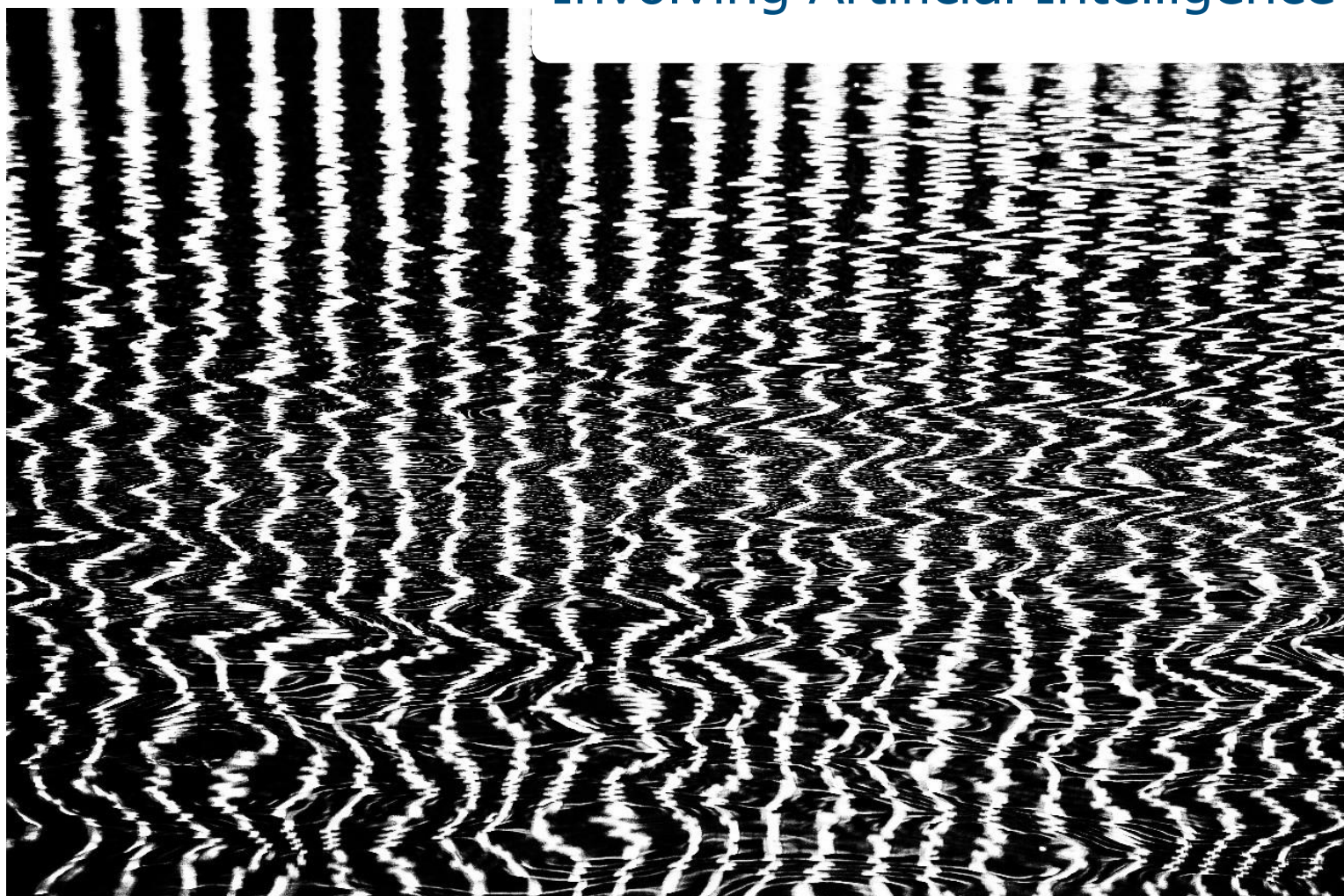




MINISTÈRE DE LA CULTURE

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Task Force Report on the Legal Status of Productions Involving Artificial Intelligence



**PRESENTED TO THE CONSEIL SUPÉRIEUR
DE LA PROPRIÉTÉ LITTÉRAIRE ET ARTISTIQUE**

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Report presented to the plenary meeting
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Cover image:

Ondes sismiques [Seismic Waves]

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The task force warmly thanks the photographer Miki Lasch for authorising the reproduction of her work, *Ondes sismiques* [Seismic Waves], the symbolic value of which echoes the report's theme.

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EXECUTIVE SUMMARY

The framework: conditions of access built around the human. Copyright protection is reserved for an original creation, one bearing the imprint of its author’s personality through free and creative choices. This requirement presupposes, by its very nature, a human author. Legal persons, animals, and machines cannot be authors. By contrast, two conditions have always been irrelevant to copyright protection: the merit of the work and whether the author executed it personally. This dual irrelevance opens the way to the question of artificial intelligence (AI). A work may be protected regardless of its merit and regardless of the tool used to bring it into being, provided that the creative choices remain human.

The founding distinction: hybrid production and synthetic production. The report distinguishes two broad categories of content produced with the help of AI (commonly called “outputs”). Hybrid production is that in which the human retains an active role in the creative process. When it crosses the threshold of originality, it becomes a hybrid creation—the only kind protectable by copyright. Synthetic production, conversely, is generated without significant human intervention. It thus remains, necessarily, outside the scope of copyright. The challenge is therefore to place a given production on one side or the other of this dividing line¹.

On this point, the task force’s position is one of inclusion. The notion of originality, as consolidated by the *Mio/Konektra* ruling of 4 December 2025, is flexible and robust enough to accommodate hybrid creations, without it being necessary or desirable to redefine it.

Part one: identify and characterise. No redefinition is required. The standard of originality is single: no separate threshold can be imposed on hybrid productions on the sole ground that the tool used is AI. The milestones of European case law (from *Infopaq* to *Mio/Konektra*) suffice to establish this. This principle enjoys broad international consensus: the most recent comparative and professional work is united in addressing the question using existing legal tools, without creating new categories.

To assess originality, the report proposes looking first at the object itself – the perceptible creative choices within it – rather than questioning the author’s intention. This move toward an objective standard, already present in European case law, must nonetheless remain measured. It consists of reading the personality of the author in the resulting work, not protecting a result for its own sake, independent of any human author. This second path, which would bring purely mechanical content into copyright, is rejected.

The *Evema v. Someva* ruling of 9 April 2026, the first French application of *Mio/Konektra*, holds that “the creative character of these choices [...] cannot be presumed”: neither the

¹ For a diagram of the different scenarios and the associated vocabulary, see annexes, section figures, tables, diagrams, “Productions using AI – adopted vocabulary”.

aesthetic effect of the result, nor the mere fact that unconstrained choices were possible, suffices to establish originality. It must still be shown how these choices reflect the personality of the author. Works with an erased or displaced author (be they anonymous, pseudonymous, or collective) confirms this point: the law seeks the trace of personality in the object, not the creator's civil identity. The analogy with the American doctrine of works made for hire is, by contrast, rejected, for lack of any prior human creation.

This reading is largely confirmed outside France. By the European Parliament, for instance, by recent legislative developments in Italy and the United Kingdom, and by the positions taken in the United States (where the Supreme Court declined, on 2 March 2026, to hear the *Thaler* case) as well as in Mexico. All converge on the same requirement of a creative human contribution.

Finally, the requirement of human attribution extends to related rights, though in a different fashion. Those that naturally presuppose a human performance, such as the performing artist's right, cannot arise from a purely synthetic output. Those that reward investment, such as the rights of phonogram or videogram producers, audiovisual communication companies, or database producers, could in theory apply to synthetic content under a literal (and hasty) reading of the texts. However, they were designed to remunerate individuals that bring human creations to market, and the task force recommends excluding them from such content, so that they do not capture collective-licensing revenue from material that copyright leaves free. Finally, the related right of press publishers cannot apply to a publication essentially generated by AI, for lack of "works".

Locating originality: the three-phase grid. Transposing the method of the *Painer* ruling, the report identifies the three moments at which originality may reside, its "seats". These are upstream (conception, parameter-setting, detailed prompting); during generation (iteration and direction of the tool); and downstream (selection, editing, integration into a larger whole). Each of these seats, on its own, suffices to found protection.

The grid reveals a difference in approach between the two major traditions. American copyright measures the control the human creator exercises over the expression at the moment it is fixed; protection there is graduated and can vanish as the AI's share grows. Continental law, by contrast, seeks the imprint of personality in the object assessed as a whole. The two traditions converge less on the conception of authorship than on the concrete criteria used to verify originality.

The dividing line: creative direction or delegation to the machine. All the traditions examined look for the human mark in the object itself, and not merely in the process. From this emerges an organising criterion: at each phase, one must determine whether the user exercised creative direction whose trace is imprinted in the result, or whether the user delegated the determinative expressive choices to a machine. Delegation is recognised by several indicators: generic instructions, follow-up prompts without creative inflection, adoption of the raw result.

The unpredictability of the process is not, in itself, an obstacle. Copyright has always been able to accommodate chance. What may be lacking instead is human direction; directed randomness is distinct from randomness that is merely undergone.

At each moment, the analysis weighs “seats” (positive indicators of creative direction) against their counter-indicators (the corresponding negative signs of delegation). To these three phases are added two cross-cutting criteria, which use the same positive/negative structure. The first – the trace in the object – verifies the alleged seats. A seat invoked solely by reference to the process, but which does not manifest itself in the result, is inoperative. The second – the interchangeability of the user – is its negative counterpart and allows borderline cases to be resolved. If any user, given equally generic instructions, would obtain a result with undifferentiated expressive characteristics, the personal imprint is lacking. What is at issue is not the exact reproducibility of the result (technically impossible, given the stochastic nature of the models) but precisely this interchangeability.

The assessment grid. The report does not propose a new definition to the courts but rather a two-entry assessment grid. It crosses the three *Painer* phases with, for each phase, the seats (positive indicators of creative direction) and their counter-indicators (the corresponding negative signs of delegation), under the control of the two cross-cutting criteria.

Its logic is disjunctive – a single seat suffices – and verificatory: the alleged seat must manifest itself in the object. The detailed grid is presented, in table form, in the relevant section below². It converges, under different vocabularies, with several frameworks developed independently by legal scholarship, administrations, and industry. Above all, it recalls that the conditions sometimes proposed – such as intentionality or transformativeness³ – cannot be cumulated; adding them together would amount to improperly raising the threshold. For originality is a threshold, not a scale—protection is either full or nil, without gradation according to the number of seats. The grid thus acts as a safeguard in both directions: against under-protection, which would deny genuine creative work, and against over-protection, which would extend copyright to productions devoid of human direction⁴. The grid delimits protection; it does not expand it.

Part two: securing protection. The challenge is first and foremost evidentiary. A hybrid creation is a work like any other. The difficulty lies not in its legal regime but in proving its character, since AI deprives human creation of the self-evidence it once automatically enjoyed. Two kinds of proof, governed by opposite regimes, must be distinguished: authorial status, which is presumed (absent proof to the contrary, Art. L. 113-1 of the French Intellectual Property Code), and originality, which is never presumed (*Mio/Konektra, Evema*). In hybrid creation, these two proofs are bound together by a common fact: the attribution of the expressive choices to a human being.

² See annexes, section figures, tables, diagrams, “Originality assessment grid – seats and counter-Indicia”.

³ See annexes, section figures, tables, diagrams, “Diagram of the originality assessment grid”.

⁴ See annexes, section figures, tables, diagrams “Diagram – convergent typology”.

The report rejects the path of a legal presumption of originality, discouraged by European case law, and extends the reasoning of the 2020 report to the *Conseil Supérieur de la Propriété Littéraire et Artistique* [Superior Council of Literary and Artistic Property] (CSPLA) on proof of originality.

The burden of proof is then divided into two stages, without altering existing law. In the first stage, the initiative falls on whoever contests protection. It is for that party to put forward concrete evidence of generation without determinative human intervention. Absent such evidence, the claimant has nothing to establish: authorial status is presumed, and originality, so long as it is not contested, need not be proven (the doctrine of the undisputed fact [*théorie du fait constant*]). In the second stage, once such evidence has been produced, the burden shifts to the claimant, who must then establish that the expressive choices perceptible in the object stem from his or her creative activity, and not from the operation of the system. German courts have already reasoned along these lines. The Regional Court of Frankfurt (Dec. 2025) dismissed a challenge based on mere abstract probability, and the Düsseldorf Court of Appeal (Apr. 2026) denied protection to a claimant who gave no account of their creative choices.

Evidentiary tools and their limits. Demonstration rests first on the object itself, with the process serving only as a supplement: creative dossier, intermediate versions, metadata, prompt logs. To these are added declarations made to trusted third parties (on the model of the German collective management organisation VG Wort) and indicators drawn from transparency regimes, foremost among them the labelling required under the AI Regulation. None of these tools is, however, either necessary or sufficient. Labelling attests to a piece of content's artificial origin and not to human input. It therefore says nothing about its eligibility for protection. Above all, these requirements must remain evidentiary instruments before the courts. Beyond the courtroom, they cannot be turned into a formality on which the very existence of the right would depend—something the Berne Convention prohibits. The question arises most acutely with regard to a possible declaratory mechanism entrusted to collective management organisations. Such a scheme could serve to prevent appropriation and enhance legal certainty, on condition that it remain an indicator committing its author, without ever becoming a declaration on which the vesting of the right – or merely its collection – would depend.

The regime for non-protectable content: the public domain. Where content is synthetic, no substitute form of protection proves persuasive. A special copyright regime, modelled on that for software, is excluded: software remains a work proper to its author, which synthetic content cannot be by nature. The British precedent of section 9(3) of the CDPA, the repeal of which is planned, confirms this. A *sui generis* right is no more persuasive. The sole precedent, from Ukraine, stands as a lone outlier with internal inconsistencies, and the database producers' right presupposes a substantial investment, necessarily lacking in this context.

Synthetic production therefore falls into the public domain. Not for lack of a better solution, but as a matter of coherence, the public domain being the negative counterpart of the exclusivity granted by law. This public domain has a distinctive character: the work belongs to it from the outset, from the moment of its generation, and without any reservation of moral rights, for lack of an author. This attachment also has a systemic virtue. By refusing a monopoly to purely

synthetic content, the law preserves the interest of creative intermediaries (publishers, producers) in keeping human beings in the loop, since only a human or hybrid creation opens up the monopoly that makes licensing, adaptation, and anti-copying enforcement possible.

De lege ferenda, the report finally examines the paid public domain: free exploitation, but subject to payment of a levy. It remains necessary to clarify what this charge would cover. The task force rejects out of hand the reading that would make it a form of compensation. Basing payment on the upstream use of works, at the training stage, would shift the analysis toward inputs – which is outside the task force’s scope, and the subject of separate work – and would amount to legitimizing through remuneration something that impoverishes creation. It would, moreover, reintroduce onto material deemed free the very unlawful appropriation that attachment to the public domain is precisely meant to prevent. The levy is therefore retained only as a market-orientation instrument, intended to reduce the attractiveness of synthetic content and redirect demand toward human creation, including hybrid creation. Conceived as a flat fee owed for any public use, commercial or not, by whoever distributes the content, and allocated to a creative-support fund, it nonetheless faces a major obstacle: its implementation presupposes that the use of AI be disclosed, which is not otherwise required. It would therefore rest largely on the good faith of distributors. For now, this nonetheless remains a prospective avenue.

Protection against content. Finally, the perspective is reversed: the output is no longer the object to be protected, but rather the source of the infringement.

Internal infringements proceed from unlawful appropriation. Infringement is established when the output reproduces, in recognizable fashion, the original expressive elements of a pre-existing work (*Mio/Konektra*, transposing the recognizability requirement from *Pelham I* and rejecting the overall-impression test). It presupposes actual copying: independent creation and chance coincidence constitute an obstacle to it, whereas good faith is not a condition for civil claim for damages.

The question of “style” then calls for a decisive distinction. Style as a technique and style as a trend belong to the realm of ideas, freely reproducible. But style as the imprint of an author’s personality – an author’s own expressive identity, crystallised in perceptible material elements – is protectable, in its most fully realized form when embodied in a recognizable character or universe (Studio Ghibli, Mario, the Batmobile). Generated content “in the style of” are therefore infringing when they take up these identifiable expressive elements, but not when they merely evoke a general trend. The pastiche exception (*Pelham II*) spares them only under conditions rarely met by a synthetic output: a recognizable artistic dialogue, perceptible differences, and a “creation” within the meaning of the ruling, which presupposes a perceptible human contribution to the result.

Absent an exclusive right, parasitism [*parasitisme*] takes over. Its standard, recently tightened by the Commercial Chamber [of the Cour de cassation] – namely an identified and individualised economic value – cuts both ways. It excludes purely synthetic output, which lacks such value, but applies precisely to a creator’s invested artistic identity, even outside any competitive relationship and regardless of differences in customer base or price.

External infringements, lastly, do not proceed from an appropriation but from deception as to the authenticity of the content: consumer and purchaser protection, personality rights (voice, image) and performing artists' rights, unfair competition through confusion, and competition law. Being unrelated to the protectability of the output, they fall under other issues and are merely flagged here, so as to respect the scope of this mission.

INTRODUCTION

Context. Content produced by or with the help of generative artificial intelligence is proliferating, to the point of overrunning certain segments of the cultural and creative sectors. The field of music offers an illustration: in the autumn of 2025, the platform Spotify announced it had removed more than 75 million AI-generated tracks⁵; in April 2026, Deezer indicated that AI-generated tracks now accounted for 44% of newly uploaded titles. Around the same time, an IPSOS study found that 97% of listeners were unable to distinguish musical content entirely generated by AI from content created by a human⁶. These synthetic figures, moreover, extend beyond the musical field and take on a life of their own. Take Xania Monet, for instance, a virtual “singer” with millions of streams, or Tilly Norwood, an entirely artificially generated “actress” who has drawn notice even at film festivals⁷.

A twofold phenomenon is thus emerging, one that considerably increases the risk of human creation being displaced by artificial production: a quantitative mass proliferation of synthetic content, coupled with an increasingly perfect qualitative resemblance to human-made content. The “Will Smith eating spaghetti test” bears this out⁸. Whereas the content produced in 2023 betrayed its artificial origin without difficulty – the form and expression of the face, the appearance of the food, the fluidity of movement – the same prompts, run again in late 2025, produce an almost perfect illusion of reality.

Philosophical stakes. A question then arises which must be considered, prior to any legal analysis, from a philosophical angle: should creation remain essentially human? Can the human mind nourish itself on content that no longer proceeds from other people, but from machines? And is such a shift desirable? This would amount to a paradigm shift, a revolution in the very definition of culture. In an ecosystem where the public is now only rarely able to tell whether what it perceives comes from a human or from an AI, a decision must be made as to whether human creation ought, despite everything, to be safeguarded.

Roland Barthes once proclaimed the “death of the author”; but for him, that death was the price paid for the birth of the reader—the author was erased or displaced downstream, once the work was created, in order to let meaning unfold. Generative AI reverses this perspective: the author now risks disappearing upstream, not because he created, but because he might no longer create

⁵ M. Birken, “Spotify retire 75 millions de morceaux indésirables dans son combat face à l’IA” [Spotify Removes 75 Million Unwanted Tracks in Its Fight Against AI], *Huffington Post*, 26 September 2025: https://www.huffingtonpost.fr/culture/article/dans-son-combat-face-a-l-ia-spotify-retire-75millions-de-morceaux-indesirables_255282.html

⁶ IPSOS survey, “Musique et IA : 97 % des auditeurs ne voient pas la différence” [Music and AI: 97% of Listeners Cannot Tell the Difference]: <https://www.ipsos.com/fr-fr/musique-et-ia-97-des-auditeurs-ne-voient-pas-la-difference>

⁷ A. Bensamoun, “Intelligence artificielle et creation Culturelle : ‘je t’aime, moi non plus’ [Artificial Intelligence and Cultural Creation: I Love You... Me Neither] in *Formes de l’intelligence*, Collège de France opening colloquium (2025), Collège de France, forthcoming (2026).

⁸ On this test, see: <https://www.lefigaro.fr/secteur/high-tech/will-smith-mangeant-des-spaghettis-comment-une-video-virale-illustre-les-progres-fulgurants-de-l-ia-generative-en-seulement-deux-ans-20251016>

at all, because he has been outcompeted or even replaced⁹. It remains necessary, however, to gauge what separates the machine from the creator. AI mimics creative intelligence without possessing its substance. It invents no new rule, only recombines statistical regularities extracted from the past. Human creation is of a different order. The embodied expression of a sensibility and a relationship to the world, it falls within what the philosophy of science describes as a norm proper to the individual, not a reproducible mechanism¹⁰. Preserving the authorial function is therefore not a corporatist reflex: it is an imperative of an ontological, even civilizational, order, so closely are societies bound up with the formalization of human thought.

Accordingly, the present report answers the question of whether human creation should be preserved unreservedly in the affirmative. This conviction does not amount to proposing the eradication of AI from creation, which would be neither meaningful in theory nor workable in practice. Rather, it concentrates on identifying the often-tenuous boundaries between human creation and synthetic production, so as to preserve the place of the former in the face of the overabundance of the latter.

Copyright as a lever. Copyright, the instrument *par excellence* for protecting cultural content, constitutes a decisive lever in this respect. Because it rewards creation – a term that is not neutral and runs through the entire subject – it is meant to draw the line between what may receive protection and what must remain beyond its scope. The stakes are all the more delicate given that modern copyright, through its increasing accommodation of technical creations and what is commonly termed the “small change” of copyright, works of minimal originality, sometimes struggles to maintain a clear perimeter.

The task force thus pursues a twofold objective: to determine what falls within the scope of protection and what must escape it, but also, by this same route, to reconsider age-old conditions of access long taken for granted—foremost among them, human intervention.

A sequence of studies. The present report forms part of a sequence of reflections that, since 2020, the CSPLA has devoted to the relationship between artificial intelligence and literary and artistic property. A first report, cross-cutting and exploratory in nature, *Intelligence artificielle et culture (Artificial Intelligence and Culture)*¹¹, had embraced the entire value chain, from upstream – the absorption of content by systems – to downstream (the status of the productions they generate) at a time when consumer-facing generative AI did not yet exist. The intensity that upstream issues subsequently took on justified further dedicated work: first, the transposition of the text-and-data-mining exceptions¹²; then, the implementation of the

⁹ A. Bensamoun and J. Groffe-Charrier, “L’acte d’écrire à l’ère de l’intelligence artificielle: je pense, donc... j’écris” [The Act of Writing in the Age of Artificial Intelligence: I Think, Therefore... I Write], *JCP G* 2025, Libres propos 1029.

¹⁰ A. Bensamoun, “Artificial Intelligence and Cultural Creation: ‘I Love You... Me Neither,’” cited above.

¹¹ CSPLA, *Rapport de mission. Intelligence artificielle et culture* [Task Force Report. Artificial Intelligence and Culture], final report, 27 January 2020, A. Bensamoun and J. Farchy (co-chairs), P.-F. Schira (rapporteur).

¹² CSPLA, *Rapport de mission. Transposition des exceptions de fouille de textes et de données : enjeux et propositions* [Task Force Report. Transposition of the Text and Data Mining Exceptions: Issues and Proposals], plenary session of 15 December 2020, A. Bensamoun (chair), Y. Bouquerel (rapporteur).

transparency obligation regarding training data instituted by Article 53 of the AI Regulation¹³; and finally, the remuneration of cultural content used by AI systems¹⁴. These three reports shared a common perspective, that of the input side – the conditions under which protected content feeds the models – usefully supplemented by a separate report on the law applicable to generative AI models marketed within the European Union¹⁵.

The present task force addresses only the output side – the output, or outgoing content – and the two questions it raises. Can content produced with AI be protected? And how can one be protected against it?

The specific challenge: a question of proof. The difficulty is not, first and foremost, one of legal regime. Once it is accepted that content produced with AI can be considered a work, it is governed by the rules which ordinarily apply. The difficulty lies in the proof. Purely human creation once benefited from a kind of self-evidence: an object displaying the outward characteristics of a work was, absent particular circumstances, presumed to proceed from a human author. The availability of tools capable of producing content indistinguishable from human creations strips that self-evidence of its foundation. It is this shift – from characterisation to its demonstration – that governs the bulk of the analysis.

The stance adopted: include without redefining. To these questions, the task force intends to respond through inclusion. The autonomous concept of originality, consolidated by the *Mio/Konektra* ruling of 4 December 2025, is robust enough and flexible enough to accommodate content produced with AI, without it being necessary – or even desirable – to forge a new definition. The task, therefore, is not to reinvent originality, but to identify its concrete seats: the points in the creative process where the author’s free and creative choices are imprinted in the result.

To label them, the report proposes a rigorous vocabulary which distinguishes, within outputs, hybrid production – that in which the human retains an active role, without this prejudging originality – hybrid creation, which is the protectable share of it once the originality threshold has been crossed, and synthetic production, generated without significant human intervention and necessarily outside the scope of copyright¹⁶.

¹³ CSPLA, *Rapport de mission relative à la mise en œuvre du règlement européen établissant des règles harmonisées sur l’intelligence artificielle (« template »)* [Task Force Report on the Implementation of the European Regulation Establishing Harmonised Rules on Artificial Intelligence (“Template”)], plenary session of 9 December 2024, A. Bensamoun (chair), L. Ferreira (rapporteur), with the support of F. Pascal.

¹⁴ CSPLA, *Rapport de mission sur la rémunération des contenus culturels utilisés par les systèmes d’IA – Volet juridique* [Task Force Report on the Remuneration of Cultural Content Used by AI Systems – Legal Component], plenary session of 23 June 2025, A. Bensamoun (co-chair), J. Groffe-Charrier (co-rapporteur); a separate document focused on the economic aspects was produced by J. Farchy (co-chair) and B. Blain (co-rapporteur).

¹⁵ CSPLA, *Rapport de mission sur la loi applicable aux modèles d’IA générative commercialisés dans l’Union européenne* [Task Force Report on the Law Applicable to Generative AI Models Marketed in the European Union], plenary session of 15 December 2025, T. Azzi (chair), Y. El Hage (rapporteur).

¹⁶ For a diagram of these terminological choices, see annexes, section figures, tables, diagrams, “Productions using AI – adopted vocabulary”.

A stance against a purely consumerist reading. This choice is not neutral, and it stands in opposition to the approach advocated by certain recent works, particularly those centred on consumers and on the advantages generative AI offers them¹⁷. This lens leads to viewing copyright as a possible obstacle to “consumer welfare,” and to proposing statutory licensing systems guaranteeing broad access to content at minimal cost¹⁸. Creation is there understood in a purely instrumental, ends-driven perspective: it should endure so as to feed AI systems, so that consumers may make use of it¹⁹.

This reading seems to diminish what creation contributes to the world and to civilization. Consumer expectations cannot be ignored, but they cannot constitute the sole interpretive key. The author does not create in order to meet demand and preserving human creation cannot be reduced to satisfying needs, unless one is prepared to reduce authors (and, more broadly, rightholders) to the rank of mere “content suppliers”.

An avowed doctrinal continuity. On the matter of characterisation, which forms the report’s own specific subject matter, the analysis does not start from scratch. As early as 2020, the first report of the Artificial Intelligence and Culture task force had laid down two markers that the present task force makes its own²⁰. On the one hand, copyright remains anchored to a human author: its application presupposes a person, even where the link to the creation grows more tenuous. The recent European report on copyright and generative artificial intelligence points the same way, affirming that “content fully generated by AI that does not meet the established criteria for copyright protection should remain ineligible for copyright protection, and that the public domain status of such outputs be clearly determine”²¹. This is an essential statement, both legally and politically – in the etymological sense of a will concerning all citizens – in that it reflects the choice to reserve for humans the right that protects creation. On the other

¹⁷ C. Peukert, *The Economics of Copyright and AI: Empirical Evidence and Optimal Policy*, report commissioned by the Policy Department for Citizens’ Rights and Constitutional Affairs of the European Parliament at the request of the Committee on Legal Affairs, 3 December 2025: [https://www.europarl.europa.eu/thinktank/en/document/IUST_STU\(2025\)778859](https://www.europarl.europa.eu/thinktank/en/document/IUST_STU(2025)778859)

¹⁸ Ibid., p. 7: “This makes consumer welfare – not just creators’ or firms’ interests – the central benchmark for policy,” from which the report infers that “statutory licensing appears optimal [...]. Making the licence ensures wide access to works, a royalty rate set by a regulatory authority balances interests of rightholders, AI developers, and end users”.

¹⁹ Ibid., p. 38: “The majority of welfare gains from AI accrue to consumers [...]. Statutory licensing, carefully designed and implemented, offers a pragmatic compromise: it secures broad access, sustains incentives, and minimises costs”. Contra CSPLA, Take Force Report on the Remuneration of Cultural Content Used by AI Systems – Legal Component, cited above.

²⁰ CSPLA, *Intelligence artificielle et culture*, cited above, esp. p. 46. The report maintained that copyright must remain tied to a human being and that, insofar as AI is a tool in the hands of a natural-person creator – selection of inputs upstream, curation downstream – ordinary copyright law is intended to apply; it further explored, without settling the question, the intrinsic objectivity of originality (pp. 34–35), attribution to an indirect author, i.e. the system’s designer (pp. 35–36), and possible alternatives to copyright—a special right, a neighbouring right, a *sui generis* right, the public domain (pp. 41–46).

²¹ European Parliament Resolution of 10 March 2026 on Copyright and Generative Artificial Intelligence—Opportunities and Challenges (2025/2058(INI)), on the report of the Committee on Legal Affairs (A10-0019/2026, rapporteur: A. Voss), point 25.

hand, insofar as AI is merely a tool in the hands of a creator, classical copyright is intended to apply. This foundation is carried forward without reservation.

Continuity, however, is not stasis. Where the 2020 report explored, without opting between them, avenues that the state of the law did not yet allow to be settled – an “intrinsic” objectivization [*objectivation*] of the originality criterion, attachment to an indirect author identified with the system’s designer, or the conception of regimes alternative to copyright – the consolidation that has since occurred now makes it possible to take a position in favour of the autonomous standard of originality, the task being to locate its concrete seats within hybrid creation. That which a pioneering report had rightly left open, the present report is now in a position to resolve.

Method. The method first consisted in bringing order to a wealth of material. The question of outputs is addressed by numerous States, both within²² and outside the European Union – notably Australia²³, the United States²⁴, and China²⁵ – by legislators as well as by courts, and offering varied solutions. This work of assembling sources brought the main points of tension to the surface, which gave rise to a questionnaire circulated in November 2025 in order to gather external views²⁶. Its twenty questions were organised around four sections: generative AI and the respondent’s activity; generative AI and copyright; generative AI and other rights (personality rights, data protection law, competition law, and so on); and finally, generative AI from a prospective and comparative standpoint. The task force received more than thirty responses from stakeholders of every kind – representatives of authors and creators, collective management organizations, software publishers, press organizations, businesses – and conducted hearings on specific technical points. All of these elements informed the present analysis.

Solutions that are, by nature, provisional. The proposals set out here make no claim to being definitive. They are grounded in a given state of technology and law, the rapid evolution of which may shift or even overturn the terms of the present analysis. The clearest illustration of this is the 2020 task force itself. Conducted before generative AI systems became available to

²² See e.g. Prague Municipal Court, 11 October 2023: https://msp.gov.cz/documents/14569/1865919/10C_13_2023_10/108cad3e-d9e8-454f-bfac-d58e1253c83a; and, more recently, Munich Regional Court, 11 November 2025, *OpenAI v GEMA*: <https://www.justiz.bayern.de/gerichte-und-behoerden/landgericht/muenchen-1/presse/2025/11.php>. On the legislative side, see the Italian law of 23 September 2025: <https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2025-0923;132>

²³ See e.g. Federal Court of Australia, 15 December 2010: <https://www.austlii.edu.au/cgibin/viewdoc/au/cases/cth/FCAFC/2010/149.html>

²⁴ See in particular the decisions of the USCO: *Zarya of the Dawn*, 21 February 2023: <https://copyright.gov/docs/zarya-of-thedawn.pdf>; *Théâtre D’opéra Spatial*, 30 August 2023; *SURYAST*, 11 December 2023 (protection refused in the United States, granted in India). Before the courts, see U.S. Court of Appeals for the D.C. Circuit, *Thaler v Perlmutter*, 18 March 2025: <https://cases.justia.com/federal/appellate-courts/cadc/23-5233/23-5233-2025-03-18.pdf>

²⁵ See e.g. Beijing Internet Court, No. (2023) Jing 0491 Min Chu 11279, 27 November 2023: https://english.bjinternetcourt.gov.cn/2023-12/28/c_688.htm; Changshu People’s Court, No. (2024) Su 0581 Min Chu 6697, 18 October 2024; and, more recently, Shanghai Court, 6 November 2025. On the legislative side, see the Chinese regulation of September 2025 requiring the labelling of AI-generated content.

²⁶ See annexes, “Questionnaire”.

the general public, it reasoned about a technology that was still prospective. Some of the avenues it explored have since lost relevance as the actual use of these tools revealed the genuine, and often decisive, place of human intervention. What was once a laboratory hypothesis has become everyday practice. It would therefore be equally imprudent to treat the solutions adopted here as settled once and for all. They hold for the present state of affairs, and will need to be re-examined as technology progresses and case law matures. The analysis, moreover, will need to be supplemented so as to go deeper into certain points.

Outline. Many creators today incorporate AI as a tool within their creative process, and it would be excessive to exclude content from protection on the sole ground that this instrument was used. As early as the 1990s, the rise of consumer computing saw the emergence of creative software enabling the production or modification of graphic or audio works; their users are nonetheless authors, provided the conditions for access to protection are met. An analogous approach should prevail with respect to AI. The task, accordingly, is to revisit these conditions of access (preliminary part), so as to identify and characterise content produced with AI (part one), before testing the solutions suited to ensuring its protection (part two).

PRELIMINARY PART: REVIEW OF THE CONDITIONS OF ACCESS TO PROTECTION

Conditions rooted in legal scholarship and case law. Drawing the dividing line between content capable of accessing protection and content that must remain outside the scope of copyright requires first returning to the conditions of access themselves. These present a peculiarity: for the most part, the law neither defines nor even contemplates them, and it is the courts, assisted by legal scholarship, that have built them up. This makes setting them out here all the more necessary. To that end, protection is reserved for a human person (1), who creates a form (2) that is original (3), irrespective of its merit or of whether the author executed it personally (4).

1. Human intervention

A centuries-old requirement. A creator is human. The notion of “author,” like that of a “work of the mind,” is defined neither by French law, nor by EU law, nor by international law. No provision of the Berne Convention expressly designates the author as a natural person. Numerous indications nonetheless converge to confirm this longstanding approach²⁷.

First, the entire subject matter is built around the figure of the author. Le Chapelier’s famous statement, delivered on the occasion of the law of 13–19 January 1791 concerning performances and establishing the right of public performance, envisaged literary property as “the most sacred, the most legitimate, the most unassailable, and, if I may put it this way, the most personal of all forms of property [...] the work, fruit of a writer’s thought”²⁸. Without lending to this statement an anachronistic meaning it obviously did not have, the reminder remains central: the reward intrinsic to this property is justified as the counterpart of human creation.

Next, the concepts themselves revolve around the human being. The work “of the mind” carries a reference to thought; the imprint of personality or free and creative choices define originality; the calculation of terms of protection is carried out, with certain exceptions, from the death of the author; moral rights notably enshrine the right of “authorship” or attribution. The entire vocabulary of copyright refers, without expressly naming it, to the human being.

Finally, the legislator explicitly refers to the natural person for certain specific categories of works²⁹.

²⁷ On the Berne Convention, see A. Dietz, “The Concept of Author under the Law of the Berne Convention,” *RIDA* No. 155, January 1993, p. 3, esp. pp. 11–13. The author states that “as certain philosophical, legal, semantic, and systematic arguments reveal, (...) [the Convention] is founded on the notion of the author as the natural person who created the work”.

²⁸ Le Chapelier, Report on the Petition of Dramatic Authors, session of 13 January 1791, p. 16.

²⁹ See in particular art. L. 113-2, para. 1 of the French Intellectual Property Code (CPI): “A work of collaboration is one in the creation of which several natural persons have participated”; art. L. 113-7, para. 1: “The natural person or persons who carry out the intellectual creation of an audiovisual work shall have the status of author of

Exclusion of legal persons. Courts have repeatedly held that a legal person “cannot have the status of author”³⁰. Desbois wrote as much: “Since copyright arises in the person and in the estate of the creator, legal persons must be excluded from the circle of authors, for it is impossible to suppose that a company imagined and composed a work of the mind”³¹. While the legislator also targets the legal person with respect to the collective work³², it does not envisage the notion of author for them, but rather that of initiator (“initiative”), which is fundamentally different. And while the courts have, in some cases, recognised a legal person’s ownership of moral rights³³, they have never recognised in them authorial status. Authorship and rightsholding remain two distinct notions, even where rightsholding is original.

Exclusion of animals and machines. Authorial status is not to be confused with legal personality: it depends on personality in the sense of embodied individuality, not on the status of legal subject.

American courts drew this conclusion in the case of *Naruto the monkey’s selfie*: “this monkey – and all animals, since they are not human – lacks statutory standing under the Copyright Act”³⁴. The Copyright Office, in its *Compendium*, expressly excludes works “produced by nature, animals, or plants,” as well as those “produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author”³⁵. An identical approach prevails under French law, where the question, with respect to animals, has never been directly put to the courts³⁶. Comparative law confirms this exclusion as extended to algorithmic productions: in Australia, the courts refused protection to a database generated by artificial intelligence³⁷; in Germany, the *Bundesgerichtshof*, from a

that work”; art. L. 113-8, para. 1: “The natural person or persons who carry out the intellectual creation of a radio work shall have the status of author of that work”.

³⁰ Cass. 1re civ., 19 February 1991, No. 89-14.402, *Technal v Stocalu*, Bull. civ. I, No. 67: D. 1991.IR75. Add, to the same effect, Cass. 1re civ., 15 January 2015, *Propr. intell.* 2015, No. 55, p. 195, obs. J.-M. Bruguière, and p. 196, obs. A. Lucas; CCE 2015, comm. 19, note C. Caron.

³¹ H. Desbois, *Cours de propriété littéraire artistique et industrielle* [Course on Literary, Artistic and Industrial Property], 1960–1961, p. 58. – For a more nuanced reading of the concept, drawing on older sources, M. Vivant, “L’œuvre de l’esprit: création d’une personne physique ou morale?” [The Work of the Mind: Created by a Natural or a Legal Person?], in *L’œuvre de l’esprit en question(s): un exercice de qualification*, ed. A. Bensamoun, F. Labarthe, and A. Tricoire, Mare et Martin, Droit privé et sciences criminelles series, 2015, p. 43.

³² Art. L. 113-2, para. 3, CPI: “A work is termed collective where it is created on the initiative of a natural or legal person who edits, publishes, and discloses it under their direction and in their name, and in which the personal contributions of the various authors participating in its creation merge into the overall work for which it was conceived, such that it is not possible to attribute to each of them a separate right in the work as a whole”.

³³ Cass. 1re civ., 22 March 2012, appeal No. 11-10132: *Légipresse* 2012, p. 377, note V. Varet; D. 2012, p. 1246, note A. Latil; CCE 2012, comm. 61, obs. C. Caron; *Propr. intell.* 2012, No. 44, obs. J.-M. Bruguière: “The natural or legal person who takes the initiative for a collective work is vested with the author’s rights over that work, including the moral right prerogatives”.

³⁴ U.S. Court of Appeals for the Ninth Circuit, 23 April 2018, *Naruto & People for the Ethical Treatment of Animals v D.J. Slater*. Decision: <http://cdn.ca9.uscourts.gov/datastore/opinions/2018/04/23/16-15469.pdf>

³⁵ U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices*, 3rd ed., 2021 (last updated 28 January 2021), § 313.2: <https://www.copyright.gov/comp3/docs/compendium.pdf>

³⁶ Along these lines, see M. Vivant and J.-M. Bruguière, *Droit d’auteur et droits voisins* [Copyright and Related Rights], Précis Dalloz, 5th ed., 2025, No. 120.

³⁷ Full Court of the Federal Court of Australia, *Telstra Corporation Limited v Phone Directories Company Pty Ltd* [2010] FCAFC 149: “Drawing on the reasoning of the High Court in *IceTV v Nine Network* (2009), the Full

converging though patent-law perspective, refused to recognise an AI system as an inventor in the DABUS case³⁸.

The possible recognition (contested and contestable) of an “electronic personhood” for the most advanced AI systems would change nothing in this respect. Legal personality is, in itself, insufficient to gain authorial status³⁹. The personality required as a condition of access, via originality⁴⁰, must therefore not be understood in its legal sense, but in its philosophical meaning, referring to being and to a form of consciousness, however incomplete or altered it may be⁴¹.

2. ... resulting in a creation of form...

From idea to form. The human mind, necessarily at the heart of creation, must give formal expression to its thought for a work of the mind to emerge: this is the boundary – traditional, and at times porous – between idea and work. As Desbois put it, “even when marked with the stamp of genius, ideas are by nature and by purpose free for all to use”⁴². The justification for this exclusion is threefold.

First, it serves to prevent copyright from becoming a mechanism of over-propertization: protecting ideas would stifle future creation through the prohibition on use that a monopoly entails.

Next, it is of the very essence of creation that the same idea can give rise to multiple works, because each individual can appropriate it differently according to their own personality. The idea of depicting the end of the world gave rise to the comedy of Kubrick’s *Dr. Strangelove* as much as to the aestheticism of Lars von Trier’s *Melancholia*, to Bosch’s *Last Judgment*, or to Cormac McCarthy’s *The Road*.

Federal Court held that, to be original, a work must: 1. not be copied; 2. originate from a human author; and 3. result from independent intellectual effort. Second, the Full Court found that the extraction effort came not from a person or group of persons but from a computerised process of storing, selecting, arranging, and organising the data with a view to producing the directories in their published form. The Court emphasised that it was the extraction work that constituted the relevant effort for the purposes of assessing originality”.

³⁸ BGH, order of 11 June 2024, X ZB 5/22, *DABUS*: “*Erfinder im Sinne von § 37 Abs. 1 PatG kann nur eine natürliche Person sein. Ein maschinelles, aus Hard- oder Software bestehendes System kann auch dann nicht als Erfinder benannt werden, wenn es über Funktionen künstlicher Intelligenz verfügt*” (our translation: only a natural person can be an inventor within the meaning of § 37(1) of the Patent Act; a system consisting of hardware or software, even one equipped with artificial intelligence functions, cannot be designated as an inventor). Decision: <https://juris.bundesgerichtshof.de>

³⁹ Along these lines, see A. Bensamoun, “Intelligence artificielle et propriété intellectuelle” [“Artificial Intelligence and Intellectual Property”], in *Droit de l’intelligence artificielle* [AI Law], ed. A. Bensamoun and G. Loiseau, LGDJ/Lextenso, Droit & pratique professionnelle series, 3rd ed., 2026, p. 291. – For a critical analysis of the “fictionalisation” of a machine’s personality, see G. Courtois, “Intellectual Property and Artificial Intelligence: Towards a Redefinition of the Frameworks of Creation?,” *Arch. phil. Droit*, 2026/1, vol. 66, p. 347.

⁴⁰ On which see below, this Part, §3.

⁴¹ On the notion of consciousness, see N. Enser, *Conscience de la création et droit d’auteur* [Consciousness of Creation and Copyright], LexisNexis, CEIPI collection, 2022.

⁴² H. Desbois, *Le droit d’auteur en France* [Copyright in France], Dalloz, 3rd ed., 1978, p. 22.

Finally, the purpose of copyright is to enable works to be disseminated on terms chosen by the author, which requires the creation to be perceptible and to move beyond the stage of mere idea by taking on a form. The Christo case offers a textbook illustration: while the photographic reproduction of the wrapped Pont-Neuf constitutes infringement⁴³, the idea of wrapping buildings or furniture is free for all to use⁴⁴; the artist cannot reserve his idea to himself and bar others from it. And one might add today that the idea of “dressing” the Pont-Neuf by creating a kind of “cave” is likewise free for all to use⁴⁵.

Influence on the physical world. Human intervention must take concrete shape in the physical world: it cannot merely observe it. This requirement, tacit but natural, underlies the difficulty in characterising ready-mades, in which the artist appropriates an existing object to confer artistic significance upon it. Duchamp himself described the ready-made as “a work without an artist to make it”⁴⁶. The question is, however, less settled than it first appears: the choice of the object, its decontextualization, its placement in space all involve an intellectual intervention not unlike that which courts recognise in photojournalists (choice of subject, framing, timing). The categorical exclusion of the ready-made from the scope of protection is therefore not self-evident, and the question remains debated among legal scholars.

It remains the case that the modification of the physical world through human intervention constitutes the primary sign of possible access to protection. There is no requirement whatsoever that creation proceed from nothing: declaring a rock to be a work does not suffice, but turning it into a sculpture gives grounds for protection if the originality of the form is established. Through this modification, the author transcribes his or her personal perception, and it is that perception which grounds protection. This reasoning logically leads to the exclusion of discoveries, which reveal what already exists without modifying it⁴⁷.

Conscious modification. There remains the question, debated in legal scholarship, of whether consciousness is required in the act of intervention. Some scholars propose “excluding from copyright protection a work created by an individual entirely deprived of discernment”⁴⁸; others take the view that it is the result, not the conscious process, that must be taken into account⁴⁹. The present report adopts the latter reading: a creation made by an author who is partially deprived of his or her mental faculties should be able to benefit from protection. The

⁴³ TGI Paris, 13 March 1986: *D.* 1987, p. 150, obs. C. Colombet.

⁴⁴ TGI Paris, 26 May 1987: *D.* 1988, p. 201, obs. C. Colombet.

⁴⁵ See “La Caverne du Pont-Neuf,” by JR, June 2026: <https://www.paris.fr/pages/la-caverne-du-pont-neuf-de-jrl-incroyable-projet-sera-devoile-dans-100-jours-33164>

⁴⁶ Interview with Marcel Duchamp, conducted by Richard Hamilton and recorded on 27 September 1961 for the programme “Monitor” (broadcast on 17 June 1962 on the BBC).

⁴⁷ At most, where the discovery concerns a work of the mind, a right is granted – under the French Intellectual Property Code (art. L. 123-4 CPI) – that does not create authorial rights but rather a specific right in favour of the owner of the medium, intended to encourage the dissemination of the discovered work.

⁴⁸ A. Lucas and A. Lucas-Schloetter, *Traité de la propriété littéraire et artistique* [Treatise on Literary and Artistic Property], LexisNexis, 6th ed., 2026, No. 147.

⁴⁹ For a defence of this approach, see N. Enser, *Conscience de la création et droit d’auteur*, cited above. – Cf. E. Treppoz, “What Legal Protection(s) for Contemporary Art?,” *RIDA* 3/2006, p. 89: “Whatever the lawyer may say, chance may become part of the creative act. It is then for the artist to accept or reject this creative chance. It is the artist’s disclosure of the work that matters”.

opposite approach runs into an irreducible difficulty, that of probing the author's state of consciousness. While the absence of consciousness may, in certain cases, be obvious, the threshold remains impossible to set in others: was the poet who wrote under the influence of absinthe devoid of consciousness? For the whole poem, or only for its final lines?

The question arises with particular acuteness in the context of generative AI, where the opacity of the tool makes it singularly difficult to identify the degree of control exercised by the user, and where some might be tempted to conceal their use of the tool in order to avoid having purely synthetic productions denied protection⁵⁰. The issue is not one of admitting a creation without a creating subject, but of denying the courts any assessment of the author's psychological degree of consciousness at the moment of the creative act: not the ontological absence of consciousness, but the evidentiary impossibility of measuring its degree where it does exist.

