



## 2019 Study Question

Submission date: May 24, 2019

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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

N/A

### 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

While it is not required that the maker is necessarily known, it is required that the maker is a natural person or a legal entity.

**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

While the Dutch Copyright Act does not (explicitly) specify that a work is to be created by humans, it follows from case law of the Dutch Supreme Court, human creation of that work is indeed required to be protected by copyright. [\[1\]](#)

In order for a work to be protected by copyright, such work has to have its own, original character and shall carry the personal stamp of its maker. It is widely assumed (and supported by case law) that the work therefore must be the result of creative human labor and of creative choices; i.e. the work must be the product of the human mind.

#### Footnotes

1. [^ Dutch Supreme Court 30 May 2008, ECLI:NL:HR:2008:BC2153 \(Endstra\).](#)

**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

Assuming that the authors have only written the code that defines the AI, and, thus, that no creative (personal) stamp from the authors was present in this code and subsequent work, the author of a program or code falls within the scope of the Computer programs Directive. The subsequent work that emerges from the AI entity can however not be protected under Dutch copyright law.

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

Yes

Please Explain

Yes, if the definition of the particular goal or objective meets the criteria of being sufficiently creative and provided that said creative goals are

reflected in the work

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

Yes

Please Explain

Yes, if the data selection meets the criteria of being sufficiently creative and provided that said creative goals are reflected in the work.

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

No

Please Explain

In the Working Example, the work has been fully created by AI. Therefore, the work doesn't qualify for copyright protection under Dutch law

**4.e Someone else?**

No

Please Explain

N/A

## **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

Originality is a requirement for copyright protection, which also follows from the Infopaq case of the ECJ (ECJ 16 July 2009, C-5/08, paragraphs 34, 37 and 45).

In The Netherlands, originality is considered to have two aspects. First of all, a work should have an own original character in the sense that it is not derived from another work. Secondly, it should bear the personal stamp of the author (Dutch Supreme Court 4 January 1991, NJ 1991/606 *Van Dale / Romme*). This implies that the work should be the result of creative human activity and thus of creative choices as a result of which it can be considered a product of the human intellect. This does not include banal or trivial aspects that did not require creative activity (Dutch Supreme Court 30 May 2008, NJ 2008/556, **Endstra-tapes**). So at least some degree of human creativity expressed in a specific work is required. A certain style in which various works can be created cannot be protected by copyright, neither technical or objective results. On the other hand it is not required that the maker aimed at producing a coherent creation that was consciously made in a specific way [*"Om aan die eis te voldoen is naar het oordeel van het hof nodig dat het werk door de maker als een coherente creatie is geconcipieerd en door hem bewust in een bepaalde vorm(geving) is gegoten"*]. (Dutch Supreme Court 30 May 2008, NJ 2008/556, **Endstra-tapes** and Dutch Supreme Court 28 June 1946, NJ 1946/712, **Van Gelder/Van Rijn**). The originality should follow from the work itself and not from the intention of the maker.

This means that an artificially-generated work that has been produced without human intervention at the level of data selection, creation and disclosure, is not protected by copyright under Dutch law.

The Dutch group also considers it unlikely that intervention limited to the process of data selection (step 1), without any intervention in the AI creating the work (step 2) would lead to a copyrighted work.

If a human person is directly implicated in the work creation either by giving instructions to the AI or in modifying the work created by AI, the Dutch group considers it possible that the originality threshold will be passed.

Intervention in the phase of work selection / disclosure consisting simply of choosing one product of the AI from a series of products created, does not result in meeting the originality threshold.

### **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?

No

Please Explain

There are no supplementary requirements.

### **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* ?

As a general remark, please be note that artificially-generated work is **not** protectable by Dutch copyright under current law. The answer to this question is therefore **based on hypothetical assumptions only**, based on the Working Examples.

Assuming that artificially-generated works would indeed qualify for copyright protection, the main rule would be that the maker of the work (the AI) would be the "first owner". However, AI systems aren't qualified as juridical entities capable of holding copyrights. Depending on the circumstances, the following persons/entities would qualify as the (fictive) "first owners":

- a) The person or entity who first publishes the work (Article 4, sub 1, Dutch Copyright Act);
- b) In the event the person/entity who operates the AI system contributes sufficiently creative contribution to the work: joint ownership between the AI and the respective person/entity, which would, in practice, amount to the respective person/entity being the "first owner" (Article 5, sub 1, Dutch Copyright Act);
- c) In the event the work was made after the design by and under the direction and supervision of another person/entity: the person/entity who exercised supervision (Article 6 Dutch Copyright Act);
- d) In case the (person operating the) AI system is an employee: the company that employs the (person operating the) AI system (Article 7 Dutch Copyright Act);
- e) The one who is first identified as the maker on the work itself (Article 9 Dutch Copyright Act);
- f) (arguably) the person/entity bearing the financial risk for the artificially-generated work (Article 45d Dutch Copyright Act).

