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Creations generated by artificial intelligence in literary and artistic property: the new death of the author?

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Abstract
The development of generative artificial intelligence models is at the heart of two important debates in terms of copyright: firstly, does the use of previous works as training data constitute an infringement of copyright? The issue is utterly sensitive as creators fear a negative effect of these tools on their future careers. Secondly, what regime is applicable to "outputs", more precisely to textual, visual, musical or audiovisual contents generated by artificial intelligence? Are these works without an author? Are they protected by an intellectual property right, and if so, under what conditions and for whose benefit? These highly topical questions find a particular echo in the writings of the French semiologist and philosopher Roland Barthes (1915-1980), notably in his famous article entitled "The Death of the Author". The objectives of this study are, firstly, to present the questions raised by generative artificial intelligence in copyright law (mainly under the prism of French law, but also with regard to Romanian law, European law and court decisions taken on the subject in different countries), and, secondly, to determine to what extent the arguments developed by Roland Barthes, leading to relativising the role of the author, could contribute to current debates on this adaptation of copyright to generative artificial intelligence.

Keywords: artificial intelligence, copyright, datasets, creation process, Roland Barthes

Introduction[1]

Various productions generated by artificial intelligence (AI), particularly of a literary, artistic or musical nature, are drawing attention to their formal qualities. In the literary sphere, the ChatGPT application is raising new concerns for schools and

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[1] This article is the expanded and updated version of a communication produced in French on November 11, 2023 at the Western University of Timisoara on the occasion of the 8th edition of the Intellectual Property Conference; then, on February 17, 2024 the lecture was held in Romanian, at the Alexandru Ioan Cuza University of Iași, on the 7th edition of the "Legal Perspective on the Internet" Conference.

universities because of the new risks of cheating[2]; its GPT-4 version even passed an American bar exam allowing to become a lawyer (Piquard, 2023). In music, a collaborative project recently completed Beethoven's Tenth Symphony (Gault, 2021). The title *Daddy's car*, written in the style of the Beatles songs, is also often cited as an example (Bensamoun, 2020, p. 104). A.I.-generated graphic art has also attracted attention, including *The Next Rembrandt,* a collaboration between Microsoft computer scientists and art historians (Ginsburg, 2022, pp. 94-95), and the *Edmond de Bellamy's Portrait*, sold at auction at Christie's for over 400 000 dollars.

The generative artificial intelligence systems used to produce this type of content are based on the fairly traditional principles of *machine learning*, in which there are two main steps: first, an upstream artificial intelligence learning phase, during which the algorithm develops an inference model by analysing a large amount of data submitted to it; this training data is often referred to as a *dataset*; then, downstream, an artificial intelligence use or inference phase, during which the user submits a request or "prompt" to the artificial intelligence. By applying its inference model, the artificial intelligence will produce an *output*. If we take the example of *The Next Rembrandt* portrait, the algorithm first analysed 160 000 fragments from 346 of Rembrandt's works, in order to deduce common characteristics, for example in the use of chiaroscuro, the proportions of the faces or the type of subjects the painter often chose. The application was then asked to create a portrait typical of Rembrandt's style. The 346 portraits fed into the application make up the *dataset,* and the resulting portrait is the output. In the same way, 13 000 musical scores were needed to train the *Flowmachine* Artificial Intelligence that contributed to the production of the track *Daddy's car*.

These two stages, the learning and the use of artificial intelligence, raise distinct questions in terms of literary and artistic property (Zollinger, 2023). Upstream, does the use of protected works as datasets for artificial intelligence constitute exploitation requiring prior authorisation from the rights holders? This question is at the heart of several recent lawsuits initiated in the United States, notably by a group of famous novelists (including the author of the hit series *Games of Thrones*) and by the *New York Times* (Carre, 2024).

