Understanding Copyright in the Age of A.I.

The Danger of a new Value Gap

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Key Findings

1. In the age of Big Data, value does not lie in the data, code, text, music, image, audiovisual production itself, but rather in extracting the inherent value, patterns and new relationships.
2. It is likely that generative AI systems will replace human creations and take over the market for human creative works.
3. The replacement of the human author and the disruption of the market for creative production call for appropriate counter-measures and investments.
4. **Encouraging human creative production through the introduction of a remuneration system benefits not only authors but also the AI industry.** Financial support for the continuous creation of new material will ensure a wide range of human training resources, thereby increasing the competitiveness of the industry.
5. **It is imperative that appropriate regulatory measures are implemented to prevent the parasitic exploitation of human creative work and to ensure the full potential of these mechanisms**. Such measures are required in order to achieve the goal of fair remuneration as set out in Article 18 of the Directive on Copyright in the Digital Single Market (CDSM).

OVERVIEW

1. Basics of Intellectual Property Rights and Author Remuneration

2. (Provisional) Application of IP Basics to AI training and output

3. The exceptions for Text and Data Mining (TDM) in the Directive on Copyright in the Digital Single Market (CDMS)

4. AI Act and Author Remuneration

5. The Danger of a new Value Gap

6. A new Right of the Community of Author (*domaine public payant*) as remuneration for AI-output?

Basics of Intellectual Property Rights and Author Remuneration (1)

What is Copyright ?

- Copyright protects an author's literary or artistic creations, called "**works**".
- The work must be considered **original** in order to be protected; generally, a work must have some degree of creativity. This means that the author must exercise at least some free choice in creating the work, unmotivated by objective standards.
- According to European IP law a work must be fixed in a tangible or intangible medium of expression. **No protection of mere ideas.**
- In most national copyright systems, **only human beings** can be authors (not in the UK, New Zealand, Ireland, India, South Africa, etc.)**.**
- Ownership of copyright might belong to various creatives (**co-authorship**, collective creativity). Condition is that **everyone makes an original creative contribution** (audiovisual work).

Basics of Intellectual Property Rights and Author Remuneration (2)

What Rights does Copyright comprise?

Copyright laws of most countries distinguish between **moral rights** (personal rights) and **economic rights** (property rights).

- **Moral rights** most commonly include

(a) **The right to be known as the author** of the work ("attribution" or "paternity")

(b) **The right to the integrity** of the work, i.e. to prevent distortions.

- Economic rights can include

(a) **exclusive rights (monopoly rights**) and

(b) **simple remuneration rights**, granted by law as unwaivable (and inalienable) rights to receive remuneration **subject to collective management**.

Basics of Intellectual Property Rights and Author Remuneration (3)

a) Exclusive economic rights can include**:**

1) The right of reproduction (the core right)

2) The right of distribution (rental)

3) The right of communication to the public (e.g. by performances, broadcasting, exhibition, dissemination on the internet)

4) The right of transformation (in order to control the creation of derivative works based on the original work)

Depending on national law, whether the exclusive rights are transferred to Producer by contract or by law presumption. In both cases, the transfer should secure fair (appropriate and proportionate) remuneration of Authors (art. 18 CDMS)

Basics of Intellectual Property Rights and Author Remuneration (4)

b) Simple remuneration rights:

The Doctrine identifies **three distinct types** of **simple remuneration rights**:

1) A "mere" right of remuneration (e.g. the Resale Right, Directive 2001/84/EC refers to it as "royalty")

2) The remuneration for a "restriction" of an exclusive right (e.g. private copy levy)

3) A residual remuneration right that "survives" the transfer of an exclusive right.

- Although this residual remuneration right is an efficient way to ensure fair and effective remuneration for authors and performers, and it's not contrary to the EU acquis and has a precedent in Art. 5 of the Rental Directive, Member States have not yet decided on a global harmonization of a residual remuneration in favour of authors and performers.
- This right **does not duplicate the exclusive rights** and **does not interfere with the exercise of the exclusive rights by the producer** but ensures a steady flow of income for the authors on the one hand and a peaceful exploitation by the producer on the other hand (e.g. Germany, Spain, Poland for certain acts of exploitation).

