ASSAS LEGAL INNOVATION

THE
ASSAS LEGAL INNOVATION

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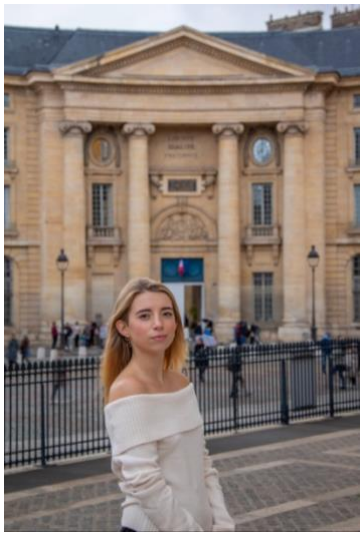

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Introduction to the Edition

It is my great honour and pleasure to introduce the first edition of the *Assas Legal Innovation Journal*.

Assas Legal Innovation is a student society dedicated to exploring the dynamic intersection of law and technology, both locally and internationally. To this end, the students who make up this editorial board came together with the vision of reflecting and debating not only on what the law is, but also about what it could be, and to convey these thoughts to other students and professionals. This led to the creation of the first edition of the *Assas Legal Innovation Journal*.

This journal is an English and French language student law review at Paris-Panthéon-Assas University. For this first edition, we invited submissions from students across different universities and disciplines in France and the United Kingdom, reflecting our commitment to a bilingual law review. This step was crucial in that we discussed the perspectives of civil law and common law students, as well as those of economics and business students. The combination of these viewpoints adds depth and texture to this first edition, which we hope will enrich our readers.

We believe that in an increasingly globalised world where we are so connected with one another, there are so many opportunities to broaden our understanding and knowledge. Law evolves in tandem with social, economic and technological trends, and such cross-cultural legal insights help shape our society and guide future generations. This, we believe, is the essence that this journal seeks to convey.

This project would not have been possible without the generous support of our sponsor, Baker McKenzie Paris. I would like to thank Baker McKenzie Paris and Me. Elsa Dalimier for their invaluable guidance and feedback in shaping the articles of the journal. I would also like to extend my sincere thanks to the inaugural Editorial Board and the Co-presidents of Assas Legal Innovation, who have worked diligently to ensure that the articles in this edition meet the highest standards. Finally, I wish to express my deepest gratitude to all the friends I met during my exchange year at Paris-Panthéon-Assas — from the University of Oxford, UCL, Humboldt

University of Berlin and the Carlos III University of Madrid — for their encouragement and support throughout this endeavour.

I hope that you find within these pages ideas that will inspire you, whether you might agree or disagree with them. If you come away from this journal with one new idea, or with one of your own, then I believe it will have achieved its purpose.

Yours Sincerely,
Jose Nabil Khoury
Editor-In-Chief, 1st edition, Assas Legal Innovation Journal

INTELLECTUAL PROPERTY LAW

From Catwalks to Algorithms: The Digital Evolution of Luxury Fashion

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Introduction

The global luxury market reached €1.5 trillion in 2023, up 10% from 2022, setting a record for the industry and demonstrating its unparalleled resilience to global problems.[1] This growth is attributed to several factors, including consumer priorities that focus on the desirability and appearance of luxury products. In order to consistently meet public and shareholder expectations, fashion companies face an evolving competitive landscape driven by technological changes in the industry.[2] And at the centre of this change is AI, defined as a set of theories implemented to make machines capable of simulating human intelligence, which presents intriguing and different challenges from other industries.[3]

This article aims to critically examine the legal issues - including intellectual property, image rights, and employment law - raised by AI in luxury fashion, by looking at usage and consequences of AI fashion models (I) and luxury non-fungible tokens (NFTs) (II).

I. The legal framework regarding the use of AI models: currently insufficiently protected but likely to evolve

In recent years, investigations have targeted major fashion retailers for their representation of models. This has been exacerbated by the use of AI modelling technology by fashion giants such as Louis Vuitton, Levi's, and Nike. The tech companies that provide this technology have developed AI systems trained on vast datasets of images of real models to generate images for advertising campaigns, fashion catalogues, and other industry needs, instead of hiring human models. Take, for example, Shudu, a model known as the face of brands like Karl Lagerfeld and Paco Rabanne: Shudu is a digitally generated model inspired by real-life models Grace Jones and Alex Wek. This usage of AI has raised and intensified several legal and ethical debates. Although

[1] Claudia D'arpizio *et al*, 'Global luxury market projected to reach €1.5 trillion in 2023, a new record for the sector, as consumers seek luxury experiences', Bain & Company Media Center (14 November 2023)
[2] Anita Balchandani *et al*, 'The state of Fashion 2024: Finding pockets of growth as uncertainty reigns', McKinsey & Company, (29 November 2023)
[3] Larousse 'Intelligence Artificielle' (2024)

the current legal framework in this area needs to be strengthened, new legislation offers promising prospects for improvement.

First and foremost, the image rights of models are at risk as some models are concerned that AI modelling companies are using their images without their knowledge or consent. Nowadays, according to model and activist Sara Ziff, models are often asked for their body scans without being informed of how they will be used and are limited in terms of what they can do as they typically hand over power-of-attorney to their agencies when they sign their modelling contracts. Even if models voluntarily consent to transfer their image rights, shouldn't the law regulate this freedom so that it does not degenerate into abuse? It would be an abuse of the law for an agency to sell images or scans of models without their knowledge to AI companies specialising in creating digital models that generate images that can replace them or deprive them of potential profit. It is no secret that partnering up with AI modelling companies has undeniable benefits for fashion companies, starting with the cost savings: human models charge around $35 per hour, with top models earning $5000 for a single day, while AI agencies such as “Deep Agency” can offer their models for $29 per month.[4]

The issues surrounding the exploitation of models' image rights are all the more worrying given that models are generally not protected by labour laws. In the US, for example, models are considered independent contractors and are therefore not covered by the National Labor Relations Act of 1935, which provides “protections against discharge and contract termination” in the event of the formation of trade unions.[5] This limits their ability to fight back against AI, as they cannot join powerful unions such as the American labour union SAG-AFTRA, which represents over 150,000 professionals in the arts, film, and marketing industries. It is therefore highly desirable that, following encouragement from non-profit organisations such as Model Alliance, a New York State legislative session is scheduled for January 2024 to vote on ‘the Fashion Workers Act’. This legislation would provide fashion models with important labour protections against abuse by AI technologies.[6]

[4] Riddhi Setty, ‘AI Threatens to Push Human Fashion Models Out of the Picture (1)’, Bloomberg Law News (9 January 2024)
[5] National Labor Relations Act of 1935 (USA)
[6] Sarah Kent, ‘Is This the Year New York Regulates Fashion?’, The Business of Fashion (9 January 2024)

Another hope is that the European Union's (EU) data protection regulations may offer greater security for fashion models due to their enlarged scope and the all-encompassing definitions they contain. For example, companies processing data from an EU model must comply with the requirements of the EU General Data Protection Regulation (GDPR), including reporting any personal data breach to the data protection authority within 72 hours. [7]

In addition, AI modelling technology has implications for diversity, equality, and inclusion (DE&I) as part of environmental, social and governance (ESG) requirements. Fashion companies can use AI models to create 'artificial diversity' such as Levi's partnership with Lalaland.ai to "increase the number and diversity of their models".[8]

Can we consider the use of AI models, which do not suffer from the discrimination and prejudice that a human mannequin might, be seen as promoting diversity? These questions may lead to the adoption of new regulations, but if not, companies will be encouraged to monitor the impact of double standards on image. It is clear, then, that technology is having a major impact on fashion models. What's more, new technologies in luxury fashion extend to the products themselves, as we'll see in the second part of this article.