Downstream, what regime applies to outputs, to contents generated by artificial intelligence? The present study will focus on the question of copyright. In the continental European tradition, and particularly in French and Romanian law, copyright protects original works of the mind, i.e. those that reflect the author's personality (Case C-145/10, §88). But is it possible to see the expression of a personality in creations generated by artificial intelligence? And can these

[2] On this subject: the 3rd International Colloquium for Research and Action on Academic Integrity: IRAFPA "Challenges and uncertainties of academic integrity in the age of artificial intelligence", University of Coimbra (Portugal), June 20–22, 2024: https://irafpa.org/publications/actes-coimbra-2024/, accessed November 16, 2024.

productions be protected by copyright? Are they works without authors, or can rights be attributed, and if so, to whom?

The two questions of whether content generated by artificial intelligence disregards the rights of prior authors on the one hand, and constitutes works without authors, on the other, are illuminated, in a curious if not anachronistic way, by the thinking of the twentieth-century French philosopher and semiologist Roland Barthes. In an article first published in 1967, Barthes highlighted the "Death of the Author". Does artificial intelligence make Barthes's wish come true? In the light of his writings from more than half a century ago, can we imagine what he would think of the development of this technology[3]? Is it possible, on this subject, to bring linguistic semiology and law into dialogue?

Such a dialogue project seems relevant to undertake, for several reasons. Indeed, copyright legislation reflects a certain perception of the process of literary and artistic creation. A link is thus sometimes affirmed, within the doctrine, between the romantic artistic movement of the 19th century, and the personalist character of French "droit d'auteur" (Gaubiac, 2020; Serfaty, 2023). However, in his work, Roland Barthes contributed to rethinking this relationship between the author and his work; as summarized by Professors Forray and Pimont, "a literary work is classically linked to its author by a 'proprietary' hermeneutic relationship which must be called into question" (Forray & Pimont, 2019). Is it not the advent of generative artificial intelligence the perfect opportunity to rethink the foundations of our law?

Ms Guittard, a specialist in Roland Barthes, has undertaken to compare Barthes's theories with René Gouriou's law thesis, published in 1959, on the protection of photographs by copyright. She drew the following conclusion: the works of these two authors would come together on the point of considering that it is not "possible to rigorously establish the legitimacy of the Author/Work pair in the photographic image according to the model hitherto applied to Fine Arts and Literature (...). Photography (...) produces (...) a paradigm shift by promoting the receptor (...): without going completely into the quantum metaphor, the possibility

[3] We asked to ChatGPT 40 mini, as a prompt: "What would Roland Barthes think of Generative AI?". The output/answer is relevant: "Though Barthes died in 1980, long before generative AI emerged, we can make an educated guess about how he might respond to this technology based on his ideas about language, the 'Death of the Author' and the fluid nature of meaning. (…) Barthes's famous essay 'The Death of the Author' (1967) argued that the identity and intentions of an author should not dictate the interpretation of their text. Instead, meaning emerges from the interaction between the text and the reader. If Barthes were to encounter generative AI, he might see it as a natural extension of this concept—an 'author' without a fixed identity or intention. AI would further decentralize authorship, removing even the human creator from the production of meaning. AI-generated texts, images, or other creative outputs could be seen as the product of a system that lacks a singular, intentional 'author' making the reader's interpretation all the more important in constructing meaning (…)".

of an image becomes, depending on who is looking at it, artistic or documentary, or both, or nothing. And the author basically no longer has any intellectual property rights to determine its meaning" (Guittard, 2019, p. 220). Reflections on the status of content generated by artificial intelligence frequently refer to the status of photographic works and the debates that the latter have given rise to (Cassar, 2024; Kamina, 2023). However, the link between Barthes's thought and the potential opened up by generative artificial intelligence does not seem, for the moment, to have been formally considered by the French copyright doctrine. The main study on the relations between Barthes and the Law, carried out in France, raising among other topics the question of copyright, does not consider the particular situation of generative artificial intelligence (Guittard & Nicolas, 2019). This is easily explainable: these are the proceedings of a 2016 conference, published in 2019, the subject was then probably too recent to be properly identified and integrated into the reflection. Since then, publications on the regime applicable to content generated by artificial intelligence in intellectual property have multiplied, but without directly invoking Barthes's thoughts, or in a succinct and indirect manner, for example, Forest (2022). Very modestly, we will thus try to lay some foundations for such a dialogue, on a subject appearing to be particularly suitable for it, or rather to enrich our presentation of copyright applied to generative AI with some questions taken from the work of Roland Barthes.

