yes

Please Explain

The requirement for originality is stated in Copyright Act § 4 (2). According to that a work is original if it is the author's own intellectual creation.

Therefore, in theory, AI-created work could qualify as an original work if it is found that AI used its own creativity to create the work. In Estonia the requirement of originality is seen through the creative process so if it is found that the AI was free in its creative process then the work could qualify as an original work.

Nevertheless, as under the current law the creativity aspect is interpreted quite narrowly, it is usually argued that AI is not creatively free as the parameters of the work have been set by humans so it cannot create an original work, which is the main requirement for a protected work.

### **Supplementary criteria**

**6** If there are supplementary or other requirements for a work to be protected by Copyright in your current law / practice, can an artificially-generated work in accordance with the Working Example fulfill them?

Yes

Please Explain

According to Copyright Act the requirements for a work to be protected by Copyright are:

- That the work has to be created in the field of either in literary, artistic and scientific works (Copyright Act § 4)
- The work has to be original
- The work has to be expressed in an objective form and can be perceived and reproduced in this form either directly or by means of technical devices
- There are no exclusion grounds

It results then, that AI-generated work could satisfy the supplementary criteria. The main problem would still be to prove that AI was free in its creative process to create the work.

### **Original ownership**

**7** Assuming that, under your current law / practice, an artificially-generated work is protectable by Copyright, who would be the “first owner” of the Copyright, *i.e.* the person defined by the law as the *original owner* ?

According to Copyright Act § 28(1) the moral and economic rights of an author shall initially belong to the author of a work unless otherwise prescribed by this Act with regard to the economic rights of the author. Therefore, the original owner would be the author of the work.

**8** Under your current law / practice, could an AI system or machine be qualified as a juridical entity capable of holding Copyright or Related Rights?

No

Please Explain

No, under current law and practice the legal capacity of an AI system is the closest to the one of an animal *i.e.* it should be treated as a thing in the meaning of General Part of the Civil Code Act § 49(1) .

**9** Does your current law / practice allow non-humans and/or non-juridical entities to hold Copyright?

No

Please Explain

According to Copyright Act § 28 the moral rights of the work can only belong to natural person(s) and in some cases the economic rights can also belong to legal person(s). The latter includes cases when works are created in execution of duties of employment or cases when economic rights have been transferred by a contract.

### **Term of protection**

**10** Assuming that, under your current law / practice, an artificially-generated work is protectable by Copyright, what is the term of protection?

The general rule is that the term of protection of copyright shall be the life of the author and seventy years after his or her death, irrespective of the date when the work is lawfully made available to the public (Copyright Act § 38(1)).

Exceptions are:

- Copyright Act § 39: The term of protection of copyright in a work created by two or more persons as a result of their joint creative activity shall be the life of the last surviving author and seventy years after his or her death.
- Copyright Act § 40: In the case of anonymous or pseudonymous works, the term of protection of copyright shall run for seventy years after the work is lawfully made available to the public.
- Copyright Act § 41(1) The term of protection of copyright in a collective work or work created in the execution of duties shall run for seventy years after the work is lawfully made available to the public.
- Copyright Act § 41(11) The term of protection of copyright in an audiovisual work shall expire seventy years after the death of the last surviving author (director, script writer, author of dialogue, author of a musical work specifically created for use in the audiovisual work).
- Copyright Act § 41(3) Where a work is published as a serial (volumes, parts, issues or instalments, etc.) and the term of protection of copyright runs from the time when the work was lawfully made available to the public, the term of protection for each instalment shall expire seventy years after the time when the instalment is lawfully made available to the public.

It follows then, that the term of the protection of an AI-generated work depends on how to qualify its authorship.

## B. Application of Related Rights criteria to artificially-generated works

**11** Could a work created with the process of the Working Example be protected by any type of Related Rights?

If YES, please answer the following sub-questions:

No

Please Explain

No, under current law according to Copyright Act § 62(1) related rights apply to a performer, producer of phonograms, broadcasting service provider, producer of the first fixation of a film, a person who, after the expiry of copyright protection, for the first time lawfully publishes or lawfully directs at the public a previously unpublished work, and a person who publishes a critical or scientific publication of a work not protected by copyright.

**1.a** What type(s) of Related Rights would be applicable?

N/A

**1.b** What would be the requirements for protection by Related Rights?

N/A

**1.c** Who would be the original owner of the Related Rights?

N/A

**1.d** What would be the term of the protection?

N/A

## II. Policy considerations and proposals for improvements of your Group's current law

**12** Could any of the following aspects of your Group's current law or practice relating to artificially-generated works be improved?