2. **(Provisional)** Application of IP Basics to AI training and output

- **AI Training**

- **Any** act of reproduction, distribution, communication to the public and transformation **of the whole work** and/or **significant, identifiable part(s) of the work** requires the authorization of the author/co-authors.

- Regardless of whether mass digitization turns protected content into mere data (so-called "de-intellectualised use"), every use is an IP relevant act of exploitation.

- Without distinguishing between use of "*works as works*" and use of "*works at data*", according to Art. 18 CDMS author could receive for ANY act of exploitation an appropriate and proportionate remuneration; the result would be total chaos (See next slide regarding exception).

- **AI Output**

1) Creative work that is the result of a machine, without human intervention:

Authorship is not extended in most countries to non-humans. No work, so no IP protection.

2) Creative work as a result of collaboration between a human and machine:

- If a machine and a human work together, but you can separate what each of them has done, then IP will only focus on the human part.

- If the human and machine's contributions are more intertwined, a work's eligibility for copyright depends on how much control or influence the human author had on the machine's outputs (authorial kind of contribution), but difficult case to case decision (*black box effect*) .

3. The exceptions for Text and Data Mining (TDM) in the Directive on Copyright in the Digital Single Market (CDMS)

Art 3 DSM

Covers the reproduction and extraction from databases of works or other subject matter and storage and retention of copies

For purposes of **scientific research**

Beneficiaries: research organizations, cultural heritage institutions

No compensation (Recital 17)

Lawful access requirement (Recital14)

No possibility of opt-out (exception can not be overridden by contract)

Art 4 DSM

Covers: Same here

For **any purposes**

Beneficiaries: not specified

No compensation: Same here

Lawful access requirement: Same here

Possibility of opt-out

APPLICABLITY OF EXCEPTION OF ART. 4 DSM TO AI MODEL TRAINING

Disputes about the applicability of exception of Art. 4 DSM to AI model training.

a)The legislator did not explicitly envisage these uses when discussing the TDM exceptions.

b) The opt-out "solution" is far from optimal:
· Practical question of where, who, when and how.
· Confusion due to multiple initiatives by AI providers, rights holder groups or other third parties to standardize op-out.
·In general, there is a need to ensure that limitations and exceptions do not adversely affect authors; the "three-step test" of the Berne Convention, the TRIPS Agreement and the WIPO Internet Treaties does not provide a satisfactory general approach to AI model training because it is a case-by-case solution).

4. AI Act and Author Remuneration

AI ACT: Article 53: Obligations for Providers of General Purpose AI Models

"1. Providers of general purpose AI models shall:

....(c) ***put in place a policy to respect Union copyright law in particular to identify and respect****, including through state of the art technologies,* ***the reservations of rights expressed pursuant to Article 4(3) of Directive (EU) 2019/790****;*

(d) draw up and make available ***a sufficiently detailed summary about the content used for training of the general-purpose AI model****, according to a template provided by the AI Office."...*

Importance of provisions of AI Act for Author Remuneration (4.1.)

a) Limited exceptions for text and data mining:

- Reproduction for AI training purposes is copyright relevant and requires authorization from rights holders, unless a copyright exception such as the specific text and data mining (TDM) rule exempts AI training from the control of rights holders.
- Art 53 and Recital 105 explicitly link the use of copyrighted works for AI model training to Art. 4 DSM and **puts an end to disputes about the applicability of this exception.**
- It appears that the legislator's solution is that the copyright holder can (a) refuse authorization for the training of AI in general, or (b) refuse permission if no remuneration is paid.