As the author of this article is neither a semiologist nor an expert in the thought of Roland Barthes, the risk of an incomplete analysis or misinterpretation should not be overlooked. The choice was made to identify, among the themes present in the work of Roland Barthes, those relating more specifically to the analysis of the creative process and the place to be accorded, or denied, to the author. In addition to his famous article on 'the Death of the Author', which is essential here, we felt it would be interesting to recall that Barthes helped to shed light on the concept of intertextuality, which is addressed in several of his writings. The study has chosen to use one of these publications, which has the double merit of summarising his thinking on this point and of having been officially translated into English (Barthes, 1981). As for the risks of misinterpretation, we assume the position of the 'Spectator' here, of the reader in the Barthesian sense, seeking meaning in the text itself of the writings cited and not in a search for the author's intentions... (see, also, adopting this stance, Forray & Pimont, 2019). Barthesian thought seems, at the end of this (rapid and non-expert) survey of his work, interesting to invoke on two more particular grounds: on the one hand, the notion of intertextuality questions the way in which a human creator's prior learning unconsciously shows through in the creations he or she subsequently formalises. Should the use of previous works as preliminary training elements ("training data") for both human creators and generative artificial intelligences be subject to copyright control or, on the contrary, escape it? On the other hand, is it not that the authorless work, which stems from the

'Death of the Author' declared by Barthes, is most perfectly illustrated by literary or artistic content generated by artificial intelligence?

These two philosophical and legal questions linked to the two technical phases (learning and use) of artificial intelligence will be addressed in turn. Firstly, upstream, do generative artificial intelligences "steal" from previous authors by using their works as datasets? Secondly, downstream, is content generated by artificial intelligence a work without an author and without copyright?

1. Upstream: does artificial intelligence steal from/counterfeit authors?

In order to train artificial intelligence to produce literary or artistic works, it must first be provided with a large number of intellectual works to analyse as training data. Is this particular use of works free, or must it be regulated and, in particular, is it covered by copyright? From a philosophical or semiological point of view inspired by Roland Barthes, this process could be seen as a generalised and technical form of intertextuality, a phenomenon common to all processes of literary and artistic creation. From a legal point of view, we need to determine whether this use requires the author's prior authorisation, as part of his or her economic exploitation rights.

1.1. Intertextuality: role of previous "texts" in the creative process

Roland Barthes adopts a broad notion of text, which applies to both literary and artistic creation. In a writing entitled "Theory of the text", he defines the notion of intertextuality in these terms: "The text redistributes language (…). One of the paths of this deconstruction-reconstruction is to permute texts, scraps of texts that have existed or exist around and finally within the text being considered: any text is an intertext; other texts are present in it, at varying levels, in more or less recognisable forms: the texts of the previous and surrounding culture. Any text is a new tissue of past citations. Bits of codes, formulae, rhythmic models, fragments of social languages, etc. pass into the text and are redistributed within it, for there is always language before and around the text. Intertextuality, the condition of any text whatsoever, cannot, of course, be reduced to a problem of sources or influences; the intertext is a general field of anonymous formulae whose origin can scarcely ever be located; of unconscious or automatic quotations, given without quotation-marks. Epistemologically, the concept of intertext is what brings to the theory of the text the volume of sociality: the whole of language, anterior or contemporary, comes to the text, not following the path of a discoverable filiation or a willed imitation, but that of a dissemination – an image which makes sure the text has the status not of a reproduction but of a productivity (…)" (Barthes, 1981, p. 39).