Perceptible, precise, and objective modification. Human intervention must result in an outcome perceptible to the senses. Article L. 112-1 of the French Intellectual Property Code establishes a principle of non-discrimination: the work must exhibit a form, whatever its nature; in principle, any of the senses may be engaged, whether mechanical (sight, hearing, touch) or chemical (taste, smell).

This textual indifference is, however, circumvented by the French Cour de cassation, which continues to exclude gustatory and olfactory creations. Initially grounded in the distinction between know-how and the imprint of personality⁵¹, the refusal now rests on a criterion of precision of form: the Court requires that the sensory form be “identifiable with sufficient precision to allow it to be communicated”⁵².

The European court confirmed this approach in the *Levola Hengelo* ruling, concerning the taste of a cheese. For there to be a work “the subject matter protected by copyright must be expressed in a manner which makes it identifiable with sufficient precision and objectivity” (para. 40), and precise and objective identification of taste is “not possible in the current state of scientific

⁵⁰ These difficulties, which concern proof rather than the substantive requirements, are examined below, Part 2, §1.

⁵¹ See in particular Cass. 1re civ., 13 June 2006, No. 02-44.718: *JurisData* No. 2006-033999; *CCE* 2006, comm. 119, note C. Caron; *JCP G* 2006, II, 10138, note F. Pollaud-Dulian; *Propri. intell.* 2006, p. 442, obs. A. Lucas; *Propri. intell.* 2007, No. 24, p. 367, obs. M. Vivant; *D.* 2006, p. 2470, note B. Edelman, and p. 2993, obs. P. Sirinelli; *Propri. ind.* 2006, comm. 82, note J. Schmidt-Szalewski; *Dr. et patrimoine* 2007, No. 156, p. 42, note J.-M. Bruguière: “the fragrance of a perfume, which results from the mere application of know-how, does not constitute, within the meaning of the relevant provisions, the creation of a form of expression capable of benefiting from copyright protection as a work of the mind”. Add, to the same effect, Cass. com., 1 July 2008, No. 07-13.952: *JurisData* No. 2008-044659; *D.* 2009, p. 1182, note B. Edelman; *Propri. intell.* 2008, p. 419, obs. J.-M. Bruguière; *RTD com.* 2008, p. 735, obs. F. Pollaud-Dulian; and Cass. 1re civ., 22 January 2009, No. 08-11.404: *JurisData* No. 2009-046664; *RIDA* 1/2009, p. 371; *RTD com.* 2009, p. 302, obs. F. Pollaud-Dulian (also concerning a fragrance).

⁵² Cass. com., 10 December 2013, No. 11-19.872: *JurisData* No. 2013-028892; *CCE* 2014, comm. 13, note C. Caron; *RIDA* 1/2014, p. 499 and 415, obs. P. Sirinelli; *Propri. intell.* 2014, p. 51, obs. J.-M. Bruguière; *D.* 2014, p. 2079, obs. P. Sirinelli. It should be noted that this criterion had previously been proposed by Professor Pierre-Yves Gautier (in earlier editions of his textbook published by PUF): P.-Y. Gautier and N. Blanc, *Propriété littéraire et artistique*, LGDJ, 3rd ed., 2025, No. 56.

development to achieve by technical means” (para. 43)⁵³. The temporal qualifier in this last formulation suggests that advances in identification methods could, in time, open the way to protection.

The *Cofemel* ruling, by confirming that characterisation as a work requires two cumulative conditions – an original subject matter and the expression of that creation, with no additional condition relating to aesthetic effect – bolsters this reading: it is the precise and objective identifiability of the form, not its sensory nature, that constitutes the decisive criterion⁵⁴.

3. ... that is original...

Classical definition and framework concept. Originality is understood as the imprint of the author’s personality⁵⁵. Reflecting the reading of copyright historically described as romantic, this condition verifies that the work bears the trace of the human being at its origin. Intrinsically subjective in its original French sense, the concept lends itself to varying formulations; all of them seek the “coloring”⁵⁶ that the author imprints upon the work.

This age-old approach has undergone significant shifts, unsurprisingly for a framework concept that Gérard Cornu described as conceivable “through the vagueness, the fuzziness, inherent to it, or if one prefers, through a certain generic quality from which the concept draws its capacity to apply to an indefinite series of cases. One can give a general idea of it and particular examples, but one cannot, without distorting it, force the examples into a fixed definition”⁵⁷. There is not one but many originalities⁵⁸, and the condition adapts according to the kinds of subject matter capable of receiving protection.

⁵³ CJEU, Grand Chamber, 13 November 2018, Case C-310/17, *Levola Hengelo BV v Smilde Foods BV*: CCE 2019, comm. 1, obs. C. Caron; *D.* 2018, p. 2464, obs. F. Pollaud-Dulian; *Propri. indus.* 2019, étude 3, obs. T. Gisclard; *Europe* 2019, p. 45, obs. D. Simon; *RLDI* 2018, No. 154, p. 16, obs. L. Costes.

⁵⁴ CJEU, Grand Chamber, 12 September 2019, Case C-683/17, *Cofemel – Sociedade de Vestuário SA v G-Star Raw CV*: *D.* 2019, p. 1759; *D.* 2020, p. 1588, obs. J.-C. Galloux and P. Kamina; *RTD com.* 2020, p. 54, obs. F. Pollaud-Dulian; *RTD eur.* 2019, p. 930, obs. E. Treppoz; *CCE* 2019, comm. 65, obs. C. Caron; *Propri. intell.* 2020, No. 74, p. 37, obs. J.-M. Bruguière.

⁵⁵ On the origin of this definition, see M. Vivant and J.-M. Bruguière, *Droit d’auteur et droits voisins*, Précis Dalloz, 5th ed., 2025, No. 280: “It is difficult to attribute authorship of the formula to any one particular person. It was probably the advocate Rendu, pleading before the Cour de cassation in 1863 in the Cavour case [...]. On that occasion, he stated that, if two photographs of the same subject differ noticeably, ‘it is because the photographer has placed in them the imprint of his personality,’ asserting that ‘any work whose form and appearance bear a type imprinted with the personality of its author’ is a work of the mind calling for protection (D. 1883.1.53)”.

⁵⁶ M. Vivant, “ChatGPT et la problématique du droit d’auteur” [ChatGPT and the Copyright Problem], *JCP G* 2023, doctr. 431, No. 9.

⁵⁷ G. Cornu, *Regards sur le titre III du livre III du code civil* [Perspectives on Title III of Book III of the Civil Code], Les cours du droit, 1976, No. 70, p. 56.

⁵⁸ Along these lines, see V.-L. Benabou, “Originalité? Vous avez dit originalités?” [“Originality? Did You Say Originalities?”], *Legicom* 2014/2, No. 53, p. 5.

Shifts: know-how, novelty, “small change”. The distinction between originality and know-how (which alone does not suffice for access to protection⁵⁹) constitutes the first sign of this shift. Whereas know-how presupposes following a “method” acquired through work, experience, and skill, originality is supposed to break new ground⁶⁰.

This approach, suited to the fine arts, has been called into question by the acceptance of copyright’s “small change” which, by broadening the field’s scope of application, has weakened the condition of access⁶¹. The result is an “overly inclusive conception of the work of the mind,”⁶² grounded in a conflation of arbitrary choices (bearing the stamp of originality) with choices of a different order⁶³.

The rule nonetheless remains one of distinction, and the Court of Justice reaffirmed it in the *Football Dataco* ruling concerning a database⁶⁴: neither labour, nor know-how, nor a significant addition to the data can substitute for originality in the selection or arrangement of that data.

Determining the originality of a utilitarian creation nevertheless requires adapting the scope of this requirement⁶⁵ by lowering the threshold.

The distinction between originality, a subjective concept in copyright law, and novelty, an objective concept in industrial property law, is subject to a similar drift. Every protected work is, in a sense, new because it is the expression of an individual personality; however, the issue is not to examine, chronologically, whether prior works or rights existed. Courts have sometimes made this confusion⁶⁶, which the cumulative protection afforded by industrial design law facilitates with respect to certain objects.

⁵⁹ See along these lines – treating know-how in relation to fragrances as a ground for denying protection – the case law cited above, this Part, §2.

⁶⁰ This does not, of course, amount to excluding experience, effort, and skill.

⁶¹ A. Bensamoun, “The Protection of Works of the Mind by Copyright: ‘Grasp All, Lose All’ [“qui trop embrasse mal étreint”],” *D.* 2010, p. 2919.

⁶² A. Lucas and A. Lucas-Schloetter, *Traité*, cited above, No. 227.

⁶³ *Ibid.*, No. 226, in relation to works such as the instructions for use of a door trellis, the text of a patent, or a telephone directory: “That the making of such works involves choices is not in doubt. But these choices are not in any way arbitrary. They reveal the creator’s know-how, objectively measurable, rather than his or her personality”.

⁶⁴ CJEU, 1 March 2012, *Football Dataco*, Case C-604/10: *Europe* 2012, 219, note L. Idot; *CCE* 2012, comm. 47, note C. Caron.

⁶⁵ Along these lines, see A. Lucas and P. Sirinelli, “L’originalité en droit d’auteur” [Originality in Copyright Law], *JCP G* 1993, I, 3681: “the functional character of these works will, in certain cases, require some departure from the classic conception of originality. The problem arises more generally for works of applied art”.

⁶⁶ See Cass. civ., 27 May 1942: S. 1942.I.124, refusing protection on the ground that the work displayed “no character of novelty”. See also TGI Paris, 3rd chamber, 8 November 1990, *Thiéral v Saraco*: *RDPI* No. 32, p. 61: “In the absence of any prior art wholly destructive of originality, the ‘Talma’ ski trousers constitute a work protectable by copyright”.

A second definition and the autonomous concept under EU law. The emergence of “digital creations” in the 1980s led, once the choice had been made to opt for copyright rather than patent law, to originality being reworked so as to give rise to a second, objective definition⁶⁷.

The *Pachot* ruling, handed down by the Cour de cassation sitting *en banc* [*Assemblée plénière*] concerning software⁶⁸ (protection subsequently organised by a dedicated directive departing from ordinary rules in numerous respects⁶⁹), approached originality as “the mark of the author’s intellectual contribution,” consisting of “a personalised effort going beyond the mere implementation of automatic and constraining logic”. This second definition matches the contours and constraints of technical creations: it is impossible to detect the imprint of a personality in a sequence of 0s and 1s, whereas “personalised effort” is, for its part, capable of being established.

To this duality – which, incidentally, makes originality a polysemous concept – is added, since the *Infopaq* ruling⁷⁰, the establishment of originality as an autonomous concept under EU law. The principle of autonomous interpretation makes it possible, as has been observed, to treat “the silences of harmonization as a reservoir of Community competence, so as to give substantive content to a concept appearing in a harmonizing text without being precisely defined there”⁷¹. The definition adopted – “the author’s own intellectual creation,” further specified notably by the *Painer*⁷² and *Mio/Konektra*⁷³ rulings – will be examined in detail below⁷⁴; suffice it to note here that the French framework concept is now shot through with an autonomous European concept, from which it derives its definition and contours.

A concept under tension. Originality has shown a remarkable capacity to adapt to the various kinds of subject matter open to protection. In doing so, it has doubtless lost part of its own identity: the “umbilical” link between author and work, enshrined by the condition of access, has here and there grown looser. The question remains as to how the concept will be

⁶⁷ On this idea of a two-headed concept, see V.-L. Benabou, “Originality, a Legal Janus: Reflections on the Birth of an Autonomous EU-Law Concept,” in *Mélanges en l’honneur du professeur André Lucas* [Essays in Honour of Professor André Lucas], Litec, 2014, p. 17 et seq.

⁶⁸ Ass. plén., 7 March 1986, *Pachot*; *D.* 1986, p. 405, note B. Edelman; *RTD com.* 1986, p. 399, obs. A. Françon.

⁶⁹ Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, subsequently Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (codified version of the 1991 directive).

⁷⁰ CJEU, 16 July 2009, *Infopaq*, Case C-5/08: *Propr. intell.* 2009, No. 33, p. 378, obs. V.-L. Benabou; *JCP G* 2009.II.272, note L. Marino; *CCE* 2009, comm. 97, C. Caron. On the judgment and its consequences, see also B. Michaux, “Originality in Question: Originality under Community Law after the *Infopaq* Judgment,” *RLDI* 2011, No. 70, p. 121; V.-L. Benabou, “The *Infopaq* Case Law: What Room Is Left for the National Court to State Copyright Law?,” *RDTI*, Larcier, Brussels, 2009, p. 71; S. von Lewinski and V.-L. Benabou, “The Characterisation of a Work of the Mind Tested against European Case Law: A Harmonised Concept?,” in *L’œuvre de l’esprit en question(s): un exercice de qualification*, cited above, p. 209.

⁷¹ V.-L. Benabou, “On the Europeanisation of Copyright,” in *Les grands arrêts de la propriété intellectuelle* [Landmark Cases in Intellectual Property], Dalloz, 2020, judgment No. 41, No. 8.

⁷² CJEU, 1 December 2011, *Painer*, Case C-145/10: *D.* 2012, p. 471, obs. J. Daleau, note N. Martial-Braz; *ibid.*, p. 1228, obs. H. Gaudemet-Tallon and F. Jault-Seseke; *ibid.*, p. 2836, obs. P. Sirinelli; *RTD com.* 2012, p. 109, obs. F. Pollaud-Dulian.

⁷³ CJEU, 4 December 2025, *Mio/Konektra*, Joined Cases C-580/23 and C-795/23: *CCE* 2026, comm. 1, obs. P. Kamina; *Propr. Intell.*, No. 98, January 2026, p. 48, obs. A. Lucas.

⁷⁴ See below, Part 1, §1.

approached with respect to productions created with the help of generative artificial intelligence⁷⁵.

4. ... irrespective of its merit or of whether the author executed it personally

Irrelevant conditions. A work need neither “merit” protection nor be personally executed by its author. These two irrelevant⁷⁶ conditions foreshadow the question of synthetic content.

Personal execution. The author need not execute the work personally. Case law has long accepted the separation between conception and execution. The Renoir-Guino case offers the textbook illustration⁷⁷. Afflicted with deforming rheumatism at the end of his life, Renoir had works he had conceived sculpted by Richard Guino, recommended by Maillol. For these works, Renoir provided supervision, advice, instructions, and requests for changes. The courts recognised him as an author on that basis, without denying that status to Guino, who had sufficient creative freedom to imprint his own personality on the work; the sculptures were treated as works of collaboration⁷⁸.

The formalization of human intervention in a work is therefore not the same as personal execution: creation can be embodied in the actions of another person. This reasoning is not, however, perfectly transposable to AI, since a machine cannot be equated with a human being⁷⁹.

Obviously, the author’s use of an instrument or tool – traditional (a paintbrush) or modern (a synthesiser⁸⁰) – does not affect the characterisation, so long as the creator retains control over it.

Merit. The legislator treats merit as irrelevant: the courts cannot turn themselves into art critics, nor allow personal taste to determine access to protection.

This principle, however, runs up against the reality of the courtroom. Case law sometimes takes into account, more or less consciously, the qualities of a work in granting or denying it protection; the distinction between the imprint of personality and talent is a fine one. Legal

⁷⁵ On this question, see below, Part 1.

⁷⁶ See the requirements that the law treats as irrelevant under art. L. 112-1 CPI, among which is merit.

⁷⁷ TGI Paris, 3rd chamber, 11 January 1971: JCP 1971.16697. Then CA Paris, 9 July 1971: *RIDA*, April 1973, No. 76, p. 160; upheld by Cass. 1re civ., 13 November 1973, No. 71-14.469: JCP 1975.II.18029, note Manigne; *D.* 1974.533, note C. Colombet.

⁷⁸ Along these lines, see F. Pollaud-Dulian, “Architecture and Copyright,” *RDI* 1990, p. 431: “The case law accepted that this was indeed a work of collaboration, even though Renoir had participated only in the composition, and not in the personal expression or execution”.

⁷⁹ On the impossibility of characterising AI as the equivalent of Guino, precisely because it is a thing within the meaning of property law, see J. Groffe-Charrier, “The Death of the Author,” *D.* 2023, p. 2011.

⁸⁰ CA Paris, 15 March 2016, No. 14/17749.

scholarship observes that “what is at issue here is not the quality of the work from an aesthetic standpoint, but its intensity—that is, the question of what kind of intellectual work it manifests”⁸¹.

The Court of Justice reiterated this distinction in the *Cofemel* ruling: “it is indeed true that aesthetic considerations form part of creative activity. That being said, the fact that a design produces an aesthetic effect does not, in itself, make it possible to determine whether that design constitutes an intellectual creation reflecting the free and creative choices of its author, and thus satisfies the requirement of originality”⁸².

From conditions to their application. These conditions of access – human intervention, formalization into a tangible form, originality understood as the imprint of free and creative choices, and the irrelevance of merit and of personal execution alike – are nothing out of the ordinary. But they were not designed with artificial intelligence in mind, and it is precisely their confrontation with AI that creates difficulty: it is not that they need to be recast, but rather that it must be determined whether, and under what conditions, content produced with AI can satisfy them.

⁸¹ M. Buydens, *La protection de la quasi-cr  ation* [The Protection of Quasi-Creation], Larcier, Brussels, 1993, p. 59.

⁸² CJEU, 12 September 2019, *Cofemel*, Case C-683/17, para. 54: *D.* 2019.1759; *D.* 2020.1588, obs. J.-C. Galloux and P. Kamina; *RTD com.* 2020.54, obs. F. Pollaud-Dulian; *RTD eur.* 2019.930, obs. E. Treppoz; *CCE* 2019, comm. 65, obs. C. Caron; *Propr. intell.* 2020, No. 74, p. 37, obs. J.-M. Brugui  re.

PART ONE: IDENTIFY AND CHARACTERISE

Varying stakes. The conditions of access to protection do not raise uniform difficulties with respect to content produced by generative AI. The condition of form poses no particular challenge: whether the content is text, an image, a sound, or a video, it constitutes a perceptible form. The conditions of human intervention and of its trace within the work – that is, originality – are, by contrast, decisive. How can European law concerning originality, now stabilised by the Court of Justice, come to grips with these creations of a new kind?

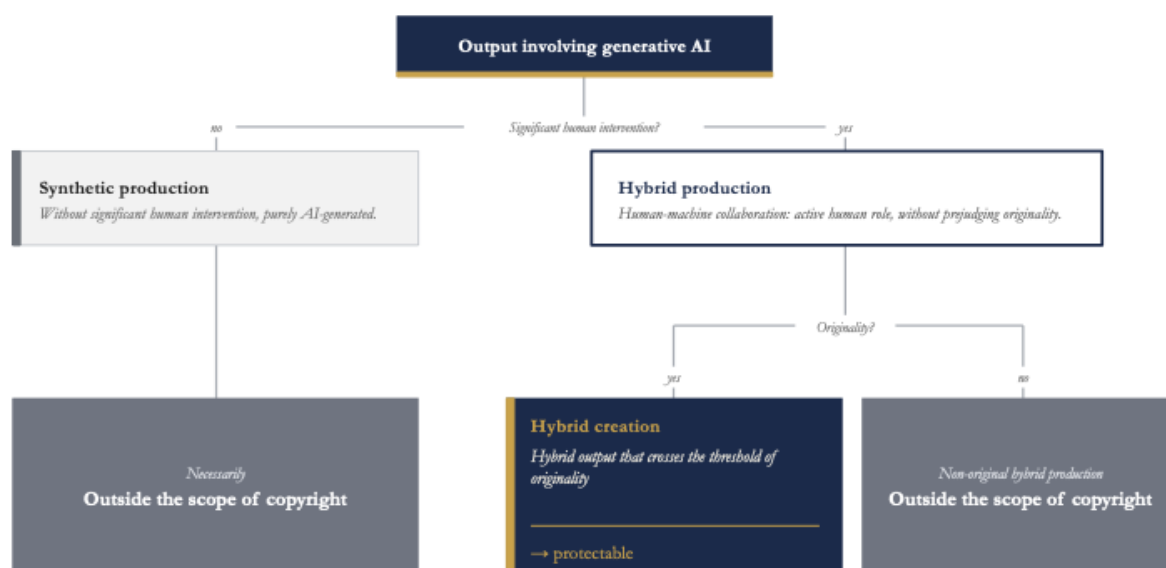
Adopted terminology. A point of vocabulary must first be settled. Productions made with the assistance of generative AI (generally referred to as “outputs”), in which the human retains an active role in the creative process, will here be referred to as *hybrid productions*⁸³. The term designates a work resulting from the collaboration between human beings and machines, without prejudging the originality of the result.

It is to be distinguished from *synthetic production*⁸⁴, purely AI-generated, which designates an output produced without significant human intervention and which necessarily falls outside the scope of copyright.

It is within the personalist conception of French copyright law, in which the work is perceived as the outward expression of a free will, that *hybrid creations* naturally find their place: there are human authors making use of increasingly powerful tools, but pursuing a creative aim of their own.

⁸³ The 2020 CSPLA report already used the notion of a “hybrid legal object” to describe creative AI itself (A. Bensamoun and J. Farchy (chairs), P.-F. Schira (rapporteur), *Intelligence artificielle et culture*, 2020, p. 25). – See G. Courtois, “Propriété intellectuelle et intelligence artificielle: vers une redéfinition des cadres de la création?” [“Intellectual Property and Artificial Intelligence: Towards a Redefinition of the Frameworks of Creation?”], *Archives de philosophie du droit*, vol. 66, 2026/1, p. 349, who discusses the “hybrid creations” that the personalist philosophy of copyright can accommodate “without fictionalising a ‘personality’ of the machine”. Add M. Sellier and C. Bouckaert, “Quelles protections pour la propriété intellectuelle? Les droits d’auteur et les droits de la presse face à l’IA générative?” [“What Protections for Intellectual Property? Copyright and Press Rights Confronted with Generative AI?”], *Dalloz actualité*, 17 October 2025, who analyse this hybrid status.

⁸⁴ In their contribution to the task force’s questionnaire, one representative of digital creators criticised the terminology of “synthetic content,” which he considers to derive from a slippage from the notion of “synthetic data” (artificial data generated for training purposes, without any autonomous expressive aim), and prefers the phrase “AI-assisted content”. This report adopts the distinction between hybrid production and synthetic production, which makes it possible to mark the boundary between the two categories without obscuring the creative dimension of the former.



Productions using AI – adopted vocabulary

Inclusion. The answer the task force intends to propose is indeed one of inclusion: the autonomous concept of originality, as consolidated by the *Mio/Konektra* ruling of 4 December 2025⁸⁵, is sufficiently robust and flexible to accommodate hybrid creations, without it being necessary – or even desirable – to forge a new definition.

The question is not a novel one, and legal scholarship is split over which path to follow. A first school of thought considered building a new framework: as early as 2012, A. Bridy examined in depth the possibility of copyright accommodating works created by computer programs, analysing the anthropocentric conception of authorship and exploring the works-made-for-hire doctrine as a possible model of attribution⁸⁶; in 2017, A. Guadamuz, from a comparative perspective, examined the status of algorithmic creations in light of the originality criterion⁸⁷.

Opposed to this reformist path is a second school, which holds the existing standard to be sufficient to meet the challenge, without the need for reform. B. Hugenholtz and J. P. Quintais analysed in detail the conditions of European copyright law as applied to output, concluding that EU law offers a framework that is “broadly well-suited and sufficiently flexible to meet the challenges posed by AI-assisted production,” and that, so long as the result reflects the creative choices of a human being “at any stage of the production process,” it is capable of

⁸⁵ CJEU, First Chamber, 4 December 2025, *Mio v Asplund and USM v Konektra*, Joined Cases C-580/23 and C-795/23, cited above.

⁸⁶ A. Bridy, “Coding Creativity: Copyright and the Artificially Intelligent Author,” *Stanford Technology Law Review*, vol. 5, 2012, p. 1. By the same author, “The Evolution of Authorship: Work Made by Code,” 39 *Colum. J.L. & Arts* 395, 2016, p. 395. Add, on literary works, P. Samuelson, “The Originality Standard for Literary Works Under U.S. Copyright Law,” *The American Journal of Comparative Law*, vol. 42, Issue suppl., 1 December 1994, p. 393.

⁸⁷ A. Guadamuz, “Do Androids Dream of Electric Copyright? Comparative Analysis of Originality in Artificial Intelligence Generated Works,” *Intellectual Property Quarterly*, 2017, p. 169: <https://ssrn.com/abstract=2981304>

constituting a work⁸⁸. The same position had, as early as 2020, been taken by D. J. Gervais, whose article ‘The Machine as Author’ constructs an originality-causation test grounded in tracing creative choices back to a human being⁸⁹. The humanist position underlying this second approach finds its clearest support in J. C. Ginsburg’s “Humanist Copyright”: “the output of an AI system will not be a ‘work of authorship’ unless human participation has determinatively caused the creation of the output”⁹⁰.

The 2020 AI and Culture report. The demonstration that follows continues the work undertaken by the CSPLA as early as 2020⁹¹. As set out in the introduction, the present report carries forward its two guiding markers: the anchoring of copyright to a human being, and the application of classical copyright wherever AI is merely a tool in the hands of a creator. But where the 2020 report left several paths open, the consolidation of case law that has since taken place, foremost among it the *Mio/Konektra* ruling, now makes it possible to take a position in favour of the autonomous standard of originality. What remains is to locate its concrete seats within hybrid creation.

A three-stage line of reasoning. The reasoning proceeds in three stages. A theoretical analysis will first establish that the autonomous concept of originality and the requirement of human authorship call for no redefinition (1). The concrete identification of the seats of originality within hybrid creation, drawing on the *Painer* model and on comparative case law, will then show where originality may manifest itself (2). Finally, the identification of a dividing line, opposing artistic direction to delegation to the machine, will make it possible to derive a method of assessment (3).

1. Originality and authorship: two concepts do not require redefinition

Three grounds of assessment. The capacity of the concepts of originality and authorship to accommodate hybrid creations must be assessed on three grounds: the single standard of originality (1.1), the degree to which the concept has been rendered objective (1.2), and its application to situations where the link between author and work has grown looser (1.3)—a

⁸⁸ P. B. Hugenholtz and J. P. Quintais, “Copyright and Artificial Creation: Does EU Copyright Law Protect AI-Assisted Output?,” *IIC*, vol. 52, 2021, p. 1190, at pp. 1213 and 1200 respectively.

⁸⁹ D. J. Gervais, “The Machine as Author,” *Iowa Law Review* 2019, vol. 105, p. 2053. Through this originality-causation test, the author argues for the application of the existing standard.

⁹⁰ J. C. Ginsburg, “Humanist Copyright,” *Journal of Free Speech Law* 6, 2025, p. 91. Part III, “AI and Human Authorship” (pp. 134–166), examines in detail the humanist position as applied to AI outputs. – By the same author, “What Is an Author... Facing the Computer: Reflections on the Author in Copyright Law,” in *Entre art et technique: les dynamiques du droit* [Between Art and Technique: The Dynamics of Law], Mélanges en l’honneur de Pierre Sirinelli [Essays in Honour of Pierre Sirinelli], Dalloz, 2022, p. 85, esp. p. 90: “it should be made clear that this is never a matter of a machine creating of its own accord. A machine endowed with free will, capable of conceiving works (or of conceiving anything at all), possessing a will of its own, exists only in the world of science fiction”.

⁹¹ CSPLA, Task Force Report, *Intelligence artificielle et culture*, January 2020, cited above, esp. p. 45.

ground on which the requirement of human authorship is also tested, leading to the rejection of any transposition of the works-made-for-hire doctrine. The institutional confirmation provided by the European Parliament’s resolution of 10 March 2026 (1.4) closes the examination from the standpoint of copyright. The same requirement of human attribution will, finally, be extended, in differentiated fashion, to related rights (1.5).

1.1. Confirmation of a single standard of originality

The European approach. Since the *Infopaq* ruling⁹², the Court of Justice has built up an autonomous concept of the “work, grounded in a single criterion: the subject matter must constitute “the author’s own intellectual creation,” which “reflects [the author’s] personality” in that it results from “free and creative choices”. Subsequently, the *Cofemel* ruling⁹³ established the principle that this standard applies uniformly to all categories of creation, and the *Brompton Bicycle* ruling⁹⁴ clarified its application to utilitarian objects. Finally, and more recently, the *Mio/Konektra* ruling drew the clearest consequence from this: no originality threshold specific to one category of works can be imposed relative to others. The Court rules out any relationship of rule and exception between protection regimes and prohibits the reconstruction, at national level, of an additional “artistic threshold”⁹⁵. The degree of originality has no bearing on the scope of protection⁹⁶: originality is a threshold, not a scale.

Application to hybrid creations—international and comparative law. This principle of unity is transposable to hybrid creations. Just as the Court refuses a “two-speed” originality for applied art, it would likewise refuse the creation of a separate, autonomous standard for hybrid productions generated with the help of AI. Originality is an autonomous concept of EU law, applied uniformly. No member state may either lower or raise it on the sole ground that the tool used is a generative AI system. The test remains invariable: an intellectual creation of the author’s own, resulting from free and creative choices reflecting that author’s personality.

This principle of unicity enjoys broad international consensus. The resolution adopted by ALAI’s Executive Committee in Paris on 17 February 2024 affirms that the humanist principle underlying the Berne Convention requires that, absent creative and determinative intervention by a human being, no production resulting from an automated data-processing system can lay claim to rights founded on that Convention; a system whose output is controlled by a natural-person author, by contrast, can provide a tool for human creation⁹⁷. A 2025 AIPPI report, based on contributions from thirty-nine national groups, confirms this consensus: the large majority

⁹² CJEU, 16 July 2009, Case C-5/08, *Infopaq International A/S v Danske Dagblades Forening*, para. 37.

⁹³ CJEU, 12 September 2019, Case C-683/17, *Cofemel*, paras. 29–30.

⁹⁴ CJEU, 11 June 2020, Case C-833/18, *Brompton Bicycle*, paras. 22–25.

⁹⁵ CJEU, First Chamber, 4 December 2025, *Mio v Asplund and USM v Konektra*, Joined Cases C-580/23 and C-795/23, cited above.

⁹⁶ *Mio/Konektra* judgment, cited above, paras. 60–63.

⁹⁷ ALAI Executive Committee Resolution on the Impact of Artificial Intelligence on Copyright, Paris, 17 February 2024.

of groups consider that existing copyright standards apply to AI productions, and that assessing the protectability of the resulting output requires no new criterion⁹⁸.

Japan further confirms this agreement though from a distinctive position. Although it was the first country in the world to introduce a broad text-and-data-mining exception, as early as 2009⁹⁹ – an exception described by Professor Ueno as a “machine-learning paradise”¹⁰⁰ – the *General Understanding on AI and Copyright*, published on 15 March 2024 by the legal subcommittee of the Cultural Council of the Agency for Cultural Affairs¹⁰¹, maintains that the protectability of the resulting output is subject to a human creative contribution, assessed according to existing copyright criteria. The maximal openness at the training stage does not carry over to the output stage: the distinction between the two phases lies at the heart of the Japanese position, and the standard of protectability has undergone no redefinition¹⁰².

This convergence extends across Asia beyond Japan. In South Korea, the Ministry of Culture, Sports and Tourism and the Korea Copyright Commission published, on 30 June 2025, a *Guide to Copyright Registration for Generative AI-Assisted Works*, which identifies three cases in which human creative contribution can justify access to protection for a production assisted by generative AI: where the production reflects the creativity of a protected work introduced by the user via prompt; where the user has made creative modifications, additions, or deletions to an autonomous production; or where the creativity lies in the selection, arrangement, or composition of the production¹⁰³. Singapore adopts an aligned position of principle, requiring “sufficient engagement of the human intellect” and “significant creative or editorial control”¹⁰⁴.

Maintaining a single standard. The application of a single standard must not be called into question on the pretext that the emergence of hybrid productions would upend the copyright landscape. The malleability of the concept allows for adaptation.

1.2. Moderate objectivity and radical objectivity

A variety of approaches to objectivity. Within this framework, the objectivity of the originality condition is a subject running throughout legal scholarship, aimed at

⁹⁸ AIPPI, Summary Report Q295 – AI & Copyright, summary report by R. Nack, G. Henry and J. Flythström, 2025, 39 national reports. See in particular the conclusions, pp. 50–52.

⁹⁹ Art. 30-4(ii) of the Japanese Copyright Act.

¹⁰⁰ T. Ueno, “Machine-Learning Paradise,” RCLIP Column, 9 September 2017, and “Japan’s ‘Machine-Learning Paradise’ Pioneered by the Amendment of the Copyright Act,” (2018) 19-2 *Business Hōmu* 1.

¹⁰¹ Legal Subcommittee under the Copyright Subdivision of the Cultural Council, *General Understanding on AI and Copyright*, 15 March 2024, English-language summary published May 2024, available at: https://www.bunka.go.jp/english/policy/copyright/pdf/94055801_01.pdf. – See T. Ueno, “General Understanding on AI and Copyright” (author’s English translation), (2024) 215 *Hō no Shihai* 87.

¹⁰² T. Ueno, article cited above (English translation).

¹⁰³ Ministry of Culture, Sports and Tourism (MCST) and Korea Copyright Commission (KCC), *Guide to Copyright Registration for Generative AI-Assisted Works*, 30 June 2025, Part 2, point 1, p. 12.

¹⁰⁴ IFRRO, *AI Governance Guide*, May 2026 (drafted by E. Rosati), p. 27, reporting the position of the Singapore government.

accommodating certain “specific” works, often by reference to French case law on software and also to CJEU case law. This approach, however, calls for nuance¹⁰⁵. In order to accommodate hybrid productions, must the concept of originality be objective, and the link between the condition of access to protection and the human creator be loosened?

The very term “objectivity” covers approaches of very different scope. Moderate objectivity, which consists of assessing originality through markers identifiable within the object itself – the “free and creative choices” – rather than by probing the author’s psyche¹⁰⁶, has already been at work in the case law of the Court of Justice since the *Infopaq* and *Painer* rulings. The 2020 AI and Culture report already contemplated seeking originality in the work rather than in the author¹⁰⁷. It is precisely this kind of objectivity that renders the concept flexible enough to accommodate hybrid creations: it makes it possible to seek the trace of personality in the result without requiring introspection into the author. The *Mio/Konektra* ruling confirms this, clarifying that intentions are relevant only insofar as they manifest themselves concretely in the work¹⁰⁸.

Radical objectivity, by contrast – which would consist of looking only at the result, independent of the existence of a human author who produced it – would present a major risk: that of bringing content entirely generated by machines within the scope of copyright, on the sole ground that it “resembles” works. Professor Lucas, commenting on the *Mio/Konektra* ruling, identifies precisely this risk: taken to its logical conclusion, the objective approach of Advocate General Szpunar (who considers it unnecessary to establish the creator’s state of consciousness during the creative process) “would lead to accepting copyright protection for the scribbles of very young children, and even – why stop there – for productions by animals or by artificial intelligence”. This rejection of radical objectivity does not contradict the refusal, expressed earlier, to make consciousness of creation a condition of access to protection¹⁰⁹. The task force’s two propositions are, on the contrary, complementary: while consciousness is not required, notably because of the difficulties its assessment would entail, free and creative choices remain indispensable. Whether the author’s consciousness is full or impaired, such choices must still have been exercised for protection to apply; it is their absence, not a lack of consciousness, that excludes animal or purely synthetic productions.

For André Lucas, the reference (emphasised in the ruling) to the “author’s personality” amounts to a kind of “veneer,” the function of which is precisely to maintain, however tenuously, the connection to a human author¹¹⁰. Yet maintaining this link with a human author, however loosened, is, within the European tradition, the guarantee that protection remains centred on human beings. The *Football Dataco* ruling had illustrated this tension before *Mio/Konektra*. Commenting on the decision, Professor Benabou observes that “the notion of choice is then no longer the sign of creative arbitrariness but the exercise of a task of selecting among data, or of expertise in arranging them, and nothing prevents adopting a purely accounting-like dimension of originality”¹¹¹. The drift toward radical objectivity, in which

¹⁰⁵ See in particular C. Jonnaert’s doctoral thesis, *Droit d’auteur et intelligence artificielle : le dilemme canadien* [Copyright and Artificial Intelligence: The Canadian Dilemma], Université de Montréal, 2022, p. 215 et seq., which surveys the arguments in favour of objectifying the criterion.

¹⁰⁶ Along these lines, A. Lucas, obs. on CJEU, 4 December 2025, *Mio/Konektra*, *Propri. intell.*, No. 98, January 2026, p. 51.

¹⁰⁷ CSPLA, *Intelligence artificielle et culture*, cited above, pp. 35 and 39.

¹⁰⁸ *Mio/Konektra* judgment, cited above, paras. 69 et seq.

¹⁰⁹ See above, Introduction, §4.

¹¹⁰ A. Lucas, obs. on CJEU, 4 December 2025, cited above, p. 53.

¹¹¹ V.-L. Benabou, “Originalité? Vous avez dit originalités?”, *Legicom* 2014/2, No. 53, p. 5, esp. p. 11.

“choice” is reduced to a technical or accounting-like operation, is precisely what the task force intends to guard against with respect to hybrid productions.

It is this second sense of objectivity that the task force rejects.

Transatlantic convergence. The gap between moderate and radical objectivity finds an echo in the most recent American scholarship, without this amounting to an adoption of the continental personalist framework. Professor Ginsburg, in her 2025¹¹² article “Humanist Copyright,” reminds us that the 1903 *Bleistein* ruling – in which Justice Holmes affirmed that “Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man’s alone”¹¹³ – drew explicit inspiration from the French conception of the imprint of personality, as it appears, for example, in a text by Charles Constant published in 1895¹¹⁴.

This lineage is not simply anecdotal. It shows that the personalist anchor runs quietly through American originality doctrine, including in its most liberal expressions. Judge Learned Hand confirmed as much in 1921, with respect to photography, holding that no image, however simple, can be free of the personal influence of its author, and that no two photographs could ever be absolutely identical¹¹⁵. Professor Ginsburg draws from this the cardinal formulation that “the essence of copyright is human individuality”¹¹⁶.

This transatlantic convergence bolsters the task force’s position: moderate objectivity preserves what radical objectivity would dissolve.

Scholarly observation of a partial objectivity at the European level. The majority view in legal scholarship sees in the European definition adopted a form of loosening of the umbilical link between author and work, the definition being at least partially objective and thus moving away from the imprint of personality¹¹⁷.

¹¹² J. C. Ginsburg, “Humanist Copyright,” cited above, p. 91.

¹¹³ *Bleistein v Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903), cited by J. C. Ginsburg, “Humanist Copyright,” cited above, p. 110, n. 54: “Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man’s alone”.

¹¹⁴ J. C. Ginsburg, “Humanist Copyright,” cited above, p. 111, n. 56, quoting Ch. Constant, “Quelques Notes Juridiques sur le Droit de L’Auteur Sur Son Œuvre” [Some Legal Notes on the Author’s Right in His Work], in *La France Judiciaire*, 1895, p. 341, esp. pp. 343–344: “For the work of the writer or artist to enjoy the property right recognised by the law of 1793, that work must bear the imprint of its author’s personality”.

¹¹⁵ *Jewelers’ Circular Pub. Co. v Keystone Pub. Co.*, 274 F. 932, 934 (S.D.N.Y. 1921, Judge L. Hand), cited by J. C. Ginsburg, “Humanist Copyright,” cited above, p. 166, n. 224: “no photograph, however simple, can be unaffected by the personal influence of the author, and no two will be absolutely alike”.

¹¹⁶ J. C. Ginsburg, “Humanist Copyright,” cited above, p. 166: “the essence of copyright is human individuality”.

¹¹⁷ See in particular P. Sirinelli, *Propriété littéraire et artistique* [Literary and Artistic Property], Memento Dalloz, 3rd ed., 2016, p. 20; M. Vivant and J.-M. Bruguière, *Droit d’auteur et droits voisins*, Précis Dalloz, 5th ed., 2025, No. 290.

This observation confirms the need to distinguish between what can be absorbed without harm – moderate objectivity, which seeks the trace of personality in the result – and what must be rejected—radical objectivity, which severs the connection to a human author.

The contours of “free and creative” choices as applied to output. The *Mio/Konektra* ruling provides three clarifications that cast their shadow over the question of output. First, the Court refines the distinction between “free” choices and “creative” choices: a free choice is not necessarily a creative one. French legal scholarship traditionally links originality to the creator’s arbitrary discretion [*l’arbitraire du créateur*]. This reading supports the distinction to be drawn: arbitrariness – that is, the unconstrained nature of a choice – is a necessary but not sufficient condition of originality; the choice must also be creative, meaning that it imprints the object with the trace of the author’s personality. This is precisely what the Court recalls in *Mio/Konektra* by distinguishing between the two characterisations.

This distinction received its first French judicial consecration in the ruling handed down by the Cour de cassation on 9 April 2026 in *Evema v. Someva*¹¹⁸, which expressly transposes the *Mio/Konektra* framework (paragraphs 62 to 67). The ruling was quashed for insufficient reasoning: according to the Court, the court of appeal had not “explained how these choices reflected the personality of their author, and hence the originality of the piece of furniture” (paragraph 11). The Court also states that “the creative character of these choices, within the meaning of copyright law, cannot be presumed” (paragraph 9, transposing paragraph 65 of *Mio/Konektra*), a formula in which legal scholarship sees the national consecration of an objective, non-graduated standard¹¹⁹.

Within this framework, a user of AI makes free (unconstrained) choices, but the question is whether they are also creative—that is, whether they are reflected in the object.

1.3. The lesson of works with an “erased author”

Anonymous, pseudonymous, and collective works. The capacity of the single concept of originality to accommodate hybrid creations is bolstered by observing positive law itself. Copyright indeed recognises works whose author is erased, obscured, displaced or marginalised—not that the author is absent, but that his or her presence cannot be discerned from the obvious evidence of a perceptible personal execution; the author may be unknown, hidden behind a pseudonym, or merged into a larger whole. In all of these cases, the link

¹¹⁸ Cass. 1re civ., 9 April 2026, appeal No. 25-11.711, judgment No. 263 F-D, *Société Evema v Société Someva*, partial quashing of CA Rennes, 1st chamber, 26 November 2024, No. 21/07434, remitted to the Angers Court of Appeal. The first explicit application expressly applying the framework of the *Mio/Konektra* judgment (points 62 to 67). The quashing was pronounced for insufficient characterisation: according to the Cour de cassation, the Court of Appeal had not “explained how these choices reflected the personality of their author and, accordingly, the originality of the furniture” (point 11). The Court also held that “the creative character of these choices, within the meaning of copyright law, cannot be presumed” (point 9, applying point 65 of *Mio/Konektra*), a formula in which legal scholarship sees the national consecration of an objective, non-graduated standard.

¹¹⁹ S. Sipetas, “Copyright protection of fashion designs after *Mio/Konektra*,” *Journal of Intellectual Property Law & Practice*, 2026, p. 1, esp. p. 5: “Cofemel treated the originality standard as binary rather than tiered”.

between the created work and the person of the author is considerably loosened, without the status of the work as such being called into question as a result.

Anonymous and pseudonymous works offer the clearest illustration. Article L. 113-6 of the French Intellectual Property Code organises the exercise of rights by the original publisher, as long as the author has not revealed his or her identity; article L. 123-3 applies to them a derogating term of protection, calculated from the date of publication rather than from the author's death. The collective work, for its part, is protected as a whole even though the imprint of personality across the work is inherently diffuse¹²⁰.

The erasure or displacement, then, does not have the same cause in every case – anonymity or pseudonymity stem from a choice made by the author, while collective dilution stems from an organizational structure of creation – but the effect is common across the categories: the person of the author is not self-identifying.

Reasoning by analogy. The lesson these legal regimes hold for hybrid creations is the following: if copyright protects works with an erased or displaced author – unknown, concealed, or merged into a larger whole – it is because the condition of originality seeks the trace of personality in the object, not the civil identification of the creator. The erasure or displacement of the author does not stand in the way of protection, so long as his or her trace persists in the result.

The comparison with hybrid creation is therefore compelling, while also revealing what distinguishes it. In the hybrid case, the author is not erased as to identity – the user is generally known – but in the act: it is the self-evidence of human execution that the machine dissolves. The question thus shifts, in the same movement as for works with an erased or displaced author, from the identity of the creator to the question of whether that creator's personality has actually been imprinted upon the result.

An analogy to be rejected: the works-made-for-hire doctrine. Unlike works with an erased or displaced author, all of which presuppose a prior human creation, the American works-made-for-hire doctrine does not designate any concealed author. Rather, it establishes a fiction of attribution. Yet the lesson to be drawn from regimes of loosened attribution holds only insofar as there exists, upstream, an original human work. In the United States, certain scholars, notably A. Bridy¹²¹ and R. C. Denicola¹²², have nonetheless proposed grounding authorship over generative-AI outputs by resorting to the works-made-for-hire doctrine, under which authorial status is exceptionally conferred on the employer or commissioning party.

This analogy has been rejected by the most authoritative scholarship. J. C. Ginsburg, in her article "Humanist Copyright," offers a thorough critique of it: the works-made-for-hire doctrine imposes a statutory extension of the concept of author, but it does not bring the work itself into existence; it presupposes that the work already exists. The District Court for the District of

¹²⁰ CPI, art. L. 113-2, para. 3, and L. 113-5.

¹²¹ A. Bridy, "Coding Creativity: Copyright and the Artificially Intelligent Author," cited above, esp. pp. 26–28.

¹²² R. C. Denicola, "Ex Machina: Copyright Protection for Computer-Generated Works," *Rutgers University Law Review*, vol. 69, 2016, p. 251.

Columbia had already put it in these terms in *Thaler v. Perlmutter*: “the image autonomously generated by Plaintiff’s computer system was never eligible for copyright, so none of the doctrines invoked by Plaintiff conjure up a copyright over which ownership may be claimed”¹²³. Professor Ginsburg draws from this a decisive conclusion: “without authorship, there is no copyright to own, and without human creators, there is no authorship”¹²⁴.

American courts have confirmed – and the Supreme Court declined, on 2 March 2026, to revisit¹²⁵ – that output entirely generated by an AI system without human creative intervention is excluded from protection: in such cases, there is no author at all, not even an unknown one.

The same reasoning applies, *mutatis mutandis*, under French law with respect to collective works. The attribution (original ownership [*titularité originaire*] provided for under Article L. 113-5 of the French Intellectual Property Code, in favour of the person under whose name the work is disclosed – including a legal person – is conceivable only because human creative contributions have previously constituted the work. The fictional attribution granted by statute does not create the author; it merely designates the rightholder.

Implication. It is between these two poles that the analysis of hybrid creations is situated: there is an identified author, but the question is whether that author’s creative choices are reflected in the result, or whether the result is entirely the product of algorithmic logic. No redefinition of the concept of originality is necessary to make this distinction.

1.4. Institutional confirmation

The European Parliament’s position. The European Parliament’s resolution of 10 March 2026 expressly limits the exclusion from protection to content “fully generated by AI” that does not meet the established criteria for protection¹²⁶. *A contrario*, the text does not prejudge the fate of creations resulting from an interaction between a human user and an AI system.

This institutional position does not emerge in isolation. Several preparatory works at the European level converge on the same conclusion.

¹²³ *Thaler v Perlmutter*, 687 F. Supp. 3d 140, 150 (D.D.C. 2023), cited by J. C. Ginsburg, “Humanist Copyright,” cited above, pp. 160–161: “the image autonomously generated by plaintiff’s computer system was never eligible for copyright, so none of the doctrines invoked by plaintiff conjure up a copyright over which ownership may be claimed”.

