

**Paris Congress**

**ALAI 2023**

**Artificial intelligence, copyright and related rights**

**June 22-23, 2023**

*To National Reporters:*

*The questionnaire uses the neutral term AI "production" to refer to content generated by an artificial intelligence system. As opposed to the term "work (of the mind)" which is the one that describes the classical object of copyright protection. This means that the content we are interested in is content produced by the artificial intelligence machine (or "system"), itself fed upstream by works of the mind, reproduced in a training data base. The margin of intervention of the final user is thus a priori very limited, but not always non-existent. The hypothesis concerned by this Congress is thus closer to what the ALAI once studied as "computer-generated creations" than to "computer-assisted creations" (see the 1989 Quebec City Congress).*

*In the mind of the editors of this questionnaire, an "artificial intelligence system" is defined as a computer system that allows, with a certain autonomy, automated decision making or predictions influencing real or virtual environments<sup>1</sup>.*

*The questions raised are numerous because of the disruptive nature of the phenomenon, the multitude of issues and the theoretical, economic and social importance of the stakes.*

*Some of the questions will undoubtedly be accompanied by brief negative answers, which is already a useful answer for the General Reporters. Simply indicate these ("no", "none").*

*In other cases, the answers may be uncertain. In these cases, it is easiest to follow the classic pattern: "1) What do statutes and regulations say? 2) What does the caselaw say? 3) What does the national group think? To questions 1 and 2 above, the answer will often be "Nothing specific about AI but the relevant reference text/principle might be ...". Regarding 3), the national group is not obliged to have taken a position.*

*It is of this uncertainty and diversity that we will try to draw together, in June, a clear picture.*

*The team of the Scientific Committee (Alexandra Bensamoun, Jane Ginsburg, Silke von Lewinski, Pierre Sirinelli) is of course at your disposal to explain a question that might not seem, because of the particular context, immediately clear.*

*Thank you all and we look forward to seeing you in Paris.*

*Note: the questionnaires must be returned by the national groups no later than May 8, 2023. They will be sent to Pierre Sirinelli ([pierre.sirinelli@univ-paris1.fr](mailto:pierre.sirinelli@univ-paris1.fr)) and Sarah Dormont ([sarah.dormont@u-pec.fr](mailto:sarah.dormont@u-pec.fr)).*

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<sup>1</sup> This definition is comparable to the one retained by the European Union in the discussion on the AI Act (proposed regulation COM(2021) 206 final, March 2023 position), itself inspired by the 2019 OECD Recommendation on AI.

## Artificial intelligence, copyright and related rights

### The contours of the relationship

#### 1. *Understanding*

**1.1** - Has your national or regional law adopted a legal definition of AI?

**1.2** - Can you provide some examples of current uses of AI and its productions in the cultural sector of your country?

**1.3** - *(Optional) What are the issues that have been exposed in your country on this subject: stakes, difficulties, orientations, proposals...?*

**1.4** - Are there any initiatives in your country or region aimed at regulating the use of AI in the cultural sectors?

#### 2. *Understanding the upstream*

**2.1** - Are the AI system or its components likely to be protected by intellectual property rights (copyright and/or industrial property – patents, trade secrets . . .) ?

**2.2** - Can rights under copyright be enforced against the use of protected contents by AI training?

Does the insertion of a pre-existing work into the computer system implicate rights under copyright?

If so, in order to avoid a finding of infringement, are the copying or storage covered by an exception?

**2.3** - In your country, are there any proposals to change the law and in which direction?

For example, by deeming that the incorporation of preexisting works into AI systems does not create an actionable "reproduction" of the works? Or by creating a new exception? Or by implementing a compulsory licensing system? Other solutions?

**2.4** - Do the "terms of service" of the platforms available in your country authorize the copying and storage for the purpose of constituting "training data" and the creation of "AI outputs" of the works posted by the users of the platform? If so, give examples of the relevant Terms of Service.

**2.5** - Are you aware of the conclusion of individual or collective licenses on this point? If yes, in which fields of creation? Under what conditions? If so, give examples.

### **3. Using AI as a tool for rights management and administration**

**3.1** - To what extent is AI used to locate or identify protected content, to moderate it, or even to fight against infringement?

**3.2** - If computer tools are used for this identification, are there rules to allow the evaluation of the tools used in order to verify the relevance of the results produced by the AI system? (For example, in the framework of the European Digital Services Act, platforms have an obligation of transparency, notably on the tools used and the results they produce - art. 15).

If the answer is yes, are these rules derived from practice (usages, contracts, softlaw...) or imposed by legislation or regulation, or by case law?

**3.3** - To what extent is AI used as a tool to recommend protected content? For example, the proposal of "playlists" by Pandora or any other online communication service making recommendations of works.

**3.4** - Should we fear, through this recommendation, a risk of dilution of contents and revenues due to a possible opacity of the system?

**3.5** - Does your national or regional law contain transparency obligations on the use of an AI system for rights management in your national or regional law (e.g. the European Digital Services Act)? What are they?

**3.6** - In general, do these tools have to comply with rules in terms of product safety or conformity? Are there procedures for certification of these tools by an authority or by professional associations? Are suppliers subject to specific due diligence obligations?

#### ***Artificial intelligence and literary and artistic property***

##### ***The contours of protection***

##### ***The status of AI Outputs***

#### **1. Access to protection**

##### **- Characterization of the AI output as a "Work" of authorship**

*Note: If an AI output has all the external aspects of a work of authorship, is it possible to consider it as a work of authorship protected by copyright?*

**4.1** - Does a "Work" always imply the presence of a physical person?

**4.2** - From what threshold is it possible to consider that there is a human intervention giving rise to an original work in the realization of an AI output? What types of intervention would allow to know if this threshold has been crossed?

