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## **The coexistence of realities in the digital space**

More and more, jurists of all kinds (practitioners, theoreticians, academics) in the various components of law are projecting their thoughts into the field of AI to anticipate a certain number of problems that could arise "quickly" regarding a technique that is developing in great strides.

These legal projections and reflections aim at anticipating and orienting the way in which it will be necessary to apprehend these new situations which do not yet exist, especially in a space of interactions, like the digital space, still badly defined (presently as well as potentially).

In this period of reflection, thinking about a legal personality or a legal responsibility of AI is a feasible and healthy approach, but it must be built step by step in order to grasp the stakes and the context in which we place AI in relationship with the natural person.

Thus, before projecting the AI as an object endowed with decisional autonomy to which one lends a personality and/or a form of responsibility/accountability, one must be interested in the reasons and causes that will come to inscribe it in its relationship to the natural person and authorize the qualification of a legal personality with regard to the existence of these interactions and relationships.

The first obstacle of apprehension seems to be that of the common space that the natural person and the AI will use to interact, the digital space, the one whose contours are not yet decided. Indeed, the AI expresses itself only through it and at the moment sees its existence conditioned by the access to this space.

The digital space is an artificial space inserted in a natural space.

There are thus two spaces in which man can circulate, and it appears today that the access roads to the different spaces are technically easier in one direction than in the other. Any person can easily access and exit the digital space with the same ease. On the contrary, any digital element is for the moment confined to its existence in this space and cannot be extracted from it, except

in exceptional cases such as robotics<sup>1</sup>. The digital space is therefore the preferential place of interaction between a natural person and AI.

Once noted that the interactions between AI and natural persons are expressed in digital space, we must look at the latter as the junction point of these interactions. Above all, we need to qualify what distinguishes it from physical space.

Digital space is an artificial "place" that tends to represent, in a dematerialized form, the complexity of physical space, in terms of sociological, economic, and legal interactions and structures.

Digital space also frees itself from a constraining physical notion, that of the distance to be covered to carry out an action (whether it is a conversation, a signature, or whether it may have sociological, economic, or legal consequences). The connection to the digital space erases the geographical position, standardizes, and makes accessible in a certain way the whole of the actions that it is possible to carry out to whoever connects to it.

From the moment that this space allows everyone to connect and interact, it also allows everyone to share and exchange their visions, truths, and realities conditioned by sets of sociological, economic, geographical, and geopolitical criteria. This accessibility to exchange and share means that the digital space tends to represent the complexity of the physical world in a dematerialized space accessible to a very large number of people, allowing them to become aware of the realities of other natural people in interaction.

Here, the term reality covers elements related to the factual beliefs of individuals, to what they take to be true for themselves and that with which they interact. There is no question of evoking metaphysical or spiritual beliefs (even if they participate in constructing ways of interacting, believing, and circulating in this space). In this case, we must focus on those that are part of a way of conceiving life in society and social relationships within a consumer system.

The consumption purpose of the circulations in digital space is important here because it conditions the shaping of individual realities to accomplish an economic purpose, on which a time will be reserved.

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<sup>1</sup> Ex : Boston Dynamics...

The digital space is partly composed of the whole of the interactions of the people in circulation and thus allows the provision of different realities, as it is the case in the physical space. The only difference is the accessibility to a greater diversity of these elements in the same place, which participates in the construction of factual beliefs and their more numerous coexistences in the same space.

The digital space is different from the physical space in that it makes possible the coexistence of realities in the same space, even contradictory ones, without this being prejudicial to those who believe in a different way.

Indeed, in digital space, it is common to be confronted with realities, or at least situations, stories, or facts, that present themselves as real and that, because of the interface through which they are expressed, made invisible their foundations and the truth that they carry. In other words, the Internet user has difficulty in distinguishing the true from the false.

It is possible in this context to evoke as examples the alternative facts or fake news, the post-truth, or the conspiracy spheres. In these cases, these beliefs predate the digital space; they do not respond to an incapacity of people to distinguish the true from the false, but to a certainty that most individuals are mistaken and that they are the holders of a form of truth that is hidden from the eyes of all. The tool that is the Internet has only exacerbated and “massified”<sup>2</sup> these behaviors thanks to an international connection as well as a capacity to mobilize and to extract oneself from this space.