¹²⁴ J. C. Ginsburg, “Humanist Copyright,” cited above, p. 161: “Without authorship, there is no copyright to own, and without human creators, there is no authorship”.

¹²⁵ U.S. Supreme Court, 2 March 2026, *Thaler v Perlmutter*: certiorari denied.

¹²⁶ European Parliament Resolution of 10 March 2026 on Copyright and Generative Artificial Intelligence – Opportunities and Challenges (2025/2058(INI)), on the report of the Committee on Legal Affairs (A10-0019/2026, rapporteur: A. Voss), point 25. Compare recital J of the same resolution.

Consistency of approaches. The study commissioned by the European Parliament’s Committee on Legal Affairs thus recommends developing “concrete, non-binding criteria” or case examples for assessing authorship of AI-assisted works – the selection and refinement of prompts with a specific creative intent, human curation of variants, combination with original human content – emphasizing that retaining the current framework as a normative anchor is “not only defensible but desirable”. The study observes that the European Union could “refine the implementation of existing principles, developing nuanced legal tools that preserve the integrity of copyright without prematurely yielding to technological determinism”¹²⁷. Along the same lines, the briefing from the European Parliamentary Research Service underlines the need for “greater coordination globally to reduce legal uncertainty and to determine the level of human involvement needed for copyright protection”¹²⁸. The European Commission’s Apply AI strategy of October 2025, which announces the launch of a “targeted study on the legal challenges related to AI-generated outputs,”¹²⁹ falls within this same movement.

Paragraph 25 of the Parliament’s resolution accordingly insists that “content fully generated by AI that does not meet the established criteria for copyright protection should continue to be ineligible for it, and that the public-domain status of such works should be clearly determined”¹³⁰. This position, adopted in plenary session by a large majority, confirms the European legislator’s commitment to the existing standard of originality and does not prejudge the fate of hybrid creations involving a human creative contribution.

Convergence among European national legislators. This European institutional position forms part of a converging trend in two European States that have recently taken positions on the characterisation of AI outputs.

In Italy, the law of 23 September 2025¹³¹ expressly codified the solution within the copyright statute itself. Its Article 25 amends the first paragraph of Article 1 of the law of 22 April 1941 by inserting the qualifier “human” before “ingenuity” and specifying that works are protected “even when they are created with the assistance of artificial intelligence tools, provided that they constitute the result of the author’s intellectual work”¹³².

¹²⁷ N. Lucchi, *Generative AI and Copyright – Training, Creation, Regulation*, EP study PE 774.095, July 2025, p. 99 (regulatory framework) and p. 144 (recommendation C: criteria for assessing authorship).

¹²⁸ S. Karttunen, *Copyright of AI-generated works: Approaches in the EU and beyond*, EPRS briefing, 19 December 2025.

¹²⁹ European Commission, *Apply AI Strategy*, October 2025, p. 11: “launch a targeted study to explore the legal challenges related to AI-generated outputs”.

¹³⁰ European Parliament Resolution of 10 March 2026 on Copyright and Generative Artificial Intelligence – Opportunities and Challenges, cited above. – On the public domain, see below, Part 2, §2.3.

¹³¹ Legge 23 settembre 2025, n. 132, *Disposizioni e deleghe al Governo in materia di intelligenza artificiale* [Law No. 132 of 23 September 2025, Provisions and Delegations to the Government on Artificial Intelligence], *Gazzetta Ufficiale* No. 223 of 25 September 2025 (entered into force 10 October 2025). Italy is the first EU Member State to adopt a systematic national regulatory framework on artificial intelligence, complementing Regulation (EU) 2024/1689.

¹³² Art. 25(1)(a) of Law No. 132/2025, amending art. 1, first paragraph, of Law No. 633 of 22 April 1941 on the protection of copyright. Our translation; original Italian text: “*anche laddove create con l’ausilio di strumenti di intelligenza artificiale, purché costituenti risultato del lavoro intellettuale dell’autore*”.

In the United Kingdom, moving in the same direction, the British government published in March 2026 its report to Parliament on copyright and artificial intelligence¹³³, which announces the planned repeal of section 9(3) of the Copyright, Designs and Patents Act 1988 relating to computer-generated works. The report observes that “it is not clear that this market failure [which the institution of copyright is intended to correct by incentivizing the production of creative output] exists in the case of wholly AI-generated creative output, where the marginal cost of production is very low,”¹³⁴ and concludes, in the absence of evidence that protecting computer-generated works serves any useful purpose, that it should be abolished while maintaining protection for AI-assisted works¹³⁵. The Communications and Digital Committee of the House of Lords had paved the way with its own report of 6 March 2026¹³⁶.

The convergence is thus clear. Whether the legislative route consists in codifying the human criterion (Italy) or in abolishing an attribution fiction that has become obsolete (United Kingdom), the goal is the same: to reserve protection for works proceeding from a human creative contribution.

Confirmation by the German supreme court. The reception of the *Mio/Konektra* ruling by national courts provides further confirmation. Ruling on remand following the Court of Justice’s answer, the Bundesgerichtshof, in a decision of 2 July 2026, quashed the appellate ruling that had denied protection, holding that the assessment of originality “must be conducted uniformly, objectively, and on the basis of the work as concretely presented,” the creator’s subjective viewpoint (creative intent or awareness of making free choices) not being determinative¹³⁷. The high court concluded that a court cannot presume the author’s creative choices: it is for the court to “seek out and identify” creativity in the very form of the object. This holding, which echoes the *Evema v. Someva* ruling issued in France five weeks earlier, confirms that the connection between a work and a human author is established through the objective trace of that author’s choices, not through reconstructing his or her state of mind—a lesson directly transposable to hybrid production.

French parliamentary confirmation. In France itself, an information report of the National Assembly, tabled on 1 July 2026 at the conclusion of the work of a task force of the Committee on Cultural Affairs and Education, adopts a convergent orientation¹³⁸. Having established, at

¹³³ HM Government, Department for Science, Innovation and Technology and Department for Culture, Media and Sport, *Report on Copyright and Artificial Intelligence*, presented to the UK Parliament pursuant to section 136 of the Data (Use and Access) Act 2025, March 2026.

¹³⁴ *Report on Copyright and Artificial Intelligence*, cited above, Section I “Computer-generated works,” §7, p. 105: “A key rationale for copyright is to remedy market failure by incentivising the production of creative output. However, it is not clear that this market failure exists in the case of wholly AI-generated creative output, where the marginal cost of production is very low”.

¹³⁵ *Ibid.*, §53, p. 111: “We agree that copyright should incentivise and protect human creativity. There is minimal evidence that protection for [CGWs] is actively used, or that it has a material impact on creativity and innovation. [...] in the absence of evidence of its ongoing value, we propose that it should be removed”.

¹³⁶ House of Lords, Communications and Digital Committee, *AI, copyright and the creative industries*, 4th Report of Session 2024–26, HL Paper 267, published 6 March 2026.

¹³⁷ BGH, 2 July 2026, I ZR 96/22, *Konektra* (GRUR 2026, forthcoming), paras. 30–32 and 51, ruling on remittal following CJEU, 4 December 2025, Joined Cases C-580/23 and C-795/23, *Mio and Konektra*, paras. 65 and 73.

¹³⁸ Assemblée nationale, Information Report No. 2993, prepared on behalf of the Committee on Cultural and Educational Affairs on the conclusions of the fact-finding mission on “Creation, dissemination and acquisition of

the close of its hearings, a “consensus” that “works entirely generated by AI must be distinguished from hybrid works, which result from personal intent and which may bear the imprint of [their] author’s personality,” the report recommends writing into the Intellectual Property Code the impossibility, for content entirely generated by AI, of benefiting from copyright protection, while reserving access to that protection, assessed case by case according to the degree of human intervention, for hybrid creations¹³⁹. The convergence concerns the dividing line—the rejection of the synthetic, openness to the hybrid where it proceeds from a human creative contribution. It comes, however, with a difference in method: whereas the parliamentary report contemplates legislative action, the present task force holds that the autonomous concept of originality, as consolidated by the *Mio/Konektra* ruling, is already capable of accommodating this distinction, without any need for redefinition or new codification.

American convergence. By comparison, in the United States, the Supreme Court declined, on 2 March 2026, to hear the appeal in *Thaler v. Perlmutter*¹⁴⁰, thereby confirming the D.C. Circuit’s ruling, which had itself upheld the refusal to register an image described as “autonomously created by a computer algorithm running on a machine,” with no claim of human intervention. As Professor J. C. Ginsburg observes, the court of appeals deliberately confined its reasoning to statutory grounds and did not decide the constitutional question, holding that it “need not address the Copyright Office’s argument that the Constitution itself requires human authorship for any copyrightable content”¹⁴¹. The scholarly debate over the constitutional basis for the human-authorship requirement thus remains formally open on the other side of the Atlantic, without prejudice to the result reached on statutory grounds. It should also be emphasised that this decision concerns only the case of an entirely autonomous production and does not settle the far more delicate question of hybrid productions in which a natural person intervenes through prompts or other forms of creative instruction. The court of appeals had, moreover, expressly noted the disagreement of several experts – including the Motion Picture Association – with the USCO’s restrictive position on prompt-engineered works, and had declined to rule on that point.

Latin American convergence. This pattern is not confined to the United States. The Supreme Court of Justice of Mexico, in a unanimous decision handed down on 2 July 2025 in the *Gerald García Báez* case, upheld the constitutionality of the refusal by the National Copyright Institute (INDAUTOR) to register an image generated using the “Leonardo” platform¹⁴². The Second

knowledge: how artificial intelligence is transforming our education and our culture,” chaired by R. Chudeau, rapporteur C. Calvez, 1 July 2026.

¹³⁹ Information Report No. 2993, cited above, pp. 117–118; recommendation No. 16. The report notes that this distinction is already applied by collective management organisations when admitting works to their repertoire, with the Society of Authors, Composers, and Publishers of Music (SACEM) having refused to register synthetic productions while admitting works where the creator retained control over the artistic choices (*ibid.*, p. 118).

¹⁴⁰ *Thaler v Perlmutter*, 130 F.4th 1039 (D.C. Cir. 2025), cert. denied, No. 24-449 (2 March 2026).

¹⁴¹ J. C. Ginsburg, “Humanist Copyright,” cited above, p. 139, n. 165, quoting *Thaler v Perlmutter*, 130 F.4th 1039, 1041 (D.C. Cir. 2025): “[W]e need not address the Copyright Office’s argument that the Constitution itself requires human authorship of all copyrighted material”.

¹⁴² Supreme Court of Justice of the Nation (Mexico), Second Chamber, Amparo Directo 6/2025, *Gerald García Báez*, session of 2 July 2025, notified August 2025, available on the SCJN’s official website (https://www2.scjn.gob.mx/juridica/engroses/2/2025/1/2_346361_7265_firmado.pdf).

Chamber held that only natural persons can be characterised as authors within the meaning of Articles 12 and 18 of the *Ley Federal del Derecho de Autor*, and that the distinction drawn between such persons and artificial entities is “objective and reasonable,” entailing no violation of the principle of equality. Copyright, characterised as a human right, cannot be extended to an artificial intelligence system devoid of creative consciousness. The decision, however, clearly distinguishes content entirely generated by AI, excluded from protection, from works created with the help of AI, for which human creative contribution remains protectable.

Justification of the approach. The approach adopted by the task force has the advantage of not prematurely locking in a doctrine in a rapidly evolving field, while firmly maintaining the requirement of a human author. It also avoids the risk of fragmentation, a risk explicitly identified by the European Parliament in its resolution cited above, whose recital AG emphasises that “the inconsistency of international rules on the eligibility of AI-generated content for copyright protection poses a risk to the overall coherence of intellectual property law” and could give rise to regulatory arbitrage detrimental to the competitiveness of European creative and technology sectors¹⁴³.

1.5. The characterisation of AI productions with respect to related rights

Summa divisio. The question of human attribution is not confined to copyright; it also arises, in differentiated form, with respect to related rights. A *summa divisio* governs the analysis, according to whether or not the related right in question is ancillary to a human activity¹⁴⁴ (1.5.1 and 1.5.2).

1.5.1. Related rights anchored in human activity

The human character of the performance. A first category comprises those related rights which, like copyright, can originally arise only from a natural person engaged in a protected activity. This is the case for the performing artist’s right, which presupposes the interpretation or performance of a work by a natural person (Art. L. 212-1 of the French Intellectual Property Code). Content entirely generated by an artificial intelligence system, devoid of any human performance, does not give rise to such a right: characterisation here follows the same logic as for copyright, and the evidentiary question is likewise transposed¹⁴⁵.

¹⁴³ Resolution of 10 March 2026, cited above, recital AG. The Parliament states there that “EU regulation on AI and copyright should not be impacted by external political pressure” and calls for “a strong and united response”.

¹⁴⁴ Along these lines as well, A. Peukert, “Mensch oder Maschine? Zum Nachweis urheberrechtlicher Schutzfähigkeit im Zeitalter künstlicher Intelligenz,” *GRUR* 2025, 109, esp. pp. 113–114.

¹⁴⁵ See below, Part 2, §1.

A dual approach. Two situations must be distinguished. On the one hand, a hybrid performance – the fixation of a human performance which is then transformed, enhanced, or recomposed with the help of an AI system – is not, by virtue of this technical intervention, deprived of its characterisation as a performance: the related right subsists in the performing artist’s contribution, so long as his or her execution remains perceptible in the result, following the same logic of “trace” adopted with respect to copyright. Conversely, a purely synthetic “performance” – a voice or performance entirely generated by the machine, even if imitating the timbre or acting style of a particular performer – gives rise to no related right, for lack of any human performance. Organizations of performing artists confirm this: the related right is meant to apply only where the output fixes, reproduces, or communicates to the public a specific, identifiable performance; the purely artificial imitation or recreation of a performer’s voice or image, which exploits no specific performance, falls outside its scope. Protection for the person whose voice or acting style would thus be imitated thus no longer falls under the related right, but under personality rights (rights to one’s voice and image), or even under the recent enforcement and transparency mechanisms discussed in connection with external infringements¹⁴⁶.

1.5.2. Related rights based on investment

Producers’ related rights. A second category comprises related rights that protect an initiative or investment detached from the notion of a work: the phonogram producer’s right (Art. L. 213-1 of the French Intellectual Property Code), the videogram producer’s right (Art. L. 215-1), the audiovisual communication enterprise’s right (Art. L. 216-1), and the database producer’s *sui generis* right (Art. L. 341-1). These rights reward the initiative and responsibility involved in the first fixation, targeting financial investment rather than the originality of a work.

This detachment from the notion of a work must not, however, be confused with a detachment from human creation. While the letter of the texts does not expressly make the vesting of these rights conditional on a link to a work or performance, two considerations, dictated by their underlying rationale, argue for keeping them out of reach of purely synthetic content. First, these rights were established as the economic extension of a cultural creation: the producer is the intermediary who enables the fixation, first release to the market, and dissemination of a performance or work that is, necessarily, human; where there is neither work nor performance to bring to market, the very function of the right is left without an object. In practice, moreover, with respect to the management of videogram producers’ related rights, for instance, it was reported to the task force that these rights apply only to audiovisual works subject to copyright. Second, these regimes reward an investment—that is, a productive effort undertaken in service of that fixation and dissemination; yet the cost of an automated generation cannot be analysed as the investment that the law specifically intends to encourage. This teleological reading finds support in the international texts themselves. Along these lines, the definitions of “phonogram” and “producer of phonograms” given by the WIPO Performances and Phonograms Treaty, as well as by the Rome Convention, presuppose the initiative and the organization or financing of

¹⁴⁶ See below, Part 2, §3.2.

a “first fixation” of sounds: the mere entry of instructions into an AI system satisfies neither the organizational contribution nor the investment that these regimes are meant to reward. The investment-incentive objective assigned to this related right, as identified by the Court of Justice, bolsters this exclusion¹⁴⁷.

Accordingly, although the letter of the law does not clearly require it, these considerations lead the task force to recommend denying the benefit of these rights to purely synthetic productions. A strictly literal reading would, however, lead to the opposite solution, and it is from this gap – between a rationale grounded in an ecosystem of human creation and conditions of existence that do not expressly require it – that the risk examined below arises: the shift of these regimes towards benefiting content that is devoid of precisely that which they were designed to reward.

The risk of revenue capture. The mechanism is worth spelling out. Hewing close to the letter of the texts, a synthetic production fixed on a phonogram, incorporated into a videogram, or entered into a database could, even while remaining unprotected by copyright, open up to its producer the exclusive and remuneration rights attached to these legal regimes. Yet these rights govern, in practice, participation in collective distribution systems (collection from streaming services, image banks, or under private-copying levies). The risk would then be one of value capture: the collection of revenue based on material that copyright leaves free, to the detriment of the pool shared among rightholders whose contribution is, by contrast, creative.

This risk is clearly identified in legal scholarship¹⁴⁸, and industry organizations flag it consistently in their responses to the task force’s questionnaire. Producers, moreover, have come out in favour of moderation of synthetic productions by distributors. Phonographic producers go so far as expressly to rule out any collection, under public communication or broadcasting rights, on recordings generated without substantial human intervention; in their view, not only does such content fail to meet the conditions for protection, but generating collective-licensing revenue from them would, for lack of a performer or producer, benefit only the suppliers of such content.

The most recent foreign scholarship reaches the same conclusion and sketches a remedy that converges with the teleological interpretation adopted by the task force. Examining the related rights of phonogram and videogram producers, M. Leistner and R. Jussen note that, on a purely textual reading of these provisions, nothing rules out purely AI-generated content benefiting from them on the same footing as a human production, at a production cost incomparably lower than that of a production built on human contributions; accordingly, they propose excluding purely synthetic content from their scope, either through a strict interpretation or through the introduction of an express threshold of substantiality for the investment¹⁴⁹.

¹⁴⁷ Art. 2(b) and (d) of the WIPO Performances and Phonograms Treaty (WPPT); art. 3 of the Rome Convention of 1961. See CJEU, 29 July 2019, *Pelham I*, C-476/17, para. 30: “the investment required to produce products such as phonograms is considerable, so that it is necessary to guarantee phonogram producers the opportunity of satisfactory returns”.

¹⁴⁸ A. Peukert, *GRUR* 2025, 109, p. 114.

¹⁴⁹ M. Leistner and R. Jussen, “The Flattening of Creative Industries? A Closer Look at Copyright Protection of AI-Based Subject Matter and the Risk of Entertainment Bubbles,” *ZGE / IPJ*, 17 (2025), p. 279, esp. Part E (“Existing neighboring rights: status quo and possible need for a teleological reduction”).

The press publishers' related right. Special mention is warranted for the press publisher's related right (Arts. L. 218-1 et seq. of the French Intellectual Property Code, transposing Article 15 of Directive 2019/790). Since a press publication is defined as a collection composed mainly of literary works of a journalistic nature¹⁵⁰, a publication composed exclusively or predominantly of AI-generated content does not appear capable of giving rise to this right.

2. The seats of originality in hybrid creation

From theory to practice. The theoretical conclusion regarding the aptness of current notions now calls for a move towards concrete application. It is necessary to identify the points at which originality may manifest itself within the hybrid creative process. This is the shift from “why” to “where”.

This exercise rests on a judicial precedent that grounds the approach: the photographic analogy constructed by the Court of Justice in the *Painer* ruling (2.1). The three-phase grid that emerges from it – upstream, during, and downstream of generation – structures the examination of the seats of originality in hybrid creation (2.2 to 2.4). Finally, a comparison between the American and European approaches brings to light a structural tension between control over expression and imprint within the object (2.5).

2.1. The photographic precedent and its transposition

Protection of photographs. Photography offers the precedent on which this approach is built. Faced with the question of whether a realistic photograph – the product of a largely mechanical process – could constitute a work, the Court did not create a new definition. It built, in the *Painer* ruling¹⁵¹, a temporal grid identifying the author's free and creative choices at each phase of the process: upstream (staging, pose, lighting), during the shoot itself (framing, angle, atmosphere), and downstream (developing techniques, software)¹⁵². “Through these various choices, the author [...] can stamp the work created with their ‘personal touch,’”¹⁵³ and the protection thus recognised “is not inferior to that enjoyed by any other work”¹⁵⁴. Directive

¹⁵⁰ Art. L. 218-1, I, CPI, which defines a press publication as a collection “composed principally of literary works of a journalistic nature,” published on the initiative of, under the editorial responsibility of, and under the control of press publishers or a press agency, excluding scientific or academic periodicals. – Cf. art. 2(4) of Directive 2019/790.

¹⁵¹ CJEU, 1 December 2011, Case C-145/10, *Painer*, paras. 87–99.

¹⁵² *Ibid.*, paras. 90–91.

¹⁵³ *Ibid.*, para. 92.

¹⁵⁴ *Ibid.*, para. 99.

2006/116/EC had, moreover, anticipated this in its Article 6, specifying that “no other criteria” apply in determining whether a photograph is eligible for protection¹⁵⁵.

Analogy with AI. The parallel with generative AI is striking. Photography, like AI generation, involves a partly mechanical process – the shutter in one case, the algorithm in the other – within which the human creative contribution must be isolated.

Professors Hugenholtz and Quintais had, moreover, grounded their pioneering analysis on this very analogy as early as 2021, considering the *Painer* ruling “particularly instructive, as it concerns subject matter created with the aid of a machine”¹⁵⁶. The “*Painer* method” – examining the author’s choices at each phase of the process – can be transposed, *mutatis mutandis*, to hybrid creations. A significant proportion of respondents to the task force’s questionnaire, moreover, adopted this same reasoning, their contributions each sketching, in their own way, a three-phase grid analogous to that of the European court. That said, it is worth recalling that each of the seats identified below can, on its own, found protection.

The Japanese *General Understanding* confirms this grid. The document identifies four factors for assessing protectability – instructions, generation attempts, selection among variants, and subsequent corrections¹⁵⁷ – which map exactly onto the three *Painer* phases: instructions belong upstream, iteration and selection belong to the generation phase, and corrections belong downstream. The same is true of the Korean guide on AI-assisted works¹⁵⁸. Without referring to it expressly, the proposed grid can be read, by analogy, as a variation on the three moments identified by the Court of Justice of the European Union in the *Painer* ruling—upstream, generation, and downstream¹⁵⁹.

Limits. The transposition of the photographic analogy to generative AI is not, however, without its limits. As S. Dusollier and N. Malevé observe, the historical recharacterisation of photography – from “machine” to “technique” placed at the author’s service, following the dialectic identified by Edelman¹⁶⁰ – rested on the photographer’s ability to control the entire image-production process. Generative AI confronts this logic with an irreducible indeterminacy in the generation process, which complicates the demonstration of continuous

¹⁵⁵ Directive 2006/116/EC, art. 6: “Photographs which are original in the sense that they are the author’s own intellectual creation shall be protected in accordance with Article 1. No other criteria shall be applied to determine their eligibility for protection”.

¹⁵⁶ P. B. Hugenholtz and J. P. Quintais, “Copyright and Artificial Creation,” cited above, p. 1196. This analysis aligns with the conclusion reached by the most recent American legal scholarship: as early as *Burrow-Giles Lithographic Co. v Sarony*, 111 U.S. 53 (1884), the Supreme Court accepted that “machines may participate in giving ‘visible expression’ to the author’s conceptions” (J. C. Ginsburg, “Humanist Copyright,” cited above, pp. 134–135). For a comparative synthesis of transatlantic precedents, see also Y. Benhamou, *Creative Value Chains: Copyright and Beyond for a Better Value Distribution*, Bristol University Press, 2026, p. 137.

¹⁵⁷ *General Understanding*, cited above, pp. 36–37; and USCO, *Copyright and Artificial Intelligence, Part 2: Copyrightability*, cited above, p. 28, summarising the Japanese position.

¹⁵⁸ Ministry of Culture, Sports and Tourism (MCST) and Korea Copyright Commission (KCC), *Guide to Copyright Registration for Generative AI-Assisted Works*, 30 June 2025, Part 2, point 1, p. 12.

¹⁵⁹ On the comparative consolidation of these positions, see IFRRO, *AI Governance Guide*, cited above, pp. 27 and 29.

¹⁶⁰ B. Edelman, *Le droit saisi par la photographie* [The Law Seized by Photography], Maspero, 1973.

creative control¹⁶¹. This observation is echoed in recent international scholarship. Professor Shujie Feng points out that the Beijing Internet Court, in its *Stable Diffusion* decision of 27 November 2023, based its characterisation of the output as a work on a photographic analogy that scholarship regards with caution: the camera, according to Feng, constitutes “a tool under the photographer’s control,” the result of which “is generally predictable,” whereas AI “exerts an autonomous decision-making” that deprives the user of equivalent control¹⁶². Such caution is, incidentally, not new. American scholarship itself observes that the *Sarony* ruling, which founded the characterisation of photographs as works, had not in fact examined the cameraman’s role in triggering the shutter¹⁶³. Historical photography thus already rested on an irreducible share of mechanics external to the author, belated awareness of which allows the singularity of generative AI to be better measured.

This observation does not invalidate the *Painer* grid, but no doubt confirms that the real issue is shifting from the definition of originality toward the proof of human creative input¹⁶⁴.

2.2. Upstream: design and parameterization

Upstream elements. The user can exercise creative choices well before generation itself: defining an artistic project, selecting and building a corpus, technical parameterization (mood, style, references). These choices are analogous to those of a photographer choosing the staging, location, and lighting, but also to those long offered by creative or editing software used not only by photographers but also by graphic designers or illustrators, such as Photoshop.

Analogy with the interview. A recent Cour de cassation ruling bolsters this reading, albeit in a different field. In a dispute concerning filmed interviews, the First Civil Division held, as a matter of principle, that an interview constitutes a protected creation once it takes on an original form, and that co-author status can be recognised in the interviewee only on condition that he or she contributed to the originality of the whole¹⁶⁵. The Court approved the court of appeal’s decision to recognise authorial status in the interviewer, who had taken the initiative for the interviews, conceived and worked out their structure and progression, chosen the themes and questions, and given them a turn of phrase bearing her personal stamp, while denying co-author

¹⁶¹ S. Dusollier and N. Malevé, “How AI unmakes images: The legal aesthetics of copyright,” forthcoming in *George Washington Journal of Law & Technology*. The authors show that the USCO engages in a “negative anthropomorphisation” of AI: the machine is recognised as having sufficient creative agency to strip the user of author status, without itself being vested with any rights.

¹⁶² S. Feng, “The copyrightability of AI-generated content: A doctrinal exploration of the pioneering Chinese judicial practice,” *Computer Law & Security Review*, vol. 59, art. 106236 (2025), p. 8.

¹⁶³ J. C. Ginsburg, “Humanist Copyright,” cited above, p. 135, n. 150: “*Sarony*’s ‘giving visible expression’ did not in fact extend to the decision when to activate the shutter; *Sarony*’s cameraman made that determination, but the decision does not consider his role in the creation of the photographic image”.

¹⁶⁴ See below, Part 2, §1.

¹⁶⁵ Cass. 1re civ., 15 October 2025, appeal No. 24-12.076, published in the Bulletin: *Légipresse* 2025, p. 529; *D.* 2025.1837; *Dalloz IP/IT* 2025.452, obs. C. Lamy; *CCE* 2025, comm. 101, obs. P. Kamina.

status to the interviewee, who had merely answered the questions asked in the order set by the interviewer, without taking part in the design or organization.

The analogy with hybrid creation is illuminating on two counts. First, the design and direction of the creative process found originality even where the raw expression comes from a third party. Second, one who merely responds within a framework set by another – even a human being whose statements are rich and personal – is not the author of the interview as a whole if he or she did not contribute to its originality. *A fortiori*, an AI system that generates responses according to the probabilistic parameters of its model cannot be credited with such a contribution.

The influence of the prompt. The generic nature of the initial prompt, however, may weigh against a finding of originality. The central argument was formulated by J. C. Ginsburg in an illuminating pedagogical example. The instruction “draw me a sheep” addressed by the Little Prince to a generative AI system, “would barely constrain the machine’s choices for how to execute the command”; such a prompt expresses only an “unprotectable idea”. Conversely, “draw me a sheep with fluffy purple curls and a diabolical face furiously butting the Little Prince on his asteroid while his Rose looks on approvingly, enjoying the scene,” a more detailed instruction, “might contain sufficient copyrightable expression to count as a literary work in its own right”¹⁶⁶.

This distinction between the prompt-as-idea and the prompt-as-expression¹⁶⁷ can be traced back to a classic precedent of American law. In *Nichols v. Universal Pictures Corp.*, Judge Learned Hand had already stated, with respect to the protectability of fictional characters, that “the less developed the characters, the less they can be copyrighted; that is the penalty an author must bear for marking them too indistinctly”¹⁶⁸.

Transposing this “penalty for indistinct marking” to the analysis of prompts, J. C. Ginsburg explicitly proposes a “Sir Toby Belch test”: the description of a future work – whether a synopsis or a treatment – gives rise to exclusive rights only on condition that it satisfies a distinctive-imprint criterion¹⁶⁹.

This requirement finds a notable illustration, *mutatis mutandis*, in the German decision of the Amtsgericht of Munich of 13 February 2026¹⁷⁰, which denied the status of a work to a logo generated by AI from a 1,700-character prompt: despite its length, the descriptions were too general to allow any inference as to the nature and appearance of the output, the creative

¹⁶⁶ J. C. Ginsburg, “Humanist Copyright,” cited above, pp. 150–151.

¹⁶⁷ A distinction must be drawn between the originality of the output – the only issue examined here – and the separate, and far rarer, originality of the prompt itself: if sufficiently detailed, a prompt may constitute a literary work in its own right, protected independently of the fate of the output; more often, however, it amounts to no more than a functional instruction devoid of originality. The parallel is with a title, “protected as the work itself” once it is original (art. L. 112-4, para. 1, CPI), though titles are often too banal to qualify.

¹⁶⁸ *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), opinion of Judge L. Hand.

¹⁶⁹ J. C. Ginsburg, “Humanist Copyright,” cited above, p. 158: “Outside the AI context, the description of a prospective work (e.g., an outline or treatment) must pass what I’ll call the ‘Sir Toby Belch test’ before its author may claim exclusive rights to realize the description. For AI prompts, the same rule of distinct marking should pertain”.

¹⁷⁰ Amtsgericht München, 13 February 2026, 142 C 9786/25, GRUR-RS 2026, 1513, §26. See also §21 on the requirement that the creative elements in the prompt dominate the output.

decision on the precise choice of design elements being left to the AI. The court’s reasoning, which likens such a prompt to a set of specifications given to a contractor carrying out the work, will be detailed further below, in connection with iteration and direction during generation. The most recent German scholarship supports this line of reasoning. M. Leistner and R. Jussen maintain that the initial prompt, however detailed, does not found protection for lack of a point of comparison enabling the causal link between the instruction and the resulting output to be established, and that an iterative series of purely textual prompts leads to protection only exceptionally, at the cost of rigorous documentation of each step¹⁷¹.

The Japanese *General Understanding* supports this analysis. Among the four factors it identifies for assessing the protectability of the resulting output, the first is “the quantity and content of the instructions given by the user”¹⁷²: upstream design and parameterization are thus recognised as a possible seat of human creative contribution, provided, here too, that their specificity is reflected in the result and is not reduced to a generic “set of specifications”.

Boundaries. Accordingly, at this stage, documented architectural design fixed *ex ante* – a set of specifications, drawn up before generation, setting out the sequencing of components and the overall structure, which the tool would merely execute – would likewise fall within this category; by contrast, the selection and arrangement of elements once generated is assessed at the downstream phase¹⁷³.

2.3. During generation: iteration and direction

The place of the human being in the choices made. Interaction with the system may itself be a seat of creative choices: series of iterations, refinements of the prompt, rejections and selection among variants. The process is reminiscent of a photographer adjusting framing and atmosphere. The classic conception/execution duality in the visual arts sheds useful light here. Professor Cámara Águila observes that, under Spanish and French case law, where an artist gives instructions and another person carries them out, each may be a co-author to the extent of his or her original contribution to the result, the artistic conception and the execution being each capable of carrying originality¹⁷⁴. This reasoning aligns with that adopted in French case law in the Renoir-Guino case, concerning the separation between intellectual conception and material execution¹⁷⁵.

¹⁷¹ M. Leistner and R. Jussen, “The Flattening of Creative Industries? (...)”, cited above, esp. pp. 15–16 (SSRN pagination 5080250).

¹⁷² *General Understanding*, cited above, pp. 36–37.

¹⁷³ See below, this Part, §2.4.

¹⁷⁴ P. Cámara Águila, “¿Un producto resultado de la Inteligencia Artificial puede ser protegido por derechos de autor?”, *Revista CESCO*, No. 54, 2025, p. 108, esp. pp. 120–123, analysing the conception/execution duality through AP Madrid (28th section), 21 May 2021 (*Negishi v De Felipe*) and TJ Paris, 8 July 2022 (*Druet v Cattelan*).

¹⁷⁵ See above, Preliminary Part, §4.

Comparative law—post-Mio/Konektra German convergence. The analogy with an executing collaborator, however, breaks down as soon as one observes that an AI system does not understand or interpret instructions the way a human executor would. Expressive elements not specified by the user are filled in by the model’s probabilistic computation, not by the talent of a collaborator. The Munich court’s decision¹⁷⁶ – the first European decision directly applying the autonomous concept of originality to generative-AI productions – decisively illustrates this point.

The court accepts, in principle, that protection is “conceivable following human intervention on the AI’s results, which may also occur after the fact or successively over the course of prompting, and which leads to the personality of the author of the prompts being precisely reflected in the output”¹⁷⁷. The tool must resemble more of an “aid” than an “autonomous creative instrument,” and the input provided must “mark the output in a sufficiently objective and clearly identifiable manner”¹⁷⁸. But the court immediately draws the practical consequence of this: copyright “rewards and protects neither investment, nor time spent, nor diligence, but solely the result of a creative activity”¹⁷⁹. Thus, even numerous iterations do not found originality if the instructions remain “merely general and open-ended as to the result,” since it is then the “decision” as to design that is “left to the AI”.

The most telling demonstration of this issue is that of the 1,700-character prompt: despite its length, the court compared it to “a set of specifications drawn up in writing for a human developer,”¹⁸⁰ since the descriptions were “so general that they permit no inference as to the nature and appearance of the output,” and the precise creative decisions are left to the machine. The prompt that orders is not the prompt that creates. Likewise, “the mere selection of an AI production among several proposals is not, in itself, sufficient,”¹⁸¹ since a choice is not, by itself, an act of creation—a point on which the court aligns with the American Copyright Office.

Convergence among German courts. The Munich Amtsgericht’s decision fits within a broader converging trend. Previously, the Frankfurt Regional Court, ruling on an application for interim relief (rather than in the main proceedings) on 17 December 2025, had held that song lyrics written by a human retained their status as a work even though the associated music had been generated by an AI system, and had remarked, in an *obiter dictum*, that “there would be grounds to deny copyright” to lyrics entirely produced by AI; the court, however, expressly reserved the question of whether text resulting from a prompt that was “skilfully chosen, individual, and protectable in its own right” could benefit from protection¹⁸².

¹⁷⁶ AG München, 2026, BeckRS 2026, 1513; GRUR-RR 2026, 143 (AI-generated logos, protection refused). Available at: <https://www.gesetze-bayern.de/Content/Document/Y-300-Z-BECKRS-B-2026-N-1513>

¹⁷⁷ Ibid., §19. All quotations are our translation.

¹⁷⁸ Ibid., §21, citing Olbrich/Bongers/Pampel, *GRUR* 2022, 870, and Leistner, *GRUR* 2025, 1123, 1132.

¹⁷⁹ Ibid., §22.

¹⁸⁰ Ibid., §26.

¹⁸¹ Ibid., §27.

¹⁸² LG Frankfurt am Main, judgment of 17 December 2025, 2-06 O 401/25, GRUR-RS 2025, 41927, upholding the preliminary injunction (einstweilige Verfügung) of 24 November 2025; text available on dejure.org, No. 2025,48127.

Subsequently, the Düsseldorf Court of Appeal, ruling on 2 April 2026 on an immediate appeal (*sofortige Beschwerde*) against an interim order of the Düsseldorf Regional Court, confirmed the same analytical framework, referring expressly to *Mio/Konektra* (paras. 48–49) and citing both the Munich Amtsgericht and the Frankfurt Regional Court¹⁸³. It held that protection for a generative-AI production is “conceivable where there is creative human intervention on the AI’s result, an intervention that may also occur after the fact or successively over the course of prompting,” on condition that this intervention leads to “the personality of the one who prompts being precisely reflected in the output”. It requires “sufficient individual pre-settings” in the programming of the generation process, “where appropriate, combined with a process of selection among the productions generated,” and recalls that “the mere selection of an AI production from among several ‘proposals’ is not, in itself, sufficient”¹⁸⁴. Where generation is “entirely software-driven,” neither copyright nor a related right may be recognised¹⁸⁵. The court finally applied this standard to the case at hand, noting that the user, warned at the hearing that the image’s appearance suggested an AI origin, had “not even outlined what creative decisions [he] would have made”¹⁸⁶. This convergence – three German decisions within four months – confirms that the framework arising from *Mio/Konektra* has found a stable application to generative-AI productions.

Comparative law—the Japanese position. The Japanese position points in the same direction. The *General Understanding* identifies, among its assessment factors, “the number of generation attempts” and “the selection from multiple output materials”¹⁸⁷. But Professor Ueno emphasises that these elements are merely indicators among others and do not, on their own, suffice to found protectability¹⁸⁸. The convergence here is remarkable with the Munich court’s refusal to give weight to the prompter’s diligence, and with the position of the U.S. Copyright Office, for which multiplying iterations does not alter the degree of control the user exercises over the expression.

This logic is echoed by the French high court. In its *Evema v. Someva* ruling of 9 April 2026, the First Civil Division of the Cour de cassation, faithfully reproducing paragraphs 65 and 67 of the *Mio/Konektra* ruling, states that “the creative character of these choices, within the

¹⁸³ OLG Düsseldorf, judgment of 2 April 2026, I-20 W 2/26 (“Underwater Dog Photos” [Unterwasser-Hundefotos]), MIR 2026, Dok. 027; full text online: https://medien-internet-und-recht.de/volltext.php?mir_dok_id=3557. The first German appellate-level decision expressly applying the *Mio/Konektra* framework to a question involving AI generation. The court cites AG München, 13 February 2026, 142 C 9786/25 (GRUR-RS 2026, 1513), and LG Frankfurt am Main, 17 December 2025, 2-06 O 401/25.

¹⁸⁴ OLG Düsseldorf, cited above. Our translation. Original text: “Ein urheberrechtlicher Schutz ist daher denkbar infolge menschlichen Eingriffs in KI-Ergebnisse, der auch nachträglich bzw. sukzessive während des Promptings stattfinden kann und der dazu führt, dass sich im Output auch gerade die Persönlichkeit des Promptenden widerspiegelt. Erforderlich ist daher eine menschlich-schöpferische Einflussnahme auf die Gestaltung des konkreten Werkes selbst, etwa durch hinreichend individuelle Voreinstellungen bei der Programmierung des Entstehungsprozesses des konkreten Erzeugnisses selbst, ggf. im Verbund mit einem Selektionsprozess unter den generierten Erzeugnissen. Die bloße Auswahl eines KI-Erzeugnisses aus mehreren „Vorschlägen“ ist für sich genommen nicht ausreichend”.

¹⁸⁵ Ibid.: “Erfolgt die Generierung des Erzeugnisses gänzlich softwaregesteuert, kommt ein Urheber und auch ein Leistungsschutz für das KI-Erzeugnis nicht in Betracht”.

¹⁸⁶ Ibid.: “nicht ansatzweise dargelegt hat, welche kreativen Entscheidungen er überhaupt getroffen hat”.

¹⁸⁷ *General Understanding*, cited above, pp. 36–37.

¹⁸⁸ T. Ueno, article cited above: the *General Understanding* “presents certain views of this Subcommittee at the time of its publication” and will need to be revisited as technology and international discussions evolve.

meaning of copyright law, cannot be presumed”¹⁸⁹: neither the fact that an object produces an aesthetic effect, nor the existence of unconstrained choices, suffices to found originality, so long as those choices do not reflect the personality of the author¹⁹⁰. Transposed to hybrid productions, this requirement corroborates the German analysis: Multiplying iterations or selecting among variants does not amount to presumed creativity; it must still be shown that the choices exercised imprint a personal stamp upon the result.

Comparative law—Chinese decisions. Chinese case law provides a third point of reference. The Beijing Internet Court¹⁹¹ granted protection to an AI-generated image, noting that the user had carried out numerous iterations, made detailed parameter choices, and selected the final result from among variants¹⁹². This approach is not an isolated one: the Donghu Development Zone Court (Wuhan), in a 2024 *Qiyu* decision, recognised the status of a work in a traditional Chinese painting created with the assistance of AI, basing its finding on the “correspondence” between the prompts, the parameters chosen by the user, and the elements visible in the result¹⁹³. Conversely, the Zhangjiagang court¹⁹⁴ denied protection, finding that neither the images nor the prompts at issue demonstrated sufficiently original quality, and emphasised the need for a verifiable creative process demonstrating the adjustment, selection, and enhancement of images through deliberate and individualised choices.

2.4. Downstream: selection, editing, and integration

A key moment? Post-generation work often constitutes the ground most favourable to establishing originality, and perhaps the most natural from the standpoint of existing copyright categories. Substantial editing, assembly, and integration into a larger composition are operations whose creative value is long-standing and well recognised¹⁹⁵. The artist who selects among variants generated by AI, then edits, assembles, and integrates the result into a graphic narrative, a trailer, or a staged scene, exercises an artistic direction not unlike that of the director of an audiovisual work or the author of a composite work within the meaning of Article L. 113-2 of the French Intellectual Property Code.

¹⁸⁹ See already this Part, §1.2.

¹⁹⁰ Cass. 1^{re} civ., 9 April 2026, *Evema*, cited above, point 9.

¹⁹¹ Beijing Internet Court, 27 November 2023, *Li v Liu* (the so-called “Stable Diffusion case”), decision No. (2023) Jing 0491 Min Chu 11279.

¹⁹² S. Feng, “The Copyrightability of AI-Generated Content: A Doctrinal Exploration of the Pioneering Chinese Judicial Practice,” cited above, p. 2.

¹⁹³ Donghu New Technology Development Area Court of Wuhan, 2024, civil judgment No. (2024) E 0192 Min Zhi Chu No. 968 (*Qiyu*), cited and analysed by S. Feng, article cited above, pp. 7–8.

¹⁹⁴ Mentioned in the EPRS Briefing, “Copyright of AI-generated works: Approaches in the EU and beyond,” December 2025, p. 4, available at: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2025/782585/EPRS_BRI\(2025\)782585_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2025/782585/EPRS_BRI(2025)782585_EN.pdf)

¹⁹⁵ Cf. art. L. 112-3, para. 1, CPI: “Authors of translations, adaptations, transformations, or arrangements of works of the mind enjoy the protection established by this Code without prejudice to the rights of the author of the original work. The same applies to authors of anthologies or compilations of works or of miscellaneous data, such as databases, which, by reason of the selection or arrangement of their content, constitute intellectual creations”.

Beyond these classic figures, the originality of hybrid creation can also manifest itself in the serial coherence of a fictional universe: the construction and unfolding, over time, of a franchise, of characters, or of a narrative constitutes a seat of originality extended to overall arrangement, the trace of which lies in the overall identity of the production¹⁹⁶.

Comparative law—characterising originality downstream. It is, moreover, this same logic that led the U.S. Copyright Office to recognise protection for the arrangement of images in *Zarya of the Dawn*¹⁹⁷: the selection, sequencing, and combination with original text constituted a “compilation” reflecting the author’s creative choices, regardless of the fact that the individual images themselves were not protected. This criterion of identifiable downstream creative contribution finds confirmation in the USCO Copyright Review Board’s decision of 30 January 2025 accepting registration of the work *A Single Piece of American Cheese*: the author had made, through an inpainting process, numerous perceptible modifications to the AI-generated image, and registration was based on the selection, coordination, and arrangement of AI-generated materials¹⁹⁸. Chinese case law validates this reading. The Changshu court¹⁹⁹ recognised, in 2024, the status of a work in an image created with the assistance of Midjourney and then retouched in Photoshop; it was the retouching work, added to the initial selection, that founded protection. An older precedent from the Beijing Internet Court, in the so-called *Wolters Kluwer* case, also deserves mention here. Predating the development of latent-diffusion systems, it had already accepted that an AI-generated statistical report could be protected where substantial human modifications had been made to it downstream²⁰⁰.

Past American case law offers further support. In *Atari v. Oman*, the Court of Appeals for the District of Columbia Circuit held that the selection and arrangement of individually unprotectable graphic elements (mere rectangles and a coloured circle making up the video game *Breakout*) satisfied the minimal degree of creativity required by copyright²⁰¹. As Judge Ruth Bader Ginsburg observed, the originality of a selection and arrangement does not require that its constituent elements themselves be protectable²⁰². An early and exemplary illustration of this logic was given by the Ninth Circuit in *Urantia Foundation v. Maaherra*: the allegedly non-human (“celestial”) character claimed for the source of the transcribed texts did not stand in the way of protection, since their selection and arrangement resulted from identifiable human intervention²⁰³.

¹⁹⁶ See the contribution of a representative of digital creators to the mission’s questionnaire, highlighting this serial consistency (universe, characters, narrative) as a marker of originality in hybrid productions; see also below, this Part, §3.3, for a concrete illustration of this logic.

¹⁹⁷ *Zarya of the Dawn* decision, 21 February 2023: CCE 2023, comm. 29, obs. P. Kamina.

¹⁹⁸ USCO, Copyright Review Board, decision of 30 January 2025, *A Single Piece of American Cheese*, registration No. 37990563.

¹⁹⁹ Changshu People’s Court, 18 October 2024, decision No. (2024) Su 0581 Min Chu 6697.

²⁰⁰ Beijing Internet Court, No. (2018) Jing 0491 Min Chu 239, *Beijing Feilin Law Firm v Baidu* (the “Wolters Kluwer case”), predating the Beijing Internet Court’s Stable Diffusion case (cited above). The precise scope of the decision has been the subject of nuanced restatement by legal scholarship, protection having arguably been recognised for the human editorial modification of the report rather than for the AI-generated report as such: see S. Feng, article cited above.

²⁰¹ *Atari Games Corp. v Oman*, 979 F.2d 242, 245–247 (D.C. Cir. 1992).

²⁰² *Ibid.*, p. 245 (opinion of Judge Ginsburg, then an appellate judge).

²⁰³ *Urantia Foundation v Maaherra*, 114 F.3d 955, 957–959 (9th Cir. 1997). The panel (Lay, Goodwin, and Schroeder, JJ.) characterised the work as a composite work within the meaning of the Copyright Act of 1909 (§304(a)) and upheld protection on the basis of the human selection and arrangement of the revelations.

Recent American scholarship supports this reading of the downstream phase. Edward Lee argues that the selection and arrangement of modules, architecture, or the sequencing of elements in a program – and, by extension, of the elements of a design shaped by an iterative process of prompting concerning layout, colour scheme, features, sequencing of screens – can found authorial status, even where the entirety of the code or result was generated by AI, a phenomenon he terms “vibe coding”²⁰⁴. This analysis follows in the wake of the *Computer Associates v. Altai* case law, in which the Second Circuit recognised that the protectable expression of a program can reside in its organizational structure – its successive “abstractions,” from object code to overall architecture – and not merely in its lines of code²⁰⁵. Transposed to the European framework, this approach supports the idea that the selection and arrangement of elements generated by the tool constitute an autonomous seat of originality at the downstream phase, independent of the machine’s material drafting of the expression, along the lines of the compilation recognised in *Zarya*; only architectural design fixed *ex ante*, prior to generation, would fall, for its part, within the upstream phase²⁰⁶.