If the notion of intertextuality is often used as an element of discussion of plagiarism phenomena (Gac, 2021), a parallel also seems to be drawn with the functioning of generative artificial intelligence. As we understand it, the idea of

intertextuality leads to relativising in some way the process of creation, which does not occur *ex nihilo*, and to highlighting the importance of previous external references, assimilated and unconsciously or indirectly reused by the creator. By disclosing his work[4], the author accepts that the public (in his function as a sensitive receiver of the work, and not as a consumer of the product which incorporates it; cf. Gaudrat (2023)) accesses it, reconstitutes it within his mind; the "reader" (in a broad sense, following the broad meaning of the notion of "text" for Barthes) integrates this work into the field of his culture, his experience. When this reader later becomes the creator of his own work, even if he does not explicitly reproduce the form of the works to which he previously had access and which constitute his personal culture, he unconsciously reuses parts of them, elements. Because the new text "produced" is the result of a deconstruction-reconstruction process, internal to the mind of the author, it is not a "re"production of the implicit references it carries, Barthes tells us. If we attempt to transpose the reasoning to generative artificial intelligence, the integration of disclosed works in training databases, with a view to allowing the system to produce new content, following a technical process of "deconstruction-reconstruction", should it not be free and escape the control of the author of the work that he has previously agreed to share intellectually with society?

The technical fixation of works in the training databases of generative artificial intelligence seems to produce an effect, or pursue a function, comparable to that of the biological fixation of the work in the mind of the reader (by essence uncontrolled by the law). The comparison, however, remains limited here: while the biological (and intimate) fixation resulting from the intellection of a work only contributes to the slow edification of the reader's person, the technical fixation of the training data, external to any person, only contributes to the design of a tool, makes it possible to integrate a large mass of data in a limited time and is often at the direct service of an economic activity (possibly in competition with that of human artists). Artificial intelligence presents itself as a form of (partly) dehumanized industrialisation of the creative process. Would this justify analysing the learning of an AI differently from the artistic learning of the "reader", to whom we recognise a freedom of intellectual access (subject, of course, to material/legal access to the exploitation support) to the works disclosed? From a legal perspective, should the technical fixation of works in the training databases of artificial intelligence models

[4] See Legea nr 8/1996 (Romania) [Law no. 8/1996], art. 10: "Autorul unei opere are următoarele drepturi morale: a) dreptul de a decide dacă, în ce mod şi când va fi adusă opera la cunoştinţa publică; (…)" [our literal translation: "The author of a work has the following moral rights: a) the right to decide if, in what way and when the work will be brought to public knowledge (…)"]; in France, art. L. 121-2 of the Intellectual Property Code: "L'auteur a seul le droit de divulguer son œuvre. Sous réserve des dispositions de l'article L. 132-24, il détermine le procédé de divulgation et fixe les conditions de celle-ci" [our translation: "The author alone has the right to disclose his work. Subject to the provisions of Article L. 132-24, it determines the disclosure process and sets the conditions thereof."].

be subject to prior authorisation? Does Barthes's distinction between production and reproduction (intertextuality relating to "productivity", not "reproduction") find an echo in the legal qualification of the use of previous works as training data?

1.2. Legal analysis of the fixation of works in datasets

To determine whether such uses of protected works as datasets do not infringe literary and artistic property rights, it is first necessary to examine whether they fall within the scope of one of the exclusive rights, in particular whether they constitute a reproduction within the meaning of copyright law. It will then be necessary to consider, where appropriate, whether such uses are covered by exceptions to copyright which would dispense with the need for authorisation.

Reproduction qualification

Such a question of qualification is difficult to answer with certainty in French law, because, according to article L. 122-3 of the French Intellectual Property Code, "Reproduction consists in the material fixation of the work by any process *that enables it to be communicated to the public in an indirect manner*" (our translation, emphasis added). In this case, using a work as training data for artificial intelligence does not really mean communicating it to the public: the work is used exclusively to develop the inference model, to train the artificial intelligence. The work is indeed fixed on a medium, but this fixation is not dedicated to communicating the work to the public. As Professor Bruguière points out, "not every technical reproduction is a legal reproduction" (Bruguière, 2020), and if the result obtained by the artificial intelligence (output) does not make it possible to identify the original formal elements of the works used as training data (Case C-476/17)[5], it is doubtful whether they are really being exploited within the meaning of French copyright law (Bruguière & Deltorn, 2023).