Importance of provisions of AI for Author Remuneration (4.2.)

b) Transparency Requirements for General-Purpose AI Systems

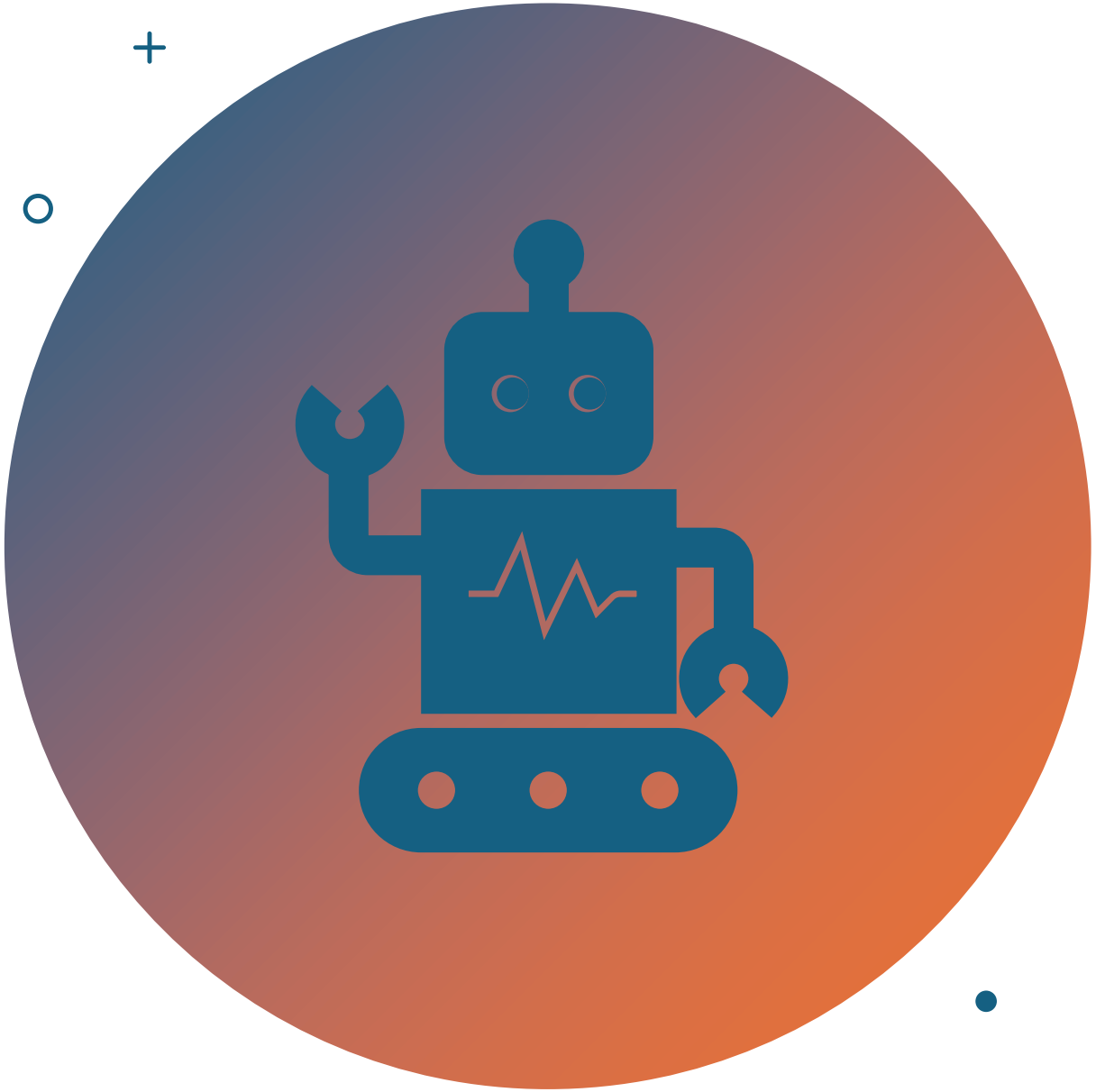
Art. 53 (up. cit.) and Recital 107

- *"While taking into due account the need to protect trade secrets and confidential business information, **this summary should be generally comprehensive** in its scope instead of technically detailed to facilitate parties with legitimate interests, **including copyright holders, to exercise and enforce their rights under Union law**, for example by listing the main data collections or sets that went into training the model, such as large private or public databases or data archives, and by **providing a narrative explanation about other data sources used.**"*
- A narrative report on data sources is considered to be sufficient to allow third parties to determine whether model providers have trained their models on legally accessible data sources and have respected "opt-outs".