1. *One or more AI entities are created that are able to receive inputs from the environment, interpret and learn from such inputs, and exhibit related and flexible behaviours and actions that help the entity achieve a particular goal or objective over a period of time. The particular goal or objective to be achieved is selected by a human and, for purposes of this Study Question, involves generation of works of a type that would normally be afforded copyright protection.*

Assuming that the end product is sufficiently creative to qualify for copyright protection, either the AI system itself (main rule), the person/entity first publishing the work (a), the company employing (the person operating the) AI system (d) or the one referenced as the author of the work (e) could qualify as the "first owner" of the copyright protected work. In addition, in the event the particular goal/objective as defined by the human can be considered, in itself, sufficiently creative (for example: a format), AND said creative contribution (such as a format) is reflected in the end product, the human could qualify as the original owner (c), or, both the human and the AI system as collective owners (b).

2. *Data is selected to be input to the one or more AI entities. The data may be prior works such as artwork, music or literature as in the examples above. The data also may be inputs from sensors or video cameras or input from other sources, such as the Internet, based on certain selection criteria.*

(a) *The data or data selection criteria are selected by a human*

Assuming that the end product is sufficiently creative to qualify for copyright protection, either the AI system itself (main rule), the person/entity first publishing the work (a), the company employing (the person operating the) AI system (d) or the one referenced as the author of the work (e) could qualify as the "first owner" of the copyright protected work. In addition, in the event the data selection criteria as defined by the human can be considered, in itself, sufficiently creative (for example: a format), AND said creative contribution (such as a format) is reflected in the end product, the human could qualify as the original owner (c), or, both the human and the AI system as collective owners (b).

(b) *The data or data selection criteria are not selected by a human*

Assuming that the end product is sufficiently creative to qualify for copyright protection, either the AI system itself (main rule), the person/entity first publishing the work (a), the company employing (the person operating the) AI system (d) or the one referenced as the author of the work (e) could qualify as the "first owner" of the copyright protected work.

3. *The selected data is input to the one or more AI entities, which achieve the particular goal or objective over time by generating "new works" that are not identical to any prior work,*

(a) *A human makes a qualitative or aesthetic selection of one work from the new works*

The selection itself is not creative. Therefore, and assuming that the end product is sufficiently creative to qualify for copyright protection, either the AI system itself (main rule), the person/entity first publishing the work (a), the company employing (the person operating the) AI system (d) or the one referenced as the author of the work (e) could qualify as the "first owner" of the copyright protected work.

(b) *No human intervention is involved in selection of a work from the new works*

Assuming that the end product is sufficiently creative to qualify for copyright protection, either the AI system itself (main rule), the person/entity first publishing the work (a), the company employing (the person operating the) AI system (d) or the one referenced as the author of the work (e) could qualify as the "first owner" of the copyright protected 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

An AI system or a machine (or a robot) is not recognized as a legal entity under current Dutch law and practice and therefore cannot be a holder of any rights and obligations including Copyright and Related Rights.

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

No

Please Explain

Non-juridical entities cannot be a holder of Copyright under current Dutch law and practice. I refer to the answer of question 8) above.

Non-humans may, under certain circumstances, be holders of copyright. The Dutch Copyright Act recognizes a so-called *fictitious maker* in articles 7 and 8 of the Dutch Copyright Act. The Copyright Act provides for two types of fictions of authorship, whereby an employer or legal entity may, under the circumstances as defined in article 7 (employer) and article 8 (legal entity) of the Dutch Copyright Act be regarded as the maker and therefore the holder of copyright instead of the original maker.

### **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?**

Note that under current Dutch law and practice an AI-generated work is not protectable by Copyright. The answer to this question therefore only provides an overview of the term of protection for copyrighted works as currently recognized under Dutch copyright law.

The main rule is 70 years after the death of the maker. If a legal entity has been designated as a fictitious maker and on the basis of Article 8 is the copyright holder, a term of protection of 70 years applies as well. This term of protection is in that case however calculated from the first of January of the year following that in which the work was lawfully published for the first time.

### **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:**

Yes

Please Explain

Certain types of works created with the process of the Working Example could be protected.

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

The sui generis database right of the Database Directive could be applicable with regard to databases in the sense of article 1(2) of the Database Directive, and that were created with the process of the Working Example.

