



**MINISTÈRE  
DE LA CULTURE**

*Liberté  
Égalité  
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**EXECUTIVE SUMMARY - Mission report  
on the applicable law, under the rules of  
private international law, to generative  
artificial intelligence models available in  
the European Union**



**REPORT PRESENTED TO THE HIGH COUNCIL  
OF LITERARY AND ARTISTIC PROPERTY**

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The emergence of generative artificial intelligence (AI) models has raised legitimate concerns among holders of literary and artistic property rights. Whereas output-related questions seem relatively straightforward as far as applicable law is concerned, input-related issues appear more difficult to tackle. The latter relate specifically to the massive use of rights holders' works and performances, available online, to feed sophisticated and data-hungry AI models for training purposes, often without any authorization.

European Union legislation affords rights holders the possibility to oppose the reproduction of their protected works and performances by AI providers for the purpose of training their models, contrary to other jurisdictions. As result of such differences, rights holders' rights largely depend on the applicable national law. Moreover, because *input*-related operations are cross-border — with content and data transferred from server to server until used to train AI models—the determination of the applicable national legislation is particularly complex. This is one of the issues that this report seeks to clarify.

**The first part of the report** analyzes the current rules of private international law, deliberately setting aside the provisions of the AI Regulation of 13 June 2024, which are examined in the second part. To date, there are no specific conflict-of-laws rules for AI models. However, general conflict-of-laws rules remain applicable, subject to their adaptation to generative AI use cases. Generally, the conflict-of-laws rule for infringements of literary and artistic property rights designates the *lex loci protectionis*, i.e., the *law of the country for which protection of the rights is claimed*. Locating the potentially unlawful act of exploitation is therefore key in determining the applicable national legislation. Applying such conflict-of-laws rule raises greater difficulties for generative AI model at the *input* stage than at the *output* stage:

- **With regard to *input*, two approaches can be followed to locate the acts of reproduction carried out:**
  - **The first approach focuses on the technical infrastructures, i.e., the servers used for AI model *input*.** This technical approach is not satisfactory and has already been rejected by the Court of Justice of the European Union in areas other than AI. It is unpredictable and, above all, difficult to implement. Indeed, locating the relevant servers with respect to acts of reproduction taking place at the *input* stage is highly uncertain, especially since, in fact, other stages than the initial training of the AI model can involve *input* (*intermediate input*). The servers used for the initial *input* may be

spread across multiple jurisdictions, which can moreover be different from those of the *intermediate input* servers. In short, the technical localization approach does not offer a satisfactory and clear solution to identify the *lex loci protectionis*.

- **The second approach considers, from a legal standpoint, the generative AI model *input* in relation to its *output*.** This legal approach to the localization of *input* rests on the assumption that the content generated by the AI model cannot be considered separately from the upstream reproduction of protected works and performances during the training phase, even if such result does not itself reproduce the said works or performances. In other words, there is no generation without prior collection of content, and conversely, collection is carried out only for generation purposes. Both content collection and result generation form a part of a single *broader process*. This process consists in *capturing the value* attached to the reproduced work or performance through its collection by the AI operator, with the aim of providing the user with the best responses. Such value capturing process is only effective at the stage where responses, previously fed by the protected work or performance, are generated for the user. This type of process, consisting in a chain of successive events linked by causality, is well-known in international law. The configuration is that of a so-called "complex" tort, involving a spatial dissociation between the harmful event (here, reproduction as *input*) and the damage caused (here, the result generated following an AI model prompt, regardless of whether the result is an infringement in itself). In the event of cross-border effects, a study of positive law shows that the "downstream" localization of complex torts tends to be preferred, and that, consequently, the law of the country where the damage occurs is normally applicable. The last event in the chain thus allows the entire process to be located and, consequently, the applicable law to be determined. Therefore, the current logic of private international law leads to the application of the law of the country where users access the responses fed by the work or performance —i.e., the country where the AI model is offered as a service—to rule on the lawfulness of acts of reproduction carried out "upstream" by the AI provider.

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- **With regard to *output*, the report distinguishes two issues, which do not present any real specificity in private international law:**
  - **The first concerns the localization** of potentially unlawful acts carried out using the response generated by the AI model, where the response itself contains original elements of a pre-existing work or performance whose reproduction has not been authorized. For example, if the infringing content is extracted from an AI generated response before being made public online, the *lex loci protectionis* must be determined according to the national audience targeted by the medium through which the content is made available—streaming platform or otherwise—using the so-called "focusing" method. The situation is comparable to that of a classic infringement—outside the use of AI—disseminated via a website: French case law currently determines the *lex loci protectionis* according to the location of a website's targeted audience.
  - **In principle,** determining whether a content generated by an AI model or with its assistance is protected under copyright law also depends on the *lex loci protectionis*. This will then be the law of the country in which the content is exploited.

