Artificial Intelligence and Copyright

contributions to the regulatory debate in Brazil

EXECUTIVE SUMMARY

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COORDINATION

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EXECUTIVE SUMMARY

1. The main goal of this study is to analyze and present the central elements reflected in the provisions on copyright and related rights in the version of Bill 2338/2023 of 4 July 2024, the 'Rapporteur's vote supplement'. The aim is to contribute to the public debate about copyright in the legislation on artificial intelligence (AI) systems. Throughout the research, we seek to explore the potential regulatory impacts on agents and the ecosystem of cultural production and innovation.

2. It is our understanding that the regulation of AI and copyright must, in this context, seek a legislative environment that promotes, at the same time, (i) the personal protection and remuneration of authors and artists; (ii) a positive and open environment for research activities and exercise of research rights, and (iii) the development and broader application and use of technological innovations, including through AI systems.

3. Initially centered solely on the legal conformation of text and data mining (TDM) for training and development of AI systems, new issues have been introduced in later versions of the Bill, which substantially change the content and scope of the regulation. Based on the 'Rapporteur's vote supplement,' we highlight the following issues as particularly relevant: (i) transparency and information on the use of protected works in system training (art. 60); (ii) right to research and copyright limitation for text and data mining purposes (art. 61); (iii) possibility of opt-out (art. 62); (iv) remuneration for copyright holders (art. 64); (v) protection of image and voice (art. 66); and (vi) regulatory competence (art. 65).

4. On closer examination, it can be perceived that, in general, the proposal to regulate copyright in Bill 2338/23 seems to have noble objectives: enhancing remuneration for authors and artists, protection of research, and promotion of innovation. However, as it stands, it still doesn't really fulfill any of these promises. Therefore, it can and should be improved, not least to guarantee its full capacity to shape the relationships and reality it seeks to figure.

5. Among the aspects that we believe need to be refined, in addition to harmonizing and better systematizing terms and concepts, we highlight the need to distinguish more precisely the various situations to be affected by the proposed legislative commands, such as (i) differentiating authors and artists from intermediaries that often hold the economic rights in their works, both as qualified subjects for the exercise of rights and as privileged recipients of any remuneration; (ii) distinguishing research activities in general from those centered on the development of AI systems, especially regarding the conditions for using TDM, which are essential for any data-intensive research; (iii) separating the development of AI systems in general from the development of generative AI systems. This is because the specificities of each of these situations bring along the need for regulation to be suited to their particularities, or, by treating different things in the same way, risk causing injustices, increasing resistance to their commands, and jeopardizing their effectiveness and the very objectives of the legislation.

6. The study also identified some risks and potential negative impacts that can be avoided. For example, authors and artists, whose well-founded fears about the future of their professional activities are hoped to be addressed, may not be effectively and equitably remunerated. Data-intensive research, even when not linked to the development of AI systems, could be hampered by the restrictive conditions for the use of TDM techniques. Furthermore, the development of national AI systems, even and especially those that are not generative, could be slowed down by the increase in requirements and high barriers for entry in the market, which has so far been dominated by a few large companies, invariably foreign ones.

7. Internationally, in foreign jurisdictions, there are various initiatives aimed at regulating the issue. Although these movements have different dynamics and procedures, which vary according to local practices and their respective legal systems, they mostly share common concerns about the impact of AI on copyright and the role of copyright in this new technological reality. However, the aim here is not to develop comparative studies, nor is there any suggestion of mere normative transpositions, but solely to illustrate some aspects that have been the subject of relevant debates and that may help in understanding the issues proposed here in Brazil.

8. The provisions in Bill 2338/23 deal with research from various angles in different parts. Some of the issues involving research activities concern: (i) (non-)application of the rules to certain research activities (art. 1, §1, c); (ii) principles, foundations, and promotion of research (art. 2, X; art. 57, II and III); (iii) access to data for research (art. 48, IX); (iv) data and text mining (art. 4, XIII; art. 61); and (v) differentiated treatment of open and free standards and formats (art. 1, §2). However, at the same time, we see some points of imprecision, contradiction, or vagueness that need to be improved for better systematization, such as the meaning and relevance of the distinctions between 'non-economic purpose,' 'commercial purpose,' 'profit-making purposes' and 'put into circulation on the market.'

9. The exercise, activities, and benefits of research go back much further than the development and provision of AI systems. The protection of the exercise and activities of research and access to its results and benefits are provided for in various provisions of Human Rights Treaties, including regional ones, and are covered by the Brazilian Constitution. Therefore, in the case of research in particular, it is extremely important to distinguish, and regulate differently, between (i) *research in general*, without any direct relation to AI systems; (ii) *research with AI*, which only uses AI systems as instruments to achieve its goals; (iii) *research on AI*, which is related to the ongoing development of the field of Computer Science and others; and (iv) *research on AI systems*, which is essential to address problematic issues that are inherent to the development, training and use of these systems. One of the negative results of treating these different situations equally is that, for example, because of the 'lawful access' requirement (art. 61, I), data-intensive computerized research that requires the use of text and data mining techniques could be emptied, hindered or even prevented, even when the aim is not to develop AI systems, generative or otherwise.