**2.a** Requirements for artificially-generated works to be protected by Copyright and/or Related Rights?

No

Please Explain

There definitely is room for improvement in terms of legal clarity when the work is created in a way as explained in the Working Example.

As there is no law or practice relating to AI-generated works. In our opinion an AI generated work without any human involvement should not be protected by Copyright.

**2.b** Ownership of artificially-generated works?

Yes

please explain.

Under current law the ownership of AI-generated works is not regulated in any way. Therefore, it should be considered how to protect the work itself and investments made in this process.

One possibility could be to consider giving AI the status that is similar to a legal person so that the work could be protected by the Copyright (AI would be the owner of right of the works) and the AI would be represented by a natural person. The other option would be that the owner of the rights to works created by the AI is owned by someone related to creation of the AI or someone involved in creation of the work by the AI. Please see further answer to question 15.

**2.c** Term of protection of artificially-generated works?

Yes

Please Explain

It should be specified in the Copyright Act what is the term of the protection of AI-generated works.

The general rule, which is that the term of protection of copyright shall be the life of the author and seventy years after his or her death, irrespective of the date when the work is lawfully made available to the public, does not match with the essence of AI-generated works as the work is in constant improvement. Also, should an AI system be granted an authorship the general rule would not work as the system is immortal. Therefore the term of protection should clearly be limited in time.

**13** Are there any other policy considerations and/or proposals for improvement to your Group's current law falling within the scope of this Study Question?

Yes

Please Explain

The main issue regarding AI-generated works is the legal uncertainty about the fact who holds the Copyright of works created with no human involvement. This uncertainty makes businesses and programmers cautious when investing into development of AI systems. As one of the purposes of intellectual property is to encourage the creation of works there is no doubt that this uncertainty hampers the process.

Nevertheless, the investments made into AI systems do not necessarily have to be protected by granting AI systems with authorship rights.

One option to consider would be protecting the AI-generated work by analogy to the regulation of rights of makers of databases in the meaning of Copyright Act § 75<sup>1</sup>. The purpose of this *sui generis* regulation is to provide independent protection for databases by establishing special rights for makers of databases to protect investments made by them.

So the AI-generated work could be by analogy qualified as a database in the meaning of Copyright Act § 75<sup>2</sup> as the work generated by the AI system is essentially the sum of different collection of works, data or other economics that is arranged in a systematic or methodical way and individually accessible by electronic or other means. That way respective *sui generis* rights could belong to natural or legal persons who are qualified as makers of AI systems.

### III. Proposals for harmonisation

**Please consult with relevant in-house / industry members of your Group in responding to Part III.**

**To answer questions 14 to 32, please base your answers on the Working Example in the full text of the Study Guidelines. If you believe that reference to other scenarios/examples is useful, please explain such scenarios/examples and their relevance to the questions presented.**

**14** In your opinion, should Copyright protection and/or Related Rights protection for artificially-generated works be harmonized? For what reasons?

Yes

For what reasons?  
please respond to the following questions without regard to your Group

There definitely is need for some legal certainty when it comes to the protection of AI-generated works. Due to the nature of AI systems, the regulation should not be done only on national levels. As the Copyright and Related Rights are harmonised, so should it be when AI-generated works are included in this regulation. The impact of the rights is cross-border and it should be harmonised to avoid disparities between national legislations .

**15** In your opinion, should artificially-generated works be protected by Copyright and/or Related Rights?

Yes

For what reasons?

There definitely should be regulation for AI-generated rights to guarantee the security of investments made in this field and through that encourage innovation.

There are several options for granting protection for AI-generated works:

**I To treat the persons who created the AI or made it possible for the AI to create the work as authors of the work** – that way would be protected the creative contribution made by the natural person.

**II To regulate AI-generated work through *sui generis* rights** – under the current regulation there already exists one set of *sui generis* rights that provides independent protection for databases by establishing special rights for makers of databases to protect investments made by them. By analogy similar regulation could be created for AI-generated works. A new distinct set of rights would help to solve the question about the ownership of rights as well as protect the investments in AI systems by a natural person or a legal person. In that case the ownership of the rights could belong to natural or legal persons who have made a substantial investment, evaluated qualitatively or quantitatively, in the collecting, obtaining, verification, arranging or presentation of data which essentially is basis for the AI-generated work.

It is our position that a new distinct set of rights would be a better way to solve the matter of ownership of rights of AI-generated works rather than expanding the idea of authorship and originality under Copyright Law. The authorship of a work is centred around the idea of originality and the creative process only applicable to humans. Therefore, trying to fit AI-generated works under the originality criteria would mean rethinking the whole concept of originality and authorship.