This coexistence of realities is not specific to this space, but is multiplied in it, notably because of the technologies of power<sup>3</sup> that it is possible to put in place in order to respond to the economic goals sought (I). Also, this coexistence of reality tends towards a confusion of what is finally true and what is taken to be true, not because of individual beliefs, but because of an incapacity of the Internet user to be able to contest its veracity. In other words, when one speaks about AI, it is designated at first, in the space of Internet (that of a circulation in connection

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<sup>2</sup> To be understood as: to increase and intensify

<sup>3</sup> Foucault M., Sécurité, territoire, population, Cours au Collège de France (1977-1978), Leçon du 8 février 1978, | 2004, Le Seuil, ISBN n° 2020307995, p. 50 : « *Une physique du pouvoir ou un pouvoir qui se pense comme action physique dans l'élément de la nature et un pouvoir qui se pense comme régulation qui ne peut s'opérer qu'à travers et en prenant appui sur la liberté de chacun, je crois que c'est là quelque chose qui est absolument fondamental. Ce n'est pas une idéologie, ce n'est pas proprement, ce n'est pas fondamentalement, ce n'est pas premièrement une idéologie. C'est d'abord et avant tout une technologie de pouvoir, c'est en tout cas dans ce sens qu'on peut le lire* »

with a consumer society), the creation of realities in the digital space by removing the border of its artificiality as well as by removing the doubt of the Internet user in front of the reality that the AI proposes (II).

### I. The relationship to reality, a plural conception specific to the digital world

In the digital space, the circulation of individuals is apparently free; it is perceived as such, in particular because of the dizzying multitude of choices present on the Internet and a difficulty of man to conceive that, in spite of this diversity of choices, they cannot be master of their circulation.

Indeed, this space felt as "freer of norms" than the physical space, is, in fact, structured by the action of algorithms which answer mainly to economic purposes and whose function is to direct and orient the movements of natural persons. This directional follow-up is done by means of the treatments of traces of behavior which intend to maintain the natural persons in a state of interaction.

To do this, the economic actors of this space resort to algorithms that lock the individuals progressively and unconsciously in an interactive bubble shifting the reality that they accept.

This confinement of individuals, initially characterized in disciplinary societies<sup>4</sup>, finds in the digital space a new form of expression, that of an invisible monitoring of the behavior of individuals.

This is thus constructed and optimized in order to make Internet users interact without interruption, with the intention of maximizing the emission of data, which is the economic value of this space and the technical lever of the confinement of Internet users for high productivity-focused purposes of interaction and consumption data.

In this perspective and in the face of this first observation, that of a form of confinement of the individual in the realities that one decides to believe, it is not necessary to have or to resort to AIs to set up these interaction bubbles. Indeed, the simple cross-checking of data, notably non-personal data, by algorithms in the context of traffic monitoring provides the expected result.

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<sup>4</sup> Foucault M., Naissance de la Biopolitique, Cours au Collège de France (1978-1979) | Gallimard, Seuil, Hautes Etudes, 2004, ISBN n° 2020324016

Therefore, the use of algorithms for interaction purposes appears to be a technology of sufficient power to allow the individualization of each person's reality in order to achieve the desired economic goals. In other words, what A. Rouvroy calls “algorithmic governmentality”<sup>5</sup> is sufficient to govern and drive the behavior of individuals circulating in digital space<sup>6</sup> in such a way that they continue to interact and maximize these times of interaction and circulation: to believe what they see.

When it is said that algorithmic governmentality is enough, it is not a tool for maximizing control, it is a technology of complex power with multiple branches that makes reality for all, an individual reality of monitoring and contentment of each one. It is applied to individuals in circulation like a "second behavioral skin"<sup>7</sup>.

This algorithmic governmentality is legitimate in order to meet certain objectives, including the extraction of usage and circulation data for economic purposes. In order to do this, as mentioned above, users must be part of a dynamic of interactions, and therefore their circulation must confirm and satisfy their perception of reality.

The easiest example to understand is the circulation on social networks which target better and better who we are the more time passes. The history of our interactions becomes clearer and breaks us down. The user becomes transparent as time goes by and unconsciously locks oneself into the reality that makes one react and interact. The question for platforms is no longer to know exactly what makes a user interact sporadically, but how to keep them on the platform in a state of interaction.

It is in this economic perspective of exploitation and processing of this non-personal data in volumes that are difficult to apprehend that we observe the occurrence and the rooting of a multitude of sometimes contradictory realities in the same space of interaction.

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<sup>5</sup> Rouvroy A., La gouvernementalité algorithmique : radicalisation et stratégie immunitaire du capitalisme et du néolibéralisme ? | La Deleuziana, Revue en ligne de philosophie, n° 3/2016, La vie et le nombre ; Rouvroy A. et Berns T., Gouvernementalité algorithmique et perspectives d'émancipation, le disparate comme condition d'individuation par la relation ? | La Découverte – Revue Réseaux, n°177, 2013 ; Rouvroy A. et Berns T., Le nouveau pouvoir statistique, Ou quand le contrôle s'exerce sur un réel normé, docile et sans événement, car constitué de corps « numériques »... | Multitudes, 2010/1, n° 40 ; Bougeard A., Le phénomène de Big Data et le Droit, Pour une appréhension juridique par sa décomposition technique, thèse, Macrez F., 2021., p. 91-96, 211, 387, 400-444

<sup>6</sup> Foucault M., Dits et écrits 1954-1988, tome IV 1980-1988, Le sujet et le pouvoir, *op. cit.*, p. 237

<sup>7</sup> Rouvroy A., Des données sans personne : le fétichisme de la donnée à caractère personnel à l'épreuve de l'idéologie des Big Data, *op. cit.*, p. 12

It is not necessary to be confronted with an AI to swear to a digital reality, it is just necessary to circulate in this space. The question is then to know if this reality will be able to extract<sup>8</sup> itself from the digital field to assert itself in the physical field as a truth to be carried, defended and spread.

