

# **AI, MORAL RIGHT AND ADAPTATION RIGHT**

**VALÉRIE LAURE BENABOU  
PROF UNIVERSITÉ AIX MARSEILLE**

# WHAT IS ARTIFICIAL INTELLIGENCE?

- Artificial Intelligence for Europe, Communication COM(2018) 237 final, 25 April 2018
- **Artificial intelligence (AI) refers to systems that display intelligent behaviour by analysing their environment and taking actions – with some degree of autonomy – to achieve specific goals.**
- Reflection will be needed on interactions between AI and intellectual property rights, from the perspective of both intellectual property offices and users, with a view to fostering innovation and legal certainty in a balanced way.
- Foot note 52 : Using AI to create works can have implications on intellectual property, with questions arising for instance on patentability, copyright and right ownership.

# CYSPE / 1956/NICOLAS SCHÖFFER

- [https://www.youtube.com/watch?time\\_continue=84&v=gjD27tjLoaQ](https://www.youtube.com/watch?time_continue=84&v=gjD27tjLoaQ)



# AI, MORAL RIGHT, ADAPTATION RIGHT

- Is it a question for Europe ?
- No harmonization of Moral Right
  - Reference to the Berne Convention : article 6bis
  - Samples in the exceptions (quotation of the source...)
- No single conception of which rights should be given to whom...
  - Can a legal person benefit from the protection ?
  - What are the relevant rights : right to divulge ? Attribution/ paternity ? Integrity (for material and/or intellectual breaches of the spirit of the work) ? Right to retreat ?
  - What are the sanctions ? Counterfeiting ?

# ADAPTATION RIGHT

- No EU acquis...
- No single conception within the different MS
  - Specific right in several countries
  - A prerogative belonging to the reproduction right (see article 1<sup>er</sup> Loi Belge)
  - No precise definition of the right in France (see article L. 122-4 CPI « Toute **représentation ou reproduction** intégrale ou partielle faite sans le consentement de l'auteur ou de ses ayants droit ou ayants cause est illicite. **Il en est de même pour la traduction, l'adaptation ou la transformation**, l'arrangement ou la reproduction par un art ou un procédé quelconque.)
- Hybrid between economic rights and moral rights (CMO/Authors)

# MORAL RIGHT & ADAPTATION RIGHT AGAINST AI OR « FOR » AI ?

- Moral right « against » AI ? Moral right as an empediment
- Moral right of human authors would potentially limit the possibility of creation of content/value by AI
- Moral right does not require a prior consent of the right holder but has to be taken into account in
  - processing ?                      and/or
  - displaying ?
- of the works embedded

# ADAPTATIONS

- Many AI “digital contents” are “adaptations” (example in the press)

## **Transcription / translation : modification of the form of expression**

- Automated translation : Trint (from oral to writings)
- Translating text to images, video : Wibitz

## **Adaptation of the results to the need of the public « costumization »**

- Personalization of the article according to the identified interests of the reader: tailored-made content : Ownpage

Localization of press articles in connexion with the reader : Wordsmith by Automated Insights/ Syllabs (example real estate ads)

- Abstracts : News Tracer ; Narrative Science transforms scores and data into abstracts of baseball matches

## **Enrichment of the content by crossing data and adding new elements**

- combinations ; links

# MORAL RIGHT FOR AI OR MORAL RIGHT AGAINST AI ?

- Moral right does not require a prior consent of the right holder but has to be taken into account in :
  - Processing the works ?
    - If the process is entirely non-human and does not imply communication of the work per se, can it harm moral right ?
    - How to authenticate the source of the work ?
    - What about moral right as regards the transient exception of article 5.1 Infosoc Directive ?
    - What about the respect of the willingness of the author not to have his/her works processed by AI ? Can it be embedded in the file / opt out system ?
    - Right to integrity : digitization/ processing pieces of information
    - How to withdraw a work from a big amount of data processed ?



# MORAL RIGHT FOR AI OR MORAL RIGHT AGAINST AI ?

- Moral right does not require a prior consent of the right holder but has to be taken into account in :
  - Displaying the final result ?
    - Is the work/source recognisable ? By human means / by technological means ?
    - Is attribution possible ? If yes, how is it made available ?
    - What about displaying works that are considered to be incompatible by their respective authors ? (Compilation / Case Jean Ferrat)
    - What if the final expression is betraying the spirit of the author ?
      - No consciousness of the AI : can it be a criminal offense ?
      - Risk of confusion : works that would look like human authors'one

# ADAPTATION & AI

- Is any use of prior piece of “works” in the final content subject to authorization ?
  - Snippets, words, pixels...
  - Copyright : Threshold of Originality... Infopaq : 11 words...
  - Neighbouring rights (Phonogram producers) Press editors right discussion...
  - Inversion of the hierarchy between copyright and neighbouring rights (Rome convention)
- What if the prior works are not capable of being identified in the final content ?
  - How far the « transformation » shall go to « dismiss » the exclusive rights ?