## A. Copyright protection of artificially-generated works

### 16 Should intervention by a human be a condition for Copyright protection of an artificially-generated work?

Yes

at which step or steps in the Working Example would human intervention be required?

This answer depends on the model that is chosen for the protection of AI-generated rights. If the rights are protected by *sui generis* rights, then the human intervention should not be a condition for the protection.

On the other hand, if the rights are protected so that the persons who created the AI or made it possible for the AI to create the work are treated as authors, then human intervention should be a condition at least in step 2 of the Working Example.

### 17 Should originality be a condition for Copyright protection of an artificially-generated work?

Yes

Please Explain

Should AI-generated works be protected by Copyright then yes, originality should remain the condition for protection. That is because the whole Copyright system is seen through the creative process and the originality of the work that is the result of this creative process. If all other works would remain subjects to originality criteria except AI-generated works, then AI-generated works would enjoy wider protection under Copyright law.

Main problem with applying originality criteria directly to AI-generated works is the question about the freedom of the creative process of the AI system. It could be argued that AI system itself can never fulfil the originality criteria because the creative process will always be intervened by humans. Humans create the programme and determine the information AI system is receiving. Therefore, for an AI system to fulfil the originality criteria, there is always lack of creative freedom.

### 18 What other requirements, if any, should be conditions for Copyright protection of an artificially-generated work?

If AI-generated rights are to be protected under Copyright regulation then in principle there is no need for other requirements besides the ones that are already set.

### 19 Who should be the original owner of the Copyright on an artificially-generated work?

The original owner of the Copyright would be either the persons who created the AI system or in terms of *sui generis* rights the rights of AI-generated works would originally belong to persons who have made a substantial investment, evaluated qualitatively or quantitatively, in the collecting, obtaining, verification, arranging or presentation of data which essentially is the basis for the AI-generated work.

### 20 What should be the term of Copyright protection for an artificially-generated work?



If the author of AI-generated work is considered to be a natural person, then the term could be set by analogy the same as for any work *i.e.* the protection shall expire seventy years after the death of the author.

If the protection is granted as a *sui generis* right, then the term could be fixed by analogy as it is with the rights of makers of databases.

**21** **Should Economic Rights differ between artificially-generated works and regular works?**

No

Please Explain

No, there is no need for differentiation when it comes to economic rights.

**22** **Considering existing exceptions to Copyright, should any exceptions apply differently to artificially-generated works versus other works?**

No

Please Explain

No, the exceptions should apply the same to all works protected by Copyright.

**23** **Should there be any new exceptions to Copyright specifically applicable to artificially-generated works?**

No

Please Explain

Not necessarily. One possible new exception would be the term of the protection of AI-generated rights, but this also depends on the model that is chosen for protecting the AI-generated works.

**24** **Moral Rights**

**24.a** **Should moral rights be recognized in artificially-generated works?**

No

Please Explain

No, for the same reasons as under the current law only natural persons can be authors of the work and hold moral rights of works. Moral rights have a lot to do with the dignity and personality of the author. It is impossible to violate moral rights of an entity that is not a conscious being.

In discussing this matter it is important to reflect the reasons why there exists a need to protect AI-generated works in a first place. It is not because we believe in the moral dignity or inherent value of AI systems in general but to protect the investments made into these systems. That is why if at all, only economic rights should be recognised for AI-generated works.

**24.b** If yes, what prerogatives should the moral rights include (for example, the right to claim authorship of the work, the right to object to any distortion, mutilation or other modification of the work)?

N/A

**24.c** If yes, who should exercise the prerogatives of moral rights?

N/A

## B. Related Rights protection of artificially-generated works

**25** Considering existing Related Rights, should any Related Rights apply to artificially-generated works?

No

Please Explain

In our opinion Related Rights should not apply to artificially generated works.

**26** Should there be any new Related Rights specifically applicable to artificially-generated works?

No

**27** If an existing or new Related Right is applicable to artificially-generated works, what requirements should be conditions for protection?

In our opinion Related Rights should not apply to artificially generated works.

**28** Which Related Rights' economic rights and moral rights should apply to artificially-generated works?

In our opinion Related Rights should not apply to artificially generated works.

**29** Who should be the original owner of the Related Right?

In our opinion Related Rights should not apply to artificially generated works.

**30** What should be the term of protection of the Related Right?

In our opinion Related Rights should not apply to artificially generated works.

**31** Please comment on any additional issues concerning any aspect of Copyright protection and Related Rights protection for artificially-generated works you consider relevant to this Study Question.

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In our opinion Related Rights should not apply to artificially generated works.

**32** Please indicate which industry sector views provided by in-house counsel are included in your Group's answers to Part III.

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