**The second part of the report** examines the impact of the AI Regulation of 13 June 2024 on private international law.

- **The provisions of this piece of legislation** are likely to support the solution, outlined in the first part of this report, which entails applying the law of the country where the AI model is placed on the market to the reproduction of works or performances for training purposes. In connection with Article 53(1)(c) of the Regulation, Recital 106 states that providers placing general-purpose AI models on the market in the European Union must implement a policy to comply with EU copyright and related right law, in particular to identify and comply with the reservation of rights made by holders of rights in accordance with Article 4(3) of Directive (EU) 2019/790 (allowing them to opt-out of text and data mining), and this "regardless of the jurisdiction in which the relevant acts under copyright law underlying the training of these general-purpose AI models take place." This recital, whose "effet utile" must be ensured, aims to clarify the geographic scope of the obligation on providers of general-purpose AI models to implement a policy to comply with EU copyright law. This is especially important when it comes to the data used by a model as *input*, and implies the irrelevance of the location of

the protected reproductions necessary to make the model work. Admittedly, Recital 106 does not, strictly speaking, contain any conflict-of-laws rule that could be applied outside of the Regulation, for example in the context of an infringement proceeding. However, consistency invites us to consider that the obligation to comply with EU copyright and related right law also applies in such a context, i.e., independently of the Regulation, including, as provided for in Recital 106, when the training of the disputed model takes place in a third country. Therefore, without being a conflict-of-laws rule, Recital 106 necessarily influences the solution to the conflict of laws.

- **If, despite the significant reservations expressed in the report,** the applicable law were to be determined at the *input* stage as that of the country where the work is reproduced, Recital 106 of the AI Regulation can be of help as it highlights the focus of European legislation on copyright and related rights, especially in AI and, more specifically, with regard to text and data mining operations. Such political prioritization at least indirectly impacts the application of private international law rules:
  - With regard to *overriding mandatory provisions*: the national judge must apply, if necessary *ex officio*, all mandatory provisions provided for by its legal system. The national law designated by the conflict-of-laws rule should be ignored in such case, at least insofar as it does not contribute to reaching the higher objective pursued by the overriding mandatory provisions. Overriding mandatory provisions are laws that pursue the protection of an *essential public interest*, to which the legislator is particularly attached. In view of the political will expressed by the EU regarding its legislation on copyright and related rights, such legislation—and in particular the provisions relating to the compliance with reservations made by right holders under the text and data mining exception—could well claim the qualification of overriding mandatory provisions, in accordance with the standard principles of private international law. Recital 106 invites us to limit the scope of this potential overriding mandatory provision according to the place where the AI model is marketed. The marketing of the AI model within the European Union should therefore trigger the application of the overriding mandatory provision of a Member State transposing European law, and more particularly the overriding mandatory provision of the Member State(s) in which the model is marketed. The fact that the reproduction of works or performances is carried out in a third country—assuming that it is

possible to identify the said third country—cannot justify setting aside this overriding mandatory provision, since the legislator clearly seeks to enable fair competition between AI model providers marketing their models in the Union market. This is in itself a possible sign of the existence of such an overriding mandatory provision.

- **With regard to the *public policy exception*:** the national judge must set aside any foreign law whose application would lead to results that are contrary to the *essential values* of its legal system. The application of a foreign law that does not allow rights holders to oppose the reproduction of their content for *input* purposes may be considered by the national judge as contrary to its national public policy provisions. Indeed, such a situation may appear contrary to European standards. The importance of legislation on copyright and related rights, as well as of fair competition between AI providers on the European market, argues in favor of integrating the principles underlying this legislation—particularly the possibility for rights holders to oppose such reproduction—into the *essential values* of the European and French legal orders. Furthermore, literary and artistic property rights are guaranteed as fundamental rights, notably under Article 17(2) of the Charter of Fundamental Rights of the European Union. Compliance with fundamental rights, which features prominently in the AI Regulation, is generally integrated by national judges into their public policy. If the foreign law were to be set aside by the French judge, its national law would then substitute it.

In conclusion, as soon as the AI model is placed on the market on its territory, regardless of the *lex loci protectionis*, the national judge is in any case particularly likely to impose its legislation, derived from EU law (as an overriding mandatory provision) or from its underlying principles (under the public policy exception). Recital 106 of the AI Regulation is likely to support national judges if they decided to proceed in this way.

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