# THE NEXT REMBRANDT

18 months of work

Digitization of 346 works of the Dutch painter

148 millions de pixels extracted from

168 263 fragments of Rembrandt's works

ING, Microsoft, J. Walter Thompson Office, Delft University,  
Mauritshuis and Rembrandt's House Museum



# ADAPTATION & AI

- Not a real specific question
- But prior consent might not be workable considering the amount of “works” being involved in the process
- Threshold for exclusive right ? Identification of the work by human sense ?
- Transformative use exception ? Article 10 ECHR ?
  - Klasen Case (**CA Versailles 16 mars 2018**) ????
  - substitutability test : if the work is not substitutable art. 10 prevails / exclusive right if not...
  - If the work/author is notorious art. 10 prevails/ exclusive right if not
- but is Freedom of Expression relevant for AI ?

# EDSGER W. DIJKSTRA

“The question of whether a computer can think is no more interesting than the question of whether a submarine can swim.”

# DEEP DREAM & "INCEPTIONISM"



# MORAL RIGHT & ADAPTATION RIGHT "FOR" AI

- Question related to the conception of "authorship" : is an AI capable of being an author ?
  - If not, can the moral right on the work be protected notwithstanding the absence of human author
    - If rooted in the personality right : no moral right unless human being
    - If considered as one of the prerogative of the "monopoly" : can be granted to any form of legal person to whom the work belongs
  - Article 178 UK *Copyright, Designs and Patents Act 1988* : « "Computer generated", in relation to a work, means that the work is generated by computer in circumstances such that there is no human author of the work ».
  - Art. 9.3, in this case, the author shall be taken to be the person « *the person by whom the arrangements necessary for the creation of the work are undertaken* ».
  - But no moral right : article 79 provides for an exception to the right to be identified as author or director for computer generated works / 81 does the same for right to object to derogatory treatment of work (integrity)

# MORAL RIGHT “FOR” AI

- Moral rights relate to human beings but if there is a public interest, law can eventually create the situation to sustain a “sort of” moral right.
  - Is it legitimate to grant such right to « someone » ?
  - Is it meaningless to attribute a moral right to « AI » works ?
  - Is it possible to enforce such a “moral” right ?



**"ASTANA COLUMNS" BY MICHAEL  
HANSMEYER. • *RMN-GRAND PALAIS, 2018***



# MORAL RIGHT "FOR" AI

- Is it legitimate to grant such right to « someone » ?
  - The robot : shall legal personality be recognised for bots ? (EP Resolution 16 Feb. 2017) : WATSON (masc?) / Ms Rena (fem?)
  - Copyright owner : person vested with economic rights would also benefit from MR (creator of AI/user)
  - Other person : cultural heritage institution ?
- Is it meaningless to attribute a moral right to « AI » works ?
  - Attribution right : source of the creation
    - Interest of the owner to identify "its" work
    - Public interest to know what (if not who) is the source of the work : historical, technological
  - Right of integrity : identifying the creation as it has been designed
    - Interest of the owner to ascertain the final version of the works (if attribution)
    - Public interest : fair competition
- Is it possible to enforce such a "moral" right ?
  - Blockchain might relate to mac address of the machine and embed the position of the « rightholder » as to the use of the work
  - Who would sue if infringement ?

# NO THEORETICAL OBSTACLE BUT ETHICAL ?

- Modification of the nature of moral right
  - If granted to the machine...
    - Vesting a machine with rights...
    - For how long ? (permanent modification of the algorithm : which version would be the one vested ?)
  - If granted to the « copyright owner » whoever he may be
    - More business oriented
    - Might reinforce economic monopoly
  - If granted to a third-Party
    - Cultural heritage purposes

# IS THE ANSWER TO BE FOUND IN A DIFFERENT GENERATED CONTENT RIGHT ?

- Economic control of the right holder on economic exploitations of the content
- “Fairness” control/ Morality control of the right holder on how the AI content is being displayed

# ALAN TURING

- “I'm afraid that the following syllogism may be used by some in the future.

Turing believes machines think

Turing lies with men

Therefore machines do not think

Yours in distress,

Alan”