II. Luxury litigation: navigating NFT disputes in high fashion

Technology has integrated and revolutionised the world of fashion. A key example is non-fungible tokens (NFTs) - defined as a non-replicable digital asset whose ownership can be demonstrated through Distributed Ledger Technology (DLT) (e.g. Blockchain)[9]. They are being used by notable brands such as Tiffany & Co, Jimmy Choo and Gucci. For a 2021 auction, Jimmy Choo had already created an NFT collection with a sneaker in different designs of varying rarity levels valued at several thousand dollars apiece. NFTs allow luxury fashion houses to rebrand themselves and target a broader and more modern audience while maintaining the image of exclusivity and

[7] Nigel Jones, 'I am an American business. Do I have to be GDPR compliant?' (*The Privacy Compliance Hub,* June 2018)
[8] Tariro Mzezewa 'Levi's 'Artificial Diversity'', The Cut's Morning Blogger (*New York*, 27 March 2023)
[9] AO Kaspersky Lab 'What are NFTs and how do they work? Kaspersky Resource Center and Definitions (2024)

inaccessibility sought by these brands. As Carmen Kervella, author of *Le Luxe et les Nouvelles Technologies*, explains:

"The strength of a luxury brand lies in its symbolic capital. The value of a luxury product exceeds the tangible nature of the item: A Chanel canvas tote is around 500 hundred euros, while the Birkin handbag ranges between 25,000 and 300,000 euros. As for the virtual version of Gucci's Dionysus bag on Roblox, it has resold for over 4000 dollars, which is more expensive than its real counterpart. The value of a luxury product goes far beyond the famous quality-price ratio that applies for FMCG brands or even premium brands."[10]

Luxury NFTs exemplifies the successful integration of a brand's symbolic value into the world of haute couture. Indeed, the protection provided by smart contracts and blockchain technology ensures the exclusivity and uniqueness of each asset. Information, such as provenance, price, and ownership, is recorded and stored on the blockchain. On the other hand, blockchain technology can also be used to prove the authenticity of material products. The Aura Blockchain, for instance, is used exclusively by luxury brands such as LVMH or Prada to trace and certify products.

However, this new technology raises legal issues, particularly regarding copyright. While luxury companies were already battling traditional counterfeiting, the rise of technology has introduced a new challenge: crypto-counterfeiting, which harms the image of luxury brands and undermines their exclusivity. The most telling example is undoubtedly that of American artist Mason Rothschild and his NFT project 'MetaBirkins'. In 2021, he drew inspiration from the famous Birkin bag by Hermès to create a series of one hundred NFT versions of the bag.

Thankfully, trademark law can be used to combat the unlawful use of a design, defeating the idea that NFTs are simply a form of 'artistic expression'. Hermès won a lawsuit in June 2023 against the artist Mason Rothschild for his "MetaBirkins NFT project", which they saw as a threat to the image of the brand and the exclusivity of its products.[11] US Trademark laws applied to these

[10] Carmen Turki-Kervella, 'Le Luxe et les Nouvelles technologies', Hors collection Maxima (Octobre 2015)
[11] Blake Brittain, 'Hermes wins permanent ban on 'MetaBirkin' NFT sales in US lawsuit', Reuters Business (24 June 2023)

"MetaBirkin", which were considered as commercial goods rather than mere works of art. The artist's reliance on the First Amendment of the US constitution which protects freedom of expression, did not hold in this case.

Such disputes take into account several factors, including potential damage to the brand's image, the number of items sold, their price and the artist's intentions. In this case, the MetaBirkin would have earned the artist nearly $800,000 and was inspired by an existing project, the 'Baby Birkin', which had already proven successful. But generally, the outcome of a lawsuit depends on the circumstances and facts of the case, which may not always be as clear-cut as in the MetaBirkin case. One solution to this copyright problem would be to hold NFT platforms such as OpenSea, one of the leading marketplaces for the sale of NFTs where the MetaBirkins were sold, accountable.

The protection of purchasers has also been questioned. In the UK, NFTs are recognised as property in their own right, separate from the artist's intellectual property, which allows them to be returned to their owner in the event of theft.[12] However, the specific rights conferred on purchasers of these virtual objects remain unclear, and their ability to be owned is still debated. To address this, the UK Law Commission is proposing the creation of a legal category for new objects such as cryptocurrencies.[13] However, there is currently a legal vacuum regarding the new concept of NFTs, which makes their enforceability against third parties more complex than for tangible property, which is already well established in law. In France, the rights associated with the ownership of NFTs seem to be limited to the smart contract and its contents.

Therefore, the legal framework for NFTs remains complex due to their innovative nature. New challenges are emerging with the economic boom of this technology such as computer piracy which could harm this new facet of luxury fashion if the legal framework does not adapt quickly to meet them. It will therefore be important to keep a close eye on how these issues develop, particularly with regard to the legal status of NFTs.

[12] *Osbourne v Persons Unknown and Others* (2023) EWHC 39 (KB)
[13] Law Commission, *Digital Assets: Consultation Paper* (Law Com No 256, 2022)

Despite the challenges posed by intellectual property rights and the rising integration of technologies into the industry, major luxury brands are increasingly embracing innovation. As Bernard Arnault, CEO of LVMH, noted, desirability is created through a customer's special experience with the brand- something new technologies, like virtual showrooms, can deliver. LVMH has teamed up with Epic Games, the company behind Fortnite, to offer immersive experiences at Viva Technology, one of Europe's largest tech and start-up events. Using Epic Games' technology, an interactive version of Louis Vuitton's Autumn/Winter 2023 fashion show was showcased, highlighting the transformative impact of technology on everyday life.

Intellectual Property and Generative Artificial Intelligence: Regulating Model Training

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Introduction

Amid rapid technological advances, the convergence of artificial intelligence (AI) and intellectual property rights has become a critical issue, sparking numerous legal disputes. Disagreements over the methods used to train generative artificial intelligence (GAI) models are intensifying. These models, which emulate human creativity, are trained on vast amounts of existing content.

This approach has triggered a series of lawsuits, with OpenAI—prominent for its ChatGPT model—frequently at the centre. While several major media groups, such as Axel Springer, Dotdash Meredith, *The Financial Times*, *The Associated Press*, and *Le Monde*, have collaborated with tech companies to regulate the use of their protected content,[1] others have chosen a more adversarial route. For instance, eight newspapers owned by Alden Global Capital have accused OpenAI of infringing on their intellectual property by incorporating their works into training datasets without permission.[2] Companies like MidJourney and Meta AI are also facing similar actions.[3] However, the lawsuit filed by *The New York Times* against OpenAI and Microsoft on December 9, 2023, stands out, presenting concrete examples that, according to the newspaper, demonstrate that the actions of OpenAI and Microsoft require prior authorisation from copyright holders.[4]

The New York Times emphasises the need to protect its rights to uphold independent journalism, a cornerstone of democracy.[5] It argues that if news organisations lose control over their content, their ability to fund essential production investments will suffer, limiting resources for investigative and public-interest reporting. This could leave critical stories untold, to the detriment of society. *The New York Times* also criticises OpenAI's transformation: founded in 2015 as a nonprofit, OpenAI restructured in 2019 to create a profit-driven subsidiary supported by a multi-billion-dollar

[1] Benjamin Mullin, 'OpenAI and News Corp Strike Deal Over Use of Content' *New York Times* (22 May 2024)
[2] Benjamin Mullin, 'Newspapers Sued Microsoft and OpenAI Over AI Copyright Infringement' *New York Times* (30 April 2024)
[3] Stéphanie Carre, 'Intelligence artificielle générative : entre adoption d'un règlement européen et nouvelle action américaine contre la violation massive du copyright du New York Times' (Dalloz actualité, 15 février 2024)
[4] Benjamin Mullin, 'New York Times Sues OpenAI and Microsoft Over Copyright Infringement' *New York Times* (27 December 2023)
[5] Complaint, New York Times v OpenAI, December 2023' (2023) New York Times

investment from Microsoft.[6] Although this structure limits returns for investors and redirects excess profits back to the original nonprofit entity, concerns have been raised. OpenAI now generates about $80 million per month,[7] and its planned restructuring as a public benefit corporation—a profit-oriented entity committed to the public good — could attract major investors such as Apple and Nvidia, a leading chip manufacturer.[8] *The New York Times* highlights a shift away from OpenAI's original values, which once prioritised transparency and safety. This restructuring would help OpenAI attract new investments to compete with well-funded rivals like Google and Anthropic while addressing the high costs of developing advanced AI. Yet experts, including OpenAI co-founder Elon Musk, warn of a possible concentration of power and a shift toward profit over safety and ethics.[9] The tech industry, led by companies like OpenAI and Microsoft, appears to be racing toward increasingly powerful AI systems, where caution may be left behind.[10]

In its lawsuit, *The New York Times* raises multiple claims against OpenAI and Microsoft. First, it alleges direct copyright infringement, asserting that OpenAI incorporated protected works from the newspaper into its training datasets without authorisation. Microsoft is accused of secondary infringement, both vicarious (having controlled and benefited from OpenAI's actions) and contributory (having technically facilitated these infringements). *The New York Times* also cites a violation of the Digital Millennium Copyright Act due to the removal of copyright management information. Claims of unfair competition and trademark dilution are also included, with the newspaper arguing that the unauthorised use of its trademarks in AI-generated content weakens its distinctiveness and harms its commercial reputation. In response to these violations, the newspaper is seeking billions of dollars in damages and a permanent injunction.[11]

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[6] Dan Milmo, 'OpenAI Planning to Become For-Profit Company, Say Reports' *The Guardian* (26 September 2024)
[7] Le Figaro, 'OpenAI, l'entreprise créatrice de ChatGPT, valorisée désormais à 80 milliards de dollars' *Le Figaro* (18 February 2024)
[8] Aaron Tilley, 'OpenAI in Talks with Apple for Funding to Develop ChatGPT' *Wall Street Journal* (18 October 2024)
[9] Dan Milmo, 'Why Is OpenAI Planning to Become a For-Profit Business and Does It Matter?' *The Guardian* (26 September 2024)
[10] Nidhi Subbaraman, 'OpenAI Restructuring Is a "Natural Consequence" of an AI Arms Race' (Cornell University, 13 October 2023)
[11] Graeme Massie, 'New York Times Sues Microsoft and OpenAI over Copyright Infringement' *The Independent* (27 December 2023)

A historical comparison can be drawn with *New York Times Co. v. Tasini* (2001), where the newspaper was accused of including freelance authors' articles in databases without authorisation.[12] At that time, the newspaper argued that removing the content could compromise the integrity of digital databases. Today, however, by demanding the removal of GPT models containing its works, *The New York Times* appears to be taking the opposite stance.