This extension to the mere arrangement of elements set out in prompts nonetheless calls for the caveat formulated by J. C. Ginsburg. Under a prompt-engineering-based approach, copyright would cover only the selection, not the elements themselves: the mention of elements in a prompt can, at best, confer a right over the particular AI execution incorporating them, without extending either to the individual elements (which third parties remain free to extract and reuse) or to other possible executions from the same instructions. The protection thus recognised is then merely “thin,” a limitation Professor Lee himself acknowledges²⁰⁷. The present task force, which requires an imprint of personality in the result, does not subscribe to this minimal threshold: what founds protection is not the composition of elements set out in a prompt but rather the trace, within the object, of creative choices attributable to a person.

The Japanese *General Understanding* further supports this analysis. The fourth factor it identifies – “human additions or corrections” made after generation²⁰⁸ – places downstream work on the same footing as the other assessment criteria, without establishing any hierarchy among them.

Under EU law, such interventions fall within the free and creative choices contemplated by the *Painer* case, exercised downstream of generation: they consist precisely in selecting, arranging, and refining the elements produced by the tool until the result bears the imprint of the user’s conceptions.

²⁰⁴ E. Lee, “Vibe Coding Authorship,” *UCLA L. Rev.*, forthcoming 2026 (draft 28 March 2026), SSRN 6489379, esp. p. 10 (selection and arrangement of a program’s modules, architecture, and sequence) and p. 12 (extension to design elements determined through an iterative prompting process).

²⁰⁵ *Computer Assocs. Int’l, Inc. v Altai, Inc.*, 982 F.2d 693, 707 and 714 (2d Cir. 1992).

²⁰⁶ See above, this Part, §2.2.

²⁰⁷ J. C. Ginsburg, “Humanist Copyright,” cited above, criticising the “bare minimum” standard of prompt engineering (“copyright would inhere in the selection and not in the elements”; a standard yielding only “a rather whimper-ish bang for the prompter’s buck”). The professor notes (*ibid.*, p. 160, n. 210) that Professor Lee herself acknowledges this limitation: “the copyright for the image should be very thin, only protecting against identical copies” (E. Lee, “Prompting Progress: Authorship in the Age of AI,” 76 Fla. L. Rev. 1445, 1539 (2024); the “bare minimum” thesis is set out at p. 1535).

²⁰⁸ *General Understanding*, cited above, pp. 36–37.

Guidance from the Court of Justice—the identifiable whole as protectable subject matter.

A recent Court of Justice decision provides converging guidance. In the *Institutul de Istorie și Teorie Literară “G. Călinescu”* ruling of 19 March 2026, the Court ruled on whether a critical edition of a text that had fallen into the public domain qualified as a work. It recalled that the originality of a literary object stems from the selection, arrangement, and combination of elements, and that it may be assessed by reference to the composition, the structure given to the work, and the formatting and layout of the text in relation to the critical apparatus. The Court added that there is no need to break up a work that has meaning only as a whole: the critical edition “may, taken as a whole, present itself as an object identifiable with sufficient precision and objectivity”. The protection thus recognised does not bring the pre-existing work back into private ownership²⁰⁹.

Transposed *mutatis mutandis* to hybrid creation, this analysis supports protecting the whole formed by AI-generated components together with human work of selection, arrangement, and critical apparatus, provided that this whole manifests the identifiable free and creative choices of its author. The analogy must, however, be handled with care. Unlike a work that has fallen into the public domain, the individual components of an AI output are not, as a matter of law, materials subject to an established status of free availability; they are merely, by default, unprotected under copyright. The principle the Court validates – the identification of a protectable whole made up of individually uncovered elements – nonetheless remains fully transposable.

The place of originality—selection. Ultimately, as both Professor Ginsburg and Professor Cámara Águila observe, the analysis would be the same for a collage composed of pre-existing, unprotectable elements, such as the Cubist collages of Picasso, Braque, or Juan Gris. AI-generated components remain individually unprotectable, but their selection, coordination, and arrangement into a whole can constitute a protectable work²¹⁰.

2.5. The transatlantic tension: control over expression versus imprint within the object

Comparative law—a divergence in approach. A tension nonetheless appears to be emerging between the American position and that of the Munich court, one that reveals a structural difference. The U.S. Copyright Office takes the view that “by revising and submitting prompts multiple times, the user is ‘re-rolling’ the dice, causing the system to generate more outputs from which to select, but not altering the degree of control over the process”²¹¹: iteration

²⁰⁹ CJEU, First Chamber, 19 March 2026, *Institutul de Istorie și Teorie Literară “G. Călinescu” and Fundația Națională pentru Știință și Artă v HK and Others*, Case C-649/23.

²¹⁰ J. C. Ginsburg, contribution to the mission; P. Cámara Águila, “¿Un producto resultado de la Inteligencia Artificial puede ser protegido por derechos de autor?,” cited above, pp. 131–132; see also, accepting that post-generation editorial work may found protection, M. Leistner and R. Jussen, cited above, pp. 16–17.

²¹¹ USCO, *Copyright and Artificial Intelligence, Part 2: Copyrightability*, cited above, p. 20. See P. Kamina, “Un an de droit anglo-américain du copyright” [A Year of Anglo-American Copyright Law], *CCE* 2026, chron. 3, No. 2 et seq.

changes nothing so long as the user does not control the conversion of his or her idea into fixed expression, while the machine remains a “black box”.

Recent American scholarship has highlighted the concrete consequences of this control-based logic. Edward Lee has introduced the concept of “copyright contraction” to describe the systematic shrinking of protection as AI’s involvement in the creative process grows²¹². The USCO’s approach indeed leads to an inverse ratio: the scope of copyright decreases in proportion to the percentage of AI-generated content, down to zero where the entirety of the expression is produced by the machine from “prompts alone”²¹³. Protection then functions as a graduated scale, its cursor moving between zero and one hundred according to the measurable degree of human intervention in the output. This restrictive position is the subject of significant scholarly criticism even within the American system itself. Professor Lee notes that the concept of “traditional elements of authorship,” on which the USCO bases its refusal to recognise prompts as an act of authorship, has never been endorsed by any federal court²¹⁴. The Court of Appeals for the District of Columbia Circuit, moreover, expressly noted, in its 2025 *Thaler v. Perlmutter* ruling, the disagreement of the Motion Picture Association and of several experts with this approach, declining to rule on the question of works created through prompt engineering²¹⁵. The scholarship most favourable to protection calls for applying to AI-assisted productions the same “selection and arrangement” principles developed as early as 1884, in the *Burrow-Giles* ruling, with respect to the then-new medium of photography²¹⁶—a form of reasoning by analogy that, on this side of the Atlantic, aligns with the transposition of the *Painer* grid proposed in the present report.

The Munich court is more open on the matter. It accepts, in principle, that iteration can found originality, provided the creative elements incorporated through prompting “dominate the output”. The divergence lies not so much in the outcome – in both instances, protection is denied on the facts of the case – as in the underlying rationale for the decision.

This structural difference is not simply a matter of vocabulary. It stems from a divergence in the very object of the test. American copyright asks about the control the author exercises over the fixation of expressive elements: the author must have determined the expression, failing which the algorithmic “black box” breaks the causal link between human will and the resulting output. This is a logic of technical mastery, inherited from the idea/expression distinction as systematised since *Feist*²¹⁷. Continental copyright, by contrast, looks for the imprint of personality within the object: the question is not whether the author technically dictated every pixel or every word, but whether his or her creative choices are imprinted in the result. The *Painer* ruling illustrates this. The photographer does not fully control the camera’s optical

²¹² E. Lee, “Vibe Coding Authorship,” cited above, esp. pp. 3–4 (defining copyright contraction as the shrinking of the availability and scope of copyright for entire categories of traditionally protected works, resulting from AI-based creation methods and the USCO’s restrictive position).

²¹³ Ibid., pp. 8–9, and Figure 1. See also USCO, *Copyright and Artificial Intelligence, Part 2: Copyrightability*, cited above, p. 18, which concludes that “prompts alone do not provide sufficient human control to make users of an AI system the authors of the output”.

²¹⁴ E. Lee, “Vibe Coding Authorship,” cited above, p. 12, and by the same author, “Prompting Progress: Authorship in the Age of AI,” 76 Fla. L. Rev. (2024), p. 1445, esp. pp. 1462–1479.

²¹⁵ *Thaler v. Perlmutter*, 130 F.4th 1039, 1049–1050 (D.C. Cir. 2025), cert. denied, No. 24-449 (2 March 2026).

²¹⁶ *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

²¹⁷ U.S. Supreme Court, 27 March 1991, *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

rendering, but his or her choices of framing, lighting, and staging are imprinted in the photograph.

Flexibility of the continental approach. The consequence for hybrid creations is significant. The American approach tends to disqualify creative iteration wherever the user does not control the conversion of his or her idea into fixed expression, however rich the dialogue with the system may be. As a result, the production is liable to be fragmented into protected and unprotected zones, in proportion to the degree of human intervention. The European approach accepts, in principle, that such a dialogue can found originality; it focuses on the existence of a personal imprint in the result, assessed as a whole. But the condition is demanding, as confirmed by the Munich court’s decision: the instructions remained too general to “mark the output in a sufficiently objective and clearly identifiable manner”. What is valued, then, is not iteration as such, but its capacity to shape the result. Where the American approach measures a quantity of control, the European approach looks for a quality of imprint.

Doctrinal depth. This divergence is not reducible to a gap between two international legal orders, nor does it stem from two irreconcilable conceptions of authorship. A recent comparative reading, admittedly, shifts the analysis, on the American side, from a discrete contribution toward the authorial status of the work taken as a whole. The issue, for this scholarship, would be whether the claimant “has demonstrated a creative relationship to the work as a whole that justifies authorship”²¹⁸.

But this particularly demanding reading does not exhaust the American tradition. Since *Burrow-Giles*, that tradition has also recognised as author the person whose creative choices – even localised ones: pose, lighting, arrangement of the scene – give rise to the object²¹⁹, the very foundation of the selection-and-arrangement logic adopted in this report²²⁰. The divergence thus lies less in the conception of authorship than in the logic of the test: control over fixation, on the Copyright Office’s side; imprint within the object, on the continental side. Recent scholarship, moreover, emphasises the qualitative difference separating the use of a prompt from that of a traditional tool. Whereas a photographer or painter determines the expressive content of their work themselves, the prompter, it is observed, “specifies only the

²¹⁸ D. J. Gervais, “Authorship and the Human Editor of LLM Outputs – A Proposal Based on a Comparative Reading of the 2026 National Reports,” contribution to the ALAI 2026 Congress, The Hague, June 2026, SSRN No. 6752619, Part IV: “the structural question is the same in the LLM context: has the human claimant demonstrated a creative relationship to the work as a whole that justifies the name of author? Copyright law answers that question, in the analog context, by reference to a high threshold of significance: not merely contribution to a work but creative origination of it”. The author, who defends a demanding threshold (the transformative rewriting standard), is cited here only to characterise the American conception of the author-work relationship; on the appropriate threshold, this report takes a less restrictive position (see below, this Part, §3.3 and 3.4).

²¹⁹ *Burrow-Giles Lithographic Co. v Sarony*, 111 U.S. 53, esp. p. 58 (defining an author as “he to whom anything owes its origin; originator; maker”) and p. 60 (1884). The photographer’s status as author was grounded there in localised creative choices: “posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories [...], arranging and disposing the light and shade, suggesting and evoking the desired expression”. The Court expressly reserved the case of purely mechanical photography (“On the question as thus stated we decide nothing,” p. 59).

²²⁰ See above, this Part, §2.4.

conceptual constraints, leaving it to the model to generate the expression”²²¹. On the European side, post-*Mio/Konektra* German case law – the Frankfurt Regional Court, the Munich Amtsgericht, and, more recently, the Düsseldorf Higher Regional Court, the first German appellate-level decision on the question²²² – confirms the continental path: it is not the technical control of the process, but the imprint of creative decisions in the object, that determines the characterisation.

It is on the criteria for verifying originality that the two traditions converge.

3. The dividing line: from the trace in the object to the assessment grid

From observation to method. Beyond the diversity of legal traditions and the solutions reached on the facts, a common denominator emerges from the whole body of decisions and positions examined: it is in the object itself – and not in the process alone – that courts look for the mark of human intervention.

This third stage of the analysis moves from “where” to “how”: it first draws out the convergence of legal traditions on the requirement of a trace within the object (3.1); then recalls that this requirement is not to be confused with a requirement of total mastery, copyright having always been able to accommodate chance within the creative process (3.2); builds on this dual foundation the operational criterion for drawing the line between protectable hybrid production and excluded synthetic production—the distinction between creative direction and delegation to the machine (3.3); and, finally, formalises an assessment grid for use by the courts (3.4).

3.1. The convergence of the sources of law examined

Focus on the object. The seats and circumstances just identified, for all their diversity, share a common denominator. Whether protection is granted or denied, it is always in the object itself – and not in the process alone – that courts look for (or find the absence of) the mark of human intervention. This cross-cutting criterion deserves to be spelled out, as it forms the common thread running through the whole body of decisions examined.

Identifiable trace. Across the four legal traditions examined, it is the criterion of the identifiable trace within the object that constitutes the common denominator. From *Painer* to *Mio/Konektra*, by way of the German decisions, American case law, Chinese case law, and the Japanese position, a common thread emerges: it is not the process as such that determines

²²¹ A. Agrawal, *Primer 2: Human Authorship in Copyright Law*, The Dialogue, New Delhi, May 2026, p. 26, under 7.2.

²²² See above, this Part, §2.3.

originality, but the trace that human intervention leaves in the final object. The Beijing Internet Court granted protection by looking for that trace in the result; the Changshu court followed the same approach. The Zhangjiagang court, by contrast, denied protection, finding no verifiable creative process. The U.S. Copyright Office expressed this through the concept of “meaningful human authorship” discernible in the resulting output. The Munich court required that the input “mark the output in a sufficiently objective and clearly identifiable manner”. The CJEU, in *Mio/Konektra*, held that the author’s intentions are relevant only insofar as they manifest themselves in the work. The Japanese *General Understanding* illustrates this through its very structure: the four assessment factors it identifies matter only to the extent that they are reflected in the result.

Scholarly confirmation. The criterion of the trace within the object finds direct confirmation in the most recent European scholarship. Commenting on the *Mio/Konektra* ruling for the fashion design sector, S. Sipetas observes that the Court of Justice consolidates the requirement that “originality must be demonstrated through the design itself: creative choices cannot be presumed and must be identifiable in the final expression of the work”²²³. The author draws from this the observation that the real source of post-*Cofemel* divergence did not concern the identification of the applicable standard, but rather its operationalization by national courts, and that *Mio/Konektra* clarifies that operationalization by returning to the object. He further infers that the originality standard functions in binary fashion – “a work either expresses free and creative choices, or it does not” – with no possible gradation²²⁴. This reading aligns with the one adopted in the present report (originality is a threshold, not a scale) and finds a direct echo in the *Evema v. Someva* ruling of 9 April 2026, by which the French Cour de cassation faithfully adopted the *Mio/Konektra* framework²²⁵.

Along the same lines, commenting on the most recent American and Chinese decisions (the Copyright Office in *A Single Piece of American Cheese*, the Beijing Internet Court in *Li v. Liu*, and the Zhangjiagang court in *Butterfly Art Chair*), E. Rosati emphasises that these solutions do not imply that AI outputs are protectable outright, but rather require “reconstruct the process that led to the AI-generated output in order to identify the human author’s contribution and separate that from what is purely AI”²²⁶. The investigative method thus described complements the requirement of an identifiable trace within the object: while the trace is assessed in the result, verifying it requires a methodological return to the creative process.

²²³ S. Sipetas, “Copyright protection of fashion designs after *Mio/Konektra*,” cited above, p. 5, under 3.2.

²²⁴ *Ibid.*, p. 5, under 3.3: “*Cofemel* [...] treated the originality standard as binary rather than tiered, meaning that a work either expresses free and creative choices, or it does not,” as well as p. 8, under 5: “*Mio/Konektra* addresses one of the most persistent sources of post-*Cofemel* divergence: not disagreement over the applicable standard, but rather inconsistency in its operationalization”.

²²⁵ See above, this Part, §2.3.

²²⁶ E. Rosati, “The Future of the Movie Industry in the Wake of Generative AI: A Perspective under EU and UK Copyright Law,” *Computer Law & Security Review*, September 2025, 59, p. 11: “Decisions like those of the US Copyright Office to register *A Single Piece of American Cheese* or those of the Beijing Internet Court in *Li v Liu* and People’s Court of Zhangjiagang City, Jiangsu Province in *Butterfly Art Chair* do not indicate that AI-generated outputs are protectable tout court: instead, they stress the need to reconstruct the process that led to the AI-generated output in order to identify the human author’s contribution and separate that from what is purely AI”. The three decisions cited by the author are, moreover, analysed elsewhere in this report (see above, this Part, §2.3 and 2.4).

A broader comparative view. The convergence thus observed among four legal traditions forms part of a broader movement, the systematic mapping of which has recently been undertaken by legal scholarship. A comparative synthesis drawn from the eighteen national reports submitted to the ALAI 2026 Congress (The Hague) concludes that “courts and collective management organizations across eighteen legal systems carry out this task using the doctrinal tools already at their disposal”²²⁷. The same synthesis explicitly contrasts two schools of thought: one calling for the construction of a new framework, illustrated by the work of A. Bridy and A. Guadamuz, and one holding that the existing concept of originality suffices to accommodate hybrid creations, illustrated notably by the work of P. B. Hugenholtz and J. P. Quintais²²⁸. The position adopted by the present report firmly aligns with the latter school. This convergence, moreover, extends beyond the sphere of the courts and reaches legislators as well²²⁹.

Convergence on the requirement, variation on the threshold. This convergence is neither uniform nor total, and recent scholarship has sought to characterise its exact nature. The comparative summary drawn up by A. Agrawal describes it as “one of broad convergence on the human authorship requirement, with significant variation in how the threshold of human creative input is set”²³⁰. This clarification is useful: the convergence concerns the principle (an identifiable human author is required), not its quantification (the threshold of human contribution remains variable from one legal system to another). China’s position offers a textbook illustration. The same author describes it as “a pragmatic accommodation rather than a genuine doctrinal shift; the requirement of human authorship is preserved in form, but the threshold of human creative contribution is set at a lower level than in the United States or the European Union”²³¹. This reading makes it possible to view the decisions of the Beijing Internet Court and the Changshu court not as a conceptual break with the requirement of human authorship, but as a variation in threshold within a single framework.

A warning against conflating effort with originality. This lower threshold calls for a note of caution. Professor Cámara Águila observes that it comes close to the skill-and-labour criterion rejected under European law, and thus corresponds neither to the autonomous concept of

²²⁷ D. J. Gervais, “Authorship and the Human Editor of LLM Outputs,” cited above, p. 3: “courts and CMOs in eighteen jurisdictions are doing the work with the doctrinal tools they already have”. The eighteen legal systems covered are Argentina, Croatia, Czechia, Finland, Germany, Greece, Hungary, Italy, Mexico, the Netherlands, Norway, Poland, Portugal, Slovenia, Sweden, Switzerland, the United Kingdom, and the United States.

²²⁸ Ibid., contrasting A. Bridy, “Coding Creativity: Copyright and the Artificially Intelligent Author,” cited above, and A. Guadamuz, “Do Androids Dream of Electric Copyright? Comparative Analysis of Originality in Artificial Intelligence Generated Works,” cited above, on one side, with P. B. Hugenholtz and J. P. Quintais, “Copyright and Artificial Creation: Does EU Copyright Law Protect AI-Assisted Output?,” cited above, on the other.

²²⁹ On this institutional confirmation, see above, this Part, §1.4.

²³⁰ A. Agrawal, *Primer 2: Human Authorship in Copyright Law*, cited above (see above, this Part, §2.5), p. 24, under 5.10: “The comparative pattern is one of broad convergence on the human authorship requirement, with significant variation in how the threshold of human creative input is set”.

²³¹ Ibid., p. 20, under 5.4: “The cases reflect a pragmatic accommodation rather than a wholesale doctrinal shift; the human authorship requirement is preserved in form, but the threshold of human creative contribution is set lower than in U.S. or E.U. jurisprudence”.

originality defined by the Court of Justice nor to the standard arising from *Feist* under American law²³².

Doctrinal and normative convergence. Beyond the convergence among courts and administrative authorities, this overall movement is also borne out at the theoretical level. The collective report published in 2022 under the European reCreating Europe program by O. Bulayenko, J. P. Quintais, D. Gervais, and J. Poort systematically reviews the three classic normative bases for copyright protection – protection grounded in human rights and the author’s personality; the Lockean labour-desert approach; and the utilitarian approach – concluding that none of them justifies protecting a resulting output in the absence of an identifiable and causal human contribution²³³. German scholarship converges in the same direction: the majority view, described by A. Peukert as the “very predominant opinion,” excludes copyright protection for purely AI-generated output, for lack of a “personal intellectual creation” within the meaning of § 2 II of the German Copyright Act (UrhG)²³⁴. In the same study, the author refutes the minority position of H. Henke and C. Heinze, who would invoke the presumption of authorship under Article 10(1) of the German Copyright Act to posit a presumptive protection in favour of the human claimant. For Professor Peukert, this extension disregards the systematic distinction between the status of a work (*Werkqualität*, a prior and objective matter) and the identification of the author (*Urheberschaft*, a subsequent one)²³⁵. This distinction, which structures German law, finds its equivalent in the EU acquis, which separates the assessment of originality (CJEU: *Infopaq*, *Painer*, *Mio/Konektra*) from that of ownership (Art. 5 of Directive 2004/48 on presumptions of authorship). This is the position adopted by the task force, with consequences for the burden of proof²³⁶.

The convergence thus described (on the requirement of an identifiable human author whose creative choices are reflected in the object) is therefore neither a judicial coincidence nor a legislative accident: it expresses a structural doctrinal consistency, shared on both sides of the Atlantic and across copyright and common-law copyright traditions alike.

This cross-cutting convergence establishes the principle. What remains is to specify the conditions for its application, beginning with an essential nuance: the requirement of a trace within the object is not to be confused with a requirement of total mastery over the result.

²³² P. Cámara Águila, *Revista CESCO*, cited above, pp. 131–134.

²³³ O. Bulayenko, J. P. Quintais, D. J. Gervais, and J. Poort, *AI Music Outputs: Challenges to the Copyright Legal Framework*, reCreating Europe Report, February 2022, section 3.3 “Normative reflections,” pp. 79–81, esp. p. 80: “Protection anchored in human rights or in the personality of the author [...] seem inapplicable to nonhuman authors. A labour-desert approach based on a Lockean analysis [...] seems similarly difficult to apply to the ‘labour’ of a machine. [...] This essentially leaves a utilitarian approach”. The analysis of the three utilitarian considerations (under-production, allocation of rights, impact on human creators) concludes, in the same terms, that there is no justification for protection.

²³⁴ A. Peukert, “Mensch oder Maschine? Zum Nachweis urheberrechtlicher Schutzfähigkeit im Zeitalter künstlicher Intelligenz,” cited above, p. 109.

²³⁵ A. Peukert, cited above, p. 111, under II.1, second argument. The author rebuts the position taken by H. Henke, *GRUR* 2023, p. 608, and by C. Heinze, *ZUM* 2024, p. 184.

²³⁶ On this point, see below, Part 2, § 1.

Trace and imprint. Before turning to these conditions, an ambiguity that the repeated use of the word might create must be dispelled: the trace within the object is not a criterion competing with the imprint of personality, nor is it a new standard of originality. The imprint of personality remains the substantive criterion, that which the law seeks: the mark of a person, the “coloring” the author imprints on the work. The trace, for its part, is merely the means of ascertaining it: it requires that the alleged seat of originality actually manifest itself in the result, failing which it remains a mere account of process, inoperative. The trace thus adds nothing to the definition of originality; it governs its objective demonstration, shifting the focus from intention to the object.

This purely verificatory function explains why the distinction remains understated in classical creation and becomes central in the hybrid context. Where a work proceeds from its author’s own hand, the imprint can ordinarily be inferred from the execution itself: the trace is presumed by the empirical evidence of the creative gesture. Artificial intelligence precisely dissolves this self-evidence: the gesture fades behind the model’s computation, and the imprint can no longer be inferred from the process alone, which is often opaque and always suspect. It must therefore be shown in the object itself. This is the lesson drawn from the *Mio/Konektra* ruling: creative choices are not to be presumed, and the author’s intentions are relevant only insofar as they manifest themselves concretely in the work²³⁷. The trace is, in short, merely the imprint called upon to show itself in the object, a condition for its objective ascertainment, where a human origin is no longer self-evident.

3.2. Chance within the creative process: chosen randomness or undergone randomness?

Trace and mastery. This requirement of a trace within the object must not, however, be confused with a requirement of total mastery over the result. Recall that personal execution is not a condition of access to protection²³⁸. Moreover, copyright has always been able to accommodate chance within the creative process. Musical improvisations, unpredictable by nature in how they unfold, are protectable on the same footing as written compositions²³⁹. Pollock’s drip painting, the Surrealists’ automatic writing, and aleatoric music all proceed from a deliberate creative gesture whose final expression the author does not fully control; and no one has ever thought to deny them the status of works²⁴⁰.

This consistency is not unique to Europe. As early as 1970, D. P. Keziah, then Head of the Music Section, Examining Division, of the U.S. Copyright Office, argued that the use of chance procedures as an aid to composition should not preclude copyright protection, provided that the composer “guides” the ultimate expression through the selection and manipulation of the

²³⁷ CJEU, 4 December 2025, Joined Cases C-580/23 and C-795/23, *Mio/Konektra*, para. 65.

²³⁸ See above, Preliminary Part, §4.

²³⁹ Cass. 1re civ., 1 July 1970, *Manitas de Plata: RIDA*, April 1971, p. 270, note B. Edelman.

²⁴⁰ See also, placing Pollock’s drip painting and the works of Niki de Saint Phalle within the creative chance embraced by copyright, while stressing that the continental standard remains stricter in requiring control over at least the selection and arrangement of materials and colours, M. Leistner and R. Jussen, cited above, p. 13.

chance elements—an analysis she expressly extended, by analogy, to computer music²⁴¹. The most recent American scholarship confirms this reading of § 313.2 of the *Compendium of U.S. Copyright Office Practices*: the Office does not categorically reject any role for chance in the creative process, and protectability remains conditional on a creative contribution or intervention by a human author²⁴².

Beyond this, creation is often accompanied by fortuitous expression, and a requirement of full preconception of every expressive element would be excessive. A general creative intent suffices, leaving room for unanticipated expressive elements. The partial unpredictability of the result is not, therefore, in itself an obstacle to protection. What matters is that a human author engaged in a creative process over which he or she retains direction, even if the machine, like Pollock’s brush or the jazz musician’s instrument, contributes to shaping the result in a way the author had not entirely anticipated.

Directed randomness and randomness merely undergone. The Japanese position illustrates this distinction at an institutional level. Professor Ueno insists that Japan’s characterization as a “Machine-Learning Paradise” applies only to the training stage and in no way prejudices the characterisation of the result²⁴³. This observation can be generalised: just as freedom at the training stage is independent of the protectability of the resulting output, the unpredictability of the algorithmic process is independent of the creativity of the result. These are two distinct questions. Pollock’s randomness is, in this respect, directed randomness: the painter controls the colours, the layers, and the depth of the texture, and executes his choices through the movements of his own body²⁴⁴.

While the transposition of this analysis to generative AI has been contested, the majority view in American scholarship expressly defends it, going so far as to argue that iterating prompts combined with selection among several results can, in certain circumstances, found authorship—a position the USCO, in its Part 2 report, did not adopt, holding that prompts, given the current state of the art, do not confer on the user sufficient control over the output²⁴⁵.

Algorithmic randomness can be seen as randomness undergone by the user: it is the model’s probabilistic computation that determines the expressive elements not specified by the instructions. At the extreme end of randomness merely undergone, American courts denied

²⁴¹ D. P. Keziah, “Copyright Registration for Aleatory and Indeterminate Musical Compositions,” 17 *Bull. Copyright Soc’y U.S.A.*, 1970, 311, esp. pp. 319–320. Add, to the same effect regarding Pollock’s drip painting: D. L. Burk, “Thirty-Six Views of Copyright Authorship, by Jackson Pollock,” 58 *Hous. L. Rev.* 263, 272 (2020).

²⁴² J. C. Ginsburg, “Humanist Copyright,” cited above, discussing the *Compendium of U.S. Copyright Office Practices* (3rd ed. 2021), §313.2.

²⁴³ T. Ueno, article cited above.

²⁴⁴ Contra P. Cámara Águila, “¿Un producto resultado de la Inteligencia Artificial puede ser protegido por derechos de autor?,” cited above, pp. 129–130, who infers from this bodily mastery of gesture that the analogy does not hold, considering the comparison with the result obtained from a simple prompt to be inapposite. The objection in fact reinforces the distinction proposed here: it is the effective direction of chance, not its mere existence, that determines the characterisation.

²⁴⁵ In defence of the analogy: M. Sag, P. Samuelson, and C. J. Sprigman, *Comments in Response to the Copyright Office’s Notice of Inquiry on Artificial Intelligence and Copyright*, Published response to the Copyright Office NOI, 2024, pp. 3–4; for the restrictive position subsequently adopted: USCO, *Copyright and Artificial Intelligence, Part 2: Copyrightability*, cited above, p. 18.

protection to a floral installation (*Wildflower Works*) on the ground that it is the forces of nature, not the gardener’s intellect, that determine its shape, growth, and appearance²⁴⁶.

The most recent scholarship, however, qualifies the scope of this precedent. The court arguably failed to examine the extent to which the gardener’s artistic vision incorporated the alterations brought about by nature, and whether the arrangement had been designed to channel those alterations in service of that vision²⁴⁷. This is precisely the question that arises with respect to hybrid creations. But this distinction is not absolute. A user who deliberately incorporates the system’s unpredictability into a process of creative direction (through a sequence of iterations, selections, and editing the trace of which is identifiable in the object) transforms randomness undergone into directed randomness. Here again, it is the requirement of a trace within the object that makes it possible to distinguish the two situations. What is decisive, in short, is the degree of human direction over the result, rather than the degree of predictability of that result.

While it does not directly concern hybrid creations, case law on constraints capable of narrowing the space for creative freedom provides, by transposition, a useful tool. In the *Evema* ruling of 9 April 2026, the First Civil Division of the Cour de cassation listed, with respect to applied art, “technical, ergonomic, or safety” constraints, as well as those stemming from “standards or [...] conventions adopted within the sector concerned”²⁴⁸. This grid can be transposed to algorithmic mediation: the system’s stochastic autonomy, the model’s architecture, and its default parameters are all constraints of a new kind, which reduce the space for creative freedom without, as a matter of principle, eliminating it. It is this notion of human direction that grounds the operational criterion for drawing the dividing line between hybrid productions capable of protection and synthetic productions that are excluded from it.

3.3. Creative direction and delegation to the machine

The organizing criterion. The requirement of a trace within the object, together with the acceptance of directed randomness within the creative process, leads to the formulation of a single organizing criterion: at each stage of the process, it must be determined whether the user exercised creative direction²⁴⁹ whose trace has been imprinted in the result, or whether the user delegated the determinative expressive choices to the machine. This distinction is not binary

²⁴⁶ *Kelley v Chicago Park District*, 635 F.3d 290, 304 (7th Cir. 2011), opinion of Judge Sykes: “natural forces – not the intellect of the gardener – determine their form, growth, and appearance”.

²⁴⁷ J. C. Ginsburg, “Humanist Copyright,” cited above, p. 136.

²⁴⁸ Cass. 1re civ., 9 April 2026, No. 25-11.711, *Evema v Someva*, point 8, applying CJEU, 4 December 2025, Joined Cases C-580/23 and C-795/23, *Mio/Konektra*, paras. 62–63; see above, this Part, §1.2.

²⁴⁹ The notion of creative direction used in this report corresponds, in the vocabulary of American copyright law, to the proximate causation defended by J. C. Ginsburg (“Humanist Copyright,” cited above, esp. pp. 148–159), itself adopted by the USCO: “while the Copyright Office has maintained that the putative author must be the proximate and determinative cause of the output, the Applicant was conceding the need for human authorship, but urging a kind of but-for causation to identify sufficient human participation in the machine’s output” (pp. 148–149). The author systematically contrasts this proximate causation with the but-for causation argued for by the claimant in *Thaler*, which she describes as “exceedingly attenuated, paying lip service to human agency in order to vastly augment the universe of machine-generated copyrighted works” (p. 149); see also below, this Part, §2.5, on the rejection of this causal extension.

but graduated, and it is precisely this gradation that the courts must assess in concreto to determine whether the threshold has been reached.

French law has long recognised the figure of the author who conceives and directs without materially executing the work: the *Hermès 1963* sculpture was held to be a Georges Braque's work, since it had been "executed according to his instructions and under his supervision". Transposing this to delegation to the machine, however, calls for the caveat raised by legal scholarship, which sees "something of an artifice" in inferring authorial status from the mere after-the-fact approval of work carried out by another²⁵⁰.

The Munich court's decision puts this clearly: "it is necessary that the use of the AI model resemble more an auxiliary tool than an autonomous creative instrument," and the input must "mark the resulting output in a sufficiently objective and clearly identifiable manner"²⁵¹. This formulation exactly traces the boundary between creative direction (the auxiliary tool placed at the author's service) and delegation (the autonomous creative instrument to which choices are surrendered). The distinction thus formulated provides a workable answer to the conceptual difficulty raised by part of legal scholarship with respect to AI tools, whose use differs qualitatively from that of a camera or a paintbrush²⁵²: since the prompter does not, unlike the photographer or the painter, determine the entirety of the expressive content of the result, a binary analysis in terms of "tool" versus "generator" does not exhaust the question. The creative-direction/delegation grid, which assesses *in concreto* the author's trace within the object, moves beyond this alternative by measuring not the nature of the instrument, but rather the extent of the creative choices reflected in the result.

Reception at the appellate level. The Düsseldorf Court of Appeal, on 2 April 2026, confirmed and refined this line of reasoning²⁵³. It held that protection is "conceivable where there is creative human intervention on the AI's result, an intervention that may also occur after the fact or successively over the course of prompting," on condition that this intervention leads to "the personality of the one who prompts being precisely reflected in the output"; it added that such an imprint can result from "sufficient individual pre-settings" in the programming of the generation process, "where appropriate, combined with a process of selection among the productions generated"²⁵⁴. Creative direction, within the meaning of the present report, thus encompasses a range of possible operations (substantial upstream parameterization, iterative conduct of prompting, reasoned selection among generated productions), the combination of which results in imprinting the user's personality on the output. Conversely, where generation is "entirely software-driven," "neither copyright nor a related right can be recognised"²⁵⁵.

²⁵⁰ A. Lucas and A. Lucas-Schloetter, *Traité*, cited above, No. 309 (the *Renoir* and *Braque II* cases); Cass. 1re civ., 13 November 1973, No. 71-14.469, *Renoir*; Cass. 1re civ., 11 May 2017, No. 16-13.427, and, on a further appeal, Cass. 1re civ., 6 January 2021, No. 19-14.205, *Braque*.

²⁵¹ AG München, 13 February 2026, 142 C 9786/25, GRUR-RS 2026, 1513, para. 21; citing Olbrich/Bongers/Pampel, GRUR 2022, 870, and Leistner, GRUR 2025, 1123, 1132. – See above, §2.2 and 2.3.

²⁵² See above, §2.5: A. Agrawal, *Primer 2: Human Authorship in Copyright Law*, cited above, p. 26.

²⁵³ See already above, this Part, §2.3.

²⁵⁴ OLG Düsseldorf, judgment of 2 April 2026, I-20 W 2/26 ("Underwater Dog Photos" [Unterwasser-Hundefotos]), MIR 2026, Dok. 027, Grounds B.II.1 (our translation); see above, this Part, §2.3.

²⁵⁵ *Ibid.*, Grounds B.II.1 (our translation). Original text: "Erfolgt die Generierung des Erzeugnisses gänzlich softwaregesteuert, kommt ein Urheber- und auch ein Leistungsschutz für das KI-Erzeugnis nicht in Betracht".

Application across the three phases. The criterion applies across the three phases of the *Painer* grid as transposed to hybrid creations. Whatever the phase at issue, a seat of originality counts only if the alleged creative choices are actually found in the result itself; a contribution that leaves no perceptible trace in the object, however real it may have been in the process, remains inoperative.

Upstream. Creative direction manifests itself through the existence of an artistic project preceding generation, documented and identifiable, translated into concrete choices of design and parameterization: building a corpus, defining a style, detailed specification of expected expressive elements.

Delegation, conversely, is revealed by the generic nature of the instructions, even within a long prompt. The Munich court²⁵⁶, which, as noted, likens a 1,700-character prompt to a set of specifications given to a human developer, adds that neither the careful, laborious drafting of the prompt nor recourse to a “paid premium version” of the AI is, on its own, capable of founding protection: “merely craft-like activities do not reflect [the prompter’s] personality, regardless of their cost or laboriousness. Copyright rewards and protects neither investment, nor time spent, nor diligence, but solely the result of a creative activity”²⁵⁷. This clarification is illuminating. What distinguishes creative direction from delegation is neither the amount of effort invested in the prompt nor the cost of accessing the tool, but the capacity of the choices made to be reflected in the result. The Japanese *General Understanding* confirms this reading: the “quantity and content of the instructions given by the user” constitute a seat of human creative contribution only insofar as their specificity is reflected in the result²⁵⁸.

The USCO’s position is more restrictive²⁵⁹, as noted above, but it stems from a copyright logic centred on fixation. This position, however, is not the subject of consensus, even within the most respected American scholarship. In the public consultation preceding the report, P. Samuelson, C. J. Sprigman, and M. Sag, three leading authorities on copyright, argued that “there is no reason in principle why prompts couldn’t be detailed enough to meet the traditional threshold of authorship in some cases”²⁶⁰. The authors accept that current technology may not offer sufficiently tight control between instructions and result, but emphasise that nothing in

²⁵⁶ AG München, cited above, para. 26.

²⁵⁷ Ibid., para. 22 (our translation). Original text: “*Bloß handwerkliche Tätigkeiten spiegeln seine Persönlichkeit nicht wieder; unabhängig von ihrem Kostenaufwand oder ihrem Maß an Fleiß. Das Urheberrecht belohnt und schützt nicht Investitionen, Zeitaufwand oder Fleiß, sondern allein das Ergebnis einer kreativen Tätigkeit*”. (Citing Dreier/Schulze/Raue, 8th ed. 2025, UrhG §2, No. 79).

²⁵⁸ *General Understanding on AI and Copyright*, cited above, pp. 36–37.

²⁵⁹ USCO, *Copyright and Artificial Intelligence, Part 2: Copyrightability*, cited above, p. 18: prompts “function essentially as instructions conveying unprotectable ideas” and, at the current state of the technology, “do not control the manner in which the AI system processes them to generate the output”.

²⁶⁰ P. Samuelson, C. J. Sprigman, and M. Sag, *Comments in Response to the Copyright Office’s Notice of Inquiry on Artificial Intelligence and Copyright*, Published response to the Copyright Office NOI, 2024, p. 3: “there is no reason in principle why prompts couldn’t be detailed enough to meet the traditional threshold of authorship in some cases”. This comment predates the USCO’s January 2025 report by fifteen months; that report partially echoed the warning about effective control over prompts but did not adopt the three authors’ position on the question of admissibility in principle.

principle prevents sophisticated prompts specifying the details of an image from satisfying the requirement of an original conception of expression attributable to the user²⁶¹.

The European tradition, which looks for the imprint of personality in the result rather than technical control over the process, does not rule out, as a matter of principle, that sufficiently precise and personalised instructions could constitute a seat of originality.

During generation. Creative direction manifests itself through an iterative process in which the user’s choices progressively shape the result, such that his or her personality is imprinted on it—something the Munich court accepts in principle where “the creative elements incorporated into the prompting dominate the output such that the object can be regarded, as a whole, as an original creation of its author”²⁶².

Delegation manifests itself where iteration is reduced to relaunching generic instructions without creative inflection. The Munich court holds, on this point, that “the ‘decision’ as to design is ultimately left to the AI through instructions that are merely general and open-ended as to the result, even where these are numerous and successively alter the appearance of the output”²⁶³. The experiment conducted by Professor Cámara Águila provides a concrete illustration of this: submitting the same detailed prompt to Gemini a few minutes apart, the four images obtained differed radically in pose, setting, colours, and style, revealing that a user who relaunches the system merely “rolls the dice” [*tirando los dados*], generating new results from which he or she then selects, without altering his or her degree of control over the expression²⁶⁴. The mere selection of one result among several proposals is likewise insufficient, as noted above in discussing the Munich decision²⁶⁵.

Downstream. Creative direction manifests itself through substantial editing, assembly work, or integration into a larger composition displaying an original architecture; illustrations of this were given above (inpainting in *A Single Piece of American Cheese*, Photoshop editing in the Changshu case, protected arrangement in *Zarya of the Dawn*).

²⁶¹ Ibid., pp. 3–4: “It may be that current AI technologies do not give users sufficient control over outputs such that complex prompts and outputs are connected closely enough to qualify the output as the user’s original intellectual conception. But it may be that as AI tools develop and allow for more fine-grained control of outputs by the user, that link will be evident in at least some outputs”.

²⁶² AG München, cited above, para. 21.

²⁶³ Ibid., para. 22.

²⁶⁴ P. Cámara Águila, “Generaciones creativas de inteligencia artificial y derechos de autor (o inventores)” [Creative Generations of Artificial Intelligence and Copyright (or Inventors)], *Revista CESCO de Derecho de Consumo*, No. 54, 2025, pp. 124–128, adopting the USCO’s phrase, report cited above, p. 19.

²⁶⁵ AG München, cited above, para. 27. This formula was echoed verbatim on appeal by the OLG Düsseldorf, 2 April 2026, cited above, Grounds B.II.1: “die bloße Auswahl eines KI-Erzeugnisses aus mehreren ‘Vorschlägen’ ist für sich genommen nicht ausreichend” [“the mere selection of one AI-generated output from among several ‘suggestions’ is not, on its own, sufficient”]. This convergence is also borne out by the most recent, and most highly regarded, American legal scholarship: J. C. Ginsburg, “Humanist Copyright,” 6 *Journal of Free Speech Law* 91 (2025), p. 143, n. 177, emphasising that “simply selecting an image from a large number of alternatives does not make one the author of the chosen picture [...]. In that respect, the applicant is no different from others who perceive aesthetic merit in objects they did not create, such as driftwood [...], or in ‘found objects’ such as bottle racks or urinals”.

Delegation is revealed by the adoption of the first result with no selection, editing, or integration, or by purely craft-like corrections (error fixes, technical adjustments) that do not reflect a creative personality. The Munich court insists: instructions “framed on a technical level and open-ended as to the result,” and corrections of the AI’s obvious errors, do not constitute creative decisions²⁶⁶.

This creative direction exercised downstream can also manifest itself in the construction of a coherent fictional universe capable of being developed over time. A contribution from a representative of digital creators to the task force’s questionnaire offers a concrete illustration: AI-generated characters (*Brainrot*) set within a distinctive aesthetic universe have been developed into a franchise, giving rise to large-scale commercial exploitation. The creators’ creative direction manifests itself through the definition of the universe, the choice of visual and narrative associations, and the overall architecture within which the individual characters are situated.

The French experience. An illustration of a different scope, because it concerns a plural literary work, can be drawn from a recent French report whose authors documented their use of generative AI at several stages: summarizing hearings, producing a first draft from a detailed outline agreed upon collectively, then critically reviewing the consolidated text submitted to several systems²⁶⁷. Creative direction there is distributed between the upstream phase – the outline, which fixes the architecture and substantive choices – and the downstream phase (successive revisions, scholarly review, and the authors’ appropriation of the text) with the generation of the first draft itself delegated to the machine. Such a configuration, where the determinative human intervention occurs before and after generation, is not in itself an obstacle to protection: it corresponds to the scenario the Düsseldorf Court of Appeal accepts when it recognises that the imprint of personality can result from a creative intervention occurring after the AI’s result²⁶⁸. That said, the authors claim the status of “sole and only authors” following “complete intellectual appropriation,” a statement that, while doubtless sufficient to establish authorship, would not dispense with the need to establish the originality of the object, which, as will be shown²⁶⁹, cannot be presumed. This example thus encapsulates the shift specific to hybrid creation: the difficulty lies not in characterising the work, but in demonstrating the human attribution of the expressive choices.

The user-interchangeability test. The criterion for resolving borderline cases is that of the interchangeability of the user. Where the expressive characteristics of the output do not depend on the personal choices of the person who commissioned it, but on the model’s probabilistic computation, the result bears no mark of personality. Professor Ginsburg formulates a

²⁶⁶ AG München, cited above, paras. 22 and 27; along the same lines, OLG Düsseldorf, 2 April 2026, cited above.

²⁶⁷ Le Club des juristes, *Intelligence artificielle et justice civile: perspectives et ambitions* [Artificial Intelligence and Civil Justice: Perspectives and Ambitions], report of the committee chaired by S. Noël (rapporteurs Ph. Métais and Y. Meneceur), April 2026, annex “Fiche méthodologique: comment l’IA a été utilisée pour la rédaction de ce rapport?” [Methodological Note: How Was AI Used in Drafting This Report?], pp. 38–39. The first draft was produced using Notebook LM from a detailed outline settled by the committee; the consolidated text was then submitted to three applications (Le Chat, Claude, ChatGPT) for a final critical review before the final proofread.

²⁶⁸ See above, this Part, §3.3 and §2.3.

²⁶⁹ See below, Part 2, §1.

convergent criterion: if the same prompts produce a plurality of different results, the purported author has not exercised sufficient control over the process to be granted author status²⁷⁰. This approach is shared by the guide adopted in June 2025 by the Korean Ministry of Culture, Sports and Tourism and the Korea Copyright Commission, which adopts as its operative criterion a closely related conceptual pair: controllability, understood as the creator’s ability to decide what he or she intends to express and to master the method and process of that expression, and predictability, understood as the capacity of the intended expression to materialise as envisaged²⁷¹. This dual criterion is adopted as an analytical framework in the present report²⁷².

The interchangeability criterion nonetheless calls for some nuance. The stochastic nature of generative AI systems makes exact reproducibility technically impossible, each execution producing a different result²⁷³. What is at issue, then, is not the strict reproducibility of the result, but the interchangeability of the user. If any user, given the same generic instructions, would have obtained an output with undifferentiated expressive characteristics, the result does not bear the imprint of a personality. Conversely, if the instructions are sufficiently precise and personalised that only a user exercising a particular creative direction could have arrived at that result, the mark of interchangeability vanishes and, with it, the obstacle to protection.

Fit with European law. This distinction between creative direction and delegation to the machine fits naturally within the framework of European originality law. The *Mio/Konektra* ruling confirms that the author’s intentions are relevant only insofar as they manifest themselves concretely in the work²⁷⁴: creative direction that is not reflected in the object – because the machine interposed its probabilistic computation between the intention and the result – is not what courts are looking for. The *Painer* ruling had already hinted at this: the photographer does not fully control the camera’s optical rendering, but his or her choices of framing, lighting, and staging are imprinted in the photograph²⁷⁵. The question is not whether the author technically dictated every pixel or every word, but rather if his or her creative choices are imprinted in the result. The European tradition, anchored in the author’s personality, is structurally more accommodating than American copyright, provided that such iteration is reflected in the object and does not remain confined to the process²⁷⁶.