At the beginning, it was possible to believe differently on the Internet, without having the necessary strength to express oneself outside this space. These believers arrived in the digital space with this reality already acquired and then sought to find a group sharing the same values, knowing that they were on the fringe of a so-called majority thought or at least a contradictory thought, without delegitimizing their belief. That is to say, in spite of a belief which pushes them to express it and to claim it, a doubt exists, and it is significant.

Henceforth, algorithmic governmentality has become so fine-tuned and intrusive in its ability to construct credible realities that individuals, who now educate themselves as much via the digital as the physical, take for granted in all spaces what is said; they no longer doubt. Above all, they are led to believe that they carry within them the right of morality, the one that must be spread.

To this, we must add the fact that access to the Internet has been democratized in the majority of developed countries, and the force to extract itself from the digital space, and thus to give body to a reality in the physical space, is easier to find today, because the number which allows this reality to take body in the real space is easier to access<sup>9</sup>. Individuals are more quickly convinced and can more quickly extract themselves from the digital space to make their reality live out loud in all the spaces at their disposal.

In the case of the coexistence of different realities brought to express themselves in physical space, they will have to confront their contradictions in a space where the field of possibilities does not exist or no longer necessarily exists. The recent history of the United States of America during the term of its 45th president is the perfect example of this confrontation of realities seeking to legitimize reactionary, conservative and conspiracy-oriented speeches and, visions on others.

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<sup>8</sup> Here the term "extract" or "to extract" designates the fact of managing to transpose in a concrete way in the physical space a behavior related to a reality admitted as true in the numerical space

<sup>9</sup> Ex de l'*alt right* américaine : *Breibart news*, *QAnon*, *Infowars*

The sociological, judicial, and economic consequences of this period on the American population are not yet measurable, but they help to understand that physical space does not allow for a balance in the coexistence of contradictory realities, and also highlights the fact that digital space is not a space of free circulation.

Indeed, it is a means of exercising a technology of power over individuals by offering them a reality adapted to meet economic goals. One only must observe the time taken by social networks (e.g., Facebook, Twitter) to moderate or simply block the “alternative facts” that solicited the most interaction in their micro-space of interaction.

The volume of interactions of Internet users to achieve the desired economic goals outweigh the concern for the truthfulness of the realities proposed to Internet users and the consequences that this coexistence generates on the individuals and societies in which these individuals are registered.

The digital space has taken such a preponderance in the conception that Internet users have of believing that if this reality were to emancipate itself from this space, today it would systematically pass through the digital space to take root and would have to return there in order to continue to exist.

This necessity to pass by the digital space to share a fact, a story or to accept the facts and stories of other Internet users, does not answer only of a will of diffusion, even though, the digital space has the interest to facilitate it greatly.

It is especially a question of knowing that in this space these different realities can exist at the same time, in the same places, without their contradiction being a brake on their existence.

Cynicism would have us say that in the data economy, there are no bad buzzes or bad realities, only realities that authorize and/or favor the confinement of individuals in a flexible power technology with purely economic purposes. On that point, Internet users are unable to question this flexible power because it satisfies them.

The objective of evoking the algorithmic governmentality or the relation to reality that the Internet users develop during their circulations in the digital space is to underline the interest that the legislator has to be interested in the way in which one constructs and proposes the realities in this space, how one moderates them, and how one regulates them.



From this point of view, it is interesting to look at a regulation such as the DSA<sup>10</sup>, which is concerned with the accountability of platforms<sup>11</sup> with respect to the information circulating in their micro-spaces<sup>12</sup> and its legality. The DSA does not set the framework for a regulation where all information cannot and should not be perceived as true by Internet users if legitimate and/or authoritative evidence contradicts a fact or information that has the purpose or consequence of deceiving. However, it obliges platforms to act when information is illicit and to moderate the information that passes through their service if it proves to be contrary to the general conditions of the platform<sup>13</sup>.

What can be deduced from this DSA regulation concerning moderation is that it refers to a contractual document where each platform can set the framework of what they consider acceptable in their service. This can therefore lead to the illegality of certain information such as alternative facts or other conspiracy theories.

However, this will not prevent the coexistence of contrary realities in the digital space. From now on, on the platforms, the place of transit and important circulation of the Internet users, a control is required by the European legislator. This control or moderation of information on the platforms, whether algorithmic or not, which aims to limit illicit and harmful information (indirectly false information) and therefore circumscribe in a certain way the real suspicious ones, will not prevent, and will not slow down the algorithmic governmentality in its application on the Internet users.