This illustrates that the complexity of this issue goes beyond mere copyright protection, raising broader challenges related to technological innovation. Generative AI models rely on vast datasets to generate innovative outputs, with significant implications for sectors such as research, finance, law, and education. The key issue is to reconcile the rights of those creators with the technological progress of AI within an appropriate legal framework.

This article addresses two regulatory approaches to generative AI training. First (I), we will examine copyright exceptions by comparing the U.S. fair use doctrine with European text and data mining (TDM) rules. Second (II), we will analyse the shift towards a transparency obligation, driven by legislative initiatives in both Europe and the United States.

I. Copyright exceptions: between Fair Use and Text and Data Mining

In its public statement on January 8, 2024, titled *OpenAI and Journalism*, OpenAI argued that the use of protected works to train its models falls under the fair use exception.[13] The company emphasised the transformative nature of data usage in training its AI models. However, the court's decision on this point is highly anticipated. The fair use doctrine, codified in the Copyright Act of 1976, permits limited use of protected works without prior authorisation, based on four key criteria courts use to determine whether a use qualifies as fair use or constitutes copyright infringement.[14]

1. The purpose and character of the use: This criterion examines whether the use is transformative, meaning it alters the original work to create something new. Transformative use, particularly for non-commercial purposes, is more likely to qualify as fair use. Commercial use is subject to stricter scrutiny.

[12] NYT v. OpenAI: The Times's About-Face' (2024) Harvard Law Review Blog, 2 April 2024
[13] OpenAI and Journalism', OpenAI (8 January 2024)
[14] Copyright Act 1976, 17 USC §§ 101-810 (1976)

2. The nature of the protected work: Creative works, such as novels or films, enjoy stronger protection, while factual works, like textbooks or scientific articles, are more likely to fall under the fair use exception.
3. The amount and substantiality of the use: This criterion assesses the proportion of the work used. Reproducing an entire work makes fair use harder to justify, though using small portions can still be problematic if they are essential to the work.
4. The effect of the use on the market: This criterion examines the impact of the use on the potential market for the original work. If the use diminishes demand for the work or competes directly with it, fair use will be harder to justify.

A notable example of this doctrine's application is the Google Books case.[15] In 2004, Google launched Google Book Search, a service that digitised out-of-print books in partnership with several libraries. Some works were fully digitised, while others were only available as excerpts. Accused of copyright infringement by the Association of American Publishers and the Authors Guild in 2005, Google argued that its service was transformative, as it increased the visibility of works without harming their market. The court ruled in Google's favour, determining that the purpose of the service—facilitating book search and discovery—did not negatively impact book sales. This case illustrates how the fair use exception could apply to training generative AI models. Just as Google Books digitised significant amounts of content to create a new product, training generative AI models could be seen as transformative use.

In its lawsuit against OpenAI, *The New York Times* claims that training AI models like ChatGPT on its protected works constitutes unauthorised reproduction. Technology firms have defended against similar allegations by asserting that their AI models merely analyse concepts without reproducing the actual texts. They argue that this process is analogous to human learning, where assimilating concepts from protected content does not constitute copyright infringement.[16] Additionally, OpenAI maintains that the training process only extracts unprotected elements, such as ideas or facts. This defence recalls the 2019 CJEU decision in *Pelham,*[17] where the Court ruled

[15] Authors Guild v Google Inc [2015] 804 F 3d 202 (2nd Cir)
[16] Anthropic, 'Response to the Copyright Office's Notice of Inquiry on Copyright and Artificial Intelligence [Docket No. 2023-6]' (2023); Google LLC, 'Comments in Response to Notice of Inquiry, "Artificial Intelligence and Copyright"', 88 Fed. Reg. 59942 (COLC-2023-0006) (30 October 2023)
[17] Pelham GmbH v Hütter and Schneider-Esleben (C-476/17) [2019] ECLI:EU:C: 2019:624.

that the use of a modified, unrecognisable sound sample did not require authorisation. Similarly, if copyrighted material used to train GAI models is altered to the point of being unrecognisable, this may not constitute copyright infringement.

This debate highlights the legal uncertainty surrounding the application of fair use to AI, an approach based on interpretative criteria left to judicial discretion. In Europe, copyright exceptions are governed by the DSM Directive (2019/790),[18] which regulates text and data mining (TDM). However, these provisions do not specifically address the training of GAI models. Article 3 of the Directive allows research organisations and heritage institutions to conduct TDM for scientific research without prior authorisation. Article 4 extends this exception to commercial uses, provided rights holders have not explicitly opted out. These exceptions remain limited to reproduction rights and do not permit public disclosure of extracted data. Additionally, access to protected works must be lawful, raising questions about the availability of content online without legal restrictions.

Recital 18 of the DSM Directive specifies that these exceptions apply to AI operating for purely statistical purposes, with copies retained only for the duration necessary for data mining. Consequently, some argue that this Directive was not designed to regulate GAI models, which require massive datasets for training.[19] Additionally, questions remain regarding the compatibility of the TDM exception with the European three-step test, which mandates that exceptions neither impair the normal exploitation of the work nor unjustifiably harm rights holders.[20]

Nevertheless, the European Commission confirmed the applicability of these exceptions in a statement by Thierry Breton on March 31, 2023, while the European Union's Artificial Intelligence Act, adopted in May 2024, goes further.[21] Article 53(1)(c) establishes the principle of a data mining exception, allowing providers to use protected works unless rights holders explicitly opt-out. This provision may therefore apply to GAI model training, with its scope extended by Article 2 to cover any AI model use within the EU, regardless of the provider's or developer's location.

[18] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market [2019] OJ L130/92
[19] Anne-Laure Caquet, 'L'intelligence artificielle générative : l'Union européenne relaie le droit d'auteur au rang des exceptions' (Village de la Justice, 24 mai 2024)
[20] ibid
[21] Thierry Breton, 'Communiqué du 31 mars 2023'

II. Trend towards a data disclosure requirement

To ensure that opposition rights, particularly through opt-out mechanisms, are respected, the European AI Act imposes transparency obligations. Article 53(1)(d) requires AI providers to publish a sufficiently detailed summary of the content used to train their models, in a format defined by the models. However, questions remain about how effectively this requirement will be applied: will the summary be detailed enough to allow the identification of copyright-protected content? In response to these uncertainties, France tasked the Higher Council for Literary and Artistic Property (CSPLA) in April 2024 with defining the specific information that AI providers must disclose.[22]

A parallel development is underway in the United States, where the Generative AI Copyright Disclosure Act,[23] introduced to Congress on April 9, 2024, mandates similar transparency. Any entity developing or modifying training datasets must submit a detailed summary of the data used to the U.S. Copyright Office before the commercialization of models. For online datasets, a simple URL is sufficient, and a public registry will centralise this information.

Unlike the European regulation, which applies to all AI providers, U.S. legislation distinguishes between companies creating datasets and those modifying them, offering a more nuanced approach.[24] Another significant difference is the U.S. disclosure requirement, which must be met at least 30 days before commercialization and applies retroactively to models released before the law's enactment. This measure addresses concerns raised by the Federal Trade Commission, which, in its analysis of June 29, 2023, highlighted the competitive advantage gained by companies with unrestricted data access in the past, creating barriers for new entrants. The FTC has called for measures to restore fair competition.[25] The practical implementation of these provisions remains to be seen, particularly regarding retroactivity, where the "machine unlearning" process appears complex. This underlines the importance of regulating the future use of data by GAI models.

