

NORDEMANN

Copyright Protection for AI-generated Works?

AI – Legal Implications

IFCLA meets tech hub Barcelona • Online Conference 2021 • 1 October 2021

Prof. Dr. Jan Bernd Nordemann, LL.M. (Cambridge)

Attorney in Berlin • Partner at NORDEMANN
Certified Attorney for Copyright and Media Law
Certified Attorney for Industrial Property Rights
Honorary Professor at Humboldt-University Berlin

Program

I. AI-generated Works: The European Approach in Copyright Law

1. Genuine Copyright Protection for AI-generated works?
2. Protection via Neighboring Rights?

II. International Approach to AI and IP:

1. The AIPPI-Resolution 2019
2. WIPO-Conversation on IP and AI
3. U.S. Copyright Office

AI-generated Works: The European Approach in Copyright Law

AI-generated Works: The European Approach in Copyright Law

Can AI-generated works be protected under German/European Copyright Law?

Protection Requirement: works need to be original in a sense that they are their author's own intellectual creations

- *CJEU, 13 November 2018, C-310/17, para. 33 – Levola/Smilde Foods (“Dutch Cheese Case”)*
- *CJEU, 11 June 2020, C-833/18, para. 22 – Brompton Bicycle*

AI-generated Works: The European Approach in Copyright Law

Can AI-generated works be protected under German/European Copyright Law?

Protection Requirement: works need to be original in a sense that they are their author's own intellectual creations

- *CJEU, 13 November 2018, C-310/17, para. 33 – Levola/Smilde Foods (“Dutch Cheese Case”)*
- *CJEU, 11 June 2020, C-833/18, para. 22 – Brompton Bicycle*
- Author may only be a natural person:
 - CJEU, 9. February 2012 - C-277/10 para 47 et seq. - *Luksan/van der Let* (only the film director = author)
 - See also Sec 7 German Copyright Act: The author only a natural person.

AI-generated Works: The European Approach in Copyright Law

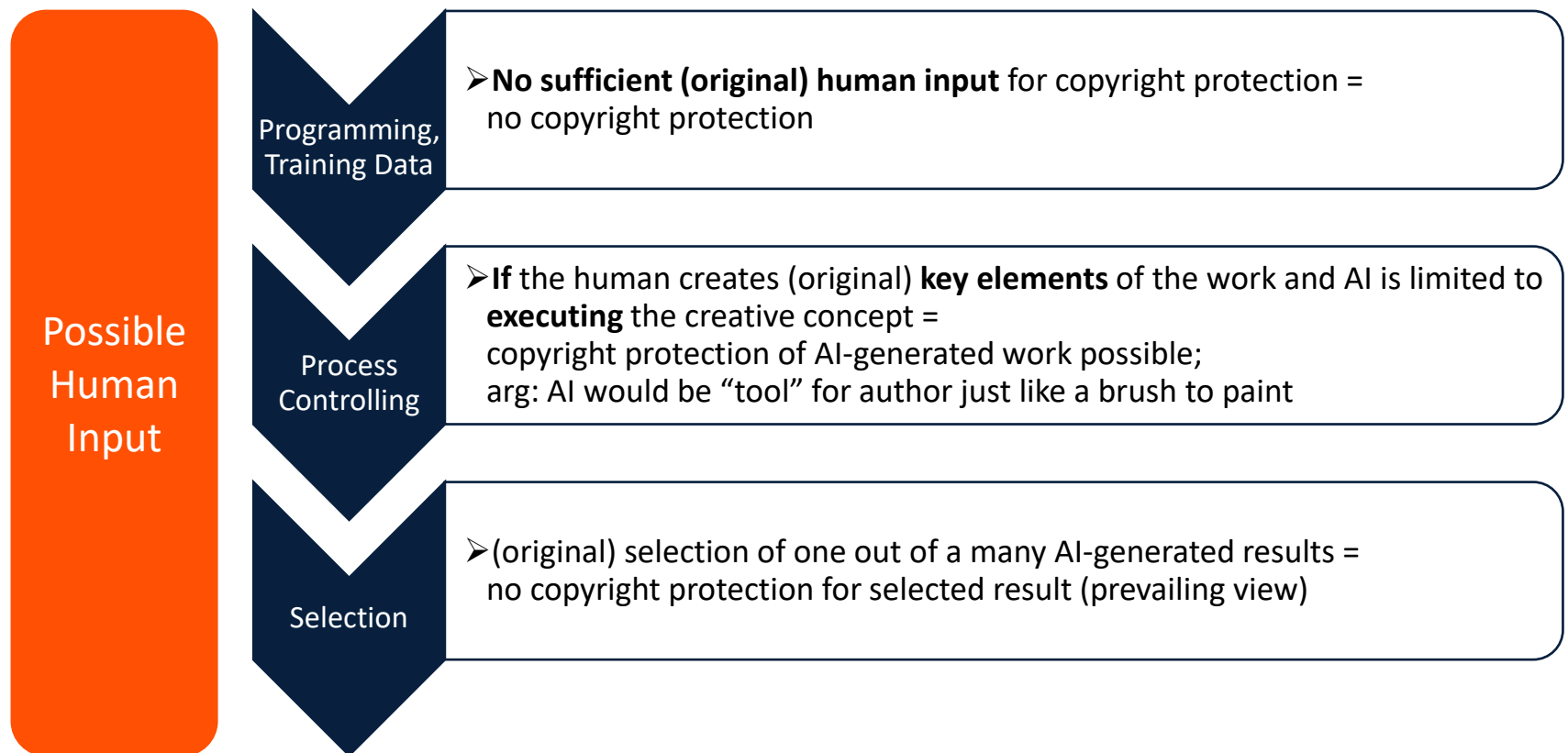
Can AI-generated works be protected under German/European Copyright Law?

