Kluwer Copyright Blog

Copyright and the meta-regulation of intermediary services and artificial intelligence

Alexander Peukert (Goethe-Universität Frankfurt am Main) · Thursday, June 13th, 2024

Photo by Chris Spiegl on Unsplash

The EU laws on digital services (Digital Services Act – DSA) and artificial intelligence (AI Act, cited here according to EP document P9_TA(2024)0138 of 13 March 2024) are intended to ensure safety and trustworthiness on the Internet and in dealing with AI. These overall aims also include the protection of copyright and related rights. The "non-authorised use of copyright protected material" is cited in recital 12 Digital Services Act (DSA) as an example of "illegal content", the availability of which is to be curbed by means of, among other things, notice and action mechanisms (Art. 16 DSA) and the mandatory risk management of very large online platforms and search engines (Arts. 34 and 35 DSA). According to Art. 53(1)(c) and (d) AI Act, providers of general-purpose AI models (e.g. the GPT models of Open AI) will have to "put in place a policy to comply with Union copyright law" and "draw up and make publicly available a sufficiently detailed summary about the content used for training" of the AI model.

However, the regulatory approach of the DSA and the AI Act differs fundamentally from that of conventional copyright law. Like other private rights, copyrights allow each rightsholder to decide autonomously in individual cases who is permitted which use and under what conditions. The DSA and the AI Act, on the other hand, do not follow this property logic. They can be described as horizontal meta-regulation in the public interest. Both acts are intended to protect all fundamental rights as well as various public interests by imposing preventive, general and abstract obligations on intermediary services and actors in the AI value chain, which are to be concretised in co-regulatory formats such as codes of conduct and ultimately to be implemented by each addressee. Public interests are also in the foreground of the DSA and the AI Act insofar as fundamental rights

are concerned because they do not function as rights of specific persons but as an objective set of values to justify systemic compliance obligations.

At first glance, the differences between copyright and meta-regulation appear unproblematic. The DSA and the AI Act are without prejudice to and do not affect the enforcement of conventional copyright law (Art. 2(4)(b) DSA, recital 108 in fine AI Act). Providers of intermediary services and AI models simply have to respect both regimes. They may not commit or promote any copyright infringements, and they must in addition comply with the special obligations pursuant to the DSA and the AI Act.

On closer inspection, however, the protection of copyright through the meta-regulation of intermediary services and AI raises numerous legal questions. Doubts already arise from the fact that EU copyright law is largely based on directives, whereas the DSA and AI Act are directly applicable regulations. What, therefore, does the general reference of the AI Act to "Union copyright law" mean? Does the AI Act transform provisions in directives, which are addressed to Member States, into an obligation of AI model providers to introduce a uniform, EU-wide copyright policy? Or do they have to implement 27 territorially limited policies? Does this transformation only concern clear, precise and unconditional provisions of directives or also partially harmonising ones?

Determining the scope of application of the copyright-related obligations in the DSA and the AI Act also poses difficulties. While copyright must be respected indiscriminately by everyone, the DSA and AI Act obligations only apply to very specific technologies and actors. When, for example, does a hosting service mutate into an online platform that must cooperate with trusted rightsholders in accordance with Art. 22 DSA? What characterises a "general-purpose AI model" and who qualifies as its "provider" (cf. Art. 3(3) and (63) AI Act)? It is also doubtful whether the effects-based rules on the territorial scope of application of the DSA and the AI Act overcome the limits of the territoriality principle in IP law, for example with regard to the training of AI models outside the EU (see recital 106 AI Act).

The discrepancy between conventional copyright law and horizontal meta-regulation becomes particularly evident in the question of whether a right or a meta-obligation has been infringed. While each individual copyright infringement triggers remedies, a breach of the DSA and the AI Act obligations presupposes, at an abstract meta-level, a lack of generally effective copyright procedures and measures. While largely irrelevant in copyright law, the principle of proportionality must always be observed in the application of the DSA and the AI Act. This principle precludes a zero-tolerance policy for IP from the outset (see Opinion of AG Saugmandsgaard Øe in Case C-401/19, para. 184 and recital 108 AI Act).