[22] Anne-Laure Caquet, 'L'intelligence artificielle générative : l'Union européenne relaie le droit d'auteur au rang des exceptions' (Village de la Justice, 24 mai 2024)
[23] Betty Jeulin, 'Analyse du projet de loi américain sur la divulgation des données d'entraînement des IA génératives', Dalloz actualité (27 mai 2024).
[24] ibid
[25] ibid

BANKING & FINANCE LAW

The Civil Liability of Activist Funds

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Introduction

As new players in the financial markets, activist funds are often portrayed as anti-passive investors. Typically, these activist investors are hedge funds that acquire a minority stake in a company to change how it is run.[1] Their goal is simple: to identify weaknesses in economic strategy, governance, or even potential fraud within publicly traded companies and exploit them for profit. This practice has been facilitated by financial scandals that have eroded market confidence. The case of the Enron accounting fraud scandal serves as a notable example; it was once hailed as "*still the best of the best*" by Goldman Sachs the day before the scandal broke.[2] Should we not reflect on the disastrous consequences for countless Americans who lost their retirement pensions? By holding merely a fraction of a company's capital, a shareholder can influence its policies. However, in capital markets, shouldn't power correlate with the amount of capital invested? As Bruno Oppetit remarked, is this not a form of capitalism without capital? While an active shareholder role can be viewed as positive, it should not come at the expense of market rules and corporate stability.

Defining shareholder activism can be challenging, as it is not a strictly legal concept. The report by the Club des Juristes offers some key insights: "*The behavior of an investor using the prerogatives granted to minority shareholders in order to influence the strategy, financial situation, or governance of the issuer, primarily through a public stance*."[3] Three main elements are highlighted: (i) the use of shareholder rights (such as management expertise or the submission of a resolution to the agenda), (ii) the intention to influence the company's strategy, and, most importantly, (iii) the public disclosure of these positions. The primary tool of activist funds is media pressure, which can manifest through internal financial reports, personal letters that may be coercive or even offensive, and leaks to the media. The consequences can be severe: for example, we can recall the dismissal of Emmanuel Faber from his position as CEO of Danone, under pressure from the Bluebell Capital fund, which managed a fund of only 70 million euros and held

[1] Will Kenton, 'Activist Investor: Definition, Role, Biggest Player' (*Investopedia,* 14 February 2024)
[2] Jean-Jacques Pluchart, « L'étude du cas Enron » *in* L'éthique des affaires : portée et limites de l'approche fonctionnaliste - La *Revue des Sciences de Gestion* 2005/6 (n°216), p. 17 à 32
[3] Rapport Club des juristes, « Activisme actionnarial » (novembre 2019)

just 20 million euros in Danone shares, out of a market capitalisation of 41 billion euros — representing just 0.05% of the capital.[4]

The case of activist sellers, also known as 'short-sellers' due to their short positions, serves as a notable illustration. The hypothesis is simple: a fund identifies a target company that it believes is overvalued by the market. For example, if a stock is trading at 10 but should only be worth 3, the fund takes a short position by borrowing these shares from a financial institution. It then sells the shares on the market, hoping to repurchase them later at a lower price, return them to the lender, and pocket the profit. This is a risky operation, as the short-seller's exposure is unlimited: once the position is taken, the stock can rise indefinitely, forcing the investor to repurchase the shares at a high price.

Short-selling is controversial by nature, as it involves betting against the health of financial markets, with the short-seller's goal being for the stock price to fall. This is particularly true in the context of short activism, where active investors intentionally aim to drive down the stock price of their target companies. A recent example is the attack by the Muddy Waters Fund against the Casino Group. A scathing report was published in December 2015, highlighting the alleged debt of the group's holdings, which future cash flows would not be able to support.[5] The report also criticised the lack of transparency in the group's accounts, suggesting potential abuses. Yet financial rating agencies like Standard & Poor's confirmed the quality of Casino Group's credit. The report had the intended self-fulfilling effect: Casino's stock price dropped by 20% — since then, it has plummeted by 95%. Under pressure, the company was unable to recover. In an interview with Le Monde, Casino's CEO Charles Naouri stated, "*For eight years, we have been the subject of regular attacks from shorts. By spreading negative rumours, in a legal environment that does not protect us, they eventually suffocated our financing*."[6]

While it is undeniable that shareholder activism generally enhances market efficiency and promotes greater oversight of publicly traded companies, the potential for abuse and market destabilisation is clear. Activist funds position themselves as a new militia of the markets, on the

[4] Financial Times, « Culture wars: Danone board sours on CEO after activist pressure » (15 mars 2021)
[5] Muddy Waters, « Muddy Waters is Short Groupe Casino », (27 décembre 2015)
[6] Le Monde, « Carson Block : "Jean-Charles Naouri avait le temps de redresser Casino" » (11 juillet 2023)

lookout for fraud.[7] However, how can their abuses be sanctioned under the law? The methods employed by activist funds — particularly the communications they issue about target companies — can be addressed through the general law of civil liability. A significant decision from the Paris Court of Appeal upheld the conviction of an activist shareholder for the abusive use of their right to criticise (I), a legal basis that raises questions (II).[8]

I. The doctrine and limits of the right to criticise

The liability of activist funds for their communications presupposes an abuse in the exercise of this right. Activists are justified in critiquing a company's management when they are shareholders. This stems from their active participation in the company strategy, which could even be considered an element of *affectio societatis.*[9] And even when the activist is not a shareholder, their right to express criticism is protected by the European Convention on Human Rights (ECHR), which guarantees freedom of expression for both individual and legal entities. This protection is especially pertinent in the context of publicly traded companies, which are inherently public. The proper functioning of these companies and the provision of accurate information to the public, whose savings are at stake, are matters of significant public interest.[10]

However, like any freedom, the right to criticise is not without limit. According to the theory of abuse of rights, a fundamental principle in the law of obligations, no right is immune from potential abuse. When the intent to cause harm undermines the lawful exercise of a right, it becomes unlawful and subject to penalties, particularly if the right is misused contrary to its function.[11] Therefore, an activist cannot use its right to criticise solely for personal gain, as opposed to a business or common shareholder interest that would be harmed.[12]

The right to criticise is primarily restricted to matters concerning the management of the company: the ECHR distinguishes between criticism directed at the individual manager and criticism aimed

[7] Carson Block, « Distorting the Shorts » (23 février 2022)
[8] Cour d'appel de Paris, Pôle 5 - chambre 9, n° 20/07397 (16 septembre 2021)
[9] Viandier A., *La notion d'associé*, Th, LGDJ, n°174, 1978 ; cf. sur ce point, Lecourt A., « Le droit de critique de l'associé », *in Mél. Urbain-Parléani* I., Dalloz 2023, p. 155
[10] CEDH, 7 février 2012, n° 40660/08, *Von Hannover c/ Allemagne*, *AJDA* 2012. p. 1726, chron. Burgorgue-Larsen L. ; *D*. 2012. 1040, note Renucci J.-F
[11] Routier R., « De la représentation logique dans l'abus - Essai en droit des affaires » *in Mél. en l'honneur du Professeur Le Cannu P.*, LGDJ, 2014
[12] D. Schmidt, « De l'intérêt commun des associés » *JCP G* 1994 p. 404

at the company's operations. In a significant judgment, *Petro Carbo Chem*, the Court prohibited any sanction, even a symbolic one, against a minority activist shareholder who had publicly criticised a major listed Romanian company, leading to its decline.[13] The court deemed the criticism non-abusive as it did not target the manager personally and was part of a general interest debate, without being defamatory or lacking a factual basis. Conversely, it must be understood that activist criticism can be abusive; the Court even acknowledged the competing interest of safeguarding the commercial success and viability of companies, which benefits not only the shareholders and employees but the economy at large.

II. The legal basis establishing the abuse of criticism rights

In the *Altamir Investment* case, an activist criticised the lack of accounting transparency, excessively high management fees and the poor performance of the company compared to its competitors. The activist published these criticisms through paid advertisements, newspaper articles, and letters addressed to shareholders, as well as to the presidents of the French Financial Markets Authority (AMF) and the Association for the Defense of Minority Shareholders (ADAM).