Importance of provisions of AI for Author Remuneration (4.3.)

c) Jurisdiction and Compliance

- Recital (106) …. *providers of general-purpose AI models should put in place a policy to comply with Union law on copyright and related rights, in particular to identify and comply with the reservations of rights expressed by rightsholders pursuant to Article 4(3) of Directive (EU) 2019/790.* ***Any provider placing a general-purpose AI model on the Union market should comply with this obligation, regardless of the jurisdiction in which the copyright-relevant acts underpinning the training of those general-purpose AI models take place. This is necessary to ensure a level playing field among providers of general-purpose AI models where no provider should be able to gain a competitive advantage in the Union market by applying lower copyright standards than those provided in the Union.***
- It seems that EU legislators want to overcome *"de facto"* the principle of territoriality and universalize the obligation to ensure compliance with "opt-outs" in the EU.
- At this stage, it remains to be seen whether AI providers and stakeholders in the creative industries will work together to ensure effective enforcement and compliance.



5. The Danger of a new Value Gap

- The AI Act does not take into account that EU rights clearance is fragmented, that there is currently no efficient pan-European rights clearance by Collective Management Societies.
- The AI Act does not consider the high risk that the standardized, machine-readable remuneration protocols will be "dictated" by the industry.
- The AI law does not have any provision for the revenue to be ultimately in the hands of the individual creator/author.
- A complicated and perhaps even impractical remuneration system may put EU-based high-tech industries at a disadvantage compared to international competence.
- Potential loss of attraction for European cultural production and heritage.

6. A new Right of the Community of Author (*domaine public payant*) as remuneration for AI-output?

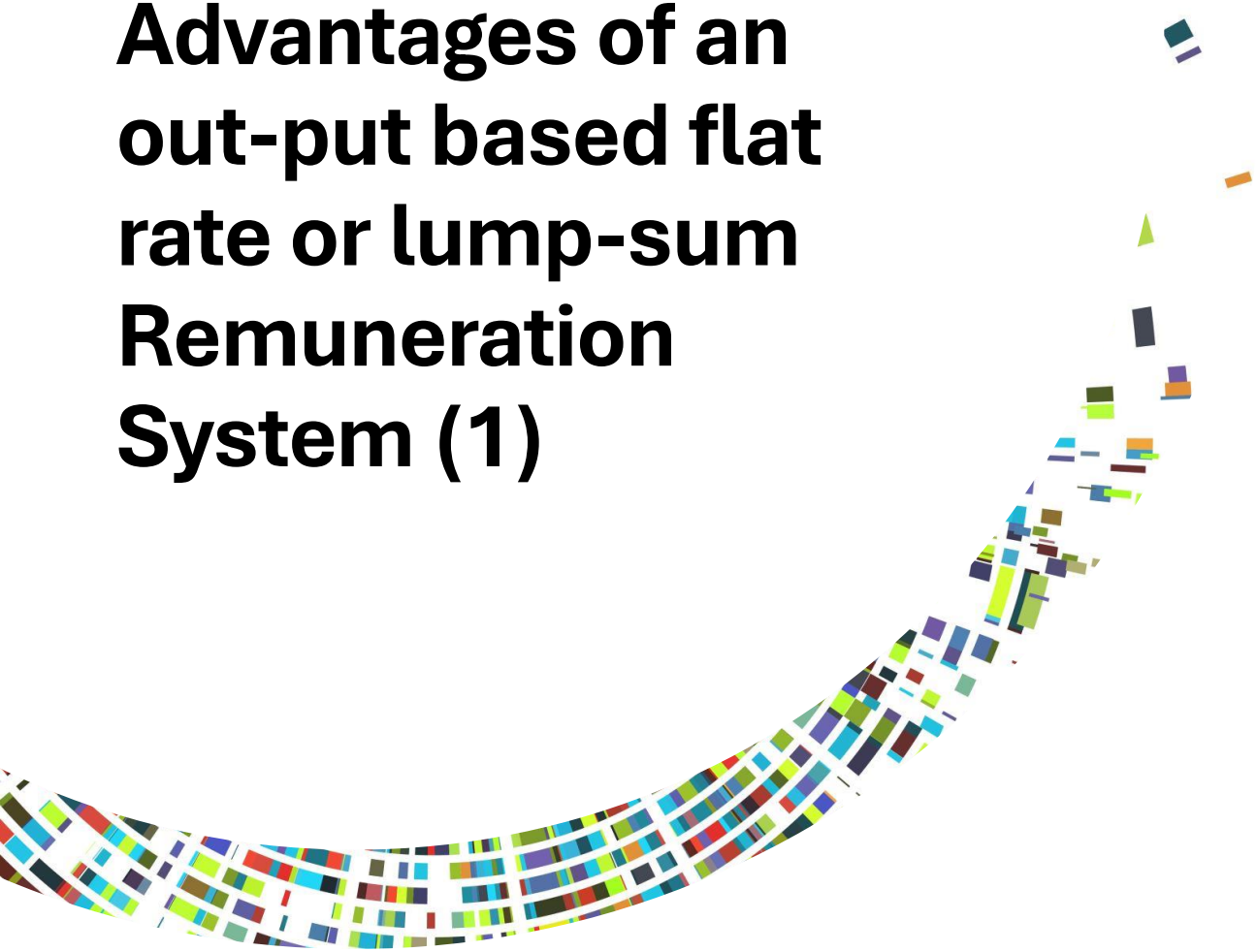
The fundamental principle of fair (appropriate and equitable) remuneration for authors and performers (art. 18 DSMD), which is based on a rigorous determination of which work has been used and how often, cannot prevent the AI system from replacing human creativity and leaving authors alone in their fight against the parasitic exploitation of their works.