3.4. Synthesis: the assessment grid

²⁷⁰ J. C. Ginsburg, “Humanist Copyright,” cited above, p. 158: “if her prompts produce myriad uncontrolled outputs, she cannot claim authorship of any of them”; see also the same author’s contribution to the mission’s questionnaire, to the same effect.

²⁷¹ MCST and KCC, *Guide to Copyright Registration for Generative AI-Assisted Works*, cited above, p. 13: “Controllability means that the creator can determine what to express and exercise control over the method and process of that expression. Predictability refers to whether the intended expression can be realized as envisioned”.

²⁷² See below, this Part, §3.4.

²⁷³ See above, this Part, §1.2.

²⁷⁴ CJEU, 4 December 2025, Joined Cases C-580/23 and C-795/23, *Mio/Konektra*, para. 67.

²⁷⁵ CJEU, 1 December 2011, C-145/10, *Painer*, paras. 90–91.

²⁷⁶ See above, this Part, §2.5.

A proposed tool. From the above demonstration emerges not a new definition of originality, but an assessment grid for use by the courts. Its general structure will first be presented: an operational tool, built around the continuum of human intervention (3.4.1). The grid itself is then set out in the form of a two-entry table, pairing each of the three phases of the “*Painer* method” with the seats of originality and their counter-indicators, under the control of two cross-cutting criteria: the trace within the object and the interchangeability of the user (3.4.2). It will be shown that this grid is not an isolated construct, but rather converges, under different vocabularies, with several operational frameworks developed by legal scholarship, administrative authorities, and industry (3.4.3). Finally, its scope and safeguards will be clarified, the grid delimiting protection without expanding it (3.4.4).

3.4.1. Presentation of the grid

An operational grid, not a definition. The grid arising from the above demonstration is organised around identifiable seats: points in the creative process where the author’s free and creative choices, reflecting creative direction, can manifest themselves and be imprinted in the object. Each of these seats can, on its own, found protection: as explained above, originality is a threshold, not a scale. Crossing the threshold gives rise to full protection, with no possible gradation according to the intensity of human intervention, which would result in a multi-speed scheme alien to the autonomous concept of originality²⁷⁷; conversely, the absence of any identifiable seat reveals delegation to the machine and excludes the object from the scope of copyright.

A grid anchored in the continuum of human intervention. This approach fits within a now-common understanding in legal scholarship of human intervention as a continuum extending from synthetic productions – entirely machine-generated and excluded from any protection – to hybrid creations, in which AI is merely a supporting tool, fully protected²⁷⁸. The threshold for protection lies somewhere along this continuum; the function of the grid is precisely to locate it in a given case, by identifying the seats reflecting creative direction.

3.4.2. The seats of originality: a two-entry grid

²⁷⁷ This binary structuring finds direct support in the most recent reading of the *Mio/Konektra* judgment: “Cofemel, which treated the originality standard as binary rather than tiered, meaning that a work either expresses free and creative choices, or it does not,” S. Sipetas, “Copyright protection of fashion designs after *Mio/Konektra*,” cited above, p. 5.

²⁷⁸ Y. Benhamou, *Creative Value Chains. Copyright and Beyond for a Better Value Distribution*, Bristol University Press, 2026, p. 78: “AI technologies can also be used across a spectrum of human intervention, from fully generated works to assistance in the creative process”. The author depicts this continuum in Figure 3.1 of the same work (*AI use: AI-generated outputs vs AI-assisted creation*). See also pp. 12 and 13.

Structure of the grid. The grid draws on the three phases of the transposed *Painer* grid – upstream, during, and downstream of generation – and pairs each phase with two entries:

- the seats (positive indicators), which reveal that the user exercised creative direction the trace of which has been imprinted in the result, and
- the counter-indicators (the negative, symmetrical signs), which reveal the delegation of the determinative expressive choices to the system.

These two entries are linked: each counter-indicator is not an autonomous ground for exclusion, but the flip side of a missing seat.

The grid is supplemented by two cross-cutting criteria, of the same positive/negative structure as the three phases: the trace within the object, which verifies the alleged seats, and the interchangeability of the user, which is its negative counterpart.

Phase (Painer)	Seats (positive indicia)	Counter-indicia (corresponding negatives)
Upstream	An artistic project predating generation, documented and identifiable, translated into concrete choices; specificity and precision of the prompt or series of prompts, going beyond a mere “brief,” reflected in the expressive elements of the result ²⁷⁹	Genericness of the prompt or absence of specific parameterisation, revealing that the bulk of expressive choices were left to the system ²⁸⁰
During generation	Creative iteration, understood not as the mere repetition of general commands, but as a process of direction during which the user’s choices progressively shape the result	Relaunching general instructions without creative inflection; selection among divergent results returned by the machine independently of any effective control by the creator ²⁸¹
Downstream	Substantial modifications, edits, or adjustments made to the raw result; integration of the generated content into a larger	Absence of any post-generation intervention (adoption of the first result without selection, editing, or integration) ²⁸² ;

²⁷⁹ On the “upstream” seat, see in particular OLG Düsseldorf, cited above (“sufficiently individual presets in programming the generation process,” see above, this Part, §2.3); J. C. Ginsburg, “Humanist Copyright,” cited above, p. 158, positing the “Sir Toby Belch test”; the Japanese *General Understanding on AI and Copyright*, which treats “the quantity and content of the instructions given by the user” as the first assessment factor (see above, this Part, §3.1).

²⁸⁰ AG München, cited above, paras. 25–27; USCO, *Copyright and Artificial Intelligence, Part 2: Copyrightability*, cited above, pp. 18–19.

²⁸¹ See P. Cámara Águila, “¿Un producto resultado de la Inteligencia Artificial puede ser protegido por derechos de autor?,” cited above, pp. 124–128, on the experience of iterative generation with Gemini (“rolling the dice” [*tirando los dados*]).

²⁸² AG München, cited above, para. 27; Zhangjiagang Court, cited above.

Phase (Painer)	Seats (positive indicia)	Counter-indicia (corresponding negatives)
	whole (composition, narrative, composite work) with an original architecture	purely artisanal nature of the intervention, not reflecting a creative personality ²⁸³
Cross-cutting criteria	Trace in the object: the creative choices invoked must be identifiable in the result itself, and not only in the account of the process ²⁸⁴	Interchangeability of the user: the expressive characteristics of the output do not depend on the personal choices of the commissioning party, but on the probabilistic computation of the model, such that any user placed in the same position, with equally generic instructions, would obtain a result with undifferentiated expressive characteristics. What is at issue is not the exact reproducibility of the result, which is technically impossible, but rather the interchangeability of the user ²⁸⁵

Reading the grid. The logic of the table is disjunctive when read horizontally and verificatory when read vertically:

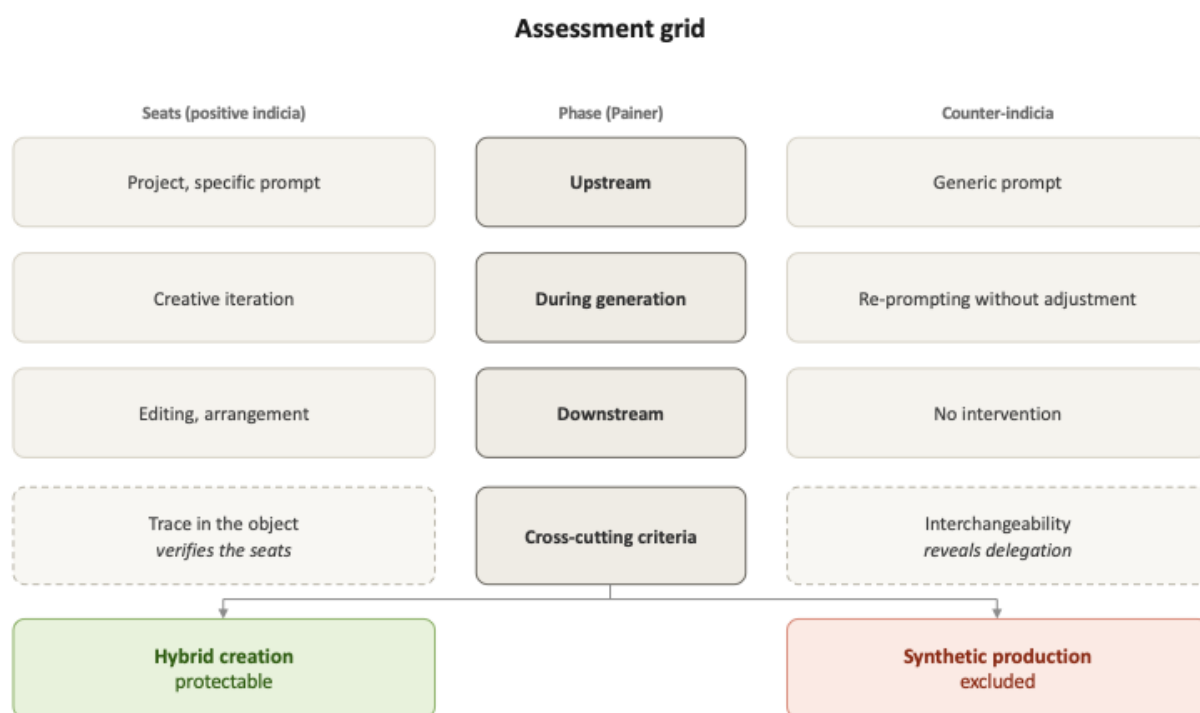
- Disjunctive: any seat present at a given phase, where its trace is identifiable in the object, can on its own found protection; a remarkable artistic project upstream may suffice even absent any downstream intervention, and vice versa.
- Verificatory: a seat invoked only in reference to the process, without manifesting itself in the object, lacks sufficient autonomy. This is the central lesson of *Mio/Konektra*, whose operational precision deserves to be highlighted: the “unique” appearance required by the ruling (paragraph 82) means neither novelty nor distinctiveness within the meaning of trademark or design law, but the object’s distinguishable character relative to similar creations by other authors, through the creative choices identifiable within it²⁸⁶.

²⁸³ AG München, cited above, para. 22.

²⁸⁴ CJEU, *Mio/Konektra*, cited above, para. 67.

²⁸⁵ J. C. Ginsburg, “Humanist Copyright,” cited above, p. 158. This report transposes this criterion into terms of the interchangeability of the user, rather than the strict reproducibility of the result, which the stochastic nature of these systems in any event renders technically impossible.

²⁸⁶ “[U]nique’ refers to the fact that the subject matter is distinguishable from similar creations by others, and it does not imply novelty or distinctiveness,” S. Sipetas, cited above, p. 4, quoting the Opinion of Advocate General Szpunar in *Mio/Konektra*, para. 30.



A single seat, the trace of which is identifiable, suffices.

3.4.3. Converging operational frameworks

A cross-regional convergence. The proposed grid is not an isolated construct. It converges, under different vocabularies, with several operational frameworks built by legal scholarship, administrative authorities, and industry, whose convergence reinforces the cross-regional scope of the criterion.

American scholarly convergence: front end/back end. The most respected American scholarship converges with the grid by distinguishing two entry points through which AI-assisted creativity can enter the scope of copyright. According to J. C. Ginsburg, “once we understand authorship to turn on the level of human-exercised control, we can bring AI-assisted creativity copyright’s ambit in at least two ways. On the front end, through the design of the prompts and other commands that reduce the randomness of the results. On the back end, by modifying the initial machine-generated product, including by selecting and rearranging the components of the literary, artistic, or musical output”²⁸⁷. Compared to this two-stage

²⁸⁷ J. C. Ginsburg, “Humanist Copyright,” cited above, p. 167: “Once we understand authorship to turn on the level of human-exercised control, we can bring AI-assisted creativity within copyright’s ambit in at least two ways. On the front end, through the design of the prompts and other commands that reduce the randomness of the

synthesis, the three-phase *Painer* grid recognises the intermediate phase of generation, the creative iteration that, within the European tradition, can on its own found originality.

Asian administrative convergence: control/predictability. The guide adopted in June 2025 by the Korean Ministry of Culture, Sports and Tourism and the Korea Copyright Commission adopts, as its operative criterion, a closely related pairing: controllability and predictability²⁸⁸. Control, so understood, is precisely what the grid calls creative direction; predictability is the matching test between intention and result, expressed through the cross-cutting criteria.

European sectoral convergence: the five-level typology. At the sectoral level, European representatives of rightholders proposed to the task force a five-level typology, ranging from human works assisted by AI to fully synthetic content. The first two levels (AI as a purely technical tool; AI enhancing human creative direction framed by precise instructions and iterative control) correspond to creative direction; the fourth (AI generates the bulk of the content, with the human confined to the initial prompt and the final choice) falls, in principle, within delegation, subject to identifiable creative modifications; the fifth (fully synthetic content) is excluded. The third level (interwoven co-creation) constitutes the intermediate zone in which the court’s assessment is decisive.

The same contribution identifies three conditions of “effective creative control”: intentionality (a documentable prior creative vision), directionality (guidance through precise, iterative instructions), and transformativeness (substantial modifications, selection, arrangement), which map onto the seats identified in this report (intentionality/upstream seat; directionality/generation-phase seat; transformativeness/downstream seat). The task force recalls, however, that each of these seats can, on its own, found protection: the cumulative requirement that applying these three conditions together would imply risks raising the threshold of protection beyond what the autonomous concept of originality requires, by adding a condition that neither the CJEU nor the Munich court has imposed.

results. On the back end, by modifying the initial machine-generated product, including by selecting and rearranging the components of the literary, artistic or musical output”.

²⁸⁸ See above, this Part, §3.3.

commissioned by the European Parliament’s Committee on Legal Affairs, which advocates developing “concrete, non-binding criteria” for assessing authorship of AI-assisted works²⁸⁹.

A grid as safeguard: neither under-protection nor over-protection. The grid, in its very function as a threshold, also serves as a safeguard against over-protection. As the most recent scholarship observes, as AI tools become increasingly configurable and the tuning of outputs grows more refined, the temptation may arise toward an ecosystem in which any assisted production would be protected, at the cost of impoverishing the public domain. Conversely, the growing sophistication of models creates a risk of under-protecting substantial human creations, since the use of a sufficiently capable tool arouses suspicion that no real contribution was made²⁹⁰. The grid is precisely designed to avoid this double pitfall: under-protection (denying genuine creative work where it exists) as well as over-protection (unduly extending protection to productions lacking any identifiable human direction). It does not expand protection; it delimits it.

Transition to the evidentiary issue. The grid set out in this section identifies the ground on which characterization takes place. Its concrete implementation, however, raises a distinct difficulty: identifying the seats presupposes that they can be demonstrated, which opens up the evidentiary question. How, case by case, can the user of AI establish proof of the alleged creative choices? How is this proof to be reconciled with the absence of any presumption of originality arising from European case law?

²⁸⁹ N. Lucchi, *Generative AI and Copyright: Training, Creation, Regulation*, cited above, pp. 73–74.

²⁹⁰ Y. Benhamou, *Creative Value Chains*, cited above, p. 159.

PART TWO: SECURING PROTECTION

Diversity of angles. Outgoing content raises questions as to which form of protection might be best suited to it. If it is, first, a hybrid creation – and therefore protectable – its legal regime offers, fundamentally, nothing specific; it is a work like any other, and the difficulty has shifted entirely onto how it is proven. How can one establish the originality – that is, the creative human contribution – of content that artificial intelligence renders indistinguishable from a purely human creation? (1.) Next, if it is instead synthetic (because the user did not, or did not sufficiently, intervene to leave their mark on it), should protection even be entertained? (2.) Finally, whether hybrid or synthetic, how can third parties be protected against it? (3.)

1. The evidentiary challenge of hybrid creations

The end of a natural human monopoly. Once it is accepted that hybrid production can, when it crosses the threshold of originality, attain the status of a work – thereby becoming, in the terminology adopted here, a “hybrid creation” – the centre of the dispute shifts. The protection regime for the hybrid creation offers, at bottom, nothing specific: it is a work like any other, subject to the same prerogatives and the same limits. What becomes complicated is not the applicable law, but rather its demonstration. Whereas a purely human creation benefited, in fact if not in law, from a kind of self-evidence (an object bearing the outward characteristics of a work was, absent particular circumstances, presumed to originate from a human author), the availability of tools capable of producing content indistinguishable from human creations strips that self-evidence of its empirical foundation²⁹¹. The challenge is therefore evidentiary before it is substantive.

Yet this shift should not be misunderstood. The fact that the empirical evidence has disappeared does not turn human authorship into a condition that every claimant must establish in advance, as a prerequisite to obtaining protection: hybrid creations remain works like any other, and their authors do not have to prove, as a matter of course, that their compositions stem from human intervention. It is only in response to a challenge – one that, invoking the use of artificial intelligence, seeks to establish the contrary – that the work’s human authorship becomes a matter requiring proof.

²⁹¹ This observation is central to the analysis of A. Peukert, “*Mensch oder Maschine? Zum Nachweis urheberrechtlicher Schutzfähigkeit im Zeitalter künstlicher Intelligenz*,” cited above, p. 109, and, by the same author, “Proving Authorship in the Age of Generative AI,” ALAI 2026 contribution [quotations by kind permission of the author], who notes that human beings have lost their “natural monopoly” over the creation of literary and artistic works, such that an object displaying the outward characteristics of a work no longer allows one to infer, with sufficient probability, that it was created by a person.

Proofs. This challenge unfolds in a progression dictated by its own logic. A claim to protection presupposes two proofs governed by opposite regimes: proof of authorship, presumed under Article L. 113-1 of the Intellectual Property Code absent proof to the contrary, and proof of originality, which is never presumed. This distinction governs everything that follows and must be established first (1.1.). In hybrid creation, these two proofs, while continuing to obey opposite regimes, converge on a common fact: the human authorship of the expressive choices. This is at once what a challenge based on recourse to AI seeks to disprove within the meaning of Article L. 113-1, and what proof of originality must itself establish. It is this knot that governs how the burden of proof is allocated between the parties, which is resolved through a two-step mechanism identified by legal scholarship and by an already-converging body of European case law (1.2.). Allocating the burden of proof, however, says nothing about how it is to be discharged: the tools on which the demonstration can rely must then be identified, ranging from examination of the object itself to indicia drawn from regimes external to copyright law (1.3.). These tools, finally, are only valid insofar as they remain instruments of proof: their growing importance calls for a limit, so that the evidentiary requirement does not turn into a formality conditioning the very existence of the right, something which the Berne Convention prohibits (1.4.).

1.1. Two proofs to distinguish, one common fact to establish

Two proofs, two regimes. Anyone claiming protection for a hybrid creation must, in reality, establish two distinct things: that they are its author, and that it is an original work. Conflating these two questions – a confusion encouraged by the very empirical self-evidence that artificial intelligence has dissolved – is the first error to set aside. They do not follow the same evidentiary regime: the first benefits from a legal presumption, while the second does not.

Proof of authorship: a presumption preserved but restricted. Authorship is, under French law, the subject of a rebuttable presumption²⁹². Under Article L. 113-1 of the Intellectual Property Code, “authorship belongs, absent proof to the contrary, to the person or persons under whose name the work is disclosed”. This presumption has an equivalent in nearly every legal system: it derives from Article 15(1) of the Berne Convention, relayed by Article 5 of Directive 2004/48 on the enforcement of intellectual property rights²⁹³. Its function is consistent: to relieve the author of the burden of proving authorship when the customary attribution of their name makes such authorship plausible.

²⁹² Under French law, proof of author status is unrestricted as to means, and art. L. 113-1 “makes the creator’s task easier”; the presumption applies to all works and remains a rebuttable presumption, with evidence to the contrary needing to be “certain, detailed, and precise”: A. Lucas and A. Lucas-Schloetter, *Traité*, cited above, Nos. 311 and 313.

²⁹³ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, art. 5; Berne Convention, art. 15(1). On the scope of this latter provision, see C. Masouyé, *Guide de la convention de Berne pour la protection des œuvres littéraires et artistiques (Acte de Paris, 1971)* [Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)], WIPO, 1978, §§15.1 and 15.2.

There is a strong temptation to mobilise this presumption so as to resolve the difficulty raised by artificial intelligence, by treating it as a presumption of human creation: an object disclosed under the name of a natural person would be presumed to be the work of a human author, leaving it to the party challenging this to establish that it was generated by a machine. This is the path proposed by certain German scholars regarding Section 10 of the *Urheberrechtsgesetz*, the equivalent of the French provision²⁹⁴. It must be firmly rejected, for the decisive reason highlighted by Professor Peukert: “whether content is protectable or falls within the public domain is a different question from who the author of a protectable work is; the former logically precedes the latter”²⁹⁵. The presumption in Article L. 113-1, like that in Article 15(1) of the Berne Convention, indeed presupposes the existence of a work and merely designates its author; it governs the legal effect of naming a person, not the status of the object on which that name appears. Extending the presumption of authorship to the very existence of a human creation would amount to presuming precisely that which is at issue.

It follows that the presumption in Article L. 113-1 retains its full force for hybrid creations. It designates the claiming party as author, absent proof to the contrary. But it in no way relieves that party of the need to establish that their claim is an original work. The presumption operates on authorship; it has no bearing on originality.

Proof of originality: a principle without a presumption. Originality is not presumed. This rule is not new, but the judgment handed down by the Court of Justice in the joined *Mio* and *Konektra* cases gave it an unprecedentedly clear formulation: “the creative character of the author’s choices regarding the subject matter cannot be presumed”²⁹⁶. The Court thereby extends its *Brompton Bicycle* case law, and the scope of this statement is not confined to the applied-art works that formed its factual backdrop. As Professor André Lucas observes, “the proposition holds generally for all works”²⁹⁷.

This point matters for our subject. If the absence of a presumption of originality holds for all works, it holds *a fortiori* for hybrid creations, whose very genesis gives rise to doubt as to the human authorship of the choices made.

Under French law, this solution is by no means a departure from the established approach. Pursuant to the maxim *Actori incumbit probatio*, enshrined in Article 1353 of the Civil Code, the risk of failing to prove originality falls on the party claiming protection, such that a

²⁹⁴ H. Henke, *GRUR* 2023, p. 608; C. Heinze, *ZUM* 2024, p. 184, who link the “human-machine” issue to §10 UrhG. This position is criticised by A. Peukert, “Mensch oder Maschine? Zum Nachweis urheberrechtlicher Schutzfähigkeit im Zeitalter künstlicher Intelligenz,” *GRUR* 2025, cited above, pp. 111–113.

²⁹⁵ Author’s translation. Original: “Ob ein Inhalt überhaupt schutzfähig oder aber gemeinfrei ist, ist eine andere Frage als die, wer der Urheber eines schutzfähigen Werkes ist. Der erste Aspekt liegt dem zweiten denklogisch voraus”. (A. Peukert, *GRUR* 2025, cited above, p. 112). See also, by the same author, “Proving Authorship in the Age of Generative AI,” cited above, where he notes that the question of protectability “logically precedes the issue of who is entitled to enforce rights in the protected work,” and that the presumption governs the legal significance of naming a person, not the status of the object.

²⁹⁶ CJEU, 4 December 2025, Joined Cases C-580/23 and C-795/23, *Mio/Konektra*, para. 65 (citing CJEU, 11 June 2020, *Brompton Bicycle*, Case C-833/18, para. 32).

²⁹⁷ A. Lucas, obs. on CJEU, *Mio/Konektra*, cited above, *Prop. Intell.* 2026, No. 98, p. 50. The author notes the ambiguity in the wording used by Advocate General Szpunar (Opinion of 8 May 2025, para. 42), which appeared to confine the absence of a presumption to works of applied art alone, whereas the Court states it in general terms.

presumption of originality “cannot stand”²⁹⁸. It is therefore for the party claiming protection to establish the originality of the object, and the rule has just been reaffirmed by the Cour de cassation, which explicitly applied the *Mio/Konektra* case law²⁹⁹. This burden is not merely a matter of making an allegation. The court expects the claimant to “spell out the contours of the originality” being invoked, failing which protection is denied³⁰⁰. Above all, the rule extends a long-standing requirement, already formulated in relation to a television programme director claiming co-author status: the burden of proving that the person concerned did not confine themselves to a purely technical role but exercised creative activity falls on whoever claims the status of author³⁰¹. This last formulation deserves particular attention, as it precisely anticipates the difficulty specific to the hybrid creation. The boundary there runs exactly between the creative contribution attributable to the person and the “purely technical” role of letting the tool carry out the determinative choices.

Two consequences follow. On the one hand, the absence of a presumption rules out any indirect means of establishing originality, whereby originality would be inferred from elements external to it; for instance, the mere inclusion, in a contract, of an assignment of copyright cannot support an inference that the assigned object is original. Conversely, the principle cannot be applied with such rigour as to impose an impossible burden of proof on the claimant. The effectiveness of protection, guaranteed by Article 41 of the TRIPS Agreement, requires that procedures remain “fair and equitable” and not be “unnecessarily complicated”³⁰². Respect for the principle of “equality of arms” or procedural fairness [*égalité des armes*] precludes demanding an excessive demonstration from the claimant. It is from this tension – a firm principle of no presumption, tempered by a requirement of reasonable proof – that the mechanism for allocating the burden proceeds³⁰³.

The conjunction of the two proofs: shifting the stakes. For hybrid creations, these two regimes, without merging into one another, combine into an unprecedented requirement. The

²⁹⁸ A. Lucas and A. Lucas-Schloetter, *Traité*, cited above, No. 255, who ties the burden of proving originality to the maxim *actori incumbit probatio* (art. 1353 Civil Code) and notes that the idea of a presumption of originality was “set aside by the Court of Justice in the *Mio/Konektra* joined cases”. – The case law is not, however, unanimous (notable exceptions in relation to software; a priority question of constitutionality was not referred on, CE, 31 October 2022): *Traité*, No. 256.

²⁹⁹ Cass. 1re civ., 9 April 2026, No. 25-11.711, *Evema v Someva* (the first explicit application of the *Mio* case law in French law). See above, Part 1, §1.2.

³⁰⁰ TJ Paris, interim proceedings, 13 November 2025, No. 25/54980: since proving originality is a condition of the merits of the claim, not of its admissibility, “it nonetheless falls to whoever relies on a copyright [...] to spell out the contours of the originality alleged,” the claim being dismissed for failure to spell out the “aesthetic and creative choices alleged”. Applied to hybrid creation, this requirement amounts to identifying the creative choices attributable to the human.

³⁰¹ Cass. 1re civ., 29 March 1989, No. 87-14.895, *Rutman v Société des gens de lettres*, unreported, *RIDA* 3/1989, p. 262: having found that the director’s work amounted to “the implementation of a technique,” the Court of Appeal properly inferred “the absence of any personal and original contribution” on the part of the person concerned, who “had not participated in the intellectual creation of the work”; it thus falls to whoever claims author status to establish a creative contribution exceeding a purely technical role. See A. Lucas and A. Lucas-Schloetter, *Traité*, cited above, No. 255 (burden of proving originality) and No. 309 (exclusion of the mere material performer; requirement of creative activity).

³⁰² TRIPS Agreement, art. 41(1) and (2) (procedures must be “fair and equitable” and must not be “unnecessarily complicated or costly”); art. 42 (the right of each party to justify its claims and to present all relevant evidence). On the use of these provisions as a basis for evidentiary balance, see A. Peukert, “Proving Authorship in the Age of Generative AI,” cited above.

³⁰³ On which see below, this Part, §1.2.

claimant must, on one hand, establish their authorship, which the presumption in Article L. 113-1 ordinarily facilitates³⁰⁴; and on the other, they must demonstrate the originality of the object, with no presumption to assist them³⁰⁵. The hybrid context makes both proofs bear on one and the same fact: the human authorship of the expressive choices. To dispute that the object has an author (by arguing that AI generated it) amounts to producing the proof to the contrary reserved by Article L. 113-1. The fact thereby disputed, namely the absence of human-authored choices, is precisely what would also be lacking for originality. In this sense, the proof of originality splits in two. It is no longer enough to show that the object embodies free and creative choices. It must further be established that those choices are attributable to a person, rather than to the partly autonomous operation of the generative system. The two proofs remain governed by distinct regimes – one presumed, the other not – but the evidentiary stakes now converge on their point of contact: the human authorship of the choices.

In this shift lies the long-identified risk of an author’s “evidentiary distress,” as it is known in French scholarship (*Beweisnot*). The creative process is rarely documented, and even less so when it makes use of tools whose internal workings the author does not master³⁰⁶. The question the court must decide is therefore not only whether the object is original, but by what method that originality – understood as the expression of creative human choices – can be established. The referring courts in the *Mio* case had grasped this perfectly, asking the Court of Justice whether originality should be assessed using a subjective approach, focused on the author’s approach during the creative process, or an objective approach, confined to examining the characteristics of the object itself³⁰⁷. The referring Swedish court further observed that, under an approach centred on the creative process, the question of originality “would thus become a question of evidence rather than a question of law”³⁰⁸.

It is to this question of method, and to the respective status of the object and the process in the proof, that we must now turn, having allocated the burden of proof between the parties.

1.2. Allocating the burden of proof: a two-step mechanism

In search of a balance. Distinguishing between the two proofs leaves untouched the only one that truly poses difficulty – that of originality – and shifts the question onto the terrain of the burden of proof. Between the party claiming protection and the party disputing it, whose task is it to establish, or to cast doubt upon, the human authorship of the creative choices? No single rule can answer this, because the hybrid context sets two opposing risks against each other.

³⁰⁴ Art. L. 113-1 CPI; the presumption, which applies to all works, remains rebuttable, with evidence to the contrary needing to be “certain, detailed, and precise”: A. Lucas and A. Lucas-Schloetter, *Traité*, cited above, Nos. 311 and 313.

³⁰⁵ CJEU, 4 December 2025, Joined Cases C-580/23 and C-795/23, *Mio/Konektra*, para. 65. Cass. 1re civ., 9 April 2026, No. 25-11.711, *Evema v Someva*, the first explicit application in French law.

³⁰⁶ On the notion of *Beweisnot* [evidentiary distress], A. Peukert, “Mensch oder Maschine? Zum Nachweis urheberrechtlicher Schutzfähigkeit im Zeitalter künstlicher Intelligenz,” cited above, pp. 109–110, and “Proving Authorship in the Age of Generative AI,” cited above: creation is typically a poorly documented process, particularly for the sole author, including in the creative use of AI as a tool.

³⁰⁷ CJEU, *Mio/Konektra*, cited above (questions referred).

³⁰⁸ CJEU, *Mio/Konektra*, cited above, para. 29 (setting out the reasoning of the referring court, the Svea Court of Appeal [Svea hovrätt]).

Placing on the claimant the burden of proving that their work is not the product of a machine would expose them to an “evidentiary distress” made all the more unjust by the fact that the creative process is rarely documented. Conversely, too readily presuming human origin would open the way to claiming rights over content that in reality has no author. The requirement of “fair and equitable” procedures imposed by the TRIPS Agreement³⁰⁹ forbids sacrificing either of these interests to the other. Instead, it calls for a balance, which can be approached by first setting aside two equally extreme solutions (1.2.1.), before identifying the one that has prevailed (1.2.2.), whose application will then need to be adjusted according to the related rights at stake (1.2.3.).

1.2.1. Two symmetrical extremes

Exclusions. A first approach would be to presume, in favour of human creation, that any object bearing the characteristics of a work originates from an author, leaving it to the party disputing this to establish recourse to the machine. Besides running up against the distinction already established between authorship and protectability, this presumption would encourage precisely the abuse it is meant to prevent: the assertion of illusory rights over synthetic content, which is today easy to produce, sign with a name, and disseminate. The opposite approach is no more acceptable. Requiring the claimant to establish, from the outset and in every case, the human character of their creation – as sections of German legal scholarship propose by amending the presumption-of-authorship rule to this end – would plunge them back into the very “evidentiary distress” one seeks to spare them, and would complicate the exercise of the right in a manner that international procedural law condemns. The solution lies between these two extremes, in a mechanism that shifts the burden alternately onto each of the parties.

The CSPLA proposal on proof of originality (2020). Before turning to that mechanism, a third avenue – of a legislative nature – deserves mention, if only to be set aside. The question of proving contested originality had in fact already given rise, even outside the context of artificial intelligence, to a proposal for rebalancing. The task force report to the CSPLA on proof of originality suggested adding to Article L. 112-1 of the Intellectual Property Code a rule under which it would be “for the party disputing a work’s originality to establish that its existence is subject to serious doubt, and, once such a challenge has been duly substantiated, for the party claiming rights in the work to identify what characterises it”³¹⁰.

The kinship between this construction and the mechanism adopted below is evident. It places an initial burden on the challenging party and calls on the claimant to respond only once the challenge has been seriously substantiated. The present analysis owes much of its intuition to

³⁰⁹ TRIPS Agreement, art. 41(1) and (2); see above, this Part, §1.1. On the use of these provisions as a principle of balance, A. Peukert, “Proving Authorship...,” cited above (section III).

³¹⁰ CSPLA, Task Force Report, *La preuve de l’originalité* [Proving Originality], December 2020, co-chairs J.-A. Benazeraf and V. Barthez, p. 7 and pp. 83–85. The proposal also amended the first paragraph of article L. 112-1 to expressly mention the requirement of originality; it was taken up by Senate bill No. 860 of 6 July 2023.

this³¹¹. Taken up as such, however, it would today run into an obstacle it could not have anticipated. Proceeding by legislative amendment, it would amount to writing into Article L. 112-1 a rule whose structure comes close to a presumption of originality, relieving the claimant of any demonstration for as long as no serious doubt has been articulated. Yet the *Mio/Konektra* judgment has since held, for all works, that “the creative character of the author’s choices regarding the subject matter cannot be presumed”³¹². A legal presumption of originality, even a rebuttable one, would sit in tension with the autonomous notion whose evidentiary regime the Court has just clarified. The legislative route thus appears, if not foreclosed, at least strongly discouraged. A further consideration counsels against it: a general presumption enshrined in statute, whichever way it operates, would deprive courts of the flexibility needed to adapt to the particularities of each dispute and to reverse the burden when circumstances require it—precisely when the diversity of hybrid situations instead calls for a case-by-case assessment.

The approach adopted. What remains, then, is a judicially crafted modulation, within the existing law, that presumes nothing, but distributes the evidentiary initiative between the parties according to the circumstances. This is what the requirement of “equality of arms” or procedural fairness [*égalité des armes*] demands, and it is what the two-step mechanism implements. It is worth noting that the 2020 report itself supplied the conceptual apparatus for this, by tying its proposed rebalancing to the ordinary principles of the law of evidence – plausibility and capacity to produce proof – which will be found again at the foundation of this mechanism³¹³.

1.2.2. *A burden that shifts in two stages*

The principle and its two-stage application. The starting point remains that of ordinary law. Whoever claims an exclusive right over an object must establish its protectability, since they are claiming an exception to the default freedom that places content outside any exclusivity³¹⁴. This principle, however, governs only the second stage of the analysis; it leaves entirely open the question of who bears the initiative at the first stage. This is the balance sketched out, under French law, by distinguishing the two evidentiary mechanisms at play.

An anchor in French law. French law has the resources to accommodate this logic, provided one distinguishes the two mechanisms operating at the first stage.

³¹¹ This lineage is all the more direct given that the 2020 report intended, through this “qualified challenge,” to “avoid systematic and dilatory challenges to originality, without thereby avoiding [...] the debate on originality” (ibid., p. 6)—an aim shared by the mechanism adopted here.

³¹² CJEU, 4 December 2025, Joined Cases C-580/23 and C-795/23, *Mio/Konektra*; see above, this Part, §1.1.

³¹³ CSPLA, *La preuve de l’originalité* [Proving Originality], cited above, pp. 61–64 and 75 et seq.

³¹⁴ A. Peukert, “Proving Authorship...,” cited above (section IV); CJEU, 4 December 2025, Joined Cases C-580/23 and C-795/23, *Mio/Konektra*, para. 65; BGH, 20 February 2025, I ZR 16/24, *Birkenstock Sandal*, GRUR 2025, 407, para. 28.

As to authorship, the presumption in Article L. 113-1 relieves the claimant of any burden of proof, absent proof to the contrary. It is this proof to the contrary that is attempted by whoever argues that the content was generated by a machine.

As to originality, the claimant may rely on the appearance the object presents, under the so-called “statistical truth” or “plausibility” criterion – “it is the party fighting against appearances who must destroy them” – such that, so long as originality is not contested, no proof is required (the theory of the “undisputed fact” [*théorie du fait constant*])³¹⁵, even if, in practice, this leniency appears somewhat diminished insofar as a simple denial in the pleadings seems to suffice³¹⁶.

Artificial intelligence destabilises both of these supports at once, and for a single reason: the allegation that the content was generated by a machine calls into question human intervention at the source. This fact – and whether or not the expressive choices are attributable to a person – is common to both proofs. It grounds authorship (absent human intervention, there is no author within the meaning of Article L. 113-1) and conditions originality (absent human-authored choices, there is no imprint of personality). This is why a challenge based on AI, although aimed in the first instance at authorship, simultaneously strips the appearance of originality of its foundation. The two proofs remain distinct in regime, but converge on this point.

From this follows a two-stage mechanism bearing on this common fact. At the first stage, the burden of initiative rests on the party raising the challenge. It is for that party to put forward concrete indicia of generation without any determinative human intervention, failing which the claimant has nothing to establish, whether as to authorship (presumed) or as to originality (covered by the appearance). At the second stage, once such indicia have been articulated, the burden shifts to the claimant. It falls to them to establish that the identifiable expressive choices in the object are attributable to their own creative activity, rather than to the mere operation of the system. This demonstration serves at once to rebut the proof to the contrary bearing on authorship and to characterise originality, not because the two proofs merge into one but, rather, because a single instance of human intervention governs both. French law has long recognised the requirement underlying this second stage. Faced with a director claiming co-author status, courts require whoever claims to be an author to establish a personal and original contribution extending beyond the mere implementation of a technique, failing which authorship is denied³¹⁷. Transposed to hybrid creation, the boundary runs between choices attributable to the person and the “purely technical” role of letting the tool carry out the determinative choices.

³¹⁵ On these points, A. Lucas and A. Lucas-Schloetter, *Traité*, cited above, Nos. 257–258; CSPLA, *La preuve de l'originalité*, cited above, pp. 61–64.

³¹⁶ F. Gaullier, “La preuve de l'originalité, une charge complexe – La preuve de l'originalité: mission impossible?” [Proving Originality, a Complex Burden – Proving Originality: Mission Impossible?], in *L'originalité en photographie* [Originality in Photography], RLDI 2011/70 (dossier), p. 126, esp. p. 127.

³¹⁷ Cass. 1re civ., 29 March 1989, No. 87-14.895, unreported, *RIDA* 3/1989, p. 262: ruling on a claim to co-author status in a series of television programmes, the Court upheld the lower courts’ finding that, having “precisely analysed the role played” by the party concerned, they had properly inferred from their findings “the absence of any personal and original contribution by the director,” whose work amounted to “the implementation of a technique” rather than the intellectual creation of the work. – It is for the person claiming author status to establish a creative contribution exceeding a purely technical role: A. Lucas and A. Lucas-Schloetter, *Traité*, cited above, Nos. 255 and 309.

This distributive logic can be traced, under French law, to Article 9 of the Code of Civil Procedure³¹⁸, even more so than to Article 1353 of the Civil Code—what the report on proof of originality termed a “sharing of the evidentiary burden”³¹⁹. It does not contradict the rejection, expressed since *Mio/Konektra*, of any presumption of originality: the first stage rests on no presumption of originality whatsoever, but on the theory of the undisputed fact – uncontested originality need not be proven – while the presumption of authorship in Article L. 113-1 operates, for its part, on its own separate terrain; the burden shifts only once a concrete doubt has been articulated.

Reception by the German courts (illustration). This construction has not remained purely doctrinal. Within just a few months, German courts applied it in a converging manner³²⁰ that confirms its solidity. Two decisions illustrate its opposite outcomes.

The Frankfurt Regional Court, hearing an interim application concerning the lyrics of a song whose music had been produced using an AI system, held that the burden of proving protectability rests in principle on the author, but that, where the opposing party puts forward concrete indicia of unprotectable content, it is for the party claiming the right to explain why those allegations are inaccurate, how the process unfolded, and, in the event AI was used, which elements stem from human activity³²¹. The court’s application of this rule is instructive. The expert opinion produced by the opposing party, which inferred a high probability of AI generation from mere logical breaks and a “formulaic” style, was held insufficient for lack of concrete indicia, the court further observing that such breaks may just as well, in the case of song lyrics, reflect artistic freedom³²². Having sworn on her honour that she wrote the lyrics without resorting to AI – a mode of proof accepted in interim proceedings³²³ – the claimant prevailed.

The Düsseldorf Court of Appeal applied the same rule to reach the opposite outcome, holding that the burden of explanation and plausibility rests on whoever invokes the status of a work³²⁴. Warned at the hearing that the appearance of the claimed image betrayed a computer-generated origin, the party seeking its protection did not even outline the creative choices it claimed to have made. Silence on this point sufficed to have protection denied.

The two decisions thus trace the mechanism’s symmetrical outcomes: the challenge fails when it rests on nothing more than an abstract probability; the claim fails when it stops short of documenting the process³²⁵.

³¹⁸ “It is incumbent on each party to prove, in accordance with the law, the facts necessary for the success of its claim” [Art. 9, French Code of Civil Procedure].

³¹⁹ CSPLA, *La preuve de l’originalité*, cited above, pp. 83–85.

³²⁰ LG Frankfurt am Main, 17 December 2025, 2-06 O 401/25, ZUM-RD 2026, 217 (headnote 1), citing A. Peukert, *GRUR* 2025, pp. 117–118; OLG Düsseldorf, 2 April 2026, I-20 W 2/26, MIR 2026, Dok. 027.

³²¹ *Ibid.*, expressly citing A. Peukert, *GRUR* 2025, pp. 117–118.

³²² *Ibid.*, grounds. The expert himself conceded that the claimant’s account was “soweit schlüssig” (coherent to that extent).

³²³ *Ibid.* (headnote 2 and grounds): in interim proceedings, plausibility may be established by a sworn statement (*eidesstattliche Versicherung*).

³²⁴ OLG Düsseldorf, 2 April 2026, I-20 W 2/26, MIR 2026, Dok. 027.

³²⁵ For an application on the merits, AG München, 13 February 2026, 142 C 9786/25, *GRUR-RR* 2026, 143 (see above, Part 1, §2.2).

Confirmation from international scholarship. International scholarship confirms this orientation and clarifies its purpose. Because the debate concerns human intervention at the source, it calls for reconstructing the process that led to the output in order to isolate the person's contribution within it³²⁶ – an approach others describe as a reverse engineering of human contributions³²⁷ – while recalling that this contribution must, ultimately, remain identifiable in the object itself³²⁸. That is, it must translate into the expression, failing which it would remain a mere narrative of process, unable to ground either authorship or originality.

1.2.3. A differentiated application depending on the related right

Differentiated stakes. This mechanism, tailored to copyright, does not transpose uniformly to related rights, which do not all bear the same relationship to human activity. For those that clearly presuppose a natural person's performance, such as the performing artist's right, it operates identically: the existence of a human performance is established through the same two stages. For producers' rights – phonograms, videograms, databases – which reward an initiative and an investment, the reasoning does not disappear, but shifts. The task force recommended keeping purely synthetic content beyond their reach, for want of the link to a human creation that these rights economically relay, and for want of the productive investment they are meant to encourage³²⁹. It follows that the total absence of any human contribution is not merely a risk to be guarded against upstream, but can also be raised as a ground preventing the right from vesting at all, and proof of the purely synthetic character of the fixed object becomes relevant once again. If, by contrast, one were to stick to the bare letter of the texts – a reading the task force rejects – the right would vest regardless, and the stakes would be reduced to preventing the capture of distribution revenue on output lacking an author. The dispute would then be settled less in the courtroom than via dealings with collective management organizations³³⁰.

1.3. The materials and tools of the demonstration

Means. Knowing who bears the burden does not yet determine what discharges it. Once it is accepted that the claimant must, where relevant, set out their contribution, what remains is to specify where the originality of a hybrid creation is to be read and by what means it is established. The answer unfolds in two stages, followed by a caveat: the analysis focuses first

³²⁶ E. Rosati, "The future of the movie industry in the wake of generative AI: A perspective under EU and UK copyright law," cited above, p. 12.

³²⁷ O. Bulayenko, J. P. Quintais, D. Gervais, and J. Poort, *AI Music Outputs: Challenges to the Copyright Legal Framework*, cited above, §3.1.3 in fine: "the proper substantive assessment of originality ... will require a reverse engineering of the human interventions or contributions in the use of the AI system leading to a certain output".

³²⁸ S. Sipetas, "Copyright protection of fashion designs after Mio/Konektra," cited above, p. 5.

³²⁹ See Part 1, §1.5.2.

³³⁰ On this point, see below, this Part, §1.4.

on the object, with the process coming in only as support (1.3.1.); it then draws on a set of tools, both internal to the work and borrowed from parallel regimes (1.3.2.); finally, it requires that compliance with transparency obligations not be confused with protectability, which remains independent of it (1.3.3.).

1.3.1. The primacy of the object, with the process as a supporting element

Method. The central lesson of the *Mio* judgment dictates the method: originality is demonstrated through the object itself. Creative choices are not presumed and must be identifiable in the final expression of the work³³¹. Explanations regarding the creative process, like the author’s intentions, come into play only insofar as they are reflected in the object³³². The Court adds that the choices must give the object an appearance that distinguishes it from comparable creations³³³. The assessment is therefore objective: focused on the characteristics of the creation, not on the narrative of its genesis or on its reception.

This primacy of the object does not displace the process, but rather fixes its status: that of a body of indicia, none of which is individually decisive³³⁴. The Court thus cites recourse to available forms, inspiration drawn from earlier creations, the possibility of similar independent creations, or subsequent recognition within specialist circles, specifying that none of these elements is dispositive on its own³³⁵.

The grid proposed earlier, designed for characterisation purposes, here changes function. Its headings become the evidentiary bases that the claimant articulates, and its counter-indicators become the points on which the challenging party grounds its concrete indicia. It is no longer merely a grid for assessment, but a grid for allocating the burden: it distributes, heading by heading, what each party must allege and establish.

1.3.2. The tools of the demonstration

The work and its creation file. The first tool is the object itself, together with whatever documents its genesis: intermediate versions, drafts and originals not generated by AI, metadata, and prompt logs. A file’s metadata (the date and place a photograph was taken, the

³³¹ CJEU, 4 December 2025, Joined Cases C-580/23 and C-795/23, *Mio/Konektra*, para. 65.

³³² *Ibid.*, paras. 70–75. – See also A. Lucas and A. Lucas-Schloetter, *Traité*, cited above, No. 265: the choices must be visible in the form of the object, and the author’s intentions, situated “in the realm of ideas,” count only insofar as they are expressed in the work, and cannot decisively found the assessment on their own.

³³³ *Mio/Konektra*, cited above, para. 82: the choices must confer on the object a “unique appearance,” i.e. one distinguishing it from comparable creations, without thereby requiring novelty or distinctive character (see S. Sipetas, cited above, p. 45, referring to the Opinion of Advocate General Szpunar, para. 30).

³³⁴ See also, to the same effect, A. Lucas and A. Lucas-Schloetter, *Traité*, cited above, No. 264, who place the creative process and the author’s intentions “among the bundle of indicia” that the rightholder may invoke, without this dispensing them from proving the creative activity.