The Paris Court of Appeal noted the "persistent criticism against Altamir's management, casting doubt on the transparency and reliability of the company's governance, thus damaging its reputation." The company, Moneta, was therefore found responsible for "*reputational damage that must be repaired.*"[14] The excessive nature of the criticism was characterised by the repetition of "*systematic*" critique.[15]

While this decision, the first of its kind, opens the door to the civil liability of activist funds, it should be interpreted with caution. The Court of Appeal did not rely on the usual domestic legal grounds for abuse of the right to criticise, such as defamation and disparagement, which are generally mutually exclusive.[16] Defamation, rooted in criminal law, targets statements that harm the reputation of a person whereas disparagement, based on Article 1240 of the Civil Code, applies

[13] CEDH, 30 juin 2020, n°21768/12, *Petro Carbo Chem c/ Roumanie*, *JCP E* 2020, 486
[14] Cour d'appel de Paris, Pôle 5 - chambre 9, 16 septembre 2021, n° 20/07397
[15] Civ 2ème, 3 avril 1979, Bull. civ. II, n°113 « l'arrêt retient que l'appréciation est portée sans esprit de dénigrement systématique ». ; adde Lécuyer G., Traité de droit de la presse, préc. n° 1262
[16] Viney G., « La sanction des abus de la liberté d'expression », *D.*, 2014, p. 787 ; Traullé J., « Exclusivisme de la loi du 29 juillet 1881 : la fin justifie-t-elle encore les moyens ? », *D.*, 2020, p. 1368

to statements harming a company's products or services.[17] However, the defendant, Moneta, had argued that its actions, if anything, could constitute defamation but not disparagement, as there was no "*intent by a competing company to divert the clientele of the disparaged company*."

The legal basis for this ruling remains open to interpretation, given the damages awarded under Article 700 of the French Code of Civil Procedure. The Court of Appeal may have implicitly classified the statements as disparagement by interpreting the harm to Altamir's reputation as criticism of its products and services — a view which was upheld in some contested case law (having an equivalent effect as *obiter dictum* statements).[18] Alternatively, the court could be establishing an independent basis for liability grounded in the abuse of rights. The ruling's ambiguous reasoning, and repeated references to "harassment" suggest this possibility. Did the Court of Appeal adopt A. Couret's theory that there exists a form of harassment in corporate law, akin to moral or sexual harassment?[19] However, harassment requires intent, which, as one scholar noted, "*requires that the will is directed not only toward the harmful act but also toward the consequences of that act, namely the harm itself*".[20]

The legal grounds needed to establish the misuse of the right to criticise remain unclear, but it is clear that this ruling provides a powerful legal tool for companies targeted by activist funds. This highly factual litigation must be clarified to ensure legal certainty, which is essential in this matter. It is particularly important as the right to criticise, which is a restriction on freedom of speech, must be permitted by a clear, precise, and detailed norm, according to the European Court of Human Rights' requirements.

[17] A.P., 12 juillet 2000, n° 98-10.160 et n° 98-11.155, *D*. 2000. p. 218, et p. 463, obs. Jourdain P. ; *JCP G* 2000, I, p. 280 note. Viney G
[18] Passa J., Lapousterle *J., J-Cl. Concurrence - Consommation,* fasc. 240, n° 56 ; adde Larrieu J., « Dénigrement ou diffamation : le nuage noir de la discorde », *Prop. industr.* 2024, comm. 28
[19] Couret A., « Le harcèlement des majoritaires », *BJS* 1996 n°2, page 112
[20] Tardif A., « Les potentialités du contrôle de conventionnalité en matière d'abus de la liberté d'expression », *Resp. civ. et ass*. n° 2, Février 2020, étude 2

Regulation of Emerging Technologies and Sustainable Development: An EU/UK/US Perspective

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Introduction

In a world where technology and sustainable development are reshaping our future, the European Union (EU) has made a significant contribution to international standards aimed at ethical and sustainable technology governance.

Other jurisdictions, such as the United Kingdom (UK) and the United States (US), have adopted specific standards in their regulatory frameworks and corporate governance models. Although each country has unique characteristics, they interact and inspire each other to collaborate on shared initiatives.

From this comparative law perspective, this article will discuss practices related to government technology (GovTech), which refers to the use of digital tools in administrative processes and public management, as well as corporate social responsibility (CSR) initiatives in the EU, the UK, and the US. We will highlight their similarities, differences, and mutual influences. First, we will examine the EU's stance on GovTech and CSR (I), before comparing it with the approaches of jurisdictions such as the UK and the US (II). This comparison will allow us to identify common objectives among these three jurisdictions and to gain a better understanding of the European Union's impact on global governance (III).

I. The EU's position on Govtech and ESG

The EU has established itself as a pioneer in the development of regulatory frameworks, particularly in the field of GovTech, which encompasses technologies designed to transform the public sector and increase its efficiency, making public services more accessible and effective for citizens. A notable initiative in this area is the Regulation on Artificial Intelligence (EU AI Act) adopted in May 2024. Although primarily aimed at regulating the use of AI within the EU, this legislation has a significant impact on GovTech that incorporates AI systems.[1]

[1] EU AI Act: first regulation on artificial intelligence', European Parliament Topics (6 August 2023)

The main objective of this regulation is to impose transparency requirements on companies that develop AI. For example, some AI systems are classified as ‘high risk; due to their significant impact on people’s lives—such as those used in robot-assisted surgery or grading school exams. These high-risk AI systems will need to undergo rigorous assessments to ensure compliance with current laws and regulations. The relationship between the 2023 EU AI Act and GovTech is particularly relevant, as many of the high-risk AI applications listed in Annex III of the regulation relate to public sector uses. Examples include AI systems employed in public services for access to benefits, in policing for facial recognition, and in border control for migration risks. These areas fall directly under GovTech, and the EU AI Act requires public administrations and their technology providers to adhere to strict standards of transparency, security, and ethics. It also aims to prevent the creation of illegal content, such as deepfakes, by ensuring that such AI systems are tested and certified, thereby enhancing the accountability and transparency of tech companies, including those operating in the public sector. As a result, GovTech applications using AI models like GPT-4 or DALLE-2 must comply with these standards, contributing to the development of safer and more ethical systems.

In addition, the EU has implemented specific regulations to oversee the development of GovTech. For example, Directive (EU) 2016/2102 on the accessibility of public sector websites and mobile applications requires public administrations to make digital services accessible to all citizens, including those with disabilities. This reflects the EU’s commitment to the social aspect of CSR in the context of government technology.

Beyond GovTech, the EU has also positioned itself as a leader in CSR, which the European Commission defines as "the voluntary integration by companies of social and environmental concerns into their business operations and relationships with stakeholders".[2] Although not mandatory for all organisations, CSR is playing an increasingly important role for technology companies and public sector actors, with initiatives aimed at improving sustainability and responsible governance. The intersection between technology and CSR is particularly evident in

[2] Bercy Infos, ‘Qu’est-ce que la responsabilité sociétale des entreprises (RSE) ?’ Ministère de l’Économie (18 Juillet 2022’)

the way companies are using technology solutions to measure their environmental impact and improve their transparency.

Indeed, the EU aims to achieve "carbon neutrality" by 2050, in line with the objectives of the SSP1-1.9 scenario, the most optimistic path calculated by the UN,[3] which aims to limit global warming to 1.5 degrees Celsius above pre-industrial levels.[4] A concrete example of this direction is the French law of 15 November 2021, which aims to reduce the environmental impact of digital technology. This law sets limits on the energy consumption of data centres and promotes "digital sobriety", encouraging companies to align their technological innovations with environmental goals. To support these goals, the European Investment Bank has allocated over €35 billion to fund renewable energy projects over the past decade.[5]

These regulations, binding or not, are significantly impacting the strategic decisions of companies across various industries and altering global market dynamics. For example, a GovTech company developing digital solutions for public administrations will need to ensure that its technologies comply with CSR standards, which may become mandatory in the future. If the company fails to integrate sustainable practices into its operations, the perceived value of its services may fall short of market expectations, potentially affecting its competitiveness.

Applying this model to large conglomerates, the growing recognition that business success is linked to social and environmental responsibility is exemplified by influential figures such as Larry Fink, CEO of BlackRock. In 2019, Fink urged global business leaders to focus on sustainability, environmental stewardship, and social governance.[6]

In addition, concrete initiatives are already visible, particularly with the adoption of regulatory frameworks such as the EU AI Act. Some GovTech companies, along with major tech corporations, are adjusting their strategies to comply with new sustainability and responsible

[3] What is carbon neutrality and how can it be achieved by 2050' European Parliament Topics (13 March 2019)
[4] Andrea Januta, 'Explainer: the U.N climate report's five futures decoded' Reuters, business environment (8 September 2023)
[5] COP28: EIB to support objectives of global renewables and energy efficiency pledge' (*European Investment Bank,* 2 December 2023)
[6] A fundamental reshaping of finance- Larry Fink's 2020 letters to CEOs' Blackrock (2019)

governance standards by integrating environmental, social, and governance (ESG) criteria into their operations. This shift shows that awareness of these issues is not merely theoretical but seen in tangible actions. Given the increasingly globalised nature of commerce, it is essential to examine the regulations adopted by other jurisdictions, particularly the UK and the US, to understand how these new requirements are shaping the global market.