Once a DSA or AI Act violation has been established, the question remains as to whether and how copyright holders can ensure that sanctions are imposed. Art. 54 DSA does grant a claim for compensation for "any damage or loss suffered due to an infringement" of DSA obligations. However, the more abstract the obligation (e.g. the obligation to manage copyright risks), the more difficult it is to prove that a specific damage of a specific rightsholder was caused by the DSA infringement in question. Private enforcement of the AI Act is even more limited. Art. 85 AI Act only sets out a "right to lodge a complaint with a market surveillance authority", and recital 170 AI Act suggests that this right exhausts the available remedies available to private parties.

Instead, the DSA and AI Act place their enforcement in the hands of public authorities, above all

the European Commission. In order to direct the authorities' interest towards copyright, rightsholders must become active in the DSA and AI Act governance networks, for example as trusted flaggers (Art. 22 DSA) or in the Advisory Forum pursuant to Art. 67 AI Act. As the seats at the table of administrative power are limited, disputes over the question of who may represent "the" copyright interests appear inevitable. Only a relatively small number of large players such as collecting societies and other rightsholder associations qualify for this role.

The individual author, in contrast, is invisible in this abstract order of digitality. This displacement of the subject could prove to be the most far-reaching long-term effect of the EU's meta-regulation of copyright interests.

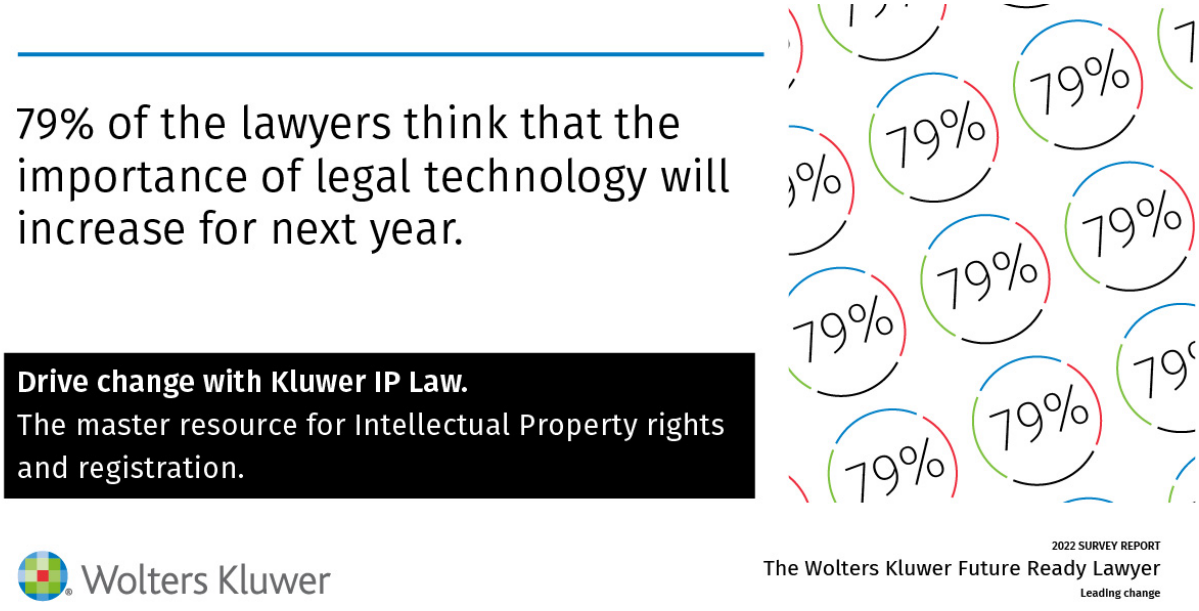
This is an adapted version of a German language editorial by the author for the German IP journal Gewerblicher Rechtsschutz und Urheberrecht (GRUR), Issue 11/2024, pp. 713-714.

To make sure you do not miss out on regular updates from the Kluwer Copyright Blog, please subscribe here.

Kluwer IP Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers think that the importance of legal technology will increase for next year. With Kluwer IP Law you can navigate the increasingly global practice of IP law with specialized, local and cross-border information and tools from every preferred location. Are you, as an IP professional, ready for the future?

Learn how **Kluwer IP Law** can support you.



This entry was posted on Thursday, June 13th, 2024 at 3:23 pm and is filed under Artificial Intelligence (AI), European Union
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.