³³⁵ *Mio/Konektra*, cited above, paras. 76–82, esp. para. 82; on circumstances arising after creation, esp. para. 81.

device and settings used, for example³³⁶) can thus help establish the origin of a given piece of content, and courts sometimes rely on this, where necessary through expert examination³³⁷. Its probative value nonetheless remains relative, since such data can itself be altered in the absence of appropriate security measures³³⁸.

Several contributors to the questionnaire emphasise this traceability, going so far as to suggest requiring that traces of prompts be preserved (AI trackers, creation workflows, etc.), which would constitute a starting point for proof. Once documented, the genesis supplies the material for the second stage of the evidentiary mechanism.

Declarations to trusted third parties. A second tool comes from declarations made to intermediaries. In Germany, the collective management organisation VG Wort has, since 31 October 2023, required an author declaring a work to confirm that it contains no AI-generated text³³⁹. Such declarations, made to collective management organizations as well as to platforms, do not settle protectability. But they do carry evidentiary weight and bind their author; no French collective management organization has, to date, put in place a comparable mechanism, the merits of which will be discussed further below (1.4).

Indicia drawn from transparency regimes. A third tool borrows from recent transparency regimes. The AI Act requires providers to mark synthetic content in a machine-readable format and to make it perceptible as artificially generated, along with an information obligation on deployers of deepfakes³⁴⁰. The draft guidelines published by the Commission on 8 May 2026 specify that this marking must be effective, interoperable, robust, and reliable, and list the techniques suited to ensuring this: watermarks, metadata identifiers, cryptographic provenance methods, logging, and fingerprinting³⁴¹. The Digital Services Act further provides reporting mechanisms³⁴². These mechanisms can supply indicia; content marked as AI-generated is one

³³⁶ On the subject of metadata, see CSPLA, Task Force Report, *Les métadonnées liées aux images fixes* [Metadata Associated with Still Images], chair T. Azzi, rapporteur Y. El Hage, July 2021.

³³⁷ See already, in relation to the authenticity of a digital photograph, CA Versailles, 25 September 2007, No. 05/02498 (an expert examination ordered to verify the “unedited” or raw character of the files and the date the photo was taken).

³³⁸ P. Gingras and F. Sénécal, “Métadonnées: plaidoyer pour des mal-aimées et des incomprises” [Metadata: A Plea for the Unloved and Misunderstood], *Revue du Barreau* 2015, vol. 74, p. 249, esp. p. 276.

³³⁹ A. Peukert, “Mensch oder Maschine? Zum Nachweis urheberrechtlicher Schutzfähigkeit im Zeitalter künstlicher Intelligenz,” cited above, 109, n. 14.

³⁴⁰ Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence (the AI Act), art. 50(2) (marking of synthetic content by providers, in a machine-readable format and perceptible as artificially generated) and (4) (information obligations on deployers of deepfakes).

³⁴¹ European Commission, draft guidelines on the implementation of the transparency obligations for certain AI systems under Article 50 of Regulation (EU) 2024/1689, cited above. – On these various families of techniques (cryptographic signatures and content credentials, unsecured metadata identifiers, digital watermarking, fingerprinting, and passive detection) and their respective limitations, see the technical study commissioned by the Commission: M. Fritz, *Technical Solutions for Marking and Detecting AI-Generated Image and Video Content in the Context of Article 50(2) AI Act*, European Commission, DG CNECT, Publications Office of the European Union, Luxembourg, 2026, which concludes that none of these techniques alone constitutes a complete solution.

³⁴² Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services (the Digital Services Act), art. 16 (notice-and-action mechanisms). These regimes pursue an objective of transparency, distinct from proof of originality.

such indicium. However, since they are designed to inform the public rather than to establish originality, their evidentiary contribution remains indirect.

Means of proving the human contribution. Once doubt has been raised, what remains is to positively establish the human contribution. German courts accept, for this purpose, drafts and originals not generated by AI, witness testimony, and – including in interim proceedings, and even in main proceedings – the author’s declaration on oath³⁴³. This last mode of proof, applied by the Frankfurt court³⁴⁴, illustrates that a reasonable demonstration, rather than scientific proof of human origin, suffices to satisfy the second stage of the mechanism.

1.3.3. The governing distinction: regulatory compliance versus protectability

A mere aid. None of these tools dispenses with the substantive originality test, and the most recent one calls for a particular caveat. The marking required under the AI Act is neither necessary nor sufficient for protection: content can be synthetic without bearing any mark at all (the obligation is not universal, and the mark can be removed)³⁴⁵. Conversely, content flagged as AI-generated may include a protectable human contribution.

These limits are confirmed and clarified by the code of practice on the marking and labelling of AI-generated content, published on 10 June 2026, which implements Article 50(2), (4), and (5) of the Regulation³⁴⁶. The code acknowledges that no single marking technique on its own satisfies all four requirements of Article 50(2) (effectiveness, interoperability, robustness, reliability), hence the requirement of multi-layered marking; it reserves particular treatment for text since, below the two-hundred token threshold, text cannot be marked with sufficient reliability, and detection of marks applied to free text remains less reliable, to the point that access to it may be restricted to verified expert users only. These caveats confirm the merely indirect evidentiary value of such marking, particularly for textual output.

³⁴³ A. Peukert, “Mensch oder Maschine? Zum Nachweis urheberrechtlicher Schutzfähigkeit im Zeitalter künstlicher Intelligenz,” cited above, p. 116 and nn. 89–91. See also LG Frankfurt am Main, cited above (see above, this Part, §1.2.2).

³⁴⁴ On this point, see above, this Part, §1.2.

³⁴⁵ These limitations (the possibility of removing or circumventing the mark, and the low informational value of its absence) are confirmed by the study referred to above, commissioned by the European Commission (M. Fritz, *Technical Solutions...*, cited above): unsecured metadata can be removed or falsified and is frequently stripped by platforms (chs. 2.2 and 4.2); watermarking remains circumventable, the field evolving in an “arms race” with no formal guarantee, including through content resynthesis (chs. 2.3.3 and 2.3.4); and the indicator is inherently one-sided, since the presence of a mark may signal artificial origin while its absence establishes nothing (ch. 4.2). Even cryptographic content credentials do not verify the truthfulness of the sealed provenance information (ch. 2.1).

³⁴⁶ Code of Practice on Transparency of AI-Generated Content, 10 June 2026, drawn up under the auspices of the European Commission and the AI Office. This code, which serves to demonstrate compliance with the obligations under Article 50(2), (4), and (5) of Regulation (EU) 2024/1689 without constituting conclusive proof of such compliance, was prepared alongside the Commission’s guidelines on Article 50 (cited above), which set out its legal scope and address the aspects it does not cover.

Several rights holders consider this marking insufficient as an evidentiary instrument. Above all, its purpose is not ours: the Regulation requires that the artificial origin of content be disclosed, not that a record be kept of the creative process that produced it. Proof of originality – that is, of the creative human contribution – thus remains largely outside its scope. The Commission’s draft guidelines accordingly take care to specify that marking in no way prejudices how the content is to be classified under copyright law³⁴⁷. Compliance with transparency obligations and protectability belong to two distinct orders: regulatory indicia are an aid, never a substitute for identifying, within the object, the creative choices attributable to a person.

Confirmation from private marking schemes. This separation between origin-marking and protectability does not stem solely from regulatory law; it is also found in the private standards that rightholders themselves devise. On 10 July 2026, a broad coalition from the music sector³⁴⁸ announced a voluntary labelling scheme, applicable only to sound recordings, distinguishing two categories: “AI-Generated” content, where AI produces all or the main portion of the creative elements, and “AI-Assisted” content, where the recording, substantially created by humans and expressing their creativity, uses AI only for certain expressive elements. This dichotomy overlaps with the dividing line adopted by the task force between synthetic production and hybrid creation. But, like regulatory marking, it serves a purpose of transparency toward the public rather than legal classification: labelling a recording as “AI-Assisted” signals a partly human origin without prejudging whether the contribution thus identified reaches the threshold of originality. Such labelling thus constitutes an additional factual indicium, but never a substitute for the substantive test.

1.4. Safeguards: avoiding a de facto formality

Proof and formality. The tools just described carry increasing power, and their use extends beyond the courtroom. This is where a final risk arises, one that must be guarded against: that the requirement to prove the human contribution, legitimate before a court, might turn, outside litigation, into a formality conditioning the very existence or exercise of the right. Such a drift would run up against a cardinal principle of copyright law (1.4.1.); it takes root in the extrajudicial uses of proof (1.4.2.) and crystallises around the question of a declarative mechanism entrusted to collective management organisations (1.4.3.).

³⁴⁷ Draft guidelines, cited above, §111.

³⁴⁸ Joint statement by IFPI, RIAA, A2IM, WIN, IMPALA, The Grammys, SAG-AFTRA, and the Human Artistry Campaign, “Music community introduces new labelling program to distinguish generative AI in sound recordings,” 10 July 2026. The scheme is expressly voluntary and confined to sound recordings, excluding lyrics, composition, video clips, and cover art.

1.4.1. *The principle: no formality*

Legal texts. The Berne Convention provides that the enjoyment and exercise of copyright are not subject to any formality³⁴⁹. Proof of originality is no exception: it is a procedural burden, borne by the claimant once a doubt has been articulated³⁵⁰, not a condition for the existence of the right. The right arises from original creation, not from prior registration, deposit, or declaration.

The European legislator itself takes care to preserve this line. The AI Act establishes a transparency obligation concerning the origin of content while carefully refraining from touching upon its protectability, and the Commission’s draft guidelines specify that marking does not prejudice classification under copyright law³⁵¹.

Proof and formality are thus not the same thing. Requiring an author to establish their contribution in proceedings where it is disputed is one thing; making the vesting or exercise of their right depend, in advance, on producing proof of humanity is another—something that the Berne Convention expressly prohibits.

1.4.2. *The risk: a drift outside the courtroom*

Potential scenarios. The danger does not come from the judge, who assesses matters case by case and adjusts the burden accordingly, but from situations where proof of human origin might be demanded upstream, systematically, as a condition for access to a service or to a prerogative. Scholarship identifies four contexts of extrajudicial exercise of the right in which the author is called upon to assert it: a formal notice sent to a third party; a notification of infringement to hosting services; the declaration of a work to collective management organisations; and the offer of an individual license³⁵².

In each of these, the evidentiary requirement, transposed outside litigation, could harden into a *de facto* formality: for example, a hosting provider refusing to act on a notification for lack of proof of humanity, even though the Digital Services Act organises such notifications without making them conditional on this³⁵³; or a platform making distribution conditional on such proof. Nor can regulatory marking become the “open sesame” of copyright. As already noted, it is neither necessary nor sufficient, and the Regulation does not even require that a record of the creative process be kept³⁵⁴; the code of practice published on 10 June 2026 confirmed this

³⁴⁹ Berne Convention for the Protection of Literary and Artistic Works, art. 5(2): “The enjoyment and the exercise of these rights shall not be subject to any formality”. See C. Masouyé, *Guide to the Berne Convention* (Paris Act, 1971), WIPO, 1978, commentary on art. 5.

³⁵⁰ See above, this Part, §1.1 and 1.2.

³⁵¹ See above, this Part, §1.3.3 (the AI Act, art. 50, and the Commission’s draft guidelines of 8 May 2026, on the separation of the regimes).

³⁵² A. Peukert, “Mensch oder Maschine? Zum Nachweis urheberrechtlicher Schutzfähigkeit im Zeitalter künstlicher Intelligenz,” cited above, 109.

³⁵³ Regulation (EU) 2022/2065, cited above, art. 16.

³⁵⁴ See above, this Part, §1.3.3.

in express terms, specifying that the marking obligations cannot be interpreted as imposing a general obligation to log, monitor, or retain prompts³⁵⁵. Vigilance is thus called for in proportion to the power of these tools: the easier traceability becomes, the stronger the temptation to turn it into a condition, and the sharper the risk of circumventing the prohibition on formalities.

1.4.3. The case of collective management organisations: the merits of a declarative mechanism

The merits of such a mechanism. It is with collective management organisations that the question arises most acutely, since the stakes there are twofold. On one hand, these organizations distribute revenue, and the risk, already flagged, is that they might pay out on synthetic output presented as a human creation³⁵⁶, a concern expressed by authors' representatives in responses to the questionnaire. On the other hand, these organizations are natural trusted third parties, and one of them has already established a declarative mechanism: VG Wort has, since 2023, required an author declaring a work to confirm that it contains no AI-generated text³⁵⁷. No French collective management organisation has, to date, followed this path.

The positions gathered during the consultation conducted by the task force converge on the diagnosis – proof is the central issue – but not on the remedy. As noted, several rightholders call, in their responses to the questionnaire, for traceability of the creative process through the retention of prompts, versions, and workflow, whereas others consider the marking required under the Regulation alone to be insufficient. The Cour de cassation for its part holds that authorship “falls exclusively within the province of statute, not of rules laid down by authors' societies for the purpose of setting royalty amounts”; a declaration made to a collective management organisation cannot, by itself, confer the right, nor make its recognition conditional on anything³⁵⁸.

A national declarative mechanism would undoubtedly serve to prevent unlawful appropriation and to promote legal certainty. It would, however, need to be designed so as not to recreate the very formality the Berne Convention prohibits: a declaration that binds its author and provides an evidentiary indicium raises no difficulty; a declaration on which the vesting of the right – or even merely its collection – would depend would raise one. The dividing line is the same one drawn throughout this discussion: between the indicium and the condition³⁵⁹.

³⁵⁵ Code of Practice, cited above (see above, this Part, §1.3.3), Section 1, Sub-measure 1.1.3, in fine: the measure concerning fingerprinting and logging “shall in no way be interpreted as creating a general commitment to log, monitor, or retain prompts”. This clarification reinforces the distinction, defended here, between evidentiary indicium and a condition for the existence or exercise of the right—a condition the Berne Convention prohibits.

³⁵⁶ See above, this Part, §1.2.3.

³⁵⁷ See above, this Part, §1.3.2 (VG Wort, since 31 October 2023).

³⁵⁸ Cass. 1re civ., 29 March 1989, No. 87-14.895, *Rutman v Société des gens de lettres*, unreported, cited above; see A. Lucas and A. Lucas-Schloetter, *Traité*, cited above, No. 306.

³⁵⁹ An illustration of this tension can be found in recent parliamentary work. The Assemblée nationale's Information Report No. 2993 (cited above) proposes establishing, within each cultural sector, a declaratory certification scheme for hybrid works, under which the author would document the extent and purposes of their use of AI—a scheme presented as a way of showcasing creative uses of the tool and informing the public

2. What regime applies where the content is not protectable by copyright?

Potential scenarios. Turning now to synthetic productions that are not protectable by copyright – whether because they fail to meet the criteria for inclusion, or meet them only insufficiently – the question changes. At this stage, it is established that they cannot claim the status of works of the mind. What, then, can they be? The answer is multiple: synthetic production might be protected by a special copyright regime (2.1.), or even by a *sui generis* right (2.2.), but neither avenue proves, respectively, possible or satisfactory. Absent suitable protection, synthetic production might ultimately fall within the public domain (2.3.).

2.1. The impossibility of a special copyright regime

The precedent of software. One possible avenue of protection might be sought in the choice made regarding software by the European Union as early as the late 1980s, crystallised in the Directive³⁶⁰. The reasoning would run as follows. If the Union was able, more than thirty-five years ago, to forge – at the margin of ordinary law – a *lex specialis* capable of bringing this technical object within the fold of the subject matter, an analogous approach could tomorrow protect synthetic products. Two special rights, born of technical developments that classical copyright could not fully accommodate, would then coexist alongside the common trunk.

A *lex specialis* that remains a copyright. The analogy does not, however, withstand scrutiny. Software (the “computer program,” in European terminology) is admittedly a singular work, one that required a special framework developed by both the legislator and courts, starting with the redefinition of originality³⁶¹. It nonetheless remains a work of the mind, as Article 1(3) of the Directive states: “A computer program shall be protected if it is original in the sense that it is the author’s own intellectual creation. No other criteria shall be applied to determine its eligibility for protection”. While the yardstick for assessing originality shifted toward intellectual contribution and personalised effort, the notion of a work – of an intellectual creation of its own author – remained unitary, thereby preserving the coherence between ordinary and special law.

(recommendation No. 5, pp. 73–74). This orientation is in line with the case for a declaratory mechanism. The recommendation, however, attaches a sanction to this scheme – loss of the benefit of copyright in the event of a false declaration – which, if understood as making the existence or exercise of the right conditional on the declaration, would run up against the no-formality principle noted above.

³⁶⁰ Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, consolidated by Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs.

³⁶¹ On this objective definition, see above, Preliminary Part, §3.

Conversely, as regards synthetic productions, no redefinition of the conditions of access could remove the fundamental incompatibility with the notion of a work. Synthetic content cannot, by its very nature, be its author's own. Reasoning by analogy with software is therefore without foundation.

The philosophical obstacle. Beyond the technical dimension, the very philosophy of copyright – which is by no means incidental, seeing as it grounds the legitimacy of the monopoly – stands opposed to the analogy. Copyright, whether ordinary or special, rewards intellectual creation. But what would a right, even a special one, reward in a product that a human being claiming its protection did not make, but which stems from a machine?

The absence of an economic justification. The economic justification is likewise lacking. The establishment of a special right for software rested on a finding recalled in the recitals of the Directive: “the development of computer programs requires the investment of considerable human, technical and financial resources while computer programs can be copied at a fraction of the cost needed to develop them independently”³⁶². The logic runs in reverse for synthetic products. No study demonstrates that the generation cost borne by the user would call for protection, and it is difficult to see how this could be otherwise—unless one assumes a human investment so substantial that the output would tip over into the category of hybrid productions potentially eligible for protection, which lies outside the scope considered here.

Disproof from foreign experience. These objections find empirical confirmation. One legal system has actually established a special copyright regime for machine productions: the United Kingdom, where section 9(3) of the Copyright, Designs and Patents Act 1988 attaches a copyright, of a reduced fifty-year duration, to works “generated by computer in circumstances such that there is no human author,” the “author” being deemed to be the person “by whom the arrangements necessary for the creation of the work are undertaken”³⁶³. Presented at the time as the world's first legislation devoted to artificial intelligence³⁶⁴, this regime has nonetheless never overcome the contradiction the task force has just identified in theory: protection applies only to “original” works, yet originality, reflecting an author's personality, presupposes distinctly human qualities that a work “with no human author” cannot, necessarily, possess. The doubt here is such that commentators have questioned whether the provision could ever

³⁶² Directive 2009/24/EC, recital 2 (wording carried over from Directive 91/250/EEC).

³⁶³ Copyright, Designs and Patents Act 1988, s. 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”), the notion of a computer-generated work being defined at s. 178 (“generated by computer in circumstances such that there is no human author of the work”), with the term of protection set at s. 12(7) (fifty years). See UK Gov., *Report on Copyright and Artificial Intelligence*, March 2026 (cited above, §1.4), Section I, points 1 and 13.

³⁶⁴ Remarks of Lord Young of Graffham, Copyright, Designs and Patents Bill, Hansard HL, vol. 489, 12 November 1987 (“the first copyright legislation anywhere in the world which attempts to deal specifically with the advent of artificial intelligence”), quoted by UK Gov., *Report on Copyright and Artificial Intelligence*, cited above, Section I, point 3, p. 104.

be applied at all³⁶⁵. Accordingly, the British government announced, in March 2026, the planned repeal of this protection, on the very structural and economic grounds already set out above. The precedent of a special copyright regime for machine productions is thus in the process of being erased, and for the very reasons that doom its transposition.

The avenue of a special law is therefore impossible, short of undermining the unity and foundations of the field.

2.2. The unsatisfactory path of a specific regime

Avenues. Since copyright, even a special copyright, is unfit to accommodate synthetic content, what remains to be examined is whether protection might be found outside copyright, in the form of a *sui generis* right. Two avenues present themselves: forging a dedicated regime, along the lines of one a state has recently adopted (2.2.1.); or borrowing from an existing related right, that of the database producer (2.2.2.). Neither is convincing.

2.2.1. The isolated precedent of a dedicated regime

The Ukrainian model. From a comparative perspective, Ukrainian legislation has recently established an alternative protection, in the form of a *sui generis* right³⁶⁶. Its Article 33, entitled “*Sui generis* right to non-original objects generated by a computer program,” first defines the subject matter: an object “that differs from existing similar objects and is formed as a result of the functioning of a computer program without the direct participation of an individual,” creations made by a person using computer tools being expressly excluded (point 1). It designates the rightholders: the authors of the program, their successors in title, or its legitimate users (point 2). It sets the term: twenty-five years from 1 January of the year following generation (point 6). Finally, it makes the right’s creation, where the object results from the use of protected works, conditional on respecting the rights of holders “whose work(s) [...] were used in the process of generating” such non-original objects (point 7)³⁶⁷.

³⁶⁵ UK Gov., *Report on Copyright and Artificial Intelligence*, cited above, Section I, points 14–15, pp. 105–106: the report identifies a “contradiction” in s. 9(3), in that the originality test is tied to human qualities (intellectual creation of the author’s own, a “personal touch”), whereas the provision applies only to works “with no human author,” casting doubt on its very applicability.

³⁶⁶ Ukrainian Law No. 2811-IX of 1 December 2022 on Copyright and Related Rights: <https://www.wipo.int/wipolex/en/legislation/details/21708>

³⁶⁷ The other provisions of article 33, not reproduced in the main text, provide in particular: (3) that the creation of such an object confers no personal non-property rights; (4) that the scope of the economic rights is determined in accordance with article 12 of the law; (5) that the right arises “as a result of the fact of the generation” of the object; (8) that the rightholder has the exclusive right to authorise third parties to use the object, on a contractual basis; (9) that the right may be assigned to a third party (art. 49); (10) that free use of the object is permitted under the procedure set out in articles 22 to 29; (11) that infringement of the right gives rise to the claim provided for in article 55 of the law.

A lone outlier. This regime, which vests a specific right in the program’s authors and its legitimate users, stands as an isolated exception. No other legislation to date adopts an equivalent regime. The property allocation recently carried out by the State of Arkansas, for that matter, followed an entirely different logic, without creating any autonomous right³⁶⁸.

Above all, the path of a dedicated right was expressly rejected by the study commissioned in 2025 by the European Parliament’s Committee on Legal Affairs, on the grounds that it risked distorting competitive dynamics within the creative sectors and “diluting the notion of the human author”³⁶⁹. The United Kingdom likewise did not take this path³⁷⁰.

While some still propose the creation of a new right³⁷¹, the recommendation emerging from recent comparative work points the other way, insofar as there is no clear and convincing evidence justifying a departure from the status quo. This position aligns with the scepticism expressed toward a *sui generis* regime for authorless productions³⁷².

The model’s shortcomings. The Ukrainian precedent, moreover, suffers from intrinsic weaknesses. By blurring the boundaries as to subject matter, as to holders, and as to the regime of the right, it adds to the confusion. Point 7 illustrates the difficulty. The mechanism evokes that of a derivative work – rights recognised in the secondary object, subject to respecting rights in the first – whereas there is, precisely, no secondary work here, the Ukrainian legislator speaking of a “non-original work”.

Above all, the condition requiring respect for rights in works “used in the generation” proves uncontrollably broad in scope. Once a system absorbs, for its training, protected works by the thousand or even the million, those works have, by hypothesis, potentially been “used”. This raises a double impasse. How is one to prove that a particular work was so used? And does such a condition not strip the right of its substance, by making lawful exploitation of the generated content practically unworkable?

³⁶⁸ On the attribution of ownership over the output made by the State of Arkansas, without creating a standalone *sui generis* regime, see Ark. Code Ann. §18-4-101 (2025), introduced by House Bill 1876 (<https://arkleg.state.ar.us/Home/FTPDocument?path=%2FBills%2F2025R%2FPublic%2FHB1876.pdf>): the owner of the property in the generated content is the person providing the input or instruction, subject to not infringing pre-existing rights; neither the nature, nor the duration, nor the scope of the right is specified.

³⁶⁹ N. Lucchi, *Generative AI and Copyright – Training, Creation, Regulation*, cited above, pp. 94–95.

³⁷⁰ See in particular, on this question, Intellectual Property Office, *Artificial Intelligence and Intellectual Property: copyright and patents – Government response to consultation*, 28 June 2022, point 26: some respondents supported the option of replacing protection for computer-generated works with a new right of reduced scope or duration (from two to ten years), but many respondents indicated that further evidence would be needed to determine its scope and duration. Results available at: <https://www.gov.uk/government/consultations/artificial-intelligence-and-ip-copyright-and-patents/outcome/artificial-intelligence-and-intellectual-property-copyright-and-patents-government-response-to-consultation>

³⁷¹ For an overview: O. Bulayenko, J. P. Quintais, D. Gervais, and J. Poort, *AI Music Outputs: Challenges to the Copyright Legal Framework*, cited above, p. 84, §3.3, and nn. 312–319.

³⁷² J. C. Ginsburg and L. A. Budiardjo, “Authors and Machines,” 34 *Berkeley Tech. L.J.* (2019), p. 343 et seq., esp. pp. 447–448. – Add P. Samuelson, C. J. Sprigman, and M. Sag, Comments in Response to the Copyright Office’s Notice of Inquiry on Artificial Intelligence and Copyright, response to NOI Question 20.1, p. 5: “At this time, we perceive no need for *sui generis* protection for generative AI outputs”.

2.2.2. The inapplicable analogy with the database producer's right

The parallel. In the absence of a dedicated regime, protection might be sought in an existing related right outside copyright: the database producer's *sui generis* right, established by the 1996 Directive³⁷³. This body of law grants the maker “the right to prevent extraction and/or re-utilization of the whole or of a substantial part [...] of the contents of that database” where obtaining, verifying, or presenting that content shows a substantial investment³⁷⁴. Would recognizing such a right be appropriate for synthetic content?

The absence of substantial investment. The answer is no, for a fundamental reason. A *sui generis* right of this kind rewards an investment; but the user of a generative system makes no investment that is substantial. Even if that user had devoted several hours to the generation process, this effort could not be characterised as a substantial investment within the meaning of the Directive. If it were, that would mean human intervention had reached a level at which the object would be liable to tip over into the category of hybrid productions potentially eligible for protection, which lies outside the scope considered here.

The absence of economic need. The transposition would be no more convincing on economic grounds. The creation of the database *sui generis* right answered a precisely identified need, recalled in the twelfth recital of the Directive³⁷⁵, one that the subsequent growth of electronic databases went on to confirm.

Nothing comparable applies to synthetic content. Apart from the particular case where the production is itself a database³⁷⁶, no comparable need justifies extending such a right to the whole of the output produced³⁷⁷.

³⁷³ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

³⁷⁴ Directive cited above, art. 7(1).

³⁷⁵ Directive 96/9/EC, cited above, recital 12: “whereas such investment in modern information storage and processing systems will not take place within the Community unless a stable and uniform legal protection regime is introduced for the protection of the rights of makers of databases”.

³⁷⁶ Along these lines, see P. B. Hugenholtz et al., *Trends and developments in artificial intelligence: challenges to the intellectual property rights framework*, final report for the European Commission, 2020, p. 14 (https://www.ivir.nl/publicaties/download/Trends_and_Developments_in_Artificial_Intelligence-1.pdf). The Data Act, however, now excludes the *sui generis* right “when data is obtained from or generated by a connected product or related service falling within the scope of this Regulation” (Regulation (EU) 2023/2854 of 13 December 2023 laying down harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (the Data Act), art. 43). – For a discussion of the proposal, see CSPLA, Task Force Report on the European Reform of the Sui Generis Database Right, A. Bensamoun and E. Gabla (co-chairs), G. Leforestier (rapporteur), July 2022.

³⁷⁷ Along these lines, see also J. C. Ginsburg, “What Is an Author... Facing the Computer: Reflections on the Author in Copyright Law,” cited above, p. 99: “several hypotheses could be advanced either to support or to reject

Neither justified by an investment nor called for by any need, the *sui generis* route must therefore, at this stage, be set aside. Absent specific protection, synthetic content ultimately falls within the public domain.

2.3. The appropriate path of the public domain

Contours. Absent any monopoly – ordinary law excludes it, the special software regime does not fit it, the *sui generis* right is not suited to it – synthetic production is subject to no exclusive protection; it falls within the public domain. This classification is not a fallback, but the expression of a coherent system, the public domain being the negative image of the exclusivity recognised by law. Its nature nonetheless needs clarifying, since the public domain that receives synthetic output does not entirely coincide with the one into which works fall once their economic rights have expired (2.3.1.). Once this nature is established, a question of policy remains. Should the exploitation of such content, as a matter of future legislation, be burdened with a charge designed to reduce its attractiveness, via the notion of the “paying public domain” (2.3.2.)?

2.3.1. The default public domain

Absence of a legal monopoly. Since no exclusive right arises, the content escapes any form of reservation. The finding is negative, though it carries a positive import: what is not appropriated remains public domain. The European legislator has confirmed this in express terms. In paragraph 25 of its resolution of 10 March 2026, the European Parliament stresses that content entirely generated by AI which does not meet the criteria for protection “should continue to be ineligible for it,” and that “the public domain status of such works should be clearly determined”³⁷⁸. This position aligns with that of the British government, which favours keeping content exclusively generated by machine outside the scope of protection³⁷⁹.

Classifying such content as part of the public domain is thus not an isolated doctrinal construction. Rather, it follows from the ordinary operation of the field, in which freedom is the rule and reservation the exception. Beyond its coherence, this classification carries a systemic virtue. By refusing a monopoly to purely synthetic content, the law preserves the economic interest of intermediaries in the creative process – publishers, producers – in keeping the human being in the loop, since only human or hybrid creation gives rise to the monopoly

the case for establishing a *sui generis* regime, but absent concrete proof of the need for a monopoly, it would be unwise (and premature) to attempt to lay down a protection regime for apparent works”.

³⁷⁸ European Parliament Resolution of 10 March 2026 on Copyright and Generative Artificial Intelligence – Opportunities and Challenges, cited above, §25.

³⁷⁹ HM Government, Department for Science, Innovation and Technology and Department for Culture, Media and Sport, *Report on copyright and artificial intelligence*, March 2026: most respondents hold that works exclusively created by AI should not be protected. The Government proposes ending protection for works entirely generated by a machine, while maintaining protection for works produced with the help of AI.

that makes licensing, adaptation, and anti-copying enforcement possible. The non-protectability of synthetic content thus, in turn, reinforces the incentive for human creation³⁸⁰.

The character of the default public domain. The public domain into which synthetic output falls, however, has a distinctive character, one that scholarship has proposed to capture under the label of a public domain “by default”³⁸¹. It differs, first, in its timing. Whereas a work of the mind enters the public domain only upon expiry of protection, once the economic rights have lapsed, synthetic production belongs there from the outset, by the mere fact of its generation. It differs, second, and above all, in its scope. A work’s falling into the public domain does not entail the disappearance of moral rights, which are perpetual and imprescriptible (Article L. 121-1 of the Intellectual Property Code); the work, though free to exploit, remains unencumbered with the right to have the author’s name and the work’s integrity respected. Nothing of the sort applies to synthetic production. Absent an author, no moral prerogative could ever have arisen, so that its passage into the public domain is not merely automatic but entirely unencumbered. It is in this sense that it has been described as a fourth locus of the public domain, distinct from the three classical loci (ideas upstream, exceptions during the term of protection, expiry of rights downstream), the fourth locus being that of authorless works³⁸².

This immediate and unencumbered character produces effects beyond copyright alone. In the absence of a protected phonogram, performer’s contribution, or work, the broadcasting of purely synthetic music escapes the equitable remuneration provided for under Article L. 214-1 of the Intellectual Property Code, whose basis presupposes a phonogram published for commercial purposes. The task force has been informed that certain payers – mainly venues playing background music – are already refusing to pay the royalty on the ground that they broadcast entirely synthetic content, raising fears that, as the practice spreads, this could produce a crowding-out effect to the detriment of performing artists and producers. This scenario illustrates the concrete impact of the default public domain. The paths toward any economic rebalancing fall, where relevant, within the scope of the paying public domain examined below.

The residual scope of alternative protections. Since synthetic content is thus destined to be freely available to all, there is a temptation to seek, in the absence of copyright, a substitute

³⁸⁰ Along these lines, J. Noti-Victor and X. Tang, “The Secret Weapon Against AI Dominance,” *The Atlantic*, 30 April 2026: the non-protectability of purely AI-generated content would preserve the incentive for cultural industries to employ human creators, since only rightsholding allows the exploitation of a work to be monetised. This argument, one of legal policy framed within the incentive-based logic of American law, is reported here as a welcome consequence, not as the basis for the solution adopted, which proceeds instead from the absence of a creative human contribution, originality being a threshold, not a sliding scale. See also above, this Part, §3.4.4 (a safeguard against over-protection).

³⁸¹ G. Azzaria, “Intelligence artificielle et droit d’auteur: l’hypothèse d’un domaine public par défaut” [Artificial Intelligence and Copyright: The Hypothesis of a Default Public Domain], *Les cahiers de la propriété intellectuelle*, October 2018, vol. 30, No. 3, p. 927, esp. p. 945, who proposes viewing the work, from the moment of its creation, as a common thing by design (“common by design”).

³⁸² G. Azzaria, “L’intelligence artificielle et le droit d’auteur: entre propriété et domaine public” [Artificial Intelligence and Copyright: Between Property and the Public Domain], contribution to the ALAI Paris Congress 2023 (forthcoming, 2026).

protection on the ground of unfair competition through parasitism [*parasitisme*]. Such an action can, however, operate only at the margins. Parasitism presupposes the appropriation of another's "know-how" and "efforts"³⁸³. In this case, one of two things is true. Either the content resulted from identifiable work, investment, or know-how, in which case these elements, while not amounting to originality, may constitute indicia of a human trace left in the object, opening the way to copyright protection and rendering a parasitism claim superfluous. Or the content was generated automatically, with no specific human contribution. In which case copyright protection is excluded, but so too, equally, will be the demonstration of an individualised economic value (which the Cour de cassation requires of anyone invoking parasitism³⁸⁴), given an object that anyone can easily reproduce.

Far from contradicting the classification within the public domain, the residual character of this avenue confirms it. Cases where a synthetic production would be appropriated by parasitism without falling within copyright's grasp will remain exceptional. Parasitism will, however, regain relevance not to protect such content, but to protect against it³⁸⁵.

Moreover, classification within the public domain concerns copyright alone. It does not exclude the possibility that regimes external to it (trade secrets, the database *sui generis* right, rules on personal data or personality rights, or contractual access terms) may, on occasion, restrict the reuse of a given output without thereby conferring any protection on it as a creation³⁸⁶.

Contrary to this purely defensive logic, some scholars propose endowing the public domain with a positive status, by characterizing it as a thing common to all (*res communes*, Article 714 of the Civil Code) or as a common good – in the sense of “the commons” – equipped with enforceable prerogatives of use, so as to shield it against exclusive reappropriation. Distinct from the paying public domain³⁸⁷, this avenue remains, under current positive law, largely prospective³⁸⁸.

³⁸³ Cass. com., 26 January 1999, *Sté Canavese: D.* 2000, p. 87, note Y. Serra.

³⁸⁴ Cass. com., 26 June 2024, No. 22-17.647, 22-21.497, and 23-13.535: the Cour de cassation requires whoever claims to be a victim of parasitism to establish the “individualised economic value” relied upon, as well as a third party's intent to trade on their coattails (*D.* 2024, p. 2137, obs. Y. Serra; *ibid.*, p. 2193, chron. C. Bellino, T. Boutié, C. Lefeuvre, and G. Maigret; *Dalloz IP/IT* 2024, p. 382, obs. A.-L. Bofua; *ibid.*, p. 474, obs. J. Passa; *RTD com.* 2025, p. 48, obs. M. Chagny).

³⁸⁵ Parasitism is considered here as a means of protecting synthetic content; on its inverse use – to protect against such content – see below, Part 2, §3.1.2.6.

³⁸⁶ Along these lines, N. Lucchi, *Generative AI and Copyright – Training, Creation, Regulation*, cited above, p. 143, who notes that productions not protected by copyright “revert to the public domain, but may nonetheless be subject to other legal regimes (...)” and warns of the twin risk of an excessive claim of exclusivity over such productions and of users' inadvertent infringement of those other regimes. In addition, on the structural precariousness of the public domain and the routes by which it is reappropriated – unwarranted copyright claims (“copyfraud”), trade mark registration, or a neighbouring or *sui generis* right over non-original reproductions – S. Dusollier, “The future of the public domain,” in E. Bonadio and C. Sganga (eds.), *A Research Agenda for EU Copyright Law*, Edward Elgar, 2025, p. 173 (an analysis conducted with respect to the temporal public domain, transposable *mutatis mutandis* to the reuse of synthetic output).

³⁸⁷ On which see below, this Part, §2.3.2.

³⁸⁸ See S. Dusollier, “Pour un régime positif du domaine public” [Towards a Positive Regime for the Public Domain], in B. Coriat (ed.), *Le retour des communes – La crise de l'idéologie propriétaire*, Les liens qui libèrent, 2015; and, by the same author, “The future of the public domain,” cited above, esp. p. 187 et seq. (an “inclusive” and “ecological” conception of the public domain). The characterisation of the public domain as a common thing is defended in particular by S. Choisy, *Le domaine public en droit d'auteur*, Litec, 2002, and A.-M. Chardeaux, *Les choses communes*, LGDJ, 2006. The only existing positive expression of this idea in EU law remains, to date,

2.3.2. *The paying public domain*

The observation and the proposal. That synthetic production falls within the public domain does not exhaust the analysis. One may still ask whether it would be appropriate to burden its exploitation with a charge, along the lines of the old notion of the “paying public domain”—free use, requiring no authorization, but subject to payment of a sum³⁸⁹.

This idea is not new. Victor Hugo, who was not inclined toward extensive post-mortem protection, already advocated for a public domain subject to a royalty³⁹⁰. Its transposition to synthetic productions has since been proposed in legal scholarship³⁹¹.

A preliminary clarification is nonetheless needed as to what such a mechanism covers here. One might legitimately view it as a form of remuneration, or even compensation: the charge on the exploitation of the output would indirectly compensate the authors whose works fed the model’s training. This is the approach taken by part of the scholarship, which ties the royalty to the substitution effect suffered by human creation and conceives of it as the counterpart, deferred to the output stage, of the upstream use of works³⁹². That reading pertains to a different question – the remuneration of content used to train AI systems, which has been the subject of separate work³⁹³ – and shifts the analysis toward the input side, which lies outside the scope of the present discussion. It is not from this angle that the task force approaches the paying public domain, all the more so since grounding the charge in compensation for upstream use would, in certain respects, amount to legitimizing through remuneration the very thing that impoverishes creation. The task force instead invokes it for what it is: not as compensation, deferred to the output stage, for an upstream use of works, but as a market-orientation instrument, intended to reduce the attractiveness of synthetic productions and, through a

Article 14 of Directive 2019/790, which prevents any reclaiming, through copyright or a neighbouring right, of faithful reproductions of visual works of art in the public domain, a provision that is, however, confined to the temporal public domain.

³⁸⁹ On the paid public domain, see in particular M. Dulong de Rosnay and L. Maurel, “Contribuer à la défense du domaine public et des biens communs de la connaissance” [Contributing to the Defence of the Public Domain and the Knowledge Commons], 2018 Report of the International Organisation of La Francophonie on the State of Digital Francophonie, OIF, 2018, p. 288; A. Latil, “Le domaine public payant” [The Paid Public Domain], *RIDA* No. 242, October 2014, p. 5. – On the largely ineffective character of these regimes and their abandonment in most of the States that had introduced them, see S. Dusollier, “The future of the public domain,” cited above, esp. p. 177.

³⁹⁰ V. Hugo, “Opening Address to the 1878 International Literary Congress,” in *Actes et paroles*. The writer argued both for the recognition of literary property and for limiting post-mortem economic rights in favour of a public domain, which he proposed should carry a levy (“Let us establish literary property, but, at the same time, let us found the public domain”). – See A. Dietz, “A Modern Concept for the Right of the Community of Authors (Domaine public payant),” *Copyright Bulletin* 24 (1990), 13.

³⁹¹ V.-L. Benabou, “Comment associer les créateurs à la valeur produite par l’utilisation de leurs œuvres par les systèmes d’intelligence artificielle?” [How Can Creators Gain a Share in the Value Generated by AI Systems’ Use of Their Works?], *CCE* 2025, étude 7, No. 33.

³⁹² M. Senftleben, “Generative AI and Author Remuneration,” cited above, p. 1556, proposing a levy based on the output, payable by providers of generative AI systems.

³⁹³ See, on this separate question, CSPLA, *Rapport de mission relative à la rémunération des contenus culturels utilisés par les systèmes d’intelligence artificielle* [Task Force Report on the Remuneration of Cultural Content Used by Artificial Intelligence Systems], June 2025: legal component, A. Bensamoun (chair) and J. Groffe-ChARRIER (rapporteur); economic component, J. Farchy (chair) and B. Blain (rapporteur).

communicating-vessels effect, to redirect demand toward human creation, hybrid creation included³⁹⁴.

The triggering event (1): the exclusion of private uses. This purpose dictates the choice of the triggering event. Three approaches are conceivable: targeting all uses, including private ones; limiting the levy to commercial exploitation alone; or adopting an intermediate criterion, that of public use³⁹⁵. The first branch runs into an insurmountable obstacle. An analogy with the private copying levy could, admittedly, justify extending the levy even to private uses, since the private character of a use is not in itself sufficient to exclude it from a royalty-based logic. But the private copying levy is owed by the manufacturer or importer of the media³⁹⁶, so that the analogy would point, for synthetic productions, to the model provider—that is, the one who makes the creation possible in the first place. Yet placing the burden on the provider would strip the mechanism of its deterrent effect on the end user. Purely private uses must therefore be excluded, unless a debtor other than the one who disseminates the content is conceived.

The triggering event (2): the criterion of public use. It remains to be seen whether the levy should then be confined to commercial exploitation. Such a limit would in turn be too narrow. What matters, in light of the purpose pursued, is not the for-profit character of the dissemination but its public nature. Just as the Society of Authors, Composers, and Publishers of Music (SACEM) collects fees when an event – even one with no commercial purpose – takes place in a public venue, it is the public nature of the use, not its commercial nature, that should trigger payment. Such a criterion closely matches the goal of redirecting activity toward human creation. Beyond commercially exploited content, this would also cover non-commercial public disseminations—for instance, the production of flyers for an event, even a scientific one, the creation of announcement cards, and so on.

The debtor: the disseminator. The debtor must be designated according to the same logic. The structural analogy – that of the private copying levy, as well as that of the equitable remuneration right of phonogram producers, which has been proposed as a model for an AI levy³⁹⁷ – pushes the burden upstream, toward the model provider. The task force deliberately departs from this. The deterrent purpose requires targeting not the one who generates, but the one who disseminates: it is the user who, by choosing to resort to an artifact rather than a

³⁹⁴ Other economic disincentive measures would no doubt be worth considering (public policy, allocation of subsidies...).

³⁹⁵ On the variety of possible approaches, see V.-L. Benabou, “Du test en trois étapes au domaine public payant – Quelques idées pour mieux associer les titulaires de droit à la production des Intelligences Artificielles génératives dans le champ de la création intellectuelle” [From the Three-Step Test to the Paid Public Domain – Some Ideas for Better Involving Rightsholders in the Output of Generative AI in the Field of Intellectual Creation], 11 December 2023: <https://vlbenabou.blog/2023/12/11/168/>

³⁹⁶ Art. L. 311-4 CPI.

³⁹⁷ See M. Senftleben, “Generative AI and Author Remuneration,” cited above, who models his proposal on Article 8(2) of Directive 92/100/EEC on rental and lending rights; on the possibility of “stacking debtors,” V.-L. Benabou, blog post cited above, 11 December 2023. Compare, in the field of private copying, CJEU, 21 October 2010, *Padawan*, Case C-467/08, para. 46.

human, must bear the charge designed to make that choice less attractive³⁹⁸. Thus, a company that publishes online an image generated by AI would be liable for the levy, even though it is not the author of the generation. The departure from the structural analogy is deliberate: it is the orienting function, not technical kinship with existing remuneration schemes, that governs the designation of the debtor.

Form and beneficiaries. What remains is the form of payment and the allocation of its proceeds. Including non-commercial public uses within the scope renders proportional royalties challenging, owing to the lack of a calculation basis. A flat fee is therefore the more natural solution. As for beneficiaries, reserving the proceeds solely for authors who have not exercised the opt-out provided for by the 2019 directive does not seem advisable³⁹⁹. Apart from the fact that the scope of rightholders would become impossible to determine, such a condition would turn the paid public domain into a compensated exception. By definition, this would presuppose the existence of a work⁴⁰⁰—in other words, precisely that which is absent here. The realistic path is that of a fund to support creation⁴⁰¹, since the levy does not compensate any individual harm (this being a matter for infringement claims) but instead constitutes the counterpart to the substitution effect suffered, indiscriminately, by creative professions. The paid public domain could thus take the form of a flat-rate levy, owed for any public use of a synthetic production by the person responsible for its dissemination, and allocated to a fund supporting creation.

A competing approach, set aside: a statutory license based on output. This orienting levy is distinct from a related but more ambitious proposal recently put forward by German legal scholarship. Noting that tying remuneration to the training stage (the opt-out under Article 4 of the 2019 directive, echoed by Article 53 of the AI Regulation) remains, in Europe, of uncertain effectiveness, Professor Leistner proposes shifting the reference point to the output and establishing, as a matter of future legislation, a collective remuneration right, modelled on the private copying levy and administered by collective management organisations through extended collective licenses, owed by the providers of systems marketed in the Union, or even, for commercial uses, by their users⁴⁰². The claimed basis is not market substitution but the unlawful appropriation, through the model's computation, of ideas, methods, motifs, and styles drawn from the “collective creative heritage”—elements that copyright law precisely leaves

³⁹⁸ V.-L. Benabou, “Comment associer les créateurs...,” cited above, No. 33: the aim is to “impose a charge on those who choose to turn to machine-generated artifacts”.

³⁹⁹ M. Senftleben, “Generative AI and Author Remuneration,” cited above, p. 1555, who reserves the benefit of the levy to rightholders who have not exercised the opt-out.

⁴⁰⁰ V.-L. Benabou, blog post cited above, 11 December 2023.

⁴⁰¹ On this idea, see S. Dusollier, “Étude exploratoire sur le droit d’auteur et les droits connexes et le domaine public” [Scoping Study on Copyright and Related Rights and the Public Domain], prepared for WIPO, May 2010, pp. 44–45; V.-L. Benabou, blog post cited above, 11 December 2023.

⁴⁰² M. Leistner, “Urheberrecht und KI: Die Trainingslizenzen kommen – warum Europa weiterdenken und den Output regulieren muss” [Copyright and AI: Training Licences Are Coming — Why Europe Must Think Further Ahead and Regulate the Output], *GRUR* 2026, p. 273, esp. pp. 274–275. – Along the same lines, and likewise expressly tying the construction to the paid public domain (A. Dietz), M. Senftleben, “Reconciling AI Innovation With Copyright Values – Why Reliance on Individual Licences is not Enough,” *IViR Research Paper* 2026, June 2026, SSRN 6926644, esp. pp. 9–13, who adds that this output-based remuneration right could be established not only *de lege ferenda* by the legislature, but also *de lege lata* by the courts, on the basis of the three-step test (art. 7(2) of Directive 2019/790 and art. 5(5) of Directive 2001/29).

free. The author, moreover, expressly links this construction to French approaches to the paid public domain.