II. The regulatory position of the UK and the US

In terms of environmental objectives, the UK has maintained positions close to those of the EU, partly due to its previous EU membership before Brexit (2020). Some of its corporate governance rules translate into disclosure obligations for companies. For example, since October 1, 2013, all publicly listed companies in the UK have been required to report their greenhouse gas emissions and global energy consumption in their annual directors' reports, in line with the Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013.

This reporting is crucial for two main reasons. First, measuring emissions is a fundamental step in managing them.[7] This report enhances a company's reputation and image, which helps to guide investor preferences. Indeed, investors are increasingly focused on sustainable investments, favouring companies with strong reputations for environmental responsibility and long-term adaptation strategies. Secondly, reporting is important because it helps save money by identifying which business activities consume a lot of energy and how they could be replaced with renewable energy and render their business more profitable. The development of GovTech is closely linked to CSR, as government technology can play a crucial role in achieving social and environmental goals. For example, it allows administrations to digitise their services, reducing paper consumption and travel, which has a positive impact on reducing carbon emissions. It also promotes social inclusion by ensuring digital accessibility, enabling all citizens, including those with disabilities, to access public services. As a result, companies providing GovTech solutions are encouraged to incorporate CSR practices into their operations to meet expectations of sustainability and social responsibility. This is particularly relevant for large companies such as Amazon, which adapt their

[7] Department for Environment, Food & Rural Affairs, 'Benefits of reporting greenhouse gas emissions' UK Government Policy Papers (8 April 2011)

facilities to meet commercial and sustainability requirements in a model known as "built-to-suit".[8] In addition, these reports can support legal action, mainly class action lawsuits. A growing trend is inspired by the US, class action lawsuits allow individuals to bring claims on behalf of a group or class.[9] Company reports can serve as grounds for such claims, exposing companies to significant financial penalties. One example is the case of emissions cheating by the German automaker Volkswagen, which led to a $14.7 billion damages award in a 2016 federal court ruling in San Francisco.[10]

When it comes to GovTech and AI, the UK favours a more liberal approach than the EU AI Act. The UK Science Department's white paper, published in March 2023, introduced a non-statutory framework instead of a 'far-reaching' legislation to regulate AI. This framework sets out expectations while granting sector regulators, such as the Financial Conduct Authority (FCA) and the Competition and Markets Authority (CMA), the authority to oversee AI in their areas.[11] Given the rapid evolution of AI, this flexible approach is designed to be adaptable, creating an environment that is conducive to innovation.[12] However, while this flexibility encourages innovation, it does not adequately address the ecological footprint of these innovations, particularly in terms of energy consumption.

In contrast, some US states have begun adopting specific laws to regulate AI. For example, New York State enacted Law 144, which requires employers to audit AI tools used in hiring decisions.[13] While the idea of an AI Bill of Rights similar to the EU AI Act is still in the drafting stages, it is worth noting that US AI policies are largely driven by non-governmental organisations. For example, institutional investors such as BlackRock are developing their own AI using Blackrock's internal standards. Others such as Microsoft are influencing the way AI could be used by investing billions of dollars into leading companies like OpenAI (the creator of ChatGPT).[14]

[8] Matt Mellot, 'Built-to-Suit: What Does That Even Mean?' (*Sterling CRE Advisors*, 2 February 2024)
[9] Wex Definitions team, 'Class Action' (*Cornell Law School*, April 2023)
[10] Andy Gillin, 'largest class action lawsuits & settlements' GJEL Accident Attorneys (1 February 2024)
[11] Mark A. Prinsley *et al,* 'The UK's approach to regulating the use of AI' Mayer Brown (7 July 2023)
[12] Hannah Meakin *et al,* 'AI and the UK regulatory framework Norton Rose Fulbright Blog (15 May 2023)
[13] Goli Madhavi *et al,* 'US state-by-state AI legislation snapshot' BCLP Client Intelligent (12 February 2024)
[14] Microsoft backed OpenAI valued at $80bn after company completes deal' The Guardian (17 February 2024)

Leading academics in the US are also playing a central role in educating global leaders on AI governance. Take Stanford's Human-Centered Artificial Intelligence Center, a key hub for global AI discussions. The centre serves as a forum that helps clarify that AI regulation goes beyond simply imposing "restrictions"; the safety of these technologies depends on the context in which they are used.[15] An AI model that lacks context would miss essential information for informed decision-making. For example, a self-driving car programmed to "protect the driver" might, in the absence of appropriate context, choose to deliberately collide with a pedestrian to achieve its objective without considering the wider implications. This kind of thinking echoes the insights of Mo Gawdat, former Chief Business Officer of X (Google), in his book *Scary Smart*.

While some developments appear to diverge, the EU, the UK, and the US influence each other and often collaborate on regulatory projects. As we will see, the EU's pioneering role in regulatory development not only demonstrates its commitment to tackling complex global challenges but also serves as a catalyst, encouraging other jurisdictions to follow its lead.

III. Global Influences and Common Goals

Achieving carbon neutrality has become a strategic target for all, with companies and governments seeing it not only as a responsible business practice goal but also as a means to safeguard their future operations.

This is evidenced by the commitment of the EU, UK, and US leaders to the Paris Agreement, signed at the 2015 United Nations Climate Change Conference (COP21). The EU, with its ambitious climate adaptation targets, played a key role in mobilising the international community.[16] For instance, during COP28, the EU encouraged the creation of new green investment funds in Africa, with the United States pledging tens of millions of dollars.[17] In addition to its pivotal role in shaping the Paris Agreement, the EU has advocated for global energy objectives, such as "transitioning away from fossil fuels". But this shift will only be meaningful if

[15] Stanford University Human Centered Artificial Intelligence
[16] David Waskow *et al,* 'Unpacking COP28: key outcomes from the Dubai climate talks and what comes next' World Resources Institute (December 17 2023)
[17] Office of US Press Relations, 'USAID commits $53 million to address climate change in cities' USAID (6 December 2023)

it is followed by concrete action. The EU has led the way by initiating new funds, such as the Global Loss and Damage Fund, pledging more than half of its initial funding (more than 400 million euros).[18] The results of COP28 show that international cooperation is essential to tackle pressing global challenges, and by committing to implement these decisions, the EU is reinforcing its position as a leader in global environmental governance.[19]

Another important consideration is that the impact of EU legislation also affects the way third-party countries deal with the EU, particularly regarding data management. A notable example is the 2018 General Data Protection Regulation (GDPR), which applies to non-European companies that process the data of EU residents. This means that companies operating in jurisdictions outside the EU often need to comply with EU guidelines and reporting requirements.[20] Consequently, other jurisdictions tend to align their regulations with those of the EU, promoting rule harmonization, which makes the market safer for investors and facilitates cross-border business, as demonstrated by the post-Brexit agreements between the EU and the UK. This highlights the role of European GovTech in encouraging other jurisdictions to adopt certain business practices.

In conclusion, the regulatory landscape for emerging technologies and sustainable development in the EU, UK and US reveals a dynamic interplay between innovation, responsibility, and global influence. While each jurisdiction offers unique approaches, common goals are emerging, particularly in combating climate change and strengthening corporate governance practices. The EU is positioning itself as a visionary and responsible actor, pioneering legislation on carbon neutrality and promoting environmental, social and governance practices. Its role in international climate conferences demonstrates its commitment beyond its borders. As its regulations continue to evolve, the EU's influence on global innovation, corporate governance, and environmental management will pave the way for the adoption of sustainable and responsible practices in the future. Thus, integrating new technological solutions into environmental policy will be crucial to ensure that technological progress and environmental protection go hand in hand.

[18] 'COP28' European Council (15 January 2024)
[19] 'Causes and effects of climate change' United Nations
[20] Brooke Master, 'BlackRock to roll out first generative AI tools to clients next month' Financial Times (6 December 2023)

NEW LEGAL TOOLS

Legal Design, a Promising Tool for a Challenged Justice System

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Introduction

In a justice system under pressure and burdened by overloaded courts, innovative solutions are being sought to reduce the strain on legal practitioners.[1] Among these solutions is legal design. Though often discussed in the context of lawyer-client relations, its broader application could significantly benefit the justice system globally.

As its name suggests, legal design merges design principles with legal best practices. The term "design" comes from the Latin word "*designare*," meaning "to draw" or "to indicate." According to the French professional designers' union, Alliance France Design, its purpose is "to provide solutions to everyday problems, big and small, related to economic, societal, and environmental issues".[2] Legal design applies this concept by conveying legal information in ways tailored to the user, often through graphics and diagrams that enhance clarity and accessibility beyond traditional text.