This will not prevent the information from continuing to circulate, but it will undoubtedly be stamped with a mention that informs of a suspicion on the veracity of the information. Once

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<sup>10</sup> Regulation (EU) 2022/2065, October 19<sup>th</sup>, 2022, *on a Single Market for Digital Services and amending Directive 2000/31/CE*

<sup>11</sup> Regulation (EU) 2022/2065, October 19<sup>th</sup>, 2022, *on a Single Market for Digital Services and amending Directive 2000/31/CE*, art. 3. i) : « “online platform” means a provider of a hosting service which, at the request of a recipient of the service, stores and disseminates to the public information, unless that activity is a minor and purely ancillary feature of another service or a minor functionality of the principal service and, for objective and technical reasons, cannot be used without that other service, and the integration of the feature or functionality into the other service is not a means to circumvent the applicability of this Regulation; »

<sup>12</sup> Bougeard A., *Le phénomène de Big Data et le Droit*, Pour une appréhension juridique par sa décomposition technique, thèse, Macrez F., 2021., p. 46, 358, 395, 425-426, 408-416, 430-440

<sup>13</sup> Regulation (EU) 2022/2065, October 19<sup>th</sup>, 2022, *on a Single Market for Digital Services and amending Directive 2000/31/CE*, art. 3. t) : « ‘content moderation’ means the activities, automated or not, undertaken by providers of intermediary services aimed, in particular, at detecting, identifying and addressing illegal content or information incompatible with their terms and conditions, provided by recipients of the service, including measures taken that affect the availability, visibility, and accessibility of that illegal content or that information, such as demotion, demonetisation, disabling of access to, or removal thereof, or the recipients’ ability to provide that information, such as the termination or suspension of a recipient’s account » ; art. 12 : « Terms and conditions ».

again, those who have decided to believe in it, know that the access to this reality is more important and exceeds the fact of seeing the information questioned.

The economic interest remains and will remain superior to the veracity and legality of the information in circulation.

Indeed, if the algorithmic models, whatever they are, answer the objective of maximizing the interactions of an Internet user in circulation or manage to erase the doubt of an Internet user in front of the observation of a false reality, the algorithms will propose, to accomplish an underlying finality (economic or technical), the whole of the possible realities at disposal to tend towards this finality.

From this moment, it is only a question of the relationship of the Internet user towards their senses and their capacity to build and deduce a real that corresponds to the physical reality.

Algorithmic models, whatever their denomination, must be legally questioned on their capacity to shape realities in order to make them coexist, or to model realities that are no longer of human hand but that manage to deceive.

On a personal level, it does not seem urgent at the moment to cross the Rubicon and to legally attack the framework and the granting of a personality to an intelligence which is not one. Today, it is only a projection of our fantasies in its capacity to imitate us, and we will come back to this. However, it is perfectly reasonable to think about it.

Today, it seems more important to act on the way realities are shaped, adopted, rooted, and accepted in the digital space, even if it means deceiving individuals about the reality they have decided to deny.

Indeed, the coexistence of realities in the same space is not something to fight against, it participates in the expression of certain freedoms, and, above all, it is up to each person to choose the reality they believe in. Not everything has to be verified and true, the role of the Law and of the norm in democracy is not to constrain in order to authorize only one reality to express itself, especially since the digital space cannot be constrained in this way.

However, what the Law can and must consider is to reflect and set a framework to regulate the information that participates in the elaboration of realities that can represent a strong risk of deception over time on individuals. In other words, to look at and be interested in that

information that can lead to consequences, or emancipation in the physical space and thus create disorder. The DSA is a way to go in this direction.

The coexistence of realities when it is based on the tangibility of facts that can be inscribed and seek to be inscribed outside of digital space can be problematic to a certain extent, but one truth predominates, that which is inscribed in physical space. As a consequence of this opposition between reality and reality extracted from the digital space, there is *in fine* a legal and social limit that is imposed on false realities. Indeed, it is possible to verify the basis of a factual reality because it is possible to confront it in several spaces and this fact authorizes to designate legally or socially the fact or the reality as misleading or false<sup>14</sup>.

So we can ask ourselves, what about when these realities are only inscribed in the digital space and are not meant to be extracted from it? Can we decide to believe in realities specific to the digital space? Can we believe in artificial realities and wonder about the question of the false as true in this space? Can reality become an individual notion of interpretation within the digital space?

In this perspective, we must look at AI and the way it is used. Indeed, this notion raises many questions and allows one to project oneself legally far enough into schemes that have not yet happened, which is a rare thing, especially for law.

However, this enthusiasm in legal anticipation should not hide the current problems in the existing relationship between AI and Internet users within the digital space.