Protection Requirement: works need to be original in a sense that they are their author's own intellectual creations

- *CJEU, 13 November 2018, C-310/17, para. 33 – Levola/Smilde Foods (“Dutch Cheese Case”)*
- *CJEU, 11 June 2020, C-833/18, para. 22 – Brompton Bicycle*
- Author may only be a natural person:
 - CJEU, 9. February 2012 - C-277/10 para 47 et seq. - *Luksan/van der Let* (only the film director = author)
 - See also Sec 7 German Copyright Act: The author only a natural person.
- EU Copyright Regimes rely on **human creation**: Without sufficient (original) **human input** → no copyright protection possible

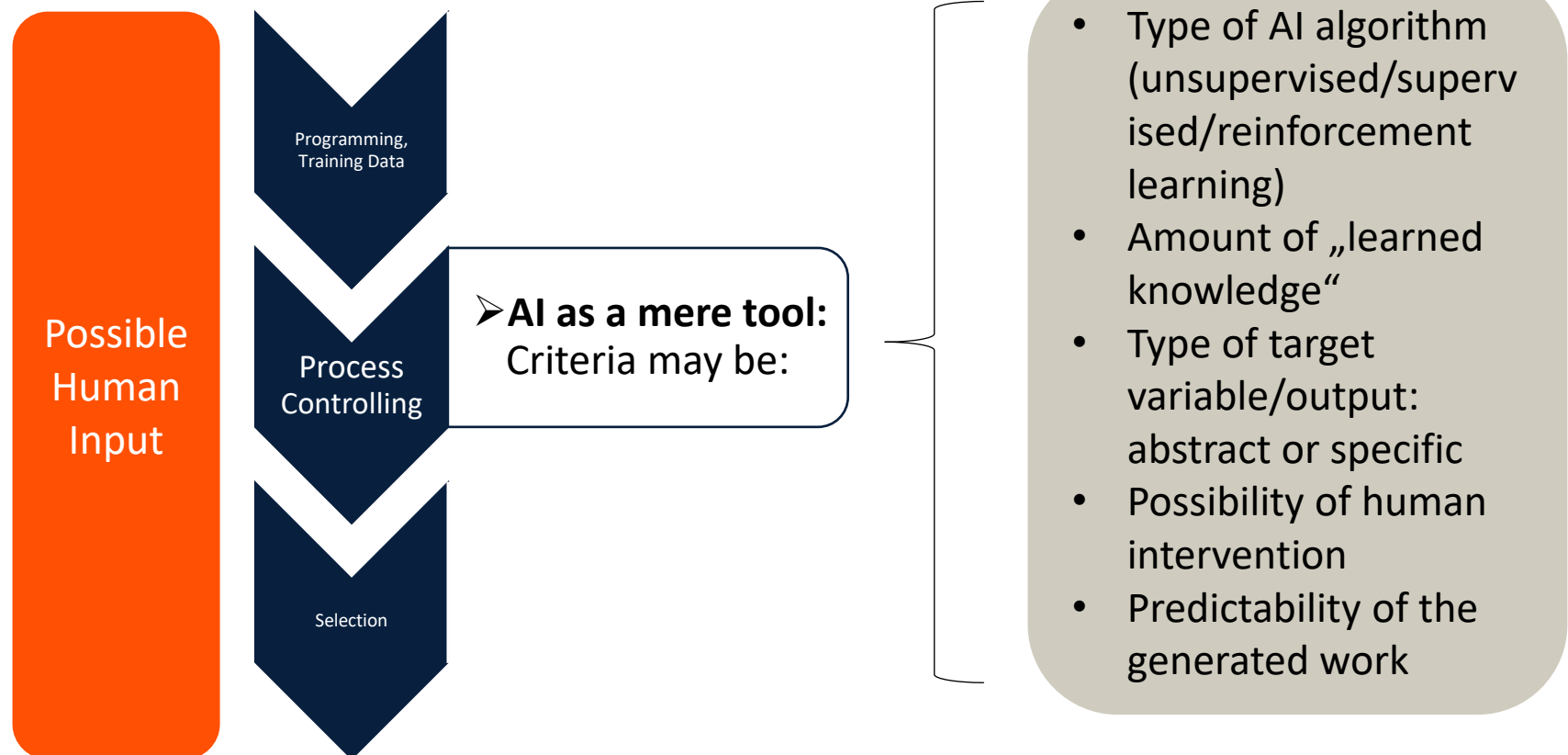
AI-generated Works: The European Approach in Copyright Law

Can AI-generated works be protected under German/European Copyright Law?



AI-generated Works: The European Approach in Copyright Law

Can AI-generated works be protected under European Copyright Law?



AI-generated Works: The European Approach in Copyright Law

Can AI-generated works be protected under European Copyright Law?

➤ “Without sufficient (original) **human input** → no copyright protection possible”

➤ Today, most AI-generated output that looks like an original work seems to have sufficient human input:

➤ Example: “The Next Rembrandt” - Portrait is not a lost work by the Dutch master but a 3D printed painting made by AI software that was fed with existing Rembrandt paintings. But it saw relevant (original) human input before finished.

www.thenextrembrandt.com