However, legal design goes beyond mere infographics. French Decree no. 2019-1333, which reformed civil procedure, illustrates this broader scope. This decree changed the drafting style of the Court of Cassation's decisions to make them more accessible to the parties.[3] These decisions are now structured with numbered paragraphs and clear headings, such as "Facts and Procedure," "Examination of Arguments," and "Conclusion." The Decree also encourages detailed reasoning, where the Court explains its thought process, making judicial reasoning more accessible to the public. These changes, aimed at clarifying and simplifying judicial procedures, are part of this legal design.

Legal design includes several stages, beginning with an "empathy" phase. Here, practitioners adopt the perspective of the intended audience to understand their needs and identify key issues. This

[1] Rapport du Comité des États Généraux de la Justice, *Rendre Justice aux Citoyens* (Octobre 2021–April 2022, Ministère de la Justice, 2022)
[2] Alliance France Design, 'Quelques citations célèbres sur le design' Alliance France Design (2024)
[3] Décret n° 2019-1333 du 11 décembre 2019 réformant la procédure civile, Journal Officiel de la République Française (11 December 2019)

reflective process then leads to the creation of a prototype, which is tested with users to ensure that it provides an effective legal solution.[4]

To fully grasp the value of legal design, it is useful to examine its origins (I). Given its practical and human-centred benefits, legal design could help ease the burden on the justice system (II), although scepticism persists regarding its perceived challenges (III).

I. The origins of a practice with ambitious goals

The development of Legal design is closely linked to the rise of LegalTech in the early 2000s.[5] This practice took root in common law countries, especially in the United States and the United Kingdom.[6] A notable early example is the 2009 project by designer Candy Chang and the Center for Urban Pedagogy, which created a guide to help New York street vendors understand regulations affecting their trade. Some, however, trace the concept back even further, attributing it to Napoleon Bonaparte's adage: "A good sketch is better than a long speech." Despite these early developments, it wasn't until 2014 that legal design was first conceptualised by lawyer and designer Margaret Hagan in her work *Law by Design,* where she presented it as an innovation in communicating legal principles.[7]

As a user-centred approach, legal design aims to improve accessibility and clarity in legal matters—values with constitutional significance.[8] Consequently, it offers a human-centred solution to address challenges faced by an increasingly strained justice system. A 2021 study by the Consumer Science & Analytics Institute (CSA), cited in the 2023 report of the *États généraux de la justice*,[9] shows that 67% of participants consider the justice system to be opaque. This same report emphasises the need to "clarify the role of justice in society and in relation to other

[4] Florence Creux-Thomas, 'Le Legal Design: Gadget ou Opportunité pour les Avocats?' La Semaine Juridique (16 December 2019, no 51) 1321
[5] 'Qu'est-ce qu'une legaltech ?' Dalloz Étudiant (29 September 2017)
[6] Sihem Ayadi Dubourg, 'Comprendre le Legal Design, pour transformer l'expérience de vos clients' Juridy (6 June 2020)
[7] Law by Design, Margaret Hagan, 2014
[8] Décision n° 99-421 DC du 16 décembre 1999
[9] Rapport du Comité des États Généraux de la Justice, *Rendre Justice aux Citoyens* (Ministère de la Justice, Avril 2022) 69

institutional players." For many litigants, legal jargon reinforces this perceived lack of transparency.

The issue extends beyond France: a 2016 online survey conducted by Belgium's High Council of Justice found that 86% of participants found legal language insufficiently clear.[10] Thus, an increased reliance on legal design could make judicial institutions more understandable to the public and clarify the meaning of judicial decisions.

II. An effective and human-centred approach

Legal design holds significant potential for mitigating litigation risks, although precise data on its impact is not yet available. It promotes a better understanding of legal standards and the consequences of violating them, thus enhancing accessibility and clarity in legal matters. For instance, 91% of terms and conditions are signed without being read.[11] This lack of informed consent represents a significant risk factor for disputes, and thus, this innovative approach could help reduce court congestion by promoting clearer commitments.

Moreover, Legal design supports the efficiency of the justice system. According to Article 6 of the European Convention on Human Rights, everyone has the right to a fair trial within a reasonable time. However, courts struggle to meet this requirement due to the large volume of new cases filed each year. For example, the Ministry of Justice reported nearly 1,453,000 new cases brought before French civil courts in 2022, an increase from the previous year.[12] The strain on the system is not only due to case volume but also to the complexity and length of procedural documents like summonses and pleadings, which can complicate the judge's ability to effectively resolve the case.

Many legal professionals share this concern. For instance, Ghislaine Brenas, founder of Just Cause, an agency specialising in legal design, stated that "nobody reads everything anymore, not clients, nor judges".[13] This sentiment echoes that of Alexandra Sabbe Ferri, founder of Sagan law firm,

[10] Conseil Supérieur de la Justice, Projet Épices: Le langage clair au menu du judiciaire (CSJ, 2018)
[11] 'D'un besoin d'intelligibilité du droit à une évolution du monde juridique par le Legal Design' Juri'Predis (24 June 2020)
[12] Ministère de la Justice, Chiffres clés de la justice, Édition 2023 (Ministère de la Justice, 2023)
[13] Florence Creux-Thomas, 'Le legal design, gadget ou opportunités pour les avocats?' La Semaine Juridique - Edition Générale (16 December 2019, no 51) 1321

questioning: “Who still reads… 40-page pleadings?[14] Judges, pressed for time, need to quickly locate and understand relevant information and the arguments underlying each claim. Legal design could offer a way to streamline information, enabling judges to grasp legal arguments more efficiently.

Finally, it is a human-centred practice. By placing litigants at the heart of its informative function, it aims to clarify the meaning of judicial decisions. This approach requires legal professionals to adopt a pedagogical role, delivering concise and understandable information to citizens. The private and public sectors alike are increasingly adopting legal design. For instance, Dany Gilbert, head of legal services in France’s Vendée department, has observed numerous positive outcomes from implementing legal design in his department, thanks to the clarity of the legal solutions provided.[15]

It thus emerges as a promising avenue to explore further, even though it does face certain criticisms.

III. Ongoing scepticism with navigable challenges

Some legal practitioners question the value of integrating legal design into legal practice. Professor Bruno Dondero, for example, has voiced doubts, arguing that “if a lawyer is someone who walks the paths of the law and guides others along them, it is hard to see how they could also exhibit creativity”.[16] The notion that lawyers should use precise, technical language primarily understood by legal professionals is still prevalent. Nevertheless, legal design is gaining traction as it is being taught in universities and used in practice. The growing importance attached to it reflects a certain shift in mentality.

Another concern is the potential for a “biased legal design”.[17] The practitioner who creates the design controls the information and decides which parts to highlight or simplify. While this could

[14] ibid
[15] Cassandre Tinebra, 'Pourquoi le Legal Design est-il un outil incontournable pour les professionnels du droit ?' (Village de la Justice, 4 January 2024)
[16] Bruno Dondero, « La créativité et les juristes », Cahiers de Droit de l’Entreprise, n° 5 Sept 2016, dossier 46
[17] Bruno Dondero, Legal design. - Parler de design à propos du droit a-t-il un sens ? La Semaine Juridique Edition Générale, n° 4, Janvier 2019

pose a risk, it may also serve as a strategic advantage in litigation. A lawyer could employ legal design to frame legal rules in ways that benefit their client which in this context could be an effective tool for enhancing argumentative skills.

Beyond doubts about the practice's effectiveness, other practical obstacles challenge its sustainability. Legal design first presents a financial issue. Training legal professionals in this practice or hiring individuals with legal and design skills entails significant costs. As this discipline is still relatively new, professionals with dual competencies are rare and therefore command high demand in the market.

Finally, legal design is often seen as time-consuming. Although training programmes are becoming more popular, they are far from the norm in French law schools. Consequently, few legal professionals are proficient in it at the start of their careers, and those who wish to delve deeper into the practice must invest time in training. However, in a justice system facing a crisis, time is a precious resource for judges and lawyers alike, as well as for businesses that often operate on strict timelines. Yet, it could be argued that legal design may ultimately save time. By improving the clarity of legal standards, it potentially reduces misunderstandings among litigants, business partners, and employees. Lawyers and in-house counsel could also benefit from time savings, as clients would have fewer questions.

RegTech as a New Technology for Compliance

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Introduction

The term “compliance” is gaining popularity around the world. What began as soft law has gradually become hard law such as France's Sapin 2 law, the US Foreign Corrupt Practices Act (FCPA) and, more recently, France's Duty of Vigilance law. Adhering to these rules is essential not only in a company’s operations but also in the continuous oversight of its suppliers and subsidiaries. As a result, regulatory compliance has become a fast-growing area of the law that plays a critical role across organisations, whether they operate in the financial sector or other industries.