**4.3** - How can we distinguish between AI-assisted outputs and outputs generated by an AI?

**4.4** - In some countries, it is asserted that there can only be a work of authorship if the form obtained is the result of creative work by the author in the sense that the latter is aware of the result (work) he wants to achieve even if this result is a little different from his hope/expectations. This requirement, for example, would exclude the quality of author of a person deprived of discernment (for example, an insane person, a very young child, a somnambulist...) or would entail the refusal of protection of a production which would be only the fruit of random forces.

Does this condition exist in your country?

If so, is it a statutory or administrative requirement? Does it derive from caselaw? From secondary authorities (e.g. academic writings)?

**4.5** - Are the criteria traditionally considered to be irrelevant (such as merit, or purpose) taken into account in the framework of protecting an AI output?

#### ***- Characterization of a performer's performance***

**4.6** - In order to be vested with a neighboring right, does the performer necessarily have to be a natural person?

In other words, is an "interpretation" from an artificial intelligence protectable under neighbouring rights?

**4.7** - In order to be vested with a neighbouring right, must the performer necessarily interpret a work created by a natural person?

In other words, is the interpretation, by a human being, of a production of artificial intelligence protectable under neighboring rights? (Suppose an AI-generated musical composition: if performed by a human being, would the performance be protectable?)

#### ***- If the AI output does not qualify for copyright protection***

**4.8** - Are the productions generated by AI, that are not covered by copyright, in the public domain?

**4.9** - In your country, could the productions generated by AI be qualified as "commons" (it being understood that, in some countries, the notion of "commons" has a different meaning than "public domain")? Under what conditions or according to what criteria?

**4.10** - How can we be sure that the creation presented as realized by an author is not an artificial production?

**4.11** - Usually, a collective management organization (CMO) manages a catalog attached to an author without making distinctions between "works" / "productions". How to manage the case of an author whose usual works belong to his repertoire but who would also use an AI system to generate other "productions"?

## **2. The rights regime**

### ***- The choice of the right (nature, ownership, regime, limitations)***

*\* As your legislation currently stands:*

**5.1** - Is the output generated by an artificial intelligence system likely to be protected by copyright in your country?

**5.2** - If applicable, does the production generated by an artificial intelligence system benefit from a full copyright, in particular as regards the duration and scope of the rights, or from a modified or special right?

**5.3** - If there is a protection by an adapted or special copyright (as it exists sometimes for certain works, as for example, in Europe, concerning computer programs), what are the modifications or adaptations?

**5.4** - Who is the author? Who would be the owner of the rights? Could the output be considered a joint work? If so, between whom and in what cases?

**5.5** - Is there a special ownership rule (presumption, or even fiction, as it exists in some countries for computer-generated creations; see for example, art. 9 (3) Copyright, Designs and Patents Act (CDPA) in England)?

*\* In the event of a possible legislative change:*

*Are there any concrete proposals in your country related to the items listed below? If so, answer questions 5.6 and following.*

*If not :*

*i) the national rapporteurs can give their personal opinion while making it clear that these are mere proposals of secondary authorities (e.g., academics) and not positive law;*

*ii) or they can go directly to the questions numbered 6 and following.*

**5.6** - What would be the criteria to be retained to allow access to copyright protection for AI outputs?

**5.7** - Should a specific copyright be created for these productions?

**5.8** - With what particularities (e.g., duration and content of the rights) ?

**5.9** - Can there still be a moral right ?

**5.10** - Should there be a special ownership rule (presumption, or even fiction, as it exists in some countries for computer-generated creations)?

**5.11** - Should a deposit be required? / A declaration of "origin"?

**5.12** - Should a kind of neighbouring right or a sui generis right be created?

**5.13** - What would be its characteristics?

**5.14** - The rights covered?

**5.15** - Generally speaking, what would be the limitations on or exceptions to this new right?

**5.16** - How should this protection be articulated with other existing protections?

**5.17** - In the absence of protection by a property right, are there any compromise solutions?

For example, a kind of paying public domain for them: collection of royalties paid to a collective management organization for distribution among authors continuing to create works in the traditional way? What else?

**- AI and violation of rights: the choice of remedy**

**6.1** - Can an AI output infringe, and to what extent? Who would be liable?

**6.2** - Are there other legal means (e.g. unfair competition, parasitism) to engage the liability of the person responsible for the AI output? (Who would that person be?)

**6.3** - Beyond copyright, can personality rights prevent the realization by an AI of a production using the voice or physical aspect of another person?

**- Question of transparency and remuneration**

**7.1** - In your country, is there a requirement (legal, administrative, jurisprudential, arising from practice) that AI-generated content in general be declared as such (see for example in Europe, the AI Act of April 21, 2021<sup>2</sup> and the more nuanced position of the Council of the European Union of November 2022<sup>3</sup>)?

*(Optional) If not, do you think that such a solution should be adopted?*

**7.2** - If applicable, how is the sharing and payment of remuneration carried out when AI is involved in the creative process?

*(Optional) If there is no existing solution, what solution do you think should be adopted?*

**7.3** - If applicable, how is the sum linked to the AI allocated (cultural action? payment to other rights holders...)

*(Optional) If there is no existing solution, what solution do you think should be adopted?*

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<sup>2</sup> <https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX%3A52021PC0206>

<sup>3</sup> <https://www.consilium.europa.eu/fr/press/press-releases/2022/12/06/artificial-intelligence-act-council-calls-for-promoting-safe-ai-that-respects-fundamental-rights/>