AI-generated Works: The European Approach in Copyright Law

Can AI-generated works be protected under European Copyright Law?

➤ “Without sufficient (original) **human input** → no copyright protection possible”

➤ Today, most AI-generated output that looks like an original work seems to have sufficient human input:

- Example: “Beautiful the World” by Uncanny Valley, winner of the “AI Eurovision Song Contest”
<https://www.theverge.com/2020/5/14/21258493/ai-eurovision-song-contest-australia-winning-entry-uncanny-valley>



The screenshot shows a news article from The Verge. The header includes the site name 'THE VERGE' and navigation links for 'TECH', 'REVIEWS', 'SCIENCE', 'CREATORS', 'ENTERTAINMENT', 'VIDEO', and 'MORE'. Below the header, there are social media icons for Facebook, Twitter, and a 'SHARE' button. The main headline reads: 'Australia wins first AI 'Eurovision Song Contest' by sampling koalas and kookaburras'. A sub-headline states: 'But the last-place entry relied on AI as much as possible'. The byline is 'By James Vincent | May 14, 2020, 12:51pm EDT'. Below the text is a video player showing three AI-generated characters in yellow outfits. To the right of the video player is an 'Ads by Google' section with a 'Send feedback' button and a 'Why this ad?' link.

Protection via Neighboring Rights?

Do other neighboring rights protect AI-generated works?

AI Photos

- EU: No harmonized protection.
Germany: Neighboring right for photos, but only when an haptically existing object is copied -> no protection for photos of AI made objects.