Compliance regulations and sanctions against companies are becoming increasingly stringent and require constant vigilance from those subject to them. These regulations are constantly evolving to adapt to new realities and aim to ensure the transparency, consumer protection, data security and environmental protection that are essential to good governance. However, due diligence by companies is an ongoing process and meeting these regulatory requirements is a major challenge for companies, requiring significant resources in terms of time, money and people.

This is where the emerging concept of RegTech, or regulatory technologies, comes in. RegTech refers to the use of innovative technologies such as artificial intelligence, automation, data analytics and blockchain to help companies comply with regulatory requirements in a more efficient and flexible manner.[1] In this article, we will take a closer look at the role of RegTech as an innovative technology to address corporate compliance challenges (I), while examining its benefits (II) and future prospects (III).

I. The challenges companies face in complying with regulations

Companies face several challenges in implementing regulatory compliance measures.

[1] ‘Qu'est-ce qu'une RegTech ?’ Utocat (7 July 2021)

The first major challenge is the diversity and constant evolution of international regulations. As industries grow and become more specialised, they must implement rigorous compliance programmes that require coordination across multiple departments. In addition, standards vary from jurisdiction to jurisdiction, forcing international companies to adapt their operations in different countries to different standards.[2] Failure to do so may result in significant fines and reputational damage. For example, Goldman Sachs was fined $2.9 billion by several global regulators, including the US Department of Justice (DoJ), following the 1MDB money laundering scandal involving the Malaysian investment fund in 2020.[3] To avoid these problems, companies turn to consultants for advice on compliance. The situation becomes even more complicated when companies have to ensure full and continuous compliance with standards, particularly because of the international scope of these regulations. This requires adherence not only across all global operations but also within internal business units. From supply chain management and financial transactions to due diligence, corporate social responsibility (CSR) and non-financial reporting, these requirements make monitoring and fulfilling regulatory obligations particularly challenging.

The second major challenge is data management. Organisations that process data must ensure its security, confidentiality, and integrity, to meet regulatory standards, all while defending against cyber-attacks.[4] Regulatory compliance covers the entire data lifecycle — from collecting and storing to analysing vast amounts of sensitive data. In Europe, organisations need to comply with several regulations. For instance, the General Data Protection Regulation (GDPR) sets strict standards for the protection of personal data. On the other hand, the Directive on measures for a high common level of cybersecurity across the Union (NIS2) aims to strengthen the cybersecurity of critical infrastructure. For data transfers outside the EU, companies (usually a holding or parent company) can rely on standard contractual clauses as a 'data protection passport' or adopt Binding Corporate Rules (BCRs) to maintain consistent safeguards across their international subsidiaries. These measures are all the more necessary given the increase in data leaks, often resulting from insufficient precautions. For example, the public body '*Pôle Emploi'*, now '*France Travail'*, was

[2] Jay McMahan, Michael Chau, ' Le défi des chefs de la conformité : gérer la réglementation croissante' Deloitte Perspectives
[3] A. Ananthalakshmi and Rozanna Latiff, 'Explainer: Goldman Sachs and its role in the multi-billion-dollar 1MDB scandal' Reuters Asian Markets (12 October 2023)
[4] Sylvie Miet *et al,* 'Les Regtech, un des métiers de la Fintech' KPMG France (2019)

the victim of a cyber-attack that compromised the data of over 43 million people. This case is still being investigated by the French National Commission on Informatics and Liberty (CNIL) to identify potential GDPR violations, with the risk of fines and class action lawsuits on the horizon.

The potential penalties associated with regulatory non-compliance, such as financial fines and reputational damage, or even criminal proceedings against managers, encourage the implementation of compliance policies. As a result, companies are increasingly turning to new technologies to reduce errors, automate processes and enable faster identification of risks and obligations. The technology behind RegTech enables companies to address some of the challenges they may face.

II. The benefits of RegTech for companies

Using the Sapin 2 law as a benchmark for compliance, companies must implement policies, procedures, risk mapping, and due diligence measures. These actions can rely on automation and technologies such as RegTech, which enhance risk management.

RegTech makes it possible to analyse large volumes of data, streamline operations by automating repetitive tasks, and improve compliance through real-time monitoring and robust risk management. To mitigate the issues discussed in part (I), some firms have adopted systems that categorise their client's needs using algorithms tailored to industry sectors and issue alerts when a risk situation is updated. OneTrust, for example, is a due diligence solution that allows companies to list their customers in a centralised database and identify critical red flags across multiple risk categories. This automated solution scores each third party according to the type and level of risk they pose to the company and automatically issues alerts when a high-risk situation arises for the company. As a result, organisations can better manage anomalies and suspicious activities, strengthening their ability to prevent regulatory breaches and fraud while adapting to evolving requirements and multiple international standards.

Indeed, the use of artificial intelligence combined with big data analytics can help identify and classify sensitive data, as well as manage user consent. This evolution simplifies compliance with

the GDPR and the French anti-money laundering and counter-terrorism financing (AML/CTF) regulations.[5] Going back to OneTrust's example, its RegTech cloud solution enables companies to comply with data protection laws like the GDPR while automating data analysis.

However, these AI techniques are not yet widely implemented, as they are still under development and need to be implemented gradually to minimise controversy, particularly in relation to 'predictive justice'. It is therefore important to consider the potential impact of RegTech in the future.

III. The outlook: RegTech at the service of regulators

In France, the 'Sapin 2' law of 9 December 2016 introduced significant reforms in the area of corporate regulatory compliance by putting in place mechanisms such as risk mapping, codes of conduct and an internal alert system. These improvements reflect the growing importance attached to regulatory compliance. In this context, RegTech is emerging as an essential tool for regulators to meet the challenges of due diligence and risk mitigation.

Various bodies and organisations can act as compliance regulators, depending on the industry and the specific risks faced by the company. However, these regulators often face resource constraints that limit their effectiveness. In this context, RegTech is emerging as a promising solution, offering innovative and technological means to help regulators overcome the barriers to supervision. By using new technologies to support regulators, they can fulfil their mission of overseeing the proper functioning of the financial market, protecting consumers, and ensuring data security.

Regulators can make use of whistleblowers, a concept developed by the American politician Ralph Nader. A whistleblower is an individual who reports reprehensible acts of corruption, fraud or public danger within their organisation to someone in a position to remedy the situation.[6] However, whistleblowers are often in a delicate position, holding sensitive information and risking significant social consequences such as social stigma, retaliation or loss of career opportunities.

[5] Commission nationale des sanctions, 'Le dispositive LCB-FT', publications du Ministère de l'économie française
[6] 'What is a whistleblower?' National Whistleblower Center

This is where the concept of 'whistlebots' (or AI whistleblowers) could offer a new approach, as proposed by Vivienne Brand, assistant professor at UNSW University in Australia.[7] Unlike humans, whistlebots are unaffected by social repercussions (so far) and could provide an impartial perspective on compliance issues. However, the algorithms of these 'whistlebots' rely solely on objective, contextual data, which alone cannot eliminate unethical business practices. In fact, current AI models may perceive human subjectivity as risky or unpredictable, potentially favouring a different solution from the programmer's original intention.[8]

Yet it is important to remember that ethics is a matter related to human nature and beliefs, despite its imperfections, and it should still play a fundamental role when it comes to compliance and scrutinising actions. Therefore, will the intervention of AI eliminate this human ethical aspect of decision-making and tend towards predictive and mathematical justice? For the moment, an intermediate solution is most likely to happen, and is the most effective, with a two-stage intervention involving both AI and subsequent human verification, in order to achieve this balance. What is certain, however, is that RegTech will play a crucial role in the future of regulatory compliance.

In summary, RegTech leverages new technologies to help companies fulfil their regulatory compliance obligations and effectively manage vast amounts of data and the risks associated with it. RegTech's flexible framework not only strengthens internal management within companies but also enhances their national and international reputation. However, while RegTech offers powerful tools to improve efficiency, it cannot replace human judgement. For example, tools such as OneTrust's alerts or whistlebot's reporting systems can flag potential risks, but their ability to interpret these signals is currently limited, confining them mainly to risk detection rather than fully handling cases. It is therefore crucial to integrate human oversight into the decision-making process. Moving forward, close collaboration between legal professionals and technology developers will be essential to achieving effective and ethical regulatory compliance.

[7] Vivienne Brand, 'CORPORATE WHISTLEBLOWING, SMART REGULATION AND REGTECH: THE COMING OF THE WHISTLEBOT?' (2020) 43(3) UNSW Law Journal
[8] Nizan G. Packin, *Regtech,* 'Compliance and Technology Judgement Rule' (2018) 93 Chi.-Kent L. Rev. 193.