The task force does not adopt this approach, for the very reasons that dictate the narrower scope outlined above. First, such a mechanism grounds the charge on compensation for an upstream use. It amounts to remunerating, and thereby legitimizing, the mass exploitation of works at the training stage, whereas the lawfulness of that exploitation belongs to another debate—one that remains unsettled and falls outside the scope of the task force. Second, attaching to the output a collective remuneration right benefiting all rightholders as a group, without regard to the identification of any reproduced work, amounts to establishing an exclusivity – even if reduced to a mere remuneration claim – over material that the first part of this report has treated as belonging to the public domain. This would reintroduce, through the vehicle of a new related right, the very capture that attachment to the public domain is intended to prevent⁴⁰³. The levy examined by the task force, by contrast, has neither this basis nor this function: flat-rate, owed solely by the disseminator, allocated to a fund rather than distributed among individualised rightholders, it is not the counterpart of an upstream use of works, but rather an instrument for steering downstream demand.

In a similar vein, the task force does not envisage incorporating the dissemination of purely synthetic productions into the scope of an existing statutory license, such as equitable remuneration⁴⁰⁴.

The limits of the paid public domain. The proposal for a paid public domain runs into a significant practical objection, already encountered in connection with proof: its implementation presupposes that recourse to AI is known, whereas nothing obliges the disseminator to disclose it. Since recognition of copyright does not require a detailed demonstration of the creative process, the user will be able to claim authorship status without exposing themselves to the levy—unless one shifts, as a matter of future legislation, toward a logic of process verification comparable to the description required in patent law⁴⁰⁵. But the Berne Convention, which prohibits any formality⁴⁰⁶, stands as an insurmountable obstacle here. Failing that, the system would rest essentially on the good faith of disseminators. To the bad faith of those who conceal their use of the tool would be added the mistake of those who, in good faith, regard as non-synthetic a production resulting from a few instructions, given that

⁴⁰³ See above, in Part One, the discussion devoted to investment-based neighbouring rights (§1.5.2), on the risk of collecting distribution revenue based on material that copyright leaves free. Professor Leistner's proposal is nonetheless distinguishable from that risk in that it deliberately embraces and organises it, whereas this report regards it as an effect to be avoided.

⁴⁰⁴ This proposal was put to the task force with the aim of raising the cost of dissemination. This approach runs into the same objection in principle: equitable remuneration is an exception to the exclusivity granted over a protected phonogram and presupposes, by construction, both a phonogram published for commercial purposes and rightholders – performers and producers – among whom it can be distributed (art. L. 214-1 CPI; art. 8(2) of Directive 2006/115/EC). Purely synthetic content is neither of these: subjecting it to the scheme would amount to collecting remuneration on material that the law leaves free, for the sole benefit of the providers of such content, an outcome producer organisations themselves reject. The public-policy character of the regime, invoked in support of this extension, bears only on its modalities, not on its scope. Directing the sums to a creation-support fund, as has also been suggested, does not dispose of the objection, which concerns the subjection itself.

⁴⁰⁵ Art. L. 612-5, para. 1, CPI: “The invention must be disclosed in the patent application in a manner sufficiently clear and complete for a person skilled in the art to carry it out”. On the observation that a user of AI may simply not disclose their use of the tool, see G. Azzaria, “Intelligence artificielle et droit d’auteur...,” cited above, p. 946.

⁴⁰⁶ Berne Convention, art. 5(2).

even specialists struggle to trace the boundary of what is protectable. To this is added the uncertainty surrounding categories: should hybrid productions – where there has indeed been human intervention, but insufficient to characterise as a work of the mind – fall within the paid public domain, or escape it?

However appealing it may be, this avenue thus appears largely impracticable as things stand, and can only be retained as a *de lege ferenda* prospect.

3. What protection against content?

A reversal of perspective. The preceding developments considered the output as an object of protection: can it attain the status of a work⁴⁰⁷, how is this to be proven, and, failing that, what regime applies to it⁴⁰⁸? This perspective will now be reversed. The output is no longer considered as the object to be protected, but as the possible source of an infringement of the rights and interests of others. What can be asserted against it?

Two categories of grievances must be distinguished. The first are internal. They arise from the content's appropriation of a protected value, the expressive elements of a work, which infringement addresses, or the economic identity of a creator, which parasitism addresses (3.1). The second are external. They do not stem from appropriation, but from deception as to the authenticity of the content, when a synthetic production presents itself as real; unrelated to the protection of the output, which is the subject of this task force, they belong to a different problem and are only gestured towards here (3.2).

3.1. Internal infringements

From exclusive right to ordinary law. Internal infringements are arranged along a gradation. The most direct is infringement [*contrefaçon*]: when the output reproduces, without authorization, protected elements of a pre-existing work, the infringement of the exclusive right is established under the ordinary law of infringement (3.1.1). It must still be determined what exactly, within the imitated work, is protected. This is the issue raised by the question of style, the boundary of which must be drawn, since it is this boundary that separates free borrowing from infringing copying (3.1.2). Finally, when no exclusive right is at stake – the style being reduced to a technique or a movement, or the output incorporating no protected expressive element – the imitated artist is not without recourse: the ordinary law of civil liability, in the form of parasitism, takes over (3.1.3).

⁴⁰⁷ See above, Part 1.

⁴⁰⁸ See above, this Part, §1 and 2.

3.1.1. Infringement by reproduction of protected elements

Protected elements reproduced in the output. The output can reproduce protected elements of a pre-existing work. The near-identical image of the Joker as portrayed by Joaquin Phoenix, rendered by a model from a simple prompt, offers an illustration of this⁴⁰⁹.



Image used by E. Rosati, “Infringing AI: Liability for AI-Generated Outputs under International, EU and UK copyright law”

The question raised by these outputs is no longer that of the protectability of the output, examined above⁴¹⁰, but rather that of infringement: does the output reproduce protected elements of another’s work?

The analysis here concerns the output alone. The upstream stage – text and data mining and the obligations that govern it (Article 53 of the AI Regulation) – remains outside the scope of the task force⁴¹¹. The analysis requires establishing the reproduction test (3.1.1.1), the derivation requirement (3.1.1.2), before distinguishing works from subject matter of related rights (3.1.1.3).

⁴⁰⁹ E. Rosati, “Infringing AI: Liability for AI-Generated Outputs under International, EU and UK Copyright Law,” *EJRR* 2025, vol. 16, p. 603, esp. p. 605 and fig. 1 (an output reproducing the image of the Joker as portrayed by Joaquin Phoenix); on the characterisation of plagiaristic outputs, *ibid.*, pp. 603 and 605.

⁴¹⁰ See above, Part 1 and, on the evidentiary question, this Part, §1.

⁴¹¹ On this subject, see CSPLA, Task Force Report on the Implementation of the European Regulation Establishing Harmonised Rules on Artificial Intelligence (“Template”), cited above, December 2024.

3.1.1.1. The reproduction test

The reproduction of original elements. Infringement requires the taking of elements that constitute the expression of the author's own intellectual creation⁴¹². The criterion is qualitative, not quantitative: there is reproduction "in part" as soon as the portion taken is itself original, even if it is a short excerpt, provided that the choice, arrangement, and combination of elements are sufficiently original⁴¹³. The Court of Justice confirmed this in *Mio/Konektra*: infringement arises from the taking of elements reflecting the author's intellectual creation⁴¹⁴. The degree of originality of the work is, in this regard, immaterial. A simple or weakly original work, once the threshold is crossed, is protected against the reproduction of its original elements without the scope of that protection being thereby reduced⁴¹⁵.

Recognizability. The same judgment adds a further requirement: these original elements must be reproduced in a recognizable manner, a condition transposed from *Pelham I*, which excludes from infringement borrowings that have become imperceptible once incorporated into a new work⁴¹⁶. The requirement was not self-evident. Before the judgment, sections of legal scholarship considered that extending to copyright this recognizability, originally forged for phonograms, should be rejected⁴¹⁷. The Court nevertheless established it.

This requirement is not isolated in comparative law. Swiss copyright law even makes it the explicit criterion of the derivative work, defined as a creation of the mind, of individual character, conceived from one or more pre-existing works recognizable in their individual character⁴¹⁸. Recognizability thus plays there, by legislative means, the role of threshold that the Court of Justice has developed through case law.

Rejection of the overall impression test. The Court, by contrast, rejects the "overall impression" test specific to design law; it has no role in copyright. Advocate General Szpunar's formulation gives the reason: "what distinguishes two works is not the overall impression but

⁴¹² Some legal scholarship proposes addressing these non-literal takings through the right of adaptation, conceived as a field of exclusivity partially independent from reproduction (O. Fischman-Afori, "Generative AI art and copyright governance: Rethinking the adaptation right and its limits," *Humanities and Social Sciences Communications*, 2026, Article in Press (DOI 10.1057/s41599-026-07311-y), pp. 4 and 22–24). This approach, workable in common law, remains unworkable in EU law, where adaptation is absorbed into the reproduction right under Article 2 of Directive 2001/29, as the author herself acknowledges (p. 13); hence the choice made here to reason solely on the ground of reproduction.

⁴¹³ CJEU, 16 July 2009, *Infopaq*, C-5/08, paras. 39, 45, and 47–50.

⁴¹⁴ CJEU, 4 December 2025, *Mio/Konektra*, Joined Cases C-580/23 and C-795/23, para. 86.

⁴¹⁵ *Ibid.*, para. 88; *Cofemel*, C-683/17, para. 35 (binary standard).

⁴¹⁶ On recognisability, CJEU, 4 December 2025, *Mio/Konektra*, cited above, para. 86, applying *Pelham I*, C-476/17, para. 39.

⁴¹⁷ E. Rosati, cited above, pp. 617–618, considering that extending to copyright the recognisability standard forged for the phonogram "is flawed and should be rejected, including by the CJEU when it decides the referral in *Mio*".

⁴¹⁸ Swiss Federal Act on Copyright and Related Rights of 9 October 1992 (SR 231.1), art. 3.

the details that uniquely personalise them”⁴¹⁹. This is the clearest expression of support for our subject: the test concerns personalizing expressive details, never overall resemblance.

The contribution of the German referral judgment. The relationship between these two propositions – rejecting the overall impression test while not isolating solely the elements taken – was clarified by the Bundesgerichtshof⁴²⁰. Applying the *Mio/Konektra* judgment on referral, the German high court confirms that the overall impression test remains alien to copyright, but adds that the assessment of recognizability must bear on the new creation considered as a whole, and not on the borrowed elements taken in isolation. If this were not the case, those elements would always be recognizable in the event of identical copying, such that infringement could be found even where they are no longer perceptible in the second object considered as a whole. The question is therefore not to compare the overall impression of the two objects side by side – a criterion specific to design law – but to verify whether the elements underlying the protection of the first work remain perceptible, or instead fade, within the challenged object viewed as a whole.

The indeterminacy of the reference point. Recognizability nevertheless remains under-determined. Neither *Pelham I* nor *Mio/Konektra* specifies from whose point of view it is to be assessed—a specialised observer, the average consumer, or machine detection. Yet, unlike other branches of intellectual property, copyright has no predefined reference figure (a person skilled in the art, an informed user, the average consumer), hence a risk of uneven application across sectors⁴²¹. This indeterminacy, without affecting the principle, will bear on the establishment of infringement.

A corrective is conceivable, borrowed from Anglo-American doctrine on substantial similarity: assessing recognizability from the point of view of the work’s intended audience—sometimes the ordinary observer, sometimes a more discerning observer, depending on the nature of the work in question⁴²². The test does not concern public opinion as such, but rather whether the link between the first work and the second use can be intrinsically inferred from the result itself. Transposed to recognizability under EU law, this figure would offer courts a reference point adjustable by sector, without reintroducing a predefined criterion alien to copyright.

Scope of protection and level of creativity: decoupling in principle, dependence in fact. A final clarification, provided by the German supreme court in the referral judgment cited above, sheds light on the significance of this recognizability for hybrid creations. The scope of protection, the Bundesgerichtshof recalls, does not depend on the degree of creative freedom exercised by the author. A weakly original work receives the same exclusive rights as any other, and there is no discounted protection for creations situated close to the threshold. But

⁴¹⁹ CJEU, 4 December 2025, *Mio/Konektra*, cited above, para. 87; Opinion of Advocate General Szpunar, para. 67.

⁴²⁰ BGH, 2 July 2026, I ZR 96/22, *Konektra*, cited above, paras. 60–62, applying CJEU, *Mio/Konektra*, cited above, paras. 85–87.

⁴²¹ S. Sipetas, cited above, §§3.3 and 4.2; along the same lines, E. Rosati, cited above, p. 617.

⁴²² O. Fischman-Afori, article cited above, p. 24.

this decoupling, which holds at the level of principle, does not erase a factual reality: a work of high creative value, because it more clearly reflects its author’s personality, will be more easily recognizable when taken up in a later creation. Conversely, where constraint – technical, functional, or stemming from the slightness of human intervention – has left only a low creative level, protection will, in practice, operate only against near-identical copying⁴²³.

This distinction is decisive for hybrid creation. It forbids excluding *a priori* from copyright protection productions whose originality, though real, remains slight. At the same time, it signals that the effectiveness of their protection will be measured against what, of the human trace, remains perceptible in the second object.

3.1.1.2. The derivation requirement

No protection against independent creation. Copyright does not protect against independent creation. Two authors may arrive, without knowing each other, at a similar result. This is the hypothesis of independent creation by coincidence [*rencontre fortuite*], to which case law assimilates echoes arising from a shared source of inspiration, the only accepted grounds for ruling out infringement that “results from mere reproduction”⁴²⁴—especially in fields where constraints or trends narrow the space of possible forms⁴²⁵. Similarity is therefore only infringing if it stems from actual copying. Accordingly, it has been said that no reproduction is infringing without proof of derivation⁴²⁶.

Proof of derivation. The protectability of the work relied upon falls under the aspect already examined⁴²⁷. What remains, specific to infringement, is proof of derivation. This follows an adjusted burden. Once the reproduction of protected elements is established and the work has been disclosed – which makes access possible – it falls to the defendant to prove that they could *not* have accessed the work, and thus to establish independent creation⁴²⁸. The independent-creation defence comes into play only at this stage. The mere possibility of independent creation does not bar protection, but the rightholder must show that their original choices were actually taken, not merely that the objects “resemble” one another. The particular features of

⁴²³ BGH, 2 July 2026, I ZR 96/22, *Konektra*, cited above, paras. 63–67, applying CJEU, *Mio/Konektra*, cited above, para. 88. The Bundesgerichtshof expressly characterises this dependency as “descriptive, not normative” (*deskriptiv, nicht normativ*): the scope of protection does not vary, as a matter of law, according to the degree of creativity, but the recognisability of the taking depends on it as a matter of fact.

⁴²⁴ Cass. 1re civ., 16 May 2006, No. 05-11.780 (basis: arts. L. 121-1, L. 122-1, L. 335-3 CPI); Cass. 1re civ., 2 October 2013, No. 12-25.941 (basis: arts. L. 111-1, L. 111-2, L. 122-4 CPI, together with art. 1315, now 1353, Civil Code): infringement “results from the mere fact of reproduction and can only be excluded where the party disputing it demonstrates that the similarities [...] stem from independent creation by coincidence or from subconscious echoes [...] of a common source of inspiration”.

⁴²⁵ CJEU, 4 December 2025, *Mio/Konektra*, cited above, para. 91 (two creators may independently arrive at a similar result; similarity is not infringing where the creation is genuinely independent).

⁴²⁶ E. Rosati, cited above, p. 616: “no reproduction is actionable without proof of derivation”.

⁴²⁷ See above, this Part, §1.

⁴²⁸ Cass. 1re civ., 2 October 2013, cited above; disclosure of the work (in that case, phonographic distribution of several thousand copies) making access possible (Cass. 1re civ., 16 May 2006, cited above).

artificial intelligence – given the difficulty of reconstructing the link between the output and a specific work within the training corpus – heighten this difficulty without altering its logic⁴²⁹.

The irrelevance of good faith. The objective character of infringement calls for one final clarification. The bad faith of the infringer is not a condition for a civil claim for damages⁴³⁰. Once the taking of protected elements is established, neither ignorance of the work’s protected status nor the absence of any intent to copy bars a finding of infringement.

This irrelevance is nonetheless subject to qualifications that must be identified and precisely bounded. Courts have at times accepted that involuntary reminiscence or subconscious copying and independent creation by coincidence could allow the author of the second work to escape a finding of infringement⁴³¹.

Unlike independent creation by coincidence, involuntary reminiscence or subconscious copying presupposes that the author did indeed have access to the first work, but was unaware of having taken up original elements. From this emerges scholarly criticism of its acceptance by courts in copyright matters⁴³². The hypothesis is, in any event, hardly transposable to hybrid production. Involuntary reminiscence or subconscious copying rests on a process specific to the author of the second work, who knew the first work and then reproduced elements of it without being aware of doing so. But a user who obtains an output through a prompt may never have accessed the first work at all; the taking up of elements does not stem from their own memory, but instead from the corpus from which the model was built. The psychological mechanism underlying reminiscence is thus absent—not on the machine’s side, but on the user’s own side.

Independent creation, for its part, is a matter of chance. In practice, the issue here is one of the burden of proof. Requiring the claimant in an infringement claim – the author of the first work – to prove not only priority but also that the defendant did in fact have access to the work, would be disproportionate. Accordingly, similarities allow the burden to be reversed. It then falls to the defendant to prove the absence of access. On this point, the Cour de cassation holds that, “given the difficulty of proving a negative fact, the existence of independent creation may be established through circumstantial evidence”⁴³³. Yet, in the case of a disputed output, the user is at a loss even under this relaxed regime. Having no visibility into the data from which the model was built, they have no evidence available to them capable of establishing the absence of access, the relevant information being entirely beyond their reach. This opacity does

⁴²⁹ On methods for determining whether content was present in the training data, E. Rosati, cited above, p. 616 (citing P. Maini et al.); on the transparency obligation, art. 53(1)(d) of Regulation (EU) 2024/1689; marking, however, constitutes proof neither of protectability nor of copying (see above, this Part, §1.3.3).

⁴³⁰ The irrelevance of good faith to the civil characterisation is a settled principle: Cass. 1re civ., 6 June 1990, No. 88-11.811.

⁴³¹ Cass. 1re civ., 16 May 2006, No. 05-11.780, Bull. civ. I, No. 246; *D.* 2006, p. 1532, note J. Daleau; *RIDA* 2006, No. 210, p. 189, chron. P. Sirinelli; *RTD com.* 2006, p. 596, obs. F. Pollaud-Dulian; *CCE* 2006, comm. 104, note C. Caron; *RLDI* No. 19, September 2006, p. 6, obs. J.-M. Léger.

⁴³² A. Lucas and A. Lucas-Schloetter, *Traité*, cited above, No. 1879: this scenario should “remain entirely irrelevant in copyright law, since one of two things is true: either the taking concerns elements of the common stock devoid of originality, in which case infringement is excluded in any event, or it concerns protected elements, in which case the infringer’s good faith is irrelevant”.

⁴³³ Cass. 1re civ., 5 October 2022, No. 20-23.629, *Aïcha*, *CCE* 2022, comm. 82, obs. P. Kamina; *Prop. intell.* 2023, No. 86, p. 35, obs. A. Lucas; *RTD com.* 2023, p. 122, obs. F. Pollaud-Dulian.

not, however, paralyze the evidentiary debate. Rather, it leads courts to focus on extrinsic evidence, independent of the training data. Foremost among these is the fame or dissemination of the first work, presumably all the more present in training corpora the more widely it has circulated, and from which case law already draws, in matters of independent creation, an indication of access⁴³⁴. The debate therefore cannot be settled on the subjective ground of awareness or access. Instead, it shifts to the objective ground of derivation—that is, the demonstration that the disputed element does indeed stem from the first work, a demonstration whose burden and conditions will themselves also need to be re-examined. The separate question of to whom the infringement thus established should be attributed, meanwhile, must be considered separately⁴³⁵.

Two limits, finally, shape the consequences of the infringement without affecting its characterization. On one hand, criminal proceedings for infringement do require a mental element. Good faith is not irrelevant here, though the bad faith of the infringer is traditionally presumed⁴³⁶. On the other hand, while EU law contemplates a possible effect of good faith on damages, by allowing member states to reserve more lenient treatment for an infringer who was unaware of the infringement, France has not exercised this option. Article L. 331-1-3 of the Intellectual Property Code sets uniform criteria for damages, including a flat-rate indemnity that may not be lower than the royalties evaded, without regard to the good faith of the infringer⁴³⁷.

3.1.1.3. Works and subject matter of related rights

Three distinct logics. The reproduction test is not the same depending on whether the output reproduces a work, a performer’s performance, or the subject matter of an economic intermediary of creation, because the rationale for protection differs⁴³⁸. For a work, reproduction “in part” requires the taking up of original elements. For a performer’s performance – a related right with a human basis – what is protected is the personal performance as fixed, independently of any originality in the copyright sense. For the subject matter of economic intermediaries – phonograms, videograms, fixations made by audiovisual

⁴³⁴ A. Lucas and A. Lucas-Schloetter, *Traité*, cited above, No. 1879.

⁴³⁵ See below, this Part, §3.1.1.3.

⁴³⁶ See in particular Cass. crim., 13 December 1995: *RIDA* 1996, No. 169, p. 279, obs. A. Kerever.

⁴³⁷ At EU level, Article 13 of Directive 2004/48/EC of 29 April 2004 distinguishes the infringer “who knowingly, or with reasonable grounds to know, engaged in an infringing activity,” who is liable to pay damages “actually suffered” (§1), from the infringer acting “without knowing, or without having reasonable grounds to know,” for whom Member States “may” provide for “the recovery of profits or the payment of damages [...] pre-established” (§2). France has not transposed this option: art. L. 331-1-3 CPI applies uniform criteria (“negative economic consequences, including lost profits”; “profits made by the infringer”; “moral prejudice”) and an alternative lump-sum award “which may not be less than the amount of the royalties or fees that would have been due,” without regard to good faith.

⁴³⁸ See above, this Part, §1.5.

communication companies – protection rewards an investment: reproduction of the fixation, even partial, suffices, without regard to intellectual creation or personality⁴³⁹.

Recognizability in related rights. *Pelham I* forged the recognizability requirement in relation to phonograms. The taking of a sample, even a very brief one, is in principle a reproduction “in part” falling under the producer’s right⁴⁴⁰, unless the sample is reproduced “in a modified form unrecognizable to the ear”⁴⁴¹. This boundary is not a formal threshold. The Court justifies it by reference to the specific purpose of the related right – protection of investment – specifying that no infringement is made where the taking “would not affect the possibility [...] of obtaining a satisfactory return on that investment”⁴⁴². It is thus less recognizability as such than harm to the investment that governs protection of related-rights subject matter. This criterion must not be transposed as such to works, where infringement is measured by the taking up of original elements.

Significance for the output. The distinction is not merely theoretical. Musical and audiovisual outputs – synthetic voices imitating a performer, reproduction of a phonogram – will fall under this investment-based logic, in addition to copyright. It thus answers the question, left open above⁴⁴³, of the fate of performers and producers in the face of generative AI.

Attribution of liability. Infringement by the output finally raises a question of imputation. As regards the user, this poses no particular difficulty: having entered the prompt that gave rise to the output and having exploited it, the user personally carries out the acts of reproduction and, where applicable, of communication to the public⁴⁴⁴. In accordance with what precedes, neither ignorance of the protected status of the elements taken, nor reliance on coincidental convergence, shields the user from this characterization⁴⁴⁵.

Liability does not, however, necessarily rest on the user alone. Depending on the facts, the developer or the model provider may also be implicated, whether primarily or secondarily⁴⁴⁶.

⁴³⁹ On the irrelevance of originality for investment-based subject matter, see CJEU, 29 July 2019, *Pelham I* (reproduction of the fixation “in whole or in part”); Opinion of Advocate General Emiliou, para. 172 (“a ‘mere’ act of fixation”).

⁴⁴⁰ CJEU, 29 July 2019, *Pelham I*, Case C-476/17, para. 29.

⁴⁴¹ Ibid., para. 39 and operative part, 1; already para. 31.

⁴⁴² Ibid., para. 30 (specific objective: protection of investment, recital 10 of Directive 2001/29) and para. 38 (no infringement of “a satisfactory return on [...] investment”).

⁴⁴³ See above, Part 1, §1.5.1 and 1.5.2.

⁴⁴⁴ See E. Rosati, “Infringing AI: Liability for AI-Generated Outputs under International, EU, and UK Copyright Law,” *EJRR* 2025, vol. 16, No. 2, p. 603, esp. p. 617; add MCST/KCC, *A Guide on Generative AI and Copyright*, cited above, pp. 31–33.

⁴⁴⁵ See above, this Part, §3.1.1.2.

⁴⁴⁶ E. Rosati, article cited above, pp. 619–620: liability may extend, depending on the facts, to the model developer and the system provider, not merely on a secondary but potentially also a primary basis, in light of CJEU case law on platform operators (*YouTube and Cyando*, C-682/18 and C-683/18) and that of the UK courts. – Along the same lines, M. Leistner, “Memorisierungen und urheberrechtliche Vervielfältigungen in KI-Modellen” [Memorisation and Copyright Reproduction in AI Models], cited above, esp. p. 189: the characterisation of the operators concerned (model developer, system provider, user) should, *de lege lata*, follow the principles laid down

A recent decision illustrates this, outside the field of infringement but following a transposable logic of imputation: the Munich I Regional Court held in May 2026 that the operator of a generative synthesis service is directly liable for statements produced by the tool, where those statements, formulated in its own terms, do not merely relay third-party sources and cannot benefit from the reduced-liability regimes applicable to hosting providers or search engines⁴⁴⁷. This extension, however, brings into play the characterization of the operators involved and touches on the conditions under which models are designed and trained. These questions are distinct from the one examined here, that of the output.

The subject could no doubt usefully be the object of a separate study.

The case of style. There remains the most delicate hypothesis: that in which what is taken up in the output is not a specific expressive element, but what is referred to as a “style”. As scholarship notes with respect to fashion, operating within the same stylistic movement is not enough to constitute infringement, which requires the reproduction of identifiable creative elements⁴⁴⁸.

3.1.2. The question of infringement of style in output content

The scope of a maxim. It is traditional to assert that “style is not protected,” and the argument is invoked today to maintain that generative AI productions, when they borrow a style (as with content created “in the style of” Miyazaki and Studio Ghibli), cannot constitute infringement. The maxim is accurate, but ambiguous: everything depends on what falls under the umbrella of the word “style”. The task is thus to clarify its definition, in order to draw the boundary of what is protectable.

The analysis here concerns the output that reproduces a pre-existing human work; the upstream question – that of training – remains outside the scope of this task force⁴⁴⁹. The discussion addresses legal solutions alone, technical solutions remaining separate⁴⁵⁰. The thesis defended

by the CJEU for platforms (*YouTube and Cyando*); the author notes, however, that the Bundesgerichtshof (*Manhattan Bridge*, GRUR 2024, 1809) declined to extend that case law, developed for the right of communication to the public, to the reproduction right.

⁴⁴⁷ LG München I, 28 May 2026, 26 O 869/26, BeckRS 2026, 11860. The decision is grounded in the “corporate personality right” (*Unternehmenspersönlichkeitsrecht*), which has no equivalent in French law for legal persons, where protection would likely be grounded instead in disparagement or misleading commercial practices; the reasoning attributing liability to the provider of the tool, independent of the substantive right at issue, nonetheless retains its illustrative value.

⁴⁴⁸ S. Sipetas, cited above, §4.2: mere participation in a shared stylistic vocabulary (“diffuse claims of resemblance or stylistic proximity”) is not sufficient; infringement requires an element-by-element comparison of protected features.

⁴⁴⁹ If a machine can produce downstream content “in the style of,” this is presumably because it has absorbed such content upstream. The upstream question, however, falls outside the scope of this mission.

⁴⁵⁰ Technical solutions exist, in particular those that consist in “poisoning” visual content to render it unusable by generative AI, such as Glaze, developed by B. Zhao and researchers at the University of Chicago. See AFP, “Ces artistes qui piègent leurs œuvres pour tromper l’IA” [The Artists Booby-Trapping Their Works to Fool AI], *Stratégies*, 2 January 2024.

is that it is not “style” that copyright protects, but rather identifiable expressive elements that everyday language wrongly groups under that term. The demonstration distinguishes style excluded from protection (3.1.2.1) from protectable style, or style-as-imprint (3.1.2.2), of which character and fictional universe constitute the most advanced illustration (3.1.2.3); from this it derives the applicable test for generations “in the manner of” (3.1.2.4), tests it against the pastiche exception (3.1.2.5), and finally sets out the safeguards and the fallback to parasitism (3.1.2.6).

3.1.2.1. Style excluded from protection: technique and movement

Style as a technique. For infringement to exist, the original elements of the work must be taken up; the tipping point lies in the presence of “detectable material elements”⁴⁵¹. But style sometimes reduces to a pure manufacturing technique. This is the lesson of the Christo cases. The law “protects only the creation of specific, individualised, and perfectly identifiable objects, and not a genre or family of forms [...] all of which correspond to a style or technique deriving from an idea, such as that of wrapping objects”⁴⁵². Likewise, regarding William Klein’s “painted contact sheets,” the court recalled that copyright protects “a particular work and not a series of works in which a significant element of a pictorial approach would constantly recur”⁴⁵³. The technique – Buren’s stripes, Christo’s wrapping – becomes a distinctive sign, but remains on the side of “how”—that is, of idea⁴⁵⁴.

Style as a movement. Style is also understood as an artistic genre or movement. Desbois saw it as “the common factor of artistic productions,” which “is not identified [...] with any particular work”⁴⁵⁵. Courts have logically refused any monopoly over “the cubist genre arising from Pablo Picasso’s creative intuition,” which “belongs to the common stock of creation [...] and remains [...] irreconcilable with any exclusive appropriation”⁴⁵⁶.

A well-founded exclusion. These two meanings fall within the realm of idea. Excluding them from the scope of protection follows from the idea/expression dichotomy, from the rejection of over-protection, and from the principle of free circulation: only the implementation of these

⁴⁵¹ J.-M. Deltorn, “‘In the style of...’ – deep learning, style transfer and the limits of copyright protection. A European perspective,” in *Artificial Intelligence and Intellectual Property*, Annali italiani del diritto d’autore (AIDA), vol. XXVII, May 2019, p. 337.

⁴⁵² TGI Paris, division 5, chamber 2, 26 May 1987: *D.* 1988, summary p. 201, obs. C. Colombet.

⁴⁵³ CA Paris, division 5, chamber 2, 23 September 2011: *RLDI* 2012/78, No. 2587, obs. N. Walravens-Mardaescu.

⁴⁵⁴ On the distinction between “how” and “what,” see B. Sobel, “Elements of Style: copyright, similarity and generative AI,” *Harvard Journal of Law & Technology*, vol. 38, 2024, p. 49, esp. p. 74.

⁴⁵⁵ H. Desbois, *Le droit d’auteur en France*, Dalloz, 1978, p. 22.

⁴⁵⁶ TGI Paris, 3 June 1998: *Gaz. Pal.* 1998, p. 689.

notions, if original, gains protection. On this point, there is complete convergence, in France as across the Atlantic⁴⁵⁷.

3.1.2.2. Protectable style: style as the imprint of an author's personality

From “signature style” to style as the imprint of an author's personality. Things are different when style is understood no longer as a technique or a movement, but as the style specific to the author—what is commonly referred to as their “signature style” [*patte*]. For the sake of analytical rigour, the expression style-as-imprint is preferred here, which directly echoes the “imprint of personality,” the cardinal formula in the definition of originality; it overlaps with the notion of signature-style developed by recent scholarship, understood as a durable expressive identity specific to an author, forged over time through judgment and social recognition⁴⁵⁸.

French law offers established illustrations of this. In the *Manitas de Plata* case, the Cour de cassation held that the work, “treated by its author according to his temperament and his own style, which make it a genuine composition, was original in character”⁴⁵⁹. In the Harcourt studios case, the court recognised “original creations [...] in that there is added to them the intellectual mastery constitutive of the ‘Harcourt style,’” even though the studios, being a legal entity, are inherently not an author⁴⁶⁰. Style-as-imprint, being intrinsic to the work, is thus protected along with it. One decision did, admittedly, assert the contrary; but on closer reading, it actually concerned an old pictorial system and a technique—that is, a movement or a technique, not an imprint⁴⁶¹.

An objection to be addressed: idea and expression. The thesis does not go unchallenged, and the objection must be stated in its strongest form. Part of the scholarship argues that a style identified across a series of works would, by construction, be too abstract to constitute an expression. It would remain within the realm of idea, such that its protection would run up against the idea/expression dichotomy⁴⁶². The more a form of protection rises in abstraction,

⁴⁵⁷ See also, in the American tradition, B. Sobel, cited above; P. Samuelson, C. J. Sprigman, and M. Sag, comments submitted to the U.S. Copyright Office, cited above, pp. 36–37 (“far too abstract to merit copyright protection consistent with the idea/expression distinction and Section 102(b)”).

⁴⁵⁸ See D. Friedmann, “Signature-Style,” SSRN 6454198, 2026, p. 1.

⁴⁵⁹ Cass. 1re civ., 1 July 1970, *Manitas de Plata*: D. 1970, case reports p. 734, note B. Edelman; *RTD com.* 1971, p. 705, obs. H. Desbois; *RIDA* 2/1971, p. 210. Add, to similar effect, TGI Paris, 3rd chamber, 6 July 1972: D. 1972, case reports p. 628, note C. Pactet (“this interview does not have Charles de Gaulle as its author; it constitutes a literary creation by Passeron inasmuch as he was able, through the imprint of a personal composition and style, to give the thought the original form that renders it protectable”).

⁴⁶⁰ CA Paris, 15 January 2014: *Propri. intell.* 2014, No. 51, p. 156, obs. J.-M. Bruguière.

⁴⁶¹ CA Paris, 25 November 2011, Case No. 11/05470, which states that copyright “cannot protect a style, even one specific to the artist”: on closer reading, however, the decision concerned a “pictorial system known since the end of the eighteenth century” and an “extremely old technique”—in reality a movement or a process, not an imprint of personality.

⁴⁶² P. Samuelson, C. J. Sprigman, and M. Sag, comments cited above, pp. 36–37; see also J. C. Ginsburg, “AI Image Outputs ‘in the style of...’,” in J. Vanherpe (ed.), *Reverences to Marie-Christine Janssens*, Owl Press Legal, 2024.

the more it risks encroaching on the common stock of ideas and styles that copyright leaves free.

The rebuttal. The objection, however, conflates the emergent with the abstract. Style-as-imprint is not a floating abstraction. It is an empirically identifiable pattern specific to an author, which appears only within a defined corpus. Copyright already protects emergent patterns identifiable across several works (a melodic phrase, a character..) not as ideas in themselves, but insofar as they crystallise into identifiable expressive choices⁴⁶³.

It is thus not style in itself that is protected, but the detectable expressive elements in which it crystallises. Moreover, when a style-as-imprint becomes so recognizable that reproducing it necessarily evokes a specific author, it is the imitator's expressive freedom that is constrained, not the original author's: the imitator retains full freedom to create within the same genre, and is prevented only from reproducing the precise expressive elements in which another's imprint crystallises⁴⁶⁴. Defined with sufficient precision, an artist's style can thus be protected without unduly encroaching on the public domain of ideas⁴⁶⁵.

3.1.2.3. The advanced form: character and fictional universe

From style to embodied identity. Protection reaches its clearest point when the imprint crystallises into recognizable characters and visual universes, such as those of Studio Ghibli or *The Simpsons*, or Nintendo's "plumber," whose characteristic features are rendered identically by a request "in the style of Mario"⁴⁶⁶.

⁴⁶³ D. Friedmann, "Signature-Style," cited above, pp. 29–31, who notes that copyright already protects emergent patterns: characters (*DC Comics v Towle*, 802 F.3d 1012, 9th Cir. 2015), melodic phrases (*Skidmore v Led Zeppelin*, 952 F.3d 1051, 9th Cir. 2020).

⁴⁶⁴ Ibid., p. 34 (flipped merger: "in cases of signature-style, it is the imitator – not the author – who confronts constrained expressive choice").

⁴⁶⁵ Along these lines, D. B. V. Kaye, K. Pappalardo, and J. Gray, "In the style of: exploring industry, creator and legal implications of copying style through generative AI," *Information, Communication & Society*, 2025, p. 1, esp. p. 5.

⁴⁶⁶ E. Rosati, cited above, p. 605 and fig. 2 (an output generated for "a video game plumber in the style of Mario"): the example concerns a protected character and universe, not mere style.



Image used by E. Rosati, “Infringing AI: Liability for AI-Generated Outputs under International, EU and UK Copyright Law”

Strictly speaking, this is no longer a matter of “style”. American scholarship, despite being the most restrictive on this point, expressly distinguishes style from character: a character is more than an image recognizable in a certain style, it necessarily involves a narrative element⁴⁶⁷. This category is protected even in common law. Case law recognises copyright in a character (or its attributes) possessing distinctive expressive traits, recognizable across its various depictions, as with the Batmobile⁴⁶⁸. Character and fictional universe thus constitute the most fully realised form of artistic identity, not a category distinct from it.

This is also the configuration in which AI generation is most exposed to infringement. Trained on multiple images associated with the same name, the model learns the constant and distinctive features repeated throughout the series – precisely those that characterise the character – such that a request using the name reproduces its protected expressive core. The machine’s mode of learning thus converges with what constitutes the character, and the phenomenon even extends beyond it. It concerns any simple image, frequently duplicated and consistently associated with a given label, such as Banksy’s stencil of a girl with a balloon⁴⁶⁹.

Application to generations “in the manner of Ghibli”. In images such as those that attracted significant media attention in March 2025, it is not a mere style that is reproduced. The specific colour palette (soft colours), the character proportions (eyes, body), and the characteristic

⁴⁶⁷ P. Samuelson, C. J. Sprigman, and M. Sag, comments cited above, p. 37.

⁴⁶⁸ *DC Comics v Towle*, 802 F.3d 1012 (9th Cir. 2015), concerning the Batmobile, whose distinctive expressive features remain recognisable across its various incarnations; see D. Friedmann, “Signature-Style,” cited above.

⁴⁶⁹ M. Sag, “Copyright Safety for Generative AI,” 61 *Hou. L. Rev.* 295 (2023), esp. Part IV.B (“The Snoopy Problem”).

settings (alleyways, old trains, vintage radios) are all specific expressive elements – “detectable material elements” – intrinsic to the protected work of the mind.

Characterizing these takings as infringement of a character or universe, rather than of “style,” definitively answers the objection drawn from the idea/expression dichotomy: one is no longer within the realm of idea, but within that of expression.



Images generated by Dall-E 3 and ChatGPT⁴⁷⁰

3.1.2.4. Transposition to generations “in the manner of”

The test. Infringement turns on the reproduction of detectable expressive elements, not on “style” as such. Two situations must accordingly be distinguished. Either the generation “in the manner of” refers to a technique or a movement (no infringement is possible, even if the request names an artist; a generation “in the manner of the impressionist movement” escapes liability, absent sufficient resemblance to a specific work) or it refers to an individualised artistic identity, a fortiori to a character or a universe. The taking of the expressive elements that compose it can then be caught by infringement, as with the Studio Ghibli example.

⁴⁷⁰ The image is available at the following link: <https://www.ddg.fr/actualite/ia-propriete-intellectuelle-quels-enseignements-tirer-du-buzz-mondial-lie-a-la-generation-de-videos-dans-le-style-du-studio-openai-ghibli>

A clarification on the mechanism. A frequent counterargument is that generation “in the manner of” is equivalent to the inspiration every author draws from their predecessors. The nuance is real, particularly in music, but should not be technically overstated. Framing a request “in the manner of X” steers the generation toward the traits statistically associated with X’s work – a far cry from Desbois’s “common factor of artistic productions” – without the model thereby “drawing” exclusively from that single work. The legal test remains fixed on the output and on the elements reproduced within it, not on the wording of the prompt. A character or an identity can be evoked without the artist even being named⁴⁷¹.

Comparative illustrations. American case law sheds light on this boundary, provided its examples are properly weighed. The *Steinberg* case, in the graphic arts, offers the appropriate model: stylistic reminiscences were found to be “significant” there, without this being enough to establish infringement, which requires the reproduction of precise expressive elements⁴⁷². By contrast, the *Blurred Lines* case, which found infringement on the basis of a shared groove and atmosphere (that is, style in its most diffuse sense), cannot serve as supporting the task force’s position. It protected precisely what this report intends to exclude, and the dissenting judge saw in it the risk of “cornering the market on a musical style”⁴⁷³. It therefore stands as a counter-example, not a model.

Style-as-imprint thus becomes operative and protectable only once materialised in an identifiable combination of original expressive elements. Infringement does not penalise the evocation of a manner, but the taking up or copying of a form. The notion of “style” is therefore sometimes understood too broadly, style-as-imprint ultimately belonging less to style, which is unprotectable, than to imprint, which is protectable.

3.1.2.5. The obstacle of pastiche: the contribution of the *Pelham II* judgment

A recognition in principle. The *Pelham II* judgment reinforces this analysis. The Court held there that the pastiche exception, an autonomous concept of EU law⁴⁷⁴, must “allow the use of [...] protected elements, otherwise it would be ineffective,” these elements needing to be “characteristic of the work [...] from which they originate,”⁴⁷⁵ and that it may take the form of “overt stylistic imitation”⁴⁷⁶. The Advocate General had already emphasised this: where imitative works are concerned, the boundary between borrowing unprotected elements and

⁴⁷¹ On the evocation of a protected style or character without the artist being named (the “Italian plumber problem,” the “Snoopy problem,” the “Pikachu Paradox”), see E. Rosati, “Infringing AI: Liability for AI-Generated Outputs...,” cited above, p. 605 (citing T. B. Lee and J. Grimmelmann, M. Sag, and A. Guadamuz); add D. Friedmann, “Signature-Style,” cited above.

⁴⁷² U.S. District Court for the Southern District of New York, 663 F. Supp. 706 (S.D.N.Y. 1987), *Steinberg*.

⁴⁷³ *Williams v Gaye*, U.S. Court of Appeals, 9th Cir., 895 F.3d 1106 (2018). See the dissenting opinion of Judge Nguyen: “The majority allows the Gayes to accomplish what no one has before: copyright a musical style”.

⁴⁷⁴ CJEU (Grand Chamber), 14 April 2026, Case C-590/23, *Pelham II*, para. 34 (autonomous concept of EU law): CCE 2026, comm. 50, obs. P. Kamina.

⁴⁷⁵ *Ibid.*, paras. 52 and 51 respectively, for the two quotations.

⁴⁷⁶ *Ibid.*, paras. 58 and 63 (operative part, 1).

reproducing protected material is thin, since the borrowed elements may remain original, particularly when combined⁴⁷⁷.

By accepting that a stylistic imitation drawing on protected characteristic elements falls within the scope of the exception, the Court necessarily acknowledges, de facto, that such elements – what this report calls the imprint or artistic identity – may fall within the scope of copyright: otherwise, no exception would be needed to use them.

A bounded exception. The contribution is nonetheless mixed, since the Court bounds the exception. It shares with parody and caricature the feature of evoking an existing work while displaying perceptible differences⁴⁷⁸, but it does not have “a residual character” and does not cover “any creation that evokes an existing work,” on pain of rendering redundant the other two exceptions placed on an equal footing with it⁴⁷⁹. Pastiche presupposes an “artistic or creative dialogue [...] recognizable as such,”⁴⁸⁰ and “cannot cover concealed imitations of protected subject matter, or plagiarism,” but only “overt forms of use [...] recognizable as such”⁴⁸¹. Part of the scholarship nonetheless reads the judgment in the opposite direction, as carrying a risk of expansion. By adopting a single criterion of “artistic or creative dialogue” and relegating stylistic imitation to a mere illustration, *Pelham II* could legitimise uses falling within transformative works and have knock-on effects for the outputs of generative AI systems that reproduce the style and original elements of pre-existing works⁴⁸². The reading adopted here rules out this risk: the required perceptible differences and the express exclusion of concealed imitations should in principle suffice to keep beyond pastiche any output that merely reproduces identifiable expressive elements without engaging in a recognizable dialogue.

To these internal limits is added an external limit that the judgment does not discuss, but which nevertheless remains: the three-step test of Article 5(5) of Directive 2001/29, which makes any exception conditional on there being no conflict with the normal exploitation of the work, and no unreasonable prejudice to the legitimate interests of the rightholder. This reservation is all the more significant for mass synthetic generation, which is liable to substitute for the work on its own market⁴⁸³.

⁴⁷⁷ Opinion of Advocate General N. Emiliou, Case C-590/23, 17 June 2025, para. 66. The Advocate General referred to the then-pending disputes *Andersen v Stability AI* and *Getty Images v Stability AI* (the latter having since concluded with a finding of no infringement: High Court of Justice, 4 November 2025, No. IL-2023-000007; *D. actualité*, November 2025, obs. E. Migliore), as well as, in the musical field, to the claims brought against Ed Sheeran, dismissed on the ground that the borrowed elements were too commonplace (2d Cir., 1 November 2024, *Structured Asset Sales, LLC v Sheeran*).

⁴⁷⁸ Following CJEU, 3 September 2014, *Deckmyn and Vrijheidsfonds*, Case C-201/13 (para. 20): *D.* 2014, p. 2097, note B. Galopin; *RTD com.* 2014, p. 815, obs. F. Pollaud-Dulian; *Propri. intell.* 2014, No. 53, p. 393, obs. A. Lucas; *RIDA*, October 2014, p. 387, note P. Sirinelli. The same characteristic is applied to pastiche: *Pelham II*, cited above, para. 40.

⁴⁷⁹ *Pelham II*, cited above, paras. 41, 43, and 44.

⁴⁸⁰ *Ibid.*, para. 50.

⁴⁸¹ *Ibid.*, para. 49.

⁴⁸² Along these lines, P. Kamina, “Arrêt *Pelham II*: une décision aux effets potentiellement délétères” [The *Pelham II* Judgment: A Decision with Potentially Deleterious Effects], *CCE* 2026, comm. 50.

⁴⁸³ Article 5(5) of Directive 2001/29 (reproduced at para. 6 of the judgment) is not applied in the Court’s reasoning, which strikes the balance solely by weighing the rights guaranteed by the Charter (arts. 11, 13, and 17). This silence should not, however, be taken to mean that the three-step test has been set aside, since it applies to every

Beyond pastiche alone, part of the scholarship sees in the quotation exception of the Berne Convention (Art. 10), understood as a flexible, purpose-driven mechanism centred on the characteristics of the result, a possible path for reconciling, in future, exclusivity over output with the preservation of legitimate creative uses⁴⁸⁴. This avenue, though appealing in theory, would nonetheless run into the same external limits already noted: the requirement of conformity with “fair practice” and the three-step test.

The synthetic output falls short. Transposed to generation “in the manner of,” these conditions appear rarely to be satisfied.

First, perceptible differences from the reference work are often lacking, content “in the manner of” tending, on the contrary, toward confusion.

Second and above all, what is missing is an artistic or creative dialogue recognizable as such. An imitation that merely reproduces, without engaging in such a dialogue, comes close to the concealed imitation, or even the plagiarism, that the Court expressly excludes (para. 49).