AI Music

- EU: Harmonized neighboring right of the music producer; should also protect AI recordings, as **protection of mere investment**.

AI Film

- EU: Harmonized neighboring right of the film producer; should also protect AI films, as **protection of mere investment**.

AI Art

- EU: No neighboring right existing

AI Text

- EU: Harmonized neighboring right of the press publisher; subject of discussion, whether **AI generated news articles** fall in the scope of the protection or not
- **EU: For non-press texts**, no neighboring right

Protection via Neighboring Rights?

Do other neighboring rights protect AI-generated works?



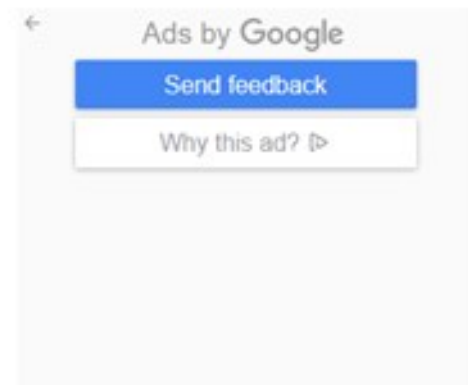
US & WORLD ENTERTAINMENT TECH

Australia wins first AI 'Eurovision Song Contest' by sampling koalas and kookaburras

But the last-place entry relied on AI as much as possible

By James Vincent | May 14, 2020, 12:51pm EDT

f SHARE



Protection via Neighboring Rights?

Do other neighboring rights protect AI-generated works?



International Approach to AI and IP: AIPPI, WIPO and the U.S. Copyright Office

AIPPI Resolution

AIPPI Resolution: Copyright in artificially generated works, 2019 (<https://bit.ly/3BX1C3P>)

AIPPI: International Association for the Protection of Intellectual Property

➤ AIPPI especially resolves, that:

2. AI-generated works should only be eligible for protection by Copyright **if there is a human intervention** in the creation of the work and provided that the other conditions for the protection are met. AI generated works should not be protected by Copyright without human intervention.
3. Originality (...) of the generated work **resulting from the human intervention** should be a condition for the protection by Copyright.
4. AI generated works should not be precluded from obtaining protection by existing Related Rights on the basis they are AI generated and should obtain that protection as long as they meet the required criteria for obtaining protection.
5. As AI is still developing, it is too early to take a position on the question, whether AI generated works not covered by such existing protection (...) should be eligible for exclusive rights protection as a Related Right (...).

WIPO & The U.S. Copyright Office

WIPO

- “WIPO Conversation on Intellectual Property and Artificial Intelligence” established in 2019
- Third Session held 12/2020, discussion continues:
- Variety of viewpoints, but: speakers agree that a **globally coordinated**, consensus-based approach to AI and IP should be fostered & WIPO takes a key role in the process

U.S. Copyright Office

- “Comments of the United States Copyright Office to the (WIPO Discussion)”
 - “(...) it is important to keep a global dialogue open, while encouraging countries to **individually** explore and establish their perspectives. Each country has its own unique copyright system and, in turn, its own way of grappling with AI issues.”
 - **Does the U.S. Copyright Office support the WIPO plan for a globally coordinated, consensus-based approach to AI and IP?**

What do you think:

Should mere AI-generated works be copyright protected?

Should there be at least neighboring right protection for all mere AI products? What about countries without neighboring rights?

NORDEMANN

Thank You.

Prof. Dr. Jan Bernd Nordemann, LL.M. (Cambridge)

Partner at NORDEMANN

**Nordemann Czychowski & Partner
Rechtsanwältinnen und Rechtsanwälte Partnerschaft mbB i.G.**

Registration Court: Potsdam District Court • Partnership Register: PR 162 P

Office Berlin:

Kurfürstendamm 59
10707 Berlin
Phone: +49 30 8632398-0
Fax: +49 30 8632398-21
info@nordemann.de

Office Potsdam:

Helene-Lange-Str. 3
14469 Potsdam
Phone: +49 331 27543-0
Fax: +49 331 27543-21
info@nordemann.de

nordemann.de