However, both European law and Romanian law seem to define the reproduction right more broadly, without making it conditional on communication of the form of the work to the public[6]. This suggests that the reproduction right could

[5] However, the reproduction of original formal elements of the training data within the outputs does not seem impossible (Guangzhou Internet Court, 2024).

[6] See Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, art. 2: "Reproduction right – Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part: (a) for authors, of their works (…)"; Legea nr. 8/1996 [Law no. 8/1996] (Romania), art. 14: "Prin reproducere, în sensul prezentei legi, se înţelege realizarea, integrală sau parţială, a uneia ori a mai multor copii ale unei opere, direct sau indirect, temporar ori permanent, prin orice mijloc şi sub orice formă, inclusiv realizarea

apply to the use of works as training data (Bensamoun, 2022, p. 246). If we accept, in the light of these definitions, that we are dealing with an act of reproduction within the meaning of copyright, it is then necessary to consider whether this exploitation is not tolerated due to exceptions to copyright.

The text and data mining exception

Articles 3 and 4 of the European directive on copyright in the Digital Single Market provide for a twofold exception for "text and data mining": article 3 concerns the exception of text and data mining for scientific research purposes, which does not seem to be the main issue here; article 4 provides for a broader but conditional exception. These exceptions have now been transposed into French law in article L. 122-5-3 of the French Intellectual Property Code, which particularly states in paragraph 3 that: "des copies ou reproductions numériques d'œuvres auxquelles il a été accédé de manière licite peuvent être réalisées en vue de fouilles de textes et de données menées à bien par toute personne, quelle que soit la finalité de la fouille, sauf si l'auteur y a opposé de manière appropriée, notamment par des procédés lisibles par machine pour les contenus mis à la disposition du public en ligne (...)"[7]. The solution introduced in Romanian law 8/1996, in the new article 36/2, seems to be quite similar:

> (1) Sunt permise reproducerile și extragerile din opere și din alte obiecte protejate accesibile în mod legal în scopul extragerii textului și a datelor. (2) Reproducerile și extragerile efectuate în conformitate cu alin. (1) pot fi păstrate atât timp cât este necesar pentru extragerea textului și a datelor. (3) Excepția prevăzută la alin. (1) se aplică cu condiția ca utilizarea operelor și a altor obiecte protejate să nu fi fost rezervată în mod expres de către titularii de drepturi în mod corespunzător, cum ar fi mijloace care pot fi citite automat în cazul conținutului făcut public online (…)[8].

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oricărei înregistrări sonore sau audiovizuale a unei opere, precum şi stocarea permanentă ori temporară a acesteia cu mijloace electronice" [our translation: "By reproduction, in the sense of this law, is meant the making, in whole or in part, of one or more copies of a work, directly or indirectly, temporarily or permanently, by any means and in any form, including the making of any audio or audiovisual recording of a work, as well as its permanent or temporary storage by electronic means"].

[7] Our translation: "copies or digital reproductions of works to which access has been lawfully may be made with a view to text and data searches carried out by any person, whatever the purpose of the search, unless the author does so. objected in an appropriate manner, in particular by machine-readable methods for content made available to the public online (...)".

[8] Our translation: "(1) Reproductions and extractions from works and other legally accessible protected objects are allowed for the purpose of extracting text and data. (2) The reproductions and extractions carried out in accordance with para. (1) may be kept for as long as necessary for text and data extraction. (3) The exception provided for in para. (1) applies

There is a paradox in French law, because it is through the introduction of this new text and data mining exception that we are enshrining the right holders' ability to oppose this use of their work as training data, even though it was uncertain that such use fell within the scope of their exclusive right... More precisely, these new exceptions enshrine a form of opt-out for the benefit of rights holders, whose works can only be fed to artificial intelligence models if they have not expressly objected, by technical and possibly contractual means (Regulation 2024/1689, 2024, §106). The principle thus seems to be that the use of works as training data is unrestricted, but it seemed important to recognise the right of authors to object to such use in view of the legal, economic and cultural issues involved in the development of AI. Collective copyright management organisations have thus taken measures, in France, to exercise this opt-out for their members, by publishing a general declaration of opposition to the use of works in their repertoire as datasets, notifying this declaration to the main artificial intelligence operators, introducing new technical measures and adapting clauses in their contract models (ADAGP, 2024).