10. The recent public availability of Generative AI systems, whose results are texts, sounds, and images, whether static or moving, and which may substitute for the use of creative works, immediately caused considerable and just concern among authors, artists, and other cultural workers, essentially in respect of its effects on their professional activity, income, and living conditions. The Brazilian Constitution, the Human Rights Treaties, and the thematic Copyright

Treaties protect their creations and interpretations against unauthorized use and violations of reserved rights. Authors and artists, as individuals, are the only recipients of the differentiated protection granted under fundamental rights. This privileged position in the legal system is not extended to business companies, even if they are or become copyright holders of any protected works and artistic interpretations, because the object of fundamental rights is the protection of the human person, in all its dimensions.

11. There are substantial differences between the actual authors and artists, who are the natural persons who are the original owners, and the corporate owners, regardless of whether they are original rightsholders, such as phonogram producers and broadcasters, or whether they are assignees or licensees. There is no denying the differences in negotiating capacity and economic power between the former and the latter, who are not on an equal footing when it comes to deliberating on contractual terms. Because of this condition of vulnerability vis-à-vis business owners, the law, as it does in other situations, establishes some rules that seek to favor authors and artists contractually, and offers some instruments for contractual review and termination. However, these solutions have, in several jurisdictions, proved ineffective in realizing their promises, either due to prohibitive costs, jurisdictional time, or well-founded fears of retaliation.

12. By establishing a duty to remunerate (art. 64), the bill only separates copyright and related rights holders from AI agents and fails to respect and contemplate the above-mentioned distinctions. By not differentiating between them as beneficiaries of rights and recipients of remuneration, it seems to want to assume that protection for rightsholders will result in fair remuneration for authors and artists. The practical consequences of not having different conditions for authors and artists, as individuals, are serious, especially concerning contracting and remuneration. Equating the contractual positions of categories with different negotiating conditions is tantamount to formalizing and consolidating the subjection of the vulnerable party (individual authors and artists) to the dictates of economic powers. Failing to legislatively guarantee that any remuneration that may be instituted must be substantially received by authors and artists means taking this possibility away from them, deceiving them in their claim, and

frustrating their hopes. The same considerations apply to the use of voice and image in the development of AI systems, whether by corporate holders of copyright and related rights (targets of the strikes by US screenwriters and actors) or technology companies.

13. Still on the subject of the right to be paid and the duty to pay, which are central to the proposal, other aspects, apart from the specific protection of authors and artists, need to be better clarified. Spelling out more precisely who should pay how much to whom, when, where, and how seem to us to be questions that it is not advisable to omit from legislation, not least because of the potential effects of the resulting uncertainties, which remain even in the face of generic criteria for future regulation. As it stands, it seems to indicate that, when developed for commercial purposes, any AI system, regardless of whether generative or not, the size of the company, the actual operation, turnover, or commercial success, would depend on prior authorization and will have to pay for the use of protected works in the training of these systems. The possible impact of this condition is that, due to the high costs imposed, it will require greater investment and potentially discourage innovation and the development of desired national AI systems. Furthermore, by strengthening the position of corporate copyright holders, not distinguishing between the different sizes of AI agents, together with the obligation of authorization and remuneration, the Bill is potentially driving the conclusion of agreements between large technology and copyright companies, which are invariably transnational, originating or based in foreign countries and jurisdictions, the benefits of which are unlikely to be reversed to meet national demands.

14. Copyright is not averse to new technologies. Its history is intrinsically linked to technological development. At each stage, revisions, adjustments, and adaptations to the existing organization and legal structure are necessary, ideally preceded by wide-ranging and informed debates. The social advance of technologies generically referred to as AI systems, especially Generative AI, due to the lack of knowledge and fears about their effects, requires a marked effort, not least because of the persistent inadequacy of copyright regulation in the digital environment.

15. The proposal establishes rights such as transparency, opt-outs, remuneration, and text and data mining. However, the establishment and design of new rights and duties must at least take into account the particularities of each scenario, the situation and position of the agents, and the effects of the various regulatory possibilities. Thus, it seems essential for better and effective regulation to discriminate, for example, between authors and artists and business owners; AI systems in general and Generative AI; research in general, research with AI, research on AI, and research on AI systems; public or private agents; for-profit or not-for-profit; small, medium or large; etc. In this respect, the proposed regulation is lacking.

16. Regulating technologies, especially those for which we have yet to fully grasp the scale of their impact, will never be easy, complete, or flawless. For this reason, the initiative and those working on it deserve every praise. That's also why no opportunity for improvement should be wasted. It is in this direction that we make the observations and comments set out in this study, whose main purpose is to make a positive contribution to the debate.

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