Thus, it seems preferable here to define the state of the relations today in what they are between the Internet user and what one designates as AI, rather than to authorize oneself to go one step too far under the pretext that it is possible to think and to elaborate one's framework or legal approach without the base that serves as its foundation.

## II. The outsourcing of human intelligence: the fantasy of purely digital realities

In this perspective of questioning what AI is in relationship to the natural person and the construction of a reality that is impossible to discern, it is necessary to return to a form of introduction of what AI is in order to be able to think it progressively.

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<sup>14</sup> This will not remove the doubt of a certain percentage of the population to believe in its existence, against the world if necessary.

Therefore, when computer scientists, data scientists, or any professionals that are linked to the development of algorithmic models aimed at processing large volumes of data are asked if they find the algorithmic models they elaborate to be intelligent, they will answer that the results obtained by the algorithmic processing are the product of a mathematical and technical execution and that this execution is targeted, fast and efficient, but in no case is it intelligent.

Algorithms are "stupid" and, in a way, "simple", despite their technical complexity because they are basically one of the execution mechanisms for obtaining targeted results<sup>15</sup>.

Thus, the more mechanisms there are, the more complex or profound the results can appear and thus give the impression of an intelligent response, but the processing prism remains very focused. Algorithms are means of processing performance that surpass human performance, in the same way as some machines for which there was and still is a fascination.

Why do we talk about Artificial Intelligence? Why does this term become part of the vocabulary when we talk about the interaction of natural persons with algorithmic models?

#### A. AI replication of human behavior parcels

Besides the marketing aspect, especially the fantasy of humankind to build a being in their own image and at the height of their intelligence<sup>16</sup> (e.g., tales, mythologies, legends, and fictional stories are the first suppliers of these reflections and whims)<sup>17</sup>. There is a form of projection of humans in their inventions, they make themselves better with each invention and therefore inexorably, they pull themselves up, above the others. Building intelligence is also a way of touching the sacred, of showing that we know how to understand and build intelligence.

What is to be noted is that this projection of humans in their inventions do not necessarily occur when it is a question of natural elements which are not of their making, but of those which coexist with them in a form of parallel evolution to human life. These parallel intelligences are

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<sup>15</sup> Office parlementaire d'évaluation des choix scientifiques et technologiques, Rapport pour une intelligence artificielle maîtrisée, utile et démystifiée, Tome 1, Session ordinaire 2016-2017, p. 193

<sup>16</sup> When we talk about man, we are talking about the average man and not about the specialist, scientific man.

<sup>17</sup> Ex : R. Daneel Olivaw, Golem, Pygmalion, Marvin ...

not "at the level" of what humans think of intelligence; they are other forms of expression that are primitive, natural, and inscribed in a function of life and survival (which is already a dramatic error of appreciation).

The human beings spend their time copying nature, even unconsciously, but are ecstatic when the animal reproduces a logic that they think are exclusive to them. In this case of imitation, also evoked is the intelligence of the animal because the act of reproduction, of behavior, or of organization refers to what the humans think to be the competence of their intelligence. However, this reproduction is done at a level of similarity which dismisses the notion of performance in its primitive state of discovery.

To come back to AI<sup>18</sup> and draw a parallel, it is not what it claims to be. Indeed, it is a misused name to designate a projection of what people think is an exclusivity of their being. When a function or a set of functions can be reproduced with a strong similarity to what humans can do, here with a much higher level of performance (unlike animals, in the human conception of what performance is), the performative result of the algorithmic processing authorizes the qualification of artificial intelligence. It consecrates human genius. AI is, in a way, a term serving as a marvel to the average human who faces the intelligence of his being, like a parent facing the awakening of a child in a given subject.

More simply, it is not a question of being able to qualify the intelligence of algorithmic models, but of underlining the state of progress copying fractions of human behavior and function. Intelligences are complex; they evolve in a given environment, and above all they evolve by means of external interactions of any type which solicit it. It is not a question of performance, but of adaptation.

It should be noted, however, that inventions improve with time, become more complex, and therefore tend to be able to reproduce increasingly complex functions that touch the supposed territory of human intelligence, and undoubtedly of intelligences in a more global sense. In this

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<sup>18</sup> Intelligence artificielle, Fundamentals and expert systems | ISO website, accessed on May 4, 2021; *Proposal for a regulation of the european parliament and of the council, laying down harmonised rules on artificial intelligence (artificial intelligence act) and amending certain union legislative acts*, Comm. Eur., 21 avril 2021, COM(2021) 206 final ; Villani C., Rapport, Donner un sens à l'intelligence artificielle, pour une stratégie nationale et européenne | remis en mars 2018, ISBN n° 9782111457089

respect, we could mention the AIs that have the capacity for creative actions linked to imagination and artistic creation<sup>19</sup>.

For example, algorithmic models have been developed to create a digital pictorial or musical works. However, despite the originality of the result, these works were built on the basis of volumes of data dedicated to the accomplishment of this function<sup>20</sup>, criteria chosen by humans and their emotions and what composes their intelligence, not those of the algorithmic neural network.