2. Downstream: is content generated by artificial intelligence an authorless work?

Continental European copyright law and, in particular, French and Romanian law, reserves protection for works created by a human being and expressing that author's personality. What, then, should be done about literary and artistic content generated by artificial intelligence? The question will be analysed from the perspective of positive law and then, prospective law.

2.1. In positive law: protection subject to the existence of an author

There are two possible ways to determine the current copyright status of works generated by artificial intelligence. Firstly, it may be considered to link them to one of the people involved in their production, for example the developer of the artificial intelligence (upstream) or its user (downstream). English law seems to generally support this solution, holding that authorship must be attributed to the person "by whom the arrangements necessary for the creation of the work" generated by computer are undertaken[9] (Serfaty, 2023). In France, Professor Pierre-Yves Gautier recommends that the holders of rights in the software and databases used by artificial

provided that the use of the works and other protected objects has not been expressly reserved by the right holders in the appropriate manner, such as machine-readable means in the case of content made public online (…)".

[9] Parliament of the United Kingdom (1988), CDPA, art. 9: "(3) In the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken".

intelligence should be granted rights in the resulting creations, in application of the civil law mechanism of accession by production (Gautier, 2018, p. 36). However, it will be objected that these people involved in learning the artificial intelligence are not really aware of the forms that will be developed by the artificial intelligence, so this solution does not seem, in our view, to correspond to the traditional logic of copyright. Similarly, if the user merely determines certain general parameters of the creation and chooses the *output* that suits him best, did he, in doing so, act as a creator? Does the mere fact of writing a prompt demonstrate the existence of an original contribution? Granting the user a right to this production could again seem artificial and incompatible with the logic of French and Romanian copyright law. A second approach could then seem more coherent, which would consist of granting no intellectual property protection to these outputs. These contents would belong to the public domain, and their exploitation would therefore be unrestricted, except for recourse to other protection mechanisms (such as civil liability in tort) to oppose certain specific wrongful uses that might be made of it.

The situation is different when the user has made a genuine creative contribution based on the result obtained by artificial intelligence. For example, for the music *Daddy's car*, the composer Benoît Carré did not limit himself to the result obtained by AI alone, he also recorded instruments, composed the lyrics and mixed the track: we are therefore in the presence of a creation assisted by artificial intelligence, whose author would be the human being who made the creative contribution. Artificial intelligence is not seen as a substitute for human creativity, but as a tool for human creativity, like other techniques before it, such as photography.

This distinction between computer-assisted and computer-generated creation is an old one, but remains fundamental in determining the relevant regime for the productions generated by artificial intelligence, as a recent case law on the subject seems to indicate. The US Copyright Office (Copyright Review Board, 2022), in a decision upheld by the District Court of Columbia (*Stephen Thaler v. Shira Perlmutter*, 2023), refused protection for the graphic work *A Recent Entrance to Paradise*, pointing out that "the statute requires that a work contain human authorship". In the application for protection of the comic strip *Zarya of the Dawn*, the Copyright Office found that a natural person, Ms Kashtanova, is indeed the author of the text and of the selection, the coordination and the arrangement of the textual and visual elements of the work, but refused to protect the visual elements generated entirely by artificial intelligence (U.S. Copyright Office, 2023). The Beijing Internet Court seems to have more easily accepted the protection of images generated by Stable Diffusion, in a decision of November 27, 2023, by attaching particular importance to the prompt engineering and to the setting of relevant parameters of the artificial intelligence system in assessing the originality of the work (Beijing Internet Court, 2023). This decision rather seems to constitute, today, an exception in global jurisprudence on the protectability of AI-generated

productions, but it perhaps anticipates the way in which the use of generative artificial intelligence will be perceived in the future, not as a substitute for human creation but as a tool of the human creator, even if it means analysing more closely where human creativity can reside and what it can consist of in the presence of such tools. In the French, European and American law at the moment, the choice of parameters within the AI model and the formulation of prompts seem in any case insufficient to characterise an original contribution and, therefore, to obtain copyright protection (the decision relating to the *Théâtre d'opéra spacial* case seems to be explicit on this point (Copyright Review Board, 2023).