There remains a third requirement, which must be stated precisely. The exception presupposes a “creation,” not a “work” in the sense in which that term requires protectable originality. Throughout its statements of principle as well as in its operative part, the Court uses the word “creation,” “work” there designating only the pastiche source⁴⁸⁵. This terminological choice aligns pastiche with the regime of the other two exceptions in the same provision, the Court having long held that parody need not display any originality of its own beyond perceptible differences, and the Advocate General having recalled that no threshold of originality is required. The single instance in which “work” refers to the result of the pastiche – the application *in concreto* to sampling (para. 57) – does not stand in the way of this: isolated, contradicted by the operative part and by paragraph 50, and stated in a case where the result was in any event a musical composition, it has descriptive rather than definitional significance; treating it as a condition of protectability would introduce into the exception a requirement of originality that neither its text, nor its structure, nor the interpretation in favour of artistic freedom claimed by the Court, permits.

exception or limitation. Along these lines, A. Guadamuz, “Pastiche or cliché? What *Pelham II* might mean for AI outputs,” *TechnoLlama*, 23 April 2026. And P. Kamina, obs. cited above on *Pelham II*.

⁴⁸⁴ O. Fischman-Afori, article cited above, pp. 26–27, suggesting that “the concept of permitted ‘quotation’, established under the Berne Convention, may offer a promising avenue for the future development of an AI-related copyright framework of global exceptions”; already along these lines, L. Bently and T. Aplin, *Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyright Works*, CUP, 2020.

⁴⁸⁵ *Pelham II*, cited above, para. 50 and operative part, 1: the exception “covers creations which evoke one or more existing works,” the term “work” there designating only the pastiche source. The Court uses “creation,” not “work,” in all of its statements of principle (paras. 43 and 50; operative part, 1). The sole occurrence linking “work” to the result of the pastiche appears at para. 57, in the concrete application to sampling (“the creation of a work meeting the requirements set out in paragraphs 49 to 53”); isolated, contradicted by the operative part and para. 50, and stated in a case where the result was in any event a musical composition, that occurrence is descriptive rather than definitional. No threshold of originality is required: see, by parity of regime with the other exceptions under Article 5(3)(k), CJEU, 3 September 2014, *Deckmyn*, Case C-201/13, para. 21 (parody need not display any originality of its own, beyond perceptible differences from the reference work); Opinion of Advocate General N. Emiliou, cited above, para. 63: “nothing in the wording of that provision requires that the ‘pastiche’ ... be an original work ... it need not reach the threshold of ‘originality’”.

It follows that a purely synthetic output fails, not because it is not “protectable” (in the sense used in the first part of this report), but because it is not even a “creation” within the meaning of the judgment. For lack of a human contribution whose dialogical character is objectively perceptible in the result, and for lack of the required perceptible differences, it does not achieve pastiche⁴⁸⁶.

Finally, it should be noted that the assessment is objective. Asked whether pastiche presupposes intent on the user’s part, the Court answers in the negative, holding that it suffices that the character of pastiche be “recognizable by a person familiar with the existing work from which elements are borrowed”⁴⁸⁷. This objective approach cuts both ways. On the one hand, it deprives of relevance the objection drawn from the machine’s lack of intent: the characterization does not reside in intent, human or algorithmic (which, in any case, does not exist), but rather in the objectively perceptible relationship between the result and the reference work. On the other hand, it forbids excluding the synthetic output on the sole ground that a machine lacks creative intent. The exclusion stems not from an absence of intent, but from the finding, made with respect to the result, that it displays no recognizable dialogue and is not perceptibly distinguishable from its source.

3.1.2.6. Safeguards and the fallback to parasitism

The pitfalls of merit. The approach is not without risk. In the examples used, style could receive protection because it was the “trademark”⁴⁸⁸ of identified artists, which presupposes, even implicitly, a degree of fame or popularity. There would be a real risk of better protecting the works of famous artists, thereby reintroducing merit as a factor, even though it is supposed to be irrelevant. The analysis must therefore focus on the expressive elements reproduced in the output, without making fame or popularity the cornerstone of the solution.

Fallback to parasitism. When the infringement route is closed off (style reduced to a technique or a movement, or mere dilution without the taking of expressive elements), the harm suffered by the artist (market substitution, dilution of their signature) can, on a subsidiary basis, be addressed under parasitism⁴⁸⁹. The individualised economic value required by the Cour de cassation can then reside precisely in the artist’s style-as-imprint, its demanding condition becoming an asset rather than an obstacle⁴⁹⁰.

⁴⁸⁶ The Court did not rule on artificial intelligence output; the transposition proposed here is the mission’s own.

⁴⁸⁷ *Pelham II*, cited above, para. 62 and operative part, 2.

⁴⁸⁸ The phrase “signature mark” is borrowed from U.S. District Court, S.D.N.Y., 663 F. Supp. 706 (1987), *Steinberg*; see above, this Part, §3.1.2.4.

⁴⁸⁹ Absent infringement, a taking may fall under unfair competition (parasitism) if it bears on an individualised economic value: see TGI Paris, 3 June 1998 (taking of Picasso’s cubist style in an advertisement), cited by M. Vivant and J.-M. Bruguière, *Droit d’auteur et droits voisins*, cited above, No. 123.

⁴⁹⁰ On characterising dilution harm as the appropriation of expressive value (expressive goodwill), likened to the misappropriation doctrine from *International News Service v Associated Press*, 248 U.S. 215 (1918), see D. Friedmann, “Signature-Style,” cited above; on the recourse, in the American tradition, to the right of publicity and

3.1.3. Parasitism

From exclusive right to ordinary law. When infringement is ruled out – style being reduced to a technique or a movement, or the output reproducing no protected expressive element – the imitated artist is nonetheless not without recourse. They retain ordinary civil liability (Article 1240 of the Civil Code), of which parasitism is, in this context, the most fitting expression. One might also consider unfair competition by imitation. But this requires a risk of confusion in the public’s mind⁴⁹¹, whereas the grievance of an artist whose identity is captured “in the manner of” is not primarily confusion (the output is not necessarily mistaken for one of their works), but the unlawful appropriation of the value attached to their identity. This is precisely what parasitism addresses, without requiring any risk of confusion. The “confusion” aspect (the output presented or perceived as an authentic work by the author) falls, for its part, under external infringements, such as consumer protection or personality rights⁴⁹².

It must still be shown that the author’s artistic identity, their style-as-imprint⁴⁹³, constitutes an economic value capable of protection. The demonstration requires establishing the strict standard that the Commercial Chamber has recently tightened (3.1.3.1), showing that artistic identity satisfies it, including addressing the objection of over-protection (3.1.3.2), then testing its application to generations “in the manner of” (3.1.3.3), before clarifying its autonomy and subsidiarity relative to infringement (3.1.3.4).

3.1.3.1. The strict standard: a fault with tightened conditions

Definition. Parasitism is a civil fault whereby an operator places itself “in the wake of another in order to unduly profit from that other’s efforts, know-how, acquired reputation, or investments made”⁴⁹⁴. The Commercial Chamber, through a series of recent judgments, has tightened its contours.

trademark (the Greg Rutkowski case), see the Samuelson/Sprigman/Sag comments, cited above, p. 37; add M. Sag, “Copyright Safety for Generative AI,” 61 *Hou. L. Rev.* 295 (2023), Part V.A.8.

⁴⁹¹ On this distinction, see the study by the Commercial, Financial and Economic Chamber, *La faute de parasitisme: vers des conditions plus restrictives* [The Fault of Parasitism: Towards More Restrictive Conditions], in *Cour de cassation, Recueil annuel des études* 2025, pp. 105–106: success in a parasitism claim “is not conditional on the existence of a likelihood of confusion” (Cass. com., 27 January 2021, No. 18-20.702), unlike unfair competition by imitation, which requires it (Cass. com., 14 November 2006, No. 05-13.351).

⁴⁹² See below, this Part, §3.2.

⁴⁹³ See above, this Part, §3.1.2.2.

⁴⁹⁴ Cass. com., 18 March 2026, No. 24-17.016, FS-B, §17; see also the study cited above, p. 89 (wording carried over from Cass. com., 26 June 2024).

The preliminary condition: an identified and individualised economic value. The claimant must first establish that what is invoked as having been parasitised represents an economic value that is “identified and individualised”⁴⁹⁵. “Identified,” meaning a defined and designated asset (reputation, goodwill, competitive advantage, particular know-how, a distinctive universe); “individualised,” meaning its contours are delineated and can be traced. Absent this, the examination of fault itself does not even arise.

Alternative elements. This value is characterised by reputation, investments, or know-how, which must be specific and contemporaneous; excluded from it is the mere taking of an idea, a concept, a fashion trend, a commonplace, or technical constraints⁴⁹⁶.

An intentional fault. Parasitism further presupposes an intent to place oneself in another’s wake. Mere reference to a well-known third party is not enough⁴⁹⁷. And, unlike unfair competition, which “cannot result from a set of presumptions,” it is assessed following an overall analysis of the relevant elements⁴⁹⁸.

The objection. This regime, criticised by some commentators, would turn parasitism into a substitute for a monopoly right. “Ordinary law cannot be used to protect a performance that special law says is not protected,” and the “loose concept” would threaten freedom of trade⁴⁹⁹. It is this objection that must now be addressed.

3.1.3.2. Artistic identity as an individualised economic asset

⁴⁹⁵ Study cited above, pp. 94–95; the gloss on the two qualifiers is borrowed from J. Larrieu, “Les points sur les ‘i’ du parasitisme” [Dotting the I’s on Parasitism], *Propr. industr.*, September 2024, comm. 64.

⁴⁹⁶ Cass. com., 26 June 2024, No. 23-13.535 and No. 22-17.647 (two landmark judgments, published in the Bulletin and the Rapport), cited and discussed in the study cited above, pp. 94–95 and 98–100.

⁴⁹⁷ On the requirement of intent, Cass. com., 3 July 2001, No. 98-23.236, Bull. 2001, IV, No. 132; on the insufficiency of a mere reference to a well-known third party, the “Moulin Rouge” case, Cass. com., 31 March 2015, No. 13-21.300, Bull. 2015, IV, No. 60.

⁴⁹⁸ Parasitism “results from a set of factors assessed as a whole, independently of any likelihood of confusion,” whereas unfair competition “cannot result from a bundle of presumptions”: Cass. com., 20 September 2016, No. 14-25.131, Bull.; Cass. com., 5 March 2025, No. 23-21.157, Bull., via the study cited above, pp. 101–102.

⁴⁹⁹ J. Passa, “Propos dissidents sur la sanction du parasitisme économique” [Dissenting Views on the Sanctioning of Economic Parasitism], *D.* 2000, p. 297; I. and G. Parléani, “2001, La tentation du Moyen Âge. L’exemple du parasitisme” [2001, The Temptation of the Middle Ages: The Example of Parasitism], in *Mélanges Gavalda*, Dalloz, 2001, p. 250; C. Le Stanc, “Pour en finir avec le parasitisme... Mais y parviendra-t-on?” [Putting an End to Parasitism... But Will We Manage It?], *Propr. industr.*, June 2010, repère 6 (“a soft concept”).

Crossing the threshold. An author’s style-as-imprint or distinctive signature style – his or her singular, identifiable, and invested-in creative universe – fits squarely within the definition of an individualised asset. The creation of a “singular universe” is among the recognised economic values, and case law protects a business’s “own universe”⁵⁰⁰. The threshold requirement, far from posing an obstacle, is satisfied by what the infringement test had itself precisely isolated⁵⁰¹.

A double-edged logic. The restrictive turn here serves the coherence of the argument. Where a purely synthetic output presents no individualised economic value and thus escapes parasitism⁵⁰², it is, conversely, the imitated artist who invokes their own value. The same criterion produces opposite results depending on who invokes it. Here the Court’s strict condition becomes an asset, not an obstacle.

Rebutting the objection. The charge of over-protection is not self-evident. Parasitism penalises conduct after the fact, not an asset as such⁵⁰³; it plays a regulatory role, not a rights-creating one⁵⁰⁴; the restrictive turn itself bounds the alleged abuse, while cumulation with infringement requires distinct facts⁵⁰⁵. It thus establishes neither a disguised monopoly nor an *a priori* restraint on free competition.

Transatlantic support. The category is by no means peculiar to the French context. American scholarship characterises the harm from “in the manner of” imitation as the appropriation of expressive goodwill, likened to the misappropriation doctrine from *International News Service v. Associated Press* (1918), the elements of which – costly effort by the claimant, freeriding, exploitation of another’s value – closely track parasitism⁵⁰⁶.

3.1.3.3. Transposition to generations “in the manner of”

⁵⁰⁰ On the “singular universe” as an economic value, J. Larrieu, cited above; on the “own universe” of a fashion house, M. Malaurie-Vignal, “Parasitisme: reconnaissance de l’univers propre de deux collections d’un grand couturier” [Parasitism: Recognition of the Distinct Universe of Two Collections by a Major Couturier], *Contrats, conc. consom.*, February 2020, comm. 21.

⁵⁰¹ See above, this Part, §3.1.1.

⁵⁰² See above, this Part, §2.3.1.

⁵⁰³ “It is indeed the parasite’s conduct that is sanctioned, not some tangible or intangible asset that is protected”: *La faute de parasitisme: vers des conditions plus restrictives*, cited above, p. 109 (conclusion).

⁵⁰⁴ M.-L. Izorche, “Concurrence déloyale et parasitisme économique” [Unfair Competition and Economic Parasitism], in *La concurrence déloyale* [Unfair Competition], Y. Serra (ed.), Dalloz, 2001, p. 27.

⁵⁰⁵ See below, §3.1.3.4.

⁵⁰⁶ D. Friedmann, “Signature-Style,” cited above.

The test. The most recent judgment provides the key here. In the “Radiomir” and “Augarde” watches case⁵⁰⁷, the Commercial Chamber held that the low-cost, mass-market imitation of a product with strong individualised economic value does not escape parasitism. Two findings are transposable. First, the claim “may be brought outside any relationship of competition”⁵⁰⁸. Second, a difference in customer base and price (the imitating watch was offered at 149 euros against 5,000 euros for the imitated model) is not a valid ground for excluding parasitism⁵⁰⁹. This is exactly the configuration of AI-generated content “in the manner of”: a widespread, cheap imitation of a creator’s identity, regardless of whether it targets the same audience or a different one, since, as just shown, that difference cannot rule out parasitism.

Intent. The phrasing “in the manner of X” and, even more so, promotional material touting the resemblance, characterises the intent to free-ride or to place oneself in the artist’s wake⁵¹⁰.

Contemporaneity. The artist’s economic value must still be current as of the relevant facts: reputation and investment cannot be inferred from mere longevity or past success alone⁵¹¹.

Transatlantic convergence. The phenomenon is international. In the United States, the harm known as dilution – suffered by an artist whose authentic works become “drowned out” beneath images generated “in the manner of” them – has been linked not to copyright, but to the right of publicity and trademark law⁵¹². Here again we find the same shift: a grievance rooted in style is addressed outside copyright, even if through other instruments.

The safeguard. This path is open only to a real, invested-in, identifiable identity. A generation “in the manner of the impressionist movement,” or the taking of a commonplace, does not reach the threshold of individualised economic value⁵¹³, which extends the safeguard against

⁵⁰⁷ Cass. com., 18 March 2026, cited above: the company Tism was marketing an “Augarde” watch imitating the “Radiomir” watch (sold since 1938), whose individualised economic value, the fruit of know-how and investment, had been established by the lower courts (§18).

⁵⁰⁸ Ibid., §§17 and 25 (the formula placed at the head of the judgment).

⁵⁰⁹ Ibid., §§24–25: the fact that the two watches were aimed at different customer bases (€149 versus €5,000) was held to be “insufficient” to rule out the intention of free-riding.

⁵¹⁰ On intent inferred from the circumstances of marketing, study cited above, p. 100 (Cass. com., 9 June 2015, No. 14-11.242: non-coincidental taking); in the case under discussion, the judgment faults the Court of Appeal for failing to examine whether the imitator had engaged in “targeted communication touting the resemblance” (Cass. com., 18 March 2026, cited above, §20(8)).

⁵¹¹ *La faute de parasitisme: vers des conditions plus restrictives*, cited above, p. 99 (the temporality and currency of the economic value); know-how and effort “cannot be inferred from the mere longevity and commercial success of the product”: Cass. com., 5 July 2016, No. 14-10.108, Bull. 2016, IV, No. 101.

⁵¹² P. Samuelson, C. J. Sprigman, and M. Sag, comments submitted to the U.S. Copyright Office, cited above, p. 37 (the case of the artist Greg Rutkowski, whose authentic works are being crowded out by images generated “in the style of Rutkowski”; referring to the right of publicity and trademark).

⁵¹³ On the exclusion of ideas, genres, fashion trends, and banality, study cited above, pp. 93–94.

the “pitfalls of merit”⁵¹⁴ and aligns both with the exclusion of style-as-technique and style-as-movement⁵¹⁵ and with the treatment of synthetic content⁵¹⁶.

3.1.3.4. Autonomy and subsidiarity

Autonomy. Parasitism and infringement arise from different causes. The latter penalises the infringement of an exclusive right, the former a fault (Article 1240)⁵¹⁷. The two claims are thus autonomous.

Substantive subsidiarity. A parasitism claim may be based on facts materially identical to those of an infringement claim rejected for lack of an exclusive right, provided that wrongful conduct is established⁵¹⁸; otherwise, subsidiarity would be deprived of practical effect, and a claimant acting in good faith whose right is ultimately found invalid would be left without any protection. This is the regulatory function of parasitism, of which the *Champagne* case offers the classic illustration⁵¹⁹.

Procedural subsidiarity. The Commercial Chamber draws a procedural consequence from this. A parasitism claim based on the same facts as an infringement claim rejected for lack of an exclusive right “pursues the same ends” within the meaning of Article 565 of the Code of Civil Procedure, and may therefore be raised for the first time on appeal⁵²⁰.

A clarification. These “same ends” refer solely to admissibility. They contradict neither the independence on the merits of the two claims, nor the prohibition on pursuing them simultaneously, as principal claims, on the same facts—a prohibition that presupposes distinct facts⁵²¹. Since the facts are then distinct, the question of double recovery for the same harm does not arise.

⁵¹⁴ See above, this Part, §3.1.2.6.

⁵¹⁵ See above, this Part, §3.1.2.1.

⁵¹⁶ See above, this Part, §2.3.1.

⁵¹⁷ Cass. com., 18 March 2026, cited above, §8; study cited above, pp. 106–107.

⁵¹⁸ Cass. com., 18 March 2026, cited above, §10.

⁵¹⁹ CA Paris, 15 December 1993, *Champagne v Yves Saint Laurent, D.* 1994, p. 145, note Ph. Le Tourneau.

⁵²⁰ Cass. com., 18 March 2026, cited above, §§11–13: “it now appears [...] necessary to hold that, where they rest on the same facts, an infringement claim and a claim [...] founded on parasitism pursue the same ends [...], such that a party who brought an infringement claim at first instance that was dismissed for lack of an exclusive right is entitled to bring, for the first time on appeal, a claim [...] founded on parasitism” (a departure from Cass. com., 22 September 1983, cited above).

⁵²¹ *Ibid.*, §9: an infringement claim and a claim for unfair competition or parasitism “may be pursued simultaneously as principal claims only where the existence of a fault arising from distinct facts [...] is established”.

The fallback. What remains, when the output is presented or perceived as an authentic work by the author, is the ground of risk of confusion, which opens the door to consumer protection and personality rights.

3.2. External infringements

From the ground of appropriation to the ground of deception. The avenues examined so far – infringement and parasitism⁵²² – share a common logic. They penalise the appropriation of a protected value, whether the expressive elements of a work or the economic identity of a creator. But the output can give rise to a grievance of a different nature, unrelated to such appropriation—that of deception as to the authenticity of the content, when a synthetic production presents itself as real. This grievance calls for avenues of protection external to copyright, which no longer concern the characterization or protection of the output – the subject of this task force – but rather the protection of individuals and the public against inauthenticity, an issue entrusted to a separate task force of the CSPLA⁵²³. For this reason, this report merely specifies the issues involved, while making clear the boundary separating them from its own subject.

Protection of the user. The first issue concerns the public exposed to content it takes to be authentic. The risk here is not value capture, but confusion: the user is deceived as to the nature or origin of what they consume. Copyright, which protects expression and not the truthfulness of what is depicted, is by construction ineffective here. Protection is instead to be sought on the side of consumer law and unfair commercial practices, reinforced by the transparency and labelling obligations of the AI Act⁵²⁴, which require disclosure of the artificial nature of content.

The deceived purchaser. On contractual grounds, a person who has acquired a synthetic output believing it to be authentic, or even believing it to be the work of a specific author, may, as the case may be, seek annulment of the sale. Authenticity – or the human origin of the content – constitutes an essential quality of the performance within the meaning of Article 1133 of the Civil Code. An error bearing on it, unless inexcusable, is grounds for annulment (Article 1132), and fraud by a seller who concealed it vitiates consent in any event (Articles 1137 and 1139). The limit is the one developed by case law regarding the authenticity of works of art:

⁵²² See above, this Part, §3.1.

⁵²³ *Mission relative aux enjeux pour les secteurs culturels et créatifs des hypertrucages générés ou manipulés par l'intelligence artificielle* [Task Force on the Challenges Posed for the Cultural and Creative Sectors by Deepfakes Generated or Manipulated Using Artificial Intelligence], entrusted to Professors Célia Zolynski and Joelle Farchy (CSPLA, mission letter of 20 June 2025).

⁵²⁴ Regulation (EU) 2024/1689 of 13 June 2024, art. 50 (transparency and labelling obligations for generated or manipulated content).

acceptance of uncertainty as to origin excludes error (Article 1133, para. 3), an extension, in the field of sale, of the distinction between chosen and endured uncertainty⁵²⁵.

Protection of the person depicted. The next issue concerns the person whose appearance or voice the output reproduces. The infringement here does not concern a work, but rather identity, as manifested in image, voice, or name, and, where a performer is involved, in their performance. Voice actors, in particular, find their spoken performances extended or duplicated by synthetic voices. This falls under personality rights and the related rights of performers, without prejudice to a possible criminal dimension⁵²⁶; it is distinct from the question of the protectability of the output, which is the concern of this report.

Unfair competition through confusion. Finally, on economic grounds, when the output is presented or perceived as an authentic work or performance of a third party, the grievance is no longer that of value capture, which parasitism addresses without confusion, but the risk of confusion itself, which underlies unfair competition by imitation. This is the aspect that the examination of parasitism expressly set aside.

The broader field of competition law. An entirely different register is that of the law of anticompetitive practices, especially those related to cartels and abuse of dominant position⁵²⁷. The question here is no longer about protecting an individual or a competitor against a given piece of content, but rather about ensuring the competitive functioning of generative AI markets (dominance of model providers, access to inputs and computing capacity). This field, which could in itself warrant a separate study, falls outside the scope of this inquiry and belongs to the competition authorities, which have already been seized of the matter⁵²⁸.

⁵²⁵ On this distinction, see above, Part 1, §3.2. In relation to works of art, authenticity is a substantial quality, error as to which vitiates consent (Cass. 1re civ., 22 February 1978, No. 76-11.551, *Poussin: D.* 1978, p. 601, note Ph. Malinvaud; JCP 1978.II.18925; *RTD civ.* 1979.126, obs. Loussouarn), whereas acceptance of uncertainty as to authenticity excludes such vitiation (Cass. 1re civ., 24 March 1987, No. 85-15.736, *Le Verrou de Fragonard: D.* 1987, p. 489, note J.-L. Aubert; *Gaz. Pal.* 12–13 March 1987.2, obs. Piedelièvre; JCP 1989.II.21300, obs. Vieville Miravete; *RTD civ.* 1987, p. 743, obs. J. Mestre) (judgments rendered under former art. 1110, the substance of which was carried over by the Ordinance of 10 February 2016). Decree No. 81-255 of 3 March 1981 (the “Marcus Decree”) grades the guarantee of authenticity according to the terminology used: “by”/“of” (art. 3) and “attributed to” (art. 4) guarantee the identity of the author to varying degrees, whereas “in the manner of,” “in the fashion of,” “in the style of,” or “after” confer no such guarantee at all (art. 7).

⁵²⁶ Protection by neighbouring rights presupposes a protected performance: where the system is trained on a recording that does not qualify as such, the artist is left without this basis, even though it is precisely their renown as a performer that is being sought. Hence a claim, advanced *de lege ferenda* by performing artists, in favour of a more intellectual conception of performance, one that would detach its subject matter from the merely fixed performance so as to capture the vocal or physical characteristics specific to the artist.

⁵²⁷ Arts. 101 and 102 TFEU; arts. L. 420-1 and L. 420-2 of the Commercial Code. See Autorité de la concurrence, Opinion No. 24-A-05 of 28 June 2024, on the competitive functioning of the generative AI sector.

⁵²⁸ The task force thanks Professor Frédéric Marty for the rich exchanges on this subject.

The difficulties. These avenues, which this report merely flags, share difficulties that must be borne in mind. The first is drawing the boundary between combating deception and freedom of expression as well as artistic freedom. The AI Act itself carves out an exception for deepfakes that form part of a work that is “manifestly artistic, creative, satirical, fictional or analogous,”⁵²⁹ such that the entire analysis turns on the extent of what remains protected as creation. The second concerns the relationship between transparency and labelling obligations and proof, labelling being neither necessary nor sufficient to establish an infringement⁵³⁰. The third is the attribution of liability among the model provider, the deployer, and the platform. Opacity will no doubt have consequences here as well.

Cross-reference. These issues of deceptive authenticity and protection of individuals fall within the scope of the task force on AI-generated or manipulated deepfakes, entrusted to Professors Célia Zolynski and Joëlle Farchy (mission letter cited above), to which this report refers, subject to the scope adopted by the co-chairs.

The competitive functioning of markets, for its part, falls to the competition authorities, which the work of the CSPLA is also intended to inform.

⁵²⁹ Regulation (EU) 2024/1689, art. 50(4) (cases where the content forms part of a work or programme that is “evidently artistic, creative, satirical, fictional or analogous”).

⁵³⁰ See above, this Part, §1.3.3.

ANNEXES

Mission letter



Conseil supérieur de la propriété littéraire et artistique

Paris, le 12 0 JUIN 2025

Madame Alexandra BENSAMOUN
Professeure des universités

OBIET : Mission relative à la protection des contenus générés avec le recours à l'IA générative

Madame la Professeure, *Chère Alexandra,*

Le développement des outils d'intelligence artificielle générative, capables de produire rapidement, efficacement et à moindre coût des contenus susceptibles d'entrer en concurrence directe avec les contenus créés par des humains, constitue un facteur de transformation profonde de la création, notamment dans les domaines des arts et des médias. Ces outils sont par ailleurs de plus en plus souvent utilisés par les auteurs eux-mêmes et intégrés dans la phase de création.

Cette évolution constitue un défi pour le droit d'auteur, en particulier sur la question majeure du critère de protection, qui touche au fondement de la matière. Lorsque les outils d'IA se substituent, en tout ou partie, à l'humain dans l'acte de création se pose en effet la question du statut juridique de l'extrait (dit « output »).

Si le droit d'auteur a vocation à protéger les extraits qui pourraient être qualifiés d'œuvres, une telle protection est soumise à ce que soient remplis les critères juridiques applicables. L'œuvre de l'esprit étant une création de forme originale, il importe de vérifier si et comment, la personne qui utilise l'IA a pu exprimer sa personnalité dans la création.

Dans le prolongement de votre précédent rapport sur les enjeux juridiques et économiques de l'intelligence artificielle dans les secteurs de la création culturelle, présenté au Conseil supérieur en novembre 2019, je souhaite vous confier une nouvelle mission qui réinterrogera la lecture des critères tenant aux conditions d'accès à la protection (création, originalité, auteur), tels qu'interprétés par les juridictions françaises et la Cour de justice de l'Union européenne. Le développement du recours à la technologie impose en effet de se pencher sur l'application de ces conditions, à l'heure où la question se pose de se saisir de l'IA pour les créateurs du monde entier.

S'agissant des extraits synthétiques, la mission examinera la question de la pertinence de leur éventuelle protection par un régime d'appropriation privative spécifique, qui permettrait d'adapter les règles sans fragiliser le droit d'auteur.

En complément de ces interrogations, la mission traitera des enjeux de concurrence entre extraits synthétiques et créations humaines. La frontière entre ces deux catégories pouvant se révéler très ténue, il importe d'évaluer les moyens juridiques qui peuvent permettre de limiter les effets négatifs de cette concurrence (action en contrefaçon, concurrence déloyale, parasitisme, etc.).

Dans son analyse, la mission prendra appui sur les jurisprudences qui ont pu déjà avoir l'occasion de se prononcer sur la qualification des productions de l'IA. Elle prendra également en considération les réflexions menées dans d'autres Etats, en particulier aux Etats-Unis où le Copyright Office des Etats Unis a publié en janvier 2025 la seconde partie de son étude approfondie sur l'intelligence artificielle et le droit d'auteur, consacrée aux conditions de protection des contenus générés par l'IA.

Les travaux engagés au niveau international et européen, notamment par l'Organisation mondiale de la propriété intellectuelle (OMPI) ou la Commission européenne, seront également l'objet d'une attention particulière.

Pour mener cette mission, vous serez assisté d'une rapporteure, Julie Groffe-Charrier, Maître de conférences à l'Université de Paris-Saclay. Vous pourrez également vous appuyer sur les directions du ministère de la culture, et en particulier le Secrétariat général (service des affaires juridiques et internationales). Vous procéderez aux auditions des membres du CSPLA ainsi que des entités et personnalités dont vous jugerez les contributions utiles.

Il serait souhaitable que le rapport final issu de vos travaux puisse être présenté lors de la séance plénière du CSPLA de juin 2026.

Je vous remercie d'avoir accepté cette mission et vous prie de croire, Madame la Professeure, à l'expression de ma meilleure considération.

Bien cordialement,

Jean-Philippe MOCHON
Président du CSPLA

Paris, 20 June 2025

Madame Alexandra BENSAMOUN
University Professor

RE: Task force concerning the protection of content generated with the use of generative AI

Dear Professor,

The development of generative artificial intelligence tools, capable of producing content likely to compete directly with content created by humans quickly, efficiently and at lower cost, constitutes a profound factor of transformation for creation, particularly in the arts and media sectors. These tools are, moreover, increasingly used by authors themselves and integrated into the creative process.

This development poses a challenge for copyright law, in particular on the major question of the criterion for protection, which goes to the very foundation of the subject matter. Where AI tools are substituted, in whole or in part, for the human in the act of creation, the question arises of the legal status of the output.

While copyright law is intended to protect outputs that might be characterised as works, such protection is subject to the fulfilment of the applicable legal criteria. Since a work of the mind is an original creation of form, it is important to verify whether, and how, the person using the AI was able to express their personality in the creation.

Further to your previous report on the legal and economic issues raised by artificial intelligence in the cultural creation sectors, presented to the Higher Council in November 2019, I wish to entrust you with a new mission which will re-examine the reading of the criteria governing conditions of access to protection (creation, originality, authorship), as interpreted by the French courts and the Court of Justice of the European Union. The growing use of the technology requires close examination of the application of these conditions, at a time when the question arises of AI's availability to creators the world over.

As regards synthetic productions, the mission will examine the question of the relevance of their possible protection by a specific regime of private appropriation, which would allow the rules to be adapted without weakening copyright law.

In addition to these questions, the mission will address issues of competition between synthetic productions and human creations. As the boundary between these two categories may prove tenuous, it is important to assess the legal means that may make it possible to limit the adverse effects of this competition (infringement action, unfair competition, parasitism, etc.).

In its analysis, the task force will draw on such case law as may already have had occasion to rule on the characterisation of AI productions. It will also take into consideration the thinking pursued in other States, in particular the United States, where the US Copyright Office published, in January 2025, the second part of its in-depth study on artificial intelligence and copyright, devoted to the conditions for the protection of AI-generated content.

Work under way at international and European level, notably by the World Intellectual Property Organization (WIPO) or the European Commission, will also receive particular attention.

To carry out this mission, you will be assisted by a rapporteur, Julie Groffe-Charrier, Associate Professor at the University of Paris-Saclay. You may also call on the support of the Ministry of Culture's directorates, in particular the Secretariat-General (Legal and International Affairs Department). You will consult CSPLA members as well as such entities and individuals whose contributions you consider useful.

It would be desirable for the final report resulting from your work to be presented at the CSPLA plenary session in June 2026.

I thank you for having accepted this mission and remain, Professor, yours sincerely,

Jean-Philippe MOCHON
President of the CSPLA]

Questionnaire

President: Alexandra Bensamoun

Rapporteur: Julie Groffe-Charrier

The objective of the Task Force on the protection of content created using generative artificial intelligence (GenAI) is twofold. The first focus will be on analysing the object itself. The second will analyse the object's relationship to its environment.

Firstly, this involves examining the creation by GenAI. This first axis leads, on one hand, to reflecting on characterisation, which implies (re)reading the criteria for access to copyright protection in light of the issues raised by GenAI, and on the other hand, examining the appropriateness and, where applicable, the possibilities for parallel protection for synthetic outputs that cannot claim copyright protection.

Secondly, synthetic production must be assessed in its relationship to objects or persons, in terms of liability. In this respect, it may infringe upon other rights – copyright, related rights, but also personality rights, personal data protection rights. Certain generations also appear parasitic. Finally, a competition law approach can be considered, likely in a prospective manner.

The purpose of this preliminary questionnaire is to gather the various viewpoints of the concerned structures and entities. The questions are divided into four sections (activity, copyright, other rights, perspectives). It is not mandatory to answer all questions.

I. GenAI and Your Activity

1. Identify your organization and the nature of its activity or the segment of its activity concerned by this mission.
2. How is artificial intelligence used in your sector to produce content?
3. Do you still rely on humans to create, or have you replaced certain creative tasks with AI? How have creative professions evolved with the development of generative AI?
4. At which stages of AI content generation does human intervention occur? What are the parameters of this intervention?

5. Have you ever faced the need to protect synthetic content (AI-generated) that you would exploit? Under what circumstances?
6. Do you have figures to share with the mission regarding synthetic content (volume, impact on remuneration, your professions, your sectors, etc.)?

II. GenAI and Copyright

7. Do you think synthetic content should be protected by copyright? By a special right? Which one?
8. If copyright should not cover synthetic content, does this exclusion also apply to related rights?
9. Is the presence of a natural person as author, in your view, an absolute rule in copyright law?
10. How would you characterise the originality of an AI-assisted creation? What could be the criteria for this originality? How and where to identify it?
11. Can synthetic content be infringing? Under what conditions? Do you think Article 53(1)(c) of the AI Regulation (obligation to comply with copyright) also requires downstream compliance?
12. Can the use of an AI system constitute an act of communication to the public? How?

III. GenAI and Other Rights (Personality Rights, Data Protection Law, Competition Law...)

13. Do you think that synthetic or AI-assisted content that uses a person's voice or image could be effectively challenged? Is current positive law sufficient? What would be your suggestions?
14. Can synthetic content be parasitic? Under what conditions? What about content "in the style of"?

15. Could there be competitive harm in using synthetic content without licensing upstream rights? Could there be distortion between two actors, one respecting the law, the other not? What would be useful mechanisms in your view (existing and prospective)?

16. Could placing an AI-generated product in commercial circulation without informing the public constitute a breach of consumer law, contract law, vis-à-vis the public? How to articulate this with Article 50 of the AI Regulation?

17. Do you think economic actors (including platforms) that offer synthetic content should be involved in organizing the coexistence between human content and synthetic content? Do you see the dilution of human content as a systemic risk within the meaning of the AI Regulation or the DSA? With what consequences?

18. In a B2B relationship concerning human content, can the provision of synthetic content sometimes constitute a contractual breach (good faith performance...)? Under what conditions?

IV. GenAI: Other Times, Other Places

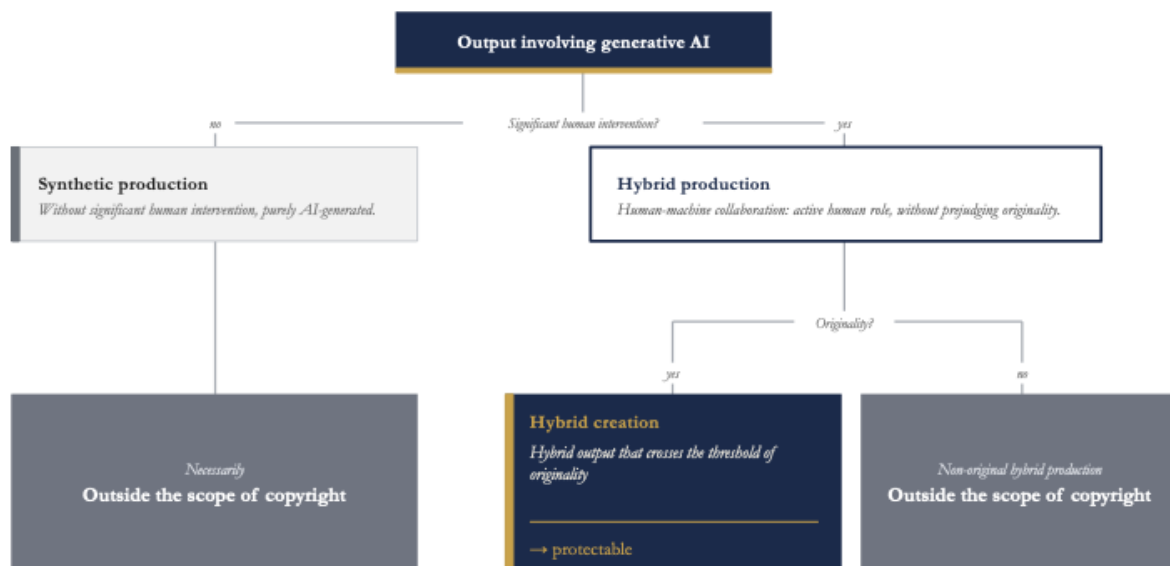
19. What GenAI-related challenges do you identify regarding the future of creativity, cultural diversity and/or information pluralism?

20. Would you like to bring to the mission's attention applicable solutions (in literary and artistic property or in other branches) in other legal systems, both in legislation and case law?

Figures, tables, diagrams

Productions using AI – adopted vocabulary

See Part One, introduction



Originality assessment grid – seats and counter-indicia

See Part One, §3.4.2

Phase (Painer)	Seats (positive indicia)	Counter-indicia (corresponding negatives)
Upstream	An artistic project predating generation, documented and identifiable, translated into concrete choices; specificity and precision of the prompt or series of prompts, going beyond a mere “brief,” reflected in the expressive elements of the result ⁵³¹	Genericness of the prompt or absence of specific parameterisation, revealing that the bulk of expressive choices were left to the system ⁵³²
During generation	Creative iteration, understood not as the mere repetition of general commands, but as a process of direction during which the user’s choices progressively shape the result	Relaunching general instructions without creative inflection; selection among divergent results returned by the machine independently of any effective control by the creator ⁵³³
Downstream	Substantial modifications, edits, or adjustments made to the raw result; integration of the generated content into a larger whole (composition, narrative, composite work) with an original architecture	Absence of any post-generation intervention (adoption of the first result without selection, editing, or integration) ⁵³⁴ ; purely artisanal nature of the intervention, not reflecting a creative personality ⁵³⁵
Cross-cutting criteria	Trace in the object: the creative choices invoked must be identifiable in the result itself, and not only in the account of the process ⁵³⁶	Interchangeability of the user: the expressive characteristics of the output do not depend on the personal choices of the commissioning party, but on the probabilistic computation

⁵³¹ On the “upstream” seat, see in particular OLG Düsseldorf, cited above (“sufficiently individual presets in programming the generation process,” see above, Part 1, §2.3); J. C. Ginsburg, “Humanist Copyright,” cited above, p. 158, positing the “Sir Toby Belch test”; the Japanese *General Understanding on AI and Copyright*, which treats “the quantity and content of the instructions given by the user” as the first assessment factor (see above, Part 1, §3.1).

⁵³² AG München, cited above, paras. 25–27; USCO, *Copyright and Artificial Intelligence, Part 2: Copyrightability*, January 2025, pp. 18–19.

⁵³³ See P. Cámara Águila, *Revista CESCO*, cited above, pp. 124–128, on the experience of iterative generation with Gemini (“rolling the dice” [*tirando los dados*]).

⁵³⁴ AG München, cited above, para. 27; Zhangjiagang Court, cited above.

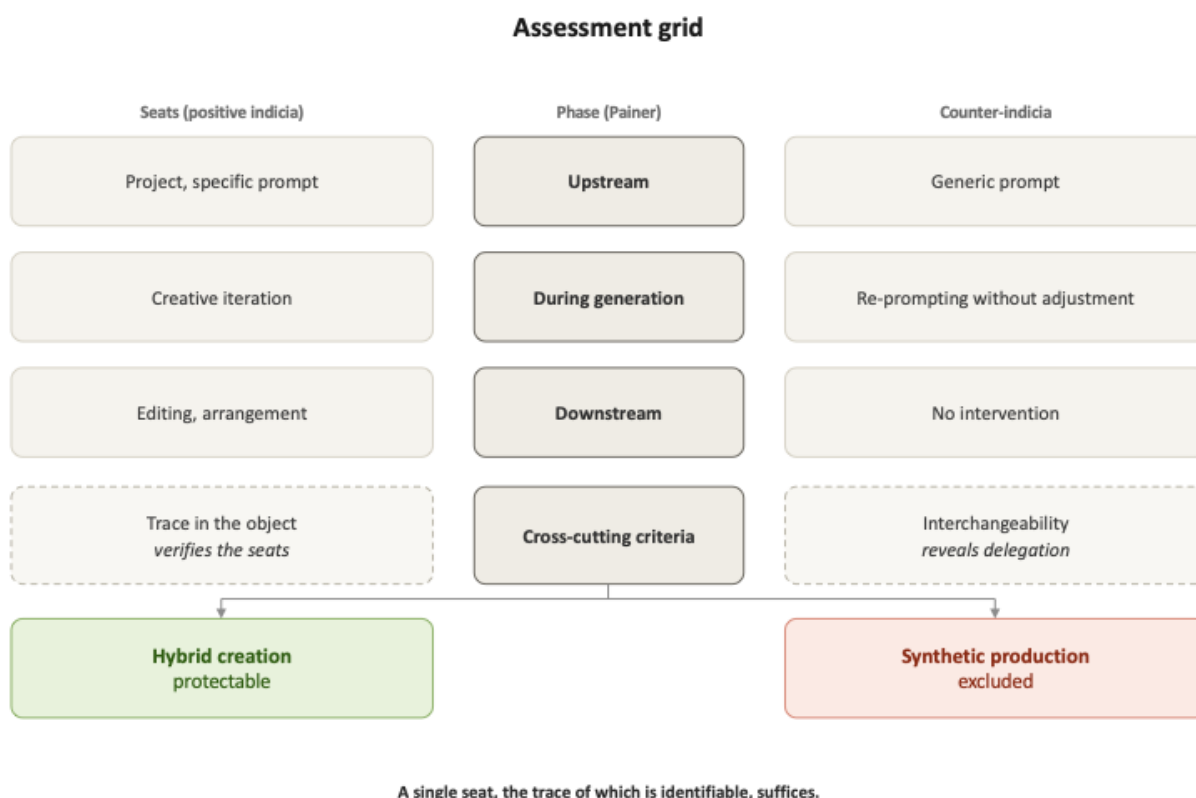
⁵³⁵ Ibid., para. 22.

⁵³⁶ CJEU, *Mio/Konektra*, cited above, para. 67.

Phase (Painer)	Seats (positive indicia)	Counter-indicia (corresponding negatives)
		of the model, such that any user placed in the same position, with equally generic instructions, would obtain a result with undifferentiated expressive characteristics. What is at issue is not the exact reproducibility of the result, which is technically impossible, but rather the interchangeability of the user ⁵³⁷

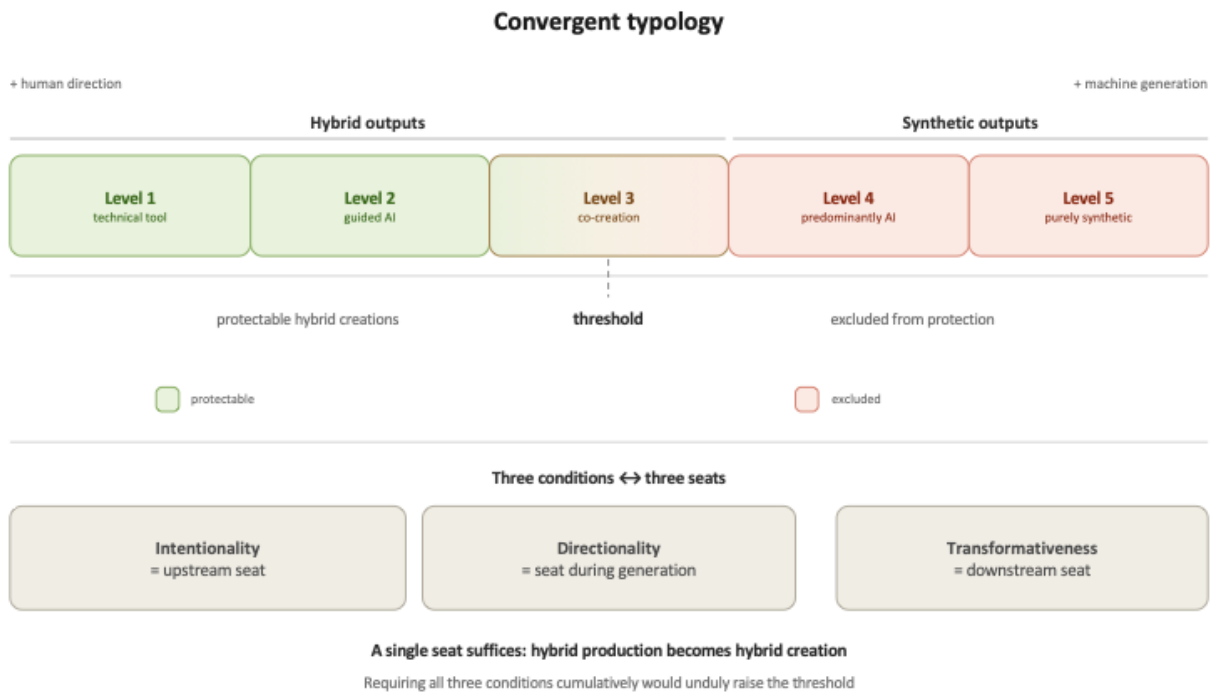
Diagram of the originality assessment grid

See Part One, §3.4.2



⁵³⁷ J. C. Ginsburg, “Humanist Copyright,” cited above, p. 158 (“if their prompts produce myriad uncontrolled outputs, she cannot claim authorship of any of them”). This report transposes this criterion into terms of the interchangeability of the user, rather than the strict reproducibility of the result—a reproducibility that the stochastic nature of these systems in any event renders technically impossible (see above, Part 1, §1.2 and 3.3).

See Part One, §3.4.3



List of interlocutors for the legal task force – persons interviewed, contributors or respondents to the questionnaire

Alexandra Bensamoun and Julie Groffe-Charrier thank all participating interlocutors for these rich and constructive exchanges.

ADAGP	KeeeX
ADAMI	Label 4 ai
Adobe	Light house studio
AFUL	Ligue des auteurs professionnels
Alliance France Design	Marty (Fr.)
ATLF	Momentum Lab
ATAA	Prisma
Atos	Procirep
CAAP	Radio France
Cabinet Firsh	SACD
Cafeyn	Sacem
Cámara Águila (P.)	SCPP
Cepic	SNAC
Communia	SNE
Depaepe (Th.)	SNEP
En chair et en os	SPEDDIDAM
Eurocinema	SPIIL
GF2I	SPPF
Ginsburg (J. C.)	SPRé
Google	Union des photographes professionnels
Guilde française des scénaristes	UPFI
IA'm	
IFPI	