

The EU's Controversial Digital Single Market Directive - Part II: Why the Proposed Mandatory Text- and Data-Mining Exception Is Too Restrictive

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Forthcoming in the November 2018 issue of Communications of the ACM, a computing professionals journal, is a column entitled "Legally Speaking: The EU's Controversial Digital Single Market Directive" by Professor Pamela Samuelson, Berkeley Law School. The editors of Communications of the ACM have given permission for this column to be pre-published for the Kluwer Copyright Blog.

The proposed European Digital Single Market (DSM) Directive would mandate a new copyright exception to enable nonprofit research and cultural heritage institutions to engage in text- and data-mining (TDM). The European Commission and the Council recognize that digital technologies have opened up significant opportunities for using TDM techniques to make new discoveries by computational analysis of large data sets. These discoveries can advance not only natural but also human sciences in ways that will benefit the information society.

Article 3 would require EU member states to allow research and cultural heritage institutions to reproduce copyrighted works and extract information using TDM technologies, as long as the researchers had lawful access to the contents being

mined. These researchers must, however, store such copies in a secure environment and retain the copies no longer than is necessary to achieve their scientific research objectives.

Importantly, rights holders cannot override the TDM exception through contract restrictions. (They can, however, use technology to ensure security and integrity of their networks and databases, which opens the possibility of technology overrides.) Article 3 also calls for rights holders, research organizations, and cultural heritage institutions to agree upon best practices for conducting TDM research.

No TDM Privilege for Profit-Making and Unaffiliated Researchers

The DSM Directive assumes that profit-making firms can and should get a license to engage in TDM research from the owners of the affected IP rights. Although the DSM contemplates the possibility of public-private partnerships, it forbids those in which private entities have control over TDM-related collaborative projects. Unaffiliated researchers (say, independent data scientists or think-tank personnel) cannot rely on the DSM's TDM exception.

Article 3 is likely to put the EU at a disadvantage in AI research because some countries have already adopted less restrictive TDM exceptions. Japan, for instance, allows text- and data-mining without regard to the status of the miner, and does not confine the scope of the exception to nonprofit "scientific research." In the U.S., for-profit firms have been able to rely on fair use to make copies of in-copyright materials for TDM purposes, as in the *Authors Guild v. Google* case. This ruling did not limit TDM purposes to scientific research.

Commentators on the DSM Directive have expressed several concerns about the restrictions on its TDM exception. For one thing, TDM licenses may not be available on reasonable terms for startups and small businesses in the EU. Second, some EU firms may ship their TDM research off-shore to take advantage of less restrictive TDM rules elsewhere. Third, some non-EU firms may decide not to invest in TDM-related research in the EU because of these restrictions. Moreover, in the highly competitive global market for world-class AI and data science researchers, the EU may suffer from "brain drain" if its most talented researchers take job opportunities in jurisdictions where TDM is broadly legal.

Conclusion

The DSM Directive's proposed exception for TDM research is a welcome development for those who work at research and cultural heritage institutions. However, the unfortunate withholding of the exception from for-profit firms and independent researchers may undermine prospects for the EU's achieving its aspiration to promote innovations in AI and data science industries. It will be hard for EU-based entities to compete with American and Japanese firms whose laws provide them with much greater freedom to engage in TDM analyses.

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