As things stand, therefore, if users wish to claim copyright over content generated by artificial intelligence, they must be able to demonstrate what their personal creative contribution has been, and how it bears the imprint of their personality. This proof appears nowadays quite difficult to provide, so it may be thought that much AI-generated content will not be protected by copyright unless the user has carried out a genuine additional creative act using the output, as in the examples given above. Should this state of the law change?

2.2. In prospective law: towards systematic protection of AI-generated content?

Should we facilitate access to protection, particularly by modifying the condition of originality? Should we ignore the secondary role played by the simple user of an artificial intelligence, who does not really determine the form of the output? Aren't the qualities of the result more important than the process by which it is obtained?

Roland Barthes's article "The Death of the Author" is particularly relevant to these questions. He considers that "it is language which speaks, not the author" (Barthes, 1977, p. 143), and that "writing is the destruction of every voice, of every paint of origin. Writing is that neutral, composite, oblique space where our subject slips away, the negative where all identity is lost, starting with the very identity of the body writing" (Barthes, 1977, p. 142). For Roland Barthes, the work, objectified, inscribed, but not created, contains within itself all the elements that make up its depth; its unity is not to be found "in its origin, but in its destination" (Barthes, 1977, p. 148), in other words, in the perception that the public, the reader, will have of it. Should we, therefore, accept that the author of any type of creation is simply a "scribe", as the philosopher defends, and that works are consequently authorless? Are we exaggerating the role of the author's personality in the process of literary and artistic creation? If the only thing that matters is the result or purpose of the work and not its origin, should not we rethink the conditions for copyright protection, or even copyright itself?

Without going to such extremes, some voices have been raised in favour of modifying the condition of originality, in order to ensure more systematic protection of literary and artistic content generated by artificial intelligence (Gaubiac, 2020).

This seemed to be the position of the European Parliament's Committee on Legal Affairs, which, in a preparatory report, suggested that consideration be given to modifying the conditions for copyright protection, specifically the originality requirement, to adapt them to these particular objects: "the elaboration of criteria for 'own intellectual creation' for copyrightable works produced by computers or robots is *demanded*'' (European Parliament Committee on Legal Affairs, 2017) (emphasis added[10]). However, no action has yet been taken on this proposal[11].

As Professor Vivant acknowledges, "if a work resulting from artificial intelligence were to be deemed protectable, it would be because it had been decided that it should be. Do we want to? Don't we want to (protect)? It is perhaps this *a priori* choice that will make the difference" (Vivant, 2018). It is certainly possible to alter the condition of originality to adapt it to these new contents, or else to create a new neighbouring or *sui generis* right to protect the investment required by the development of generative AI. But do we want such an evolution of our law? It may seem unnecessary. A change in copyright law could be detrimental to its coherence; the creation of a new right (neighbouring right or *sui generis* right) would be preferable but could contribute to the loss of clarity of intellectual property and to the phenomenon of the accumulation of intellectual property rights. In this context, existing legal regimes may seem sufficient. Just as photographs do not systematically qualify for copyright protection, content obtained with the help of artificial intelligence can only be protected by demonstrating the existence of an original creation in the traditional sense of the term. When the conditions of protection by intellectual property are not met, tort liability regimes (in France, article 1240 of the Civil Code, which includes actions for parasitism and unfair competition) can probably offer sufficient protection of the investment made for the production of content generated by artificial intelligence (on this topic Guimberteau & Courroye, 2024).