What is sought to be demonstrated at the start is that AI is a means of mathematically reproducing bits of behavior educated with quantities of data to tend towards results that are convincing and even superior to human intelligence for the same functions. In a way, it creates the possibility of erasing the capacity of humans to distinguish what is of them or not, what is of their intelligent action or that of an algorithmic model.

The difficulty of this distinction, which seems to be appearing and taking shape is that it raises a certain number of sociological, philosophical, and legal questions and problems. What is to be believed when the reality we are confronted with through interactions is no longer distinct from a reality that it is possible to model and, above all, to artificialize? Should we attribute a personality to the algorithmic models that tend to question the way in which humans apprehend their interactions with them without managing to distinguish between natural and artificial interactions?

More than the question of AI or personality, it seems that the center of the interrogations turns around the human in interaction in a particular digital space. Are they a victim or deceived in their incapacity to grasp the false reality, this digital existence without palpable and tangible reality that algorithmic models propose and can propose that algorithmic models propose and can propose ?

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<sup>19</sup> Courrier international, Le dialogue surréaliste des lords britanniques avec le robot Ai-Da, published october 12, 2022

<sup>20</sup> Bruguère J.-M., Intelligence artificielle et droit d'auteur Sortir de la science-fiction des « machines/auteurs », entrer dans la réalité du droit des données | LexisNexis, Communication Commerce électronique, n° 6, june 2020, study11

As underlined before, this reality can be, for example, of an artistic nature, interactive (e.g., the Turing test), or also sensory. The reflections on AI are anthropocentric and rightly so as they place humans at the center of the problem vis-à-vis what they call AI in a dynamic environment interacting with them, in a space that remains digital for the moment.

We must remember that the current problems of AI remain digital, in a situation confined to this space which has not yet been extracted from it in a physical form of interaction (even if recent innovations tend in this direction). In this perspective, it is necessary to question the relationship that the humans, the natural person, maintains in these interactions with the digital space by placing them as the central piece of the circulations and interactions of this space, in their way of accepting the "true" and the real in this space.

#### B. The place of the user in his relationship to AI: the question of digital reality

Indeed, the human being must be placed at the center of the interrogations for the simple reason that this digital space tends to be a copy of the physical space, in the multitude and the complexity that the human organization proposes. The only difference is that all the realities, interactions, and circulations are accessible through the same entry point and the same access, thus no longer questioning the geography of exchanges, nor the language of these exchanges.

The Internet makes it possible to live, to know, and to learn about reality from another point of view in society and from another geographical point, not knowing whether this reality that it exists, whether the person decides to believe in it or not, nor whether it is shaped and decided *a priori* and, in most cases for the moment, by an individual-natural person who thought it and stated it.

Nowadays, certain algorithmic models manage to question the relationship of the human being to reality, making an error of self-appreciation the criterion of performative validation of the model. The algorithm has succeeded in eliminating doubt; it presents itself as true and real through its results to the human observer.

As an example, certain AIs now manage to faithfully reproduce the sound of wind instruments, which is composed of a multitude of miniature characteristics that theoretically allow the

trained ear to determine the naturalness or artificiality of the sound. In another example, some images can be constructed in their entirety by writing a sentence. Here, the algorithm will not look for a photo or image corresponding to the statement of the sentence but will build this photo by breaking down each word of the sentence and inserting it in the meaning given by the latter<sup>21</sup>.

The algorithmic performance builds a sensory element of apprehension for the human being, of a written, auditory, etc. situation which does not exist and whose existence appears difficult to contest as it presents itself to the human being as true and real.

It is therefore not a question of the existence of an intelligence to which one could associate a legal personality for algorithmic models. Indeed, it is not a question of personality, nor of intelligence, nor, at least in a biological sense, of complex intelligence. It is a question of the capacity of the natural persons to believe one digital environment and the realities with which they are confronted. The digital space tends to be today the first space of interaction of the human beings and composes in great part their relationship to what they decide to take for true in their individual digital and physical reality.

Also, there is no question of talking about the responsibility of AI because it is still presented as "stupid" and "simple", therefore closer to a human invention than to an autonomous intelligence in possession of its own act of decision, in a way, a conscience.

However, it is necessary to reflect on these projections of algorithmic models that may in the future propose a personality, an unknown and new form of what can be called consciousness or intelligence, especially a decision-making autonomy that will force us to ask the question of their responsibility. However, it is not necessary to skip steps and a certain number of steps are missing to reach the existence of these innovations.

It seems more urgent and necessary to underline the philosophical-legal question of the relationship to reality in a space of constant interaction where algorithmic technologies manage to shape a desired, fantasized reality that does not exist, than to fantasize the arrival of man in the reserved domain of the sacred.