One option is the introduction of a statutory residual remuneration right, paid by users/licensees and subject to mandatory collective management, as outlined above. (input-based Remuneration System)

Statutory remuneration rights are well known in EU national law, even before Art. 5 Rental Directive, e.g. in relation to online distribution of audiovisual works. But the differences in EU national law are great. The Commission is aware of this situation, but has not considered it necessary to address it through harmonization.

Another option is the introduction of an output-based flat-rate or lumpsum Remuneration System to be imposed as a general payment obligation on all providers of generative AI systems involved in visual (and literary and artistic) production.

Advantages of an out-put based flat rate or lump-sum Remuneration System (1)



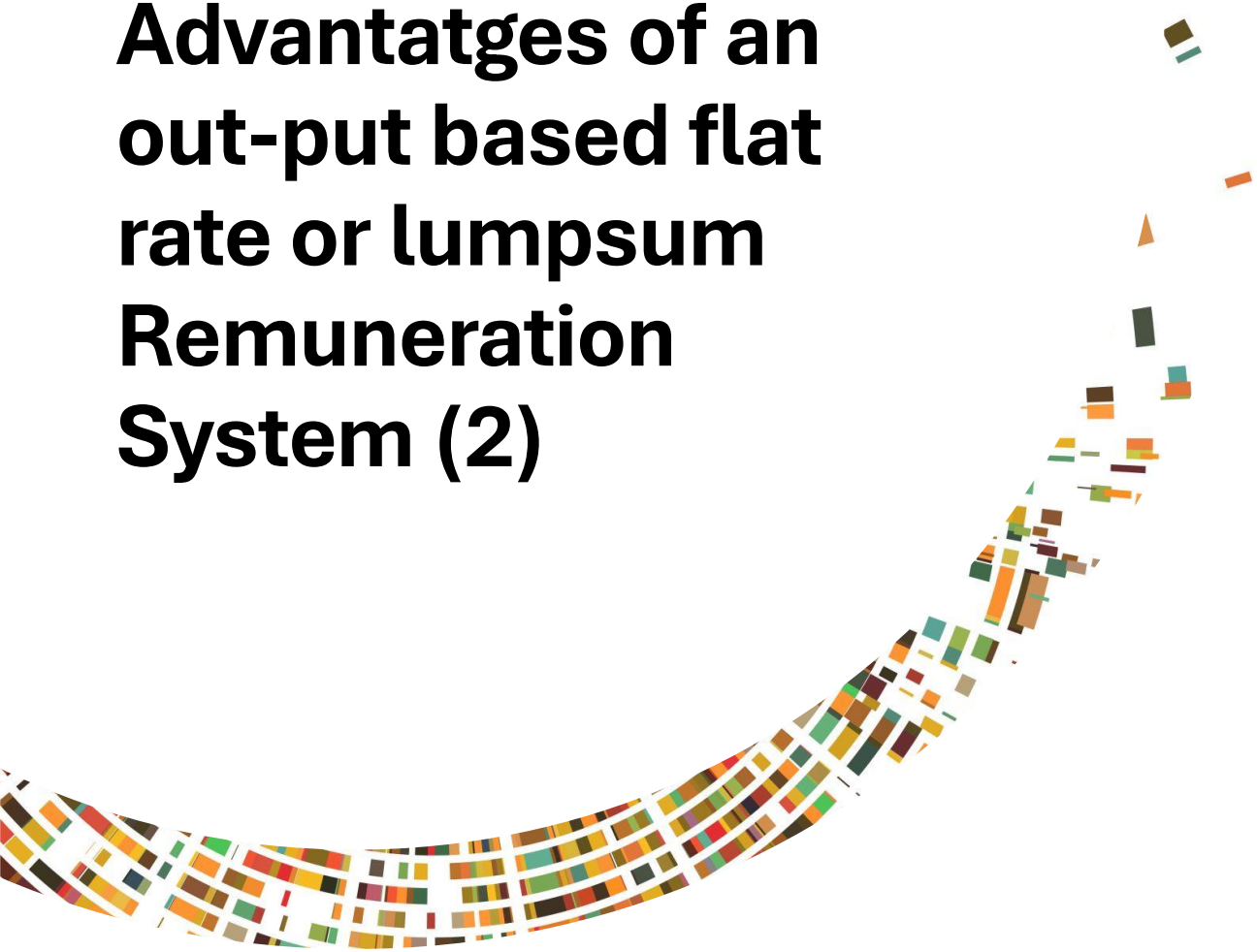
1) This system is fully compatible with or embeddable in current Copyright System:

At first glance, the lack of individually verifiable protected human expression in AI output is an obstacle to the introduction of a flat-rate or lump-sum Remuneration System.

- In early 1990, **Adolf Dietz** proposed a "*domaine public payant*" in addition to the traditional exploitation and remuneration rights of individual authors. The aim was **to close the gap between the substantial profits of those who use works in the public domain and the precarious living conditions of the authors**. Dietz entrusted the management of this new right to the existing Management Collective Societies.

- The parallels between the *domaine public payant* right and a flat-rate or lump-sum remuneration system are compelling:
  - The **exploitation of AI output falls outside the scope of the exploitation rights of individual authors**, as does the exploitation of public domain works.
  - **The output would not have been possible without human creation,** as the exploitation of public domain works requires the existence of pre-existing works.

Advantatges of an out-put based flat rate or lumpsum Remuneration System (2)



- The Court of Justice of the European Union (CJEU) (21 October 2010, Padwan ./. SGAE) has ruled that Member States are free to impose an obligation on manufacturers and importers of copy equipment and devices and media, given the practical difficulties of identifying private users and requiring them to compensate rightholders.

2) There is no need to track permissions at the level of individual works. **AI trainers avoid the heavy financial and administrative burden of identifying rights holders**.

3) **Remuneration could consist of a percentage of AI company revenues** from advertising fees or other payments.

4) **The involvement of collecting societies** (with their distribution models) **ensures that authors of human works can benefit from this additional amount**, which could also include industrial right-holders.

5) The **proposed lumpsum remuneration system is totally combinable with the existing collective rights management.**

The future is now

Let’s go!

Thanks for your patience