Conclusion

Content generated by artificial intelligence could lead to the "death of the author" in two ways. Firstly, by feeding on a wide range of works and performances,

[10] It is interesting to note the differences between the linguistic versions of this European Parliament report. In the English and Romanian versions, the modification of the definition of the condition of originality is simply "demanded" whereas, in the French version, it is "required": https://www.europarl.europa.eu/doceo/document/A-8-2017-0005FR.html.

[11] It no longer appears in subsequent texts, in particular in the European Parliament resolution directly following the aforementioned report (European Parliament, 2017), in the proposal for a regulation of 21 April 2021 (Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Legislation) and amending certain Union legislative acts, 21 April 2021, COM/2021/206 final) and in the Regulation 2024/1689 of 13 June 2024 laying down harmonised rules on artificial intelligence.

generative artificial intelligence is producing increasingly interesting results, and the cultural and creative industries could be tempted to make massive use of them, at least partially replacing human artists. The future of their profession is uncertain, and such concerns were recently expressed during the strike action by screenwriters and actors in Hollywood. Secondly, generative artificial intelligence gives substance to the Roland Barthes-inspired idea of works without authors.

After analysis, however, the law seems to offer answers to these different issues. For one thing, recognising that authors have the right to oppose the use of their works as training data is likely to limit competition from generative artificial intelligence or, at the very least, to give them a legal basis for negotiating the conditions under which their works may be incorporated into datasets. For another, copyright law seems to distinguish between artificial intelligence as a tool in the service of human creation and AI as a substitute for human creation, with protection due only in the former case. So, the death of the author has not yet been pronounced!

The question of the status of content generated by artificial intelligence is not just a legal one; it is also a philosophical, economic, social and cultural one. These different dimensions must be taken into consideration, and help to explain, in particular, the choice to control the use of previous works as generative AI datasets. But they do not necessarily coincide. Generative AI is a technical concretisation of Barthes's ideas, aiming to relativise the role of the author on a double argument drawn from 1) the concept of intertextuality; 2) his proposal to substitute the reader for the author, the meaning being to be sought by the former in the "text" itself, independently of the author's intention. But, at the end of this research, what conclusions can be drawn from the attempted dialogue between Barthes's theories and the state of positive law relating to content generated by artificial intelligence? On the one hand, works generated purely by AI, with no original contribution from a human creator, are considered to be without authorship; they do not, therefore, give rise to any copyright, regardless of a possible aesthetic or formal interest of the content generated from the point of view of the public. These productions are essentially the result of 'generalised intertextuality', of a statistical calculation carried out on the basis of a training database, accompanied by a simple choice from the user. On the other hand, copyright is still applicable when it is possible to establish the existence of an original formal contribution. If the most basic uses of generative AI embody the death of the author (and draw the consequence of the absence of protection), the legislator and the judge are still trying to detect where the original formal expression of a human creator might reside, even if he benefits from the help of a generative AI system. In doing so, the paradigm of copyright remains unchanged, and indifferent to Barthes's attempt to question the existence of the author's role more fundamentally.

The dialogue undertaken between different disciplinary fields shows its limits here. Like the distinction posed by the Austrian juspositivist philosopher Hans Kelsen between Is and Ought (*Sein/Sollen*), a discourse on art tending to determine

what carries meaning and to identify the cognitive processes at work (for the author as for the audience) cannot have a direct impact on the Law. The determination of the legal norm necessarily results from a choice of the legislator (or of the judge in his function of interpreter of the law). The motivations for this choice may be partially extra-legal but, for the moment, the conjunction of an attachment to a classic perception of the process of literary and artistic creation and the economic and social impacts of the use of generative AI rather leads to preserving the place of the author. This choice may seem wise. Indeed, the potential of technology must not be a mirage: without human creation, artificial intelligence can only make a limited contribution. In particular, if there are no new human creations, artificial intelligence will no longer be able to progress and will even end up, as recent studies have shown, collapsing in on itself (Bresge, 2023). However, we are only at the beginning of the use of generative AI in the cultural field; its consequences (in particular on the content of the law) can only be usefully measured at a later date. The author is not dead, but is this just a reprieve?

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