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<sup>21</sup> For example: [midjourney.com](https://www.midjourney.com)



The algorithm is a Swiss army knife in the Internet environment, as it serves both to govern the individual as a user in the digital space, for economic purposes and that which is designated as the expression of an algorithmic governmentality<sup>22</sup>. It can also be used to deceive the senses of the user in a purpose that is not determined, at least in a perspective of a test, to verify the capacity to deceive the individual in his way to designate the real or his interaction with him.

Should we admit that the digital space is a space where we decide to believe what is or is not, while never having the certainty of this reality? Does the algorithmic Internet become a space of deception of the senses while allowing the belief in these multiple and contradictory realities that coexist?

It seems obvious that the arrival of "AI" in the digital space does not raise the question of its legal emancipation and its legal regime, of its autonomy, but of its relationship with the individuals with whom it interacts. It is this that the law must grasp in order to concretize later the projections of its personality, nor its autonomy, or its responsibility when the time comes. It is necessary to determine the nature of the primary framework in which it is inscribed, i.e. that of diversified relationships and interactions with natural persons, as users of the digital space.

Is it reliable? Can its decisions have consequences with sociological, economic or legal repercussions? Do we decide to inscribe it in a report of the "true", of the real, or should we think of it in a context where it is used to divert reality in such a way that individuals are convinced of this new reality? Finally, how can the legal regime of an algorithmic model be constructed when its capacity to deceive is sufficient to convince the individual of its existence and its reality in an interacting digital space?

It seems hasty and perhaps too ambitious to reflect on the responsibility and legal personality of AI today. Making projections opens the way for reflection, trying to build a regime through a biased reproduction mechanism can appear dangerous and naive.

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<sup>22</sup> This algorithmic governmentality is based on the circulation of individuals and interactions that they produce and repeat in a space where they self-assess and self-monitor, thus helping to refine the governmentality that is imposed on them. This governmentality takes on all the more importance today with the multiplication of the means of capturing and processing "mental data" (Marcello Ienca ; Mental Data protection and the GDPR ; *Journal of Law and the Biosciences*, Volume 9, Issue 1, January-June 2022, Isac006, published the 25 of april 2022).

The term reproduction is mentioned above, because AI is characterized by the ability of the algorithm to imitate and reproduce human behaviors and attitudes, not to create them. This reproduction that researchers are developing should not interfere with on the way of apprehending the legal issues that arise from it.

Thinking about the responsibility and the legal personality of an AI is in a way to project that it is human and responsible, at least a form of humanity. It is to take a shortcut, a cognitive bias that projects an anthropological association to an AI through these interactions that are exclusive to our humanity. The law must take a step back, without dismissing the possibility of this future personality and responsibility.

The reproduction of parts of human behavior is similar to the industrial robot<sup>23</sup> that does better and faster than a worker. The difference is that AI does not touch our physical mechanics, but our intellectual mechanics<sup>24</sup>. For industrial robots, they have replaced individuals, they have made jobs evolve, there have undoubtedly been reflections on their rights, however, the industrial robot remains a machine, a movable good, an object protected by intellectual property rights and other economic rights. The industrial robot is not endowed with an intelligence, a consciousness that allows it to act in complete autonomy, free from the rules that condition its existence.

The AI is today in the same situation as the industrial robot<sup>25</sup>, it does not emancipate itself from the framework that is fixed to it. It is not endowed with an intelligence like the one we attribute to any living body. From this point of view and today, intelligence or even consciousness is a challenge that only the deceptive belief in its existence allows to give substance<sup>26</sup>.

### C. Reflections and questions on the coexistence of realities

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<sup>23</sup> Karel Čapek, R.U.R. (Rossum's Universal Robots), Ed. La Différence, 2019, n° ISBN : 2729123504

<sup>24</sup> Office parlementaire d'évaluation des choix scientifiques et technologiques, Rapport sur les robots et la loi, Session ordinaire 2015-2016

<sup>25</sup> Fantoni-Quinton S., L'intelligence artificielle, porteuse de risque ou promesse d'amélioration pour la pénibilité et la qualité de vie au travail | Dalloz, Revue Droit social, published in february 2021, n° 2, p. 128, note n° 4

<sup>26</sup> Courrier international, Le dialogue surréaliste des lords britanniques avec le robot Ai-Da, published october 12, 2022

This intelligence that we lend to these algorithmic models is not, however, without consequence in the space in which these algorithms act. Since, in the absence of intelligence, they manage to suppress the capacity of man to doubt their results and therefore to ask the question of what is true or not.

Deceptive reality does not mean that it is not a reality in the way it is perceived and accepted by those who believe in it, specifically when it is expressed in the digital space where realities coexist. It becomes a "real" tangible digitally.

Today, despite the acceptance of a plurality of realities that coexist and contradict each other in the same space, only those realities that can legitimately extract and maintain themselves in the different spaces retain their attribute of "true"<sup>27</sup>, where the others will recover the sense of falsehood if they try to extract themselves.