Furthermore, Design Rights protection could be applicable to designs that fall in the scope of article 3a of the Community Design Regulation.

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

The threshold for protection of a database is laid out in article 7 of the Database Directive. A qualitatively and/or quantitatively substantial investment is required in either the obtaining, verification or presentation of the contents of the database/work. A fundamental limitation in the protection afforded under the sui generis right is that it is limited to databases that meet the criteria under 1(2) of the Database Directive, thus ruling out works that are not a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means. Most notably this means that traditional 'works' (such as songs, books) cannot enjoy this Related Rights protection.

In the context of AI please note that it is required that the “substantial investment” must be attributable to the said database work. In case the same AI is instrumental in creating multiple databases problems will arise with regard to ‘labeling’ of the investment in the AI and attributing this investment to a specific database.

With regard to Design Right protection to the extent that it is new and has individual character. Design Right protection can be deemed interesting for a certain type of works made through AI, because there is no explicit criterion requiring human involvement. However, there are strict limitations and a large quantity of traditional works (such as songs, books) fall outside of the scope of Design protection.

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

The original owner of the related right is the maker of a database. The maker of the database is the person who takes the initiative and the risk of investing;

The right to the Community design shall vest in the designer or his successor in title.

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

15 years for database rights, and 5 years (with possible extension up to 25 years) for design rights.

**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?**

Yes

Please Explain

The Dutch Group considers that artificially-generated works pose many questions with regard to the boundaries of copyright protection, and thus there is an undesirable lack in legal certainty. The Industry would welcome any type of guidance and clarity on the requirements for artificially generated works to be protected by Copyright and/or Related Rights

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

Yes

please explain.

As above sub a)

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

Yes

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Please Explain

As above sub a)

**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?

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No

Please Explain

As above sub 1

### 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?

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Yes

For what reasons?

please respond to the following questions without regard to your Group

Copyright protection and/or Related Rights protection for artificially-generated works should be harmonized. The main reason for harmonization would be that the Industry (and public alike) would benefit from a clear scope of protection with regard to artificially-generated works that is the same irrespective of jurisdiction.

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

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No

For what reasons?

The *majority* view of the Dutch Group is that artificially-generated works should *not* be awarded protection in order to provide an incentive for the creation of such works. Full Copyright protection should be reserved for works that meet the criteria for Copyright protection. Only in so far as an artificially-generated work will meet these criteria it can be protected by Copyright Law. The same goes for Related Rights protection.

The *minority* view is that protection should be awarded protection to provide an incentive for the creation of such works.

### A. Copyright protection of artificially-generated works

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

No

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Please Explain

See question 15: the normal criteria for Copyright protection should apply.

In the *minority* view, intervention by a human is required as a condition for Copyright protection. A human should be directly implicated in the work creation by either giving instructions to the AI in order to modify its work or by modifying the work created by AI in order to obtain the final work.

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

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Yes

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Please Explain

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

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None

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

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The human that is directly implicated in the work creation and has – therefor – taken the creative choices that are protected.

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

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The regular term of 70 years.

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

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No

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Please Explain

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

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No

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Please Explain

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

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No

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Please Explain

However, the *minority* view is that to foster the development of intellectual intelligence, there should be a new exception that allows for the reproduction of works for the exclusive use as training data for an AI.

**24** **Moral Rights**

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

No

Please Explain

There should be no difference with other works. Moral rights will be accepted with regard to the creative work of the author.

**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)?**

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

**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

However, the *minority* view on *new* Related Rights is that the introduction of a separate sui generis regime pertaining to artificially-generated works, a pseudo-copyright protection with objective conditions for protection, the same economic rights as copyright protection grants, and a shorter term of protection is an option that should be considered.

**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?**

N/A

In the *minority* view, the condition for protection of a new Related Right should be that only a criterion originality is applied, where the originality is solely determined on the basis of an 'own place in the market' and whether (and so far as) the work involved is (new and) original compared to other works already known. Therefore, there will be no criterion of 'creative choices'.

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

N/A

In the *minority* view, the economic rights of Copyright protection should be afforded to the new Related Right. No moral rights should apply

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

N/A

In the *minority* view, the original owner of the new Related Right should be the entity responsible for the first publication of the work. The entity that is responsible for the first publication will – in most circumstances be the same entity as the entity that has borne the investment for the making of the artificially generated work, whilst the first publication serves as a more reliable and objective criterion to determine the right holder.

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

N/A

In the *minority* view: 3 years after first making available

**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.**

N/A

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

N/A