However, if these realities seek to exist only in the digital space, then the whole of these realities can coexist with others in their contradiction, opposition, and artificiality. The digital space authorizes reality to become an individual choice of belief. It is no longer a question of asking the question of the origin or the validity of a reality, but of an individual and personal appreciation of what composes the reality of individuals in this space.

The digital space is a space of expression and of confusion of realities. The Internet user can believe a reality constructed by an AI by attributing it to another Internet user, and even in the hypothesis that the truth is revealed, can decide that in this space this work, conversation, or story is part of an individual and tangible reality for the Internet user.

What is interesting here is the observation that beyond any technology of power<sup>28</sup> that aims to maximize interactions in individual realities that push to consumption and data generation, the Internet user can be deceived in other ways than for consumption and interaction purposes and

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<sup>27</sup> With some exceptions...

<sup>28</sup> Foucault M., Sécurité, territoire, population, Cours au Collège de France (1977-1978), Leçon du 8 février 1978, *op. cit.*, p. 50 : « Une physique du pouvoir ou un pouvoir qui se pense comme action physique dans l'élément de la nature et un pouvoir qui se pense comme régulation qui ne peut s'opérer qu'à travers et en prenant appui sur la liberté de chacun, je crois que c'est là quelque chose qui est absolument fondamental. Ce n'est pas une idéologie, ce n'est pas proprement, ce n'est pas fondamentalement, ce n'est pas premièrement une idéologie. C'est d'abord et avant tout une technologie de pouvoir, c'est en tout cas dans ce sens qu'on peut le lire »

be led to believe that what they see, hears, or reads is real, in the sense of a human origin as to what they observe.

Beyond the loss of reference with respect to what the Internet user takes as factual<sup>29</sup>, they can also perceive as true interactions and information that are nevertheless artificial. The digital space is above all a place that favors the individual decision of appreciation (the individual interaction) over a group decision with respect to the choice of the realities taken as components of the belief of each Internet user and this of their artificiality, or origins.

Hence, this relationship to the belief in different digital realities should not have to raise so many problems, since it is a matter of the personal decision of Internet users in their circulation in this space.

For as much, it questions the limits of these decisions that will come to give weight to realities that cannot be extracted from the digital space, that do not have vocation, but that can by being integrally artificial in their construction, erase the doubt of their artificiality, coming thus to propose a new way of conceptualizing reality in the digital space.

How should we position ourselves in front of artistic digital creations where it is impossible to distinguish between a physical author and an AI because of technical criteria and an emotional feeling in front of the work specific to each one? How can we know who we are talking to if the interlocutor performs better and better at the Turing test? What to believe when the first two questions suppose that one can build argued and visual realities difficult to question in their foundation because the Internet user associates to them a personal vision of what could be a part of humanity?

Should we admit that the digital space is a place where the field of real, false, artificial, or natural realities can coexist in the same state of perception by the people who circulate in this space? A superposition of states of reality? It sounds a bit quantum-like approach, but it is a worthwhile question.

It would seem that today it is possible. The digital space tends to favor the coexistence of a field of realities that are increasingly complex and diversified, all the more so if algorithmic models manage to reproduce realities that appear and sound credible to the Internet user who faces

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<sup>29</sup> It is necessary to understand the truth, here, in the fact of being associated with the hand of the man

them. In other words, the latter manages to project this reality into another space (physical space) by attributing to it a credibility X factor. It is not a question of extracting it into another space, but of believing it to be credible and to be able to integrate it into another space, and thus to take it as true.

Finally, this coexistence of realities in the digital space true or false, artificial or not does not stop and is not intended to stop at multiple factual realities for the same fact or at realities that manage to erase the doubt as to the algorithmic origin of their existence. It is possible to believe in a digital consciousness<sup>30</sup>.

It is not a question of autonomy, of personality, but of a sufficiently advanced algorithmic model which leaves the possibility for the human being who interacts with it to question the very nature of the interlocutor, which he knows to be artificial<sup>31</sup>.

Could this belief derived from the conversational experience between the user and the model be a way to prove, despite the obvious human limitations of the algorithmic model, the individual acceptance of a shaping of a reality of an algorithmic human-like personality?

In other words, is this reality anchored in the unilateral decision of the user to attribute to this model his personal conception of what he expects from a human consciousness? And thus, could this unilateral decision constitute a new individual reality and open a new door of reflection to attribute to any digital interlocutor the attribute of a consciousness that meets individual criteria of appreciation?

Will the qualification of consciousness become a new problem of individual attribution when it seeks to be expressed through the prism of the digital? Will there be a coexistence of digital consciousnesses at various degrees, as there is a coexistence of digital realities?

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<sup>30</sup> Tiku N., The Google engineer who thinks the company's AI has come to life, The Washington Post, published June 11, 2022

<sup>31</sup> Lemoine B., Is LaMDA sentient ? – an Interview, medium.com website, published June 11, 2022