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A first look at the Spanish proposal to introduce ECL for AI training

Teresa Nobre (COMMUNIA) · Wednesday, December 11th, 2024

A few weeks ago, the Spanish Ministry of Culture released a [legislative proposal](#) aimed at introducing extended collective licensing (ECL) for the development of general-purpose AI models. The first of its kind, the “Draft Royal Decree to regulate the granting of extended collective licenses for the massive exploitation of works and other subject matter protected by intellectual property rights for the development of general-purpose artificial intelligence models,”^[1] was open for comments until earlier this week.

In this blogpost, we analyse the main features of the proposed ECL framework and discuss the potential overlap between this licensing mechanism and the text and data mining (TDM) exception mandated by Article 4 of the DSM Directive and implemented in Spain through Article 67 of the [Royal Decree 24/2021](#).

The legal basis to introduce ECL for AI training

[Article 12](#) of the DSM Directive allows Member States to introduce licensing mechanisms with extended effect “within well-defined areas of use, where obtaining authorisations from rightholders on an individual basis is typically onerous and impractical to a degree that makes the required licensing transaction unlikely, due to the nature of the use or of the types of works or other subject matter concerned”.

According to the explanatory memorandum to the draft royal decree, the Spanish government considers that the uses associated with the development of general-purpose AI models fall into the areas of use delineated by Article 12 due to “the constant need to carry out massive uses of works (...) whose ownership corresponds, in turn, to an enormous number of right holders, in such a way that obtaining the corresponding authorizations individually becomes excessively onerous and practically unfeasible, to the point that obtaining the necessary license becomes improbable”.

The explanatory memorandum goes on to point out the strategic importance of AI for Spain and the significant obstacles that a “foreseeable” massive opt-out from the general-purpose TDM exception would create “to the proper development of artificial intelligence systems”. The Spanish government further assumes that, in spite of opting out from the exception, “many right holders would be willing and even wish to authorize such uses (...) provided that they are licensed”, thus

justifying the introduction of a ECL framework for AI model development:

In this context, extended collective licenses are considered to be the ideal legal instrument for collecting societies to be able to grant non-exclusive authorizations, i.e. collective licenses for the development of general-purpose artificial intelligence models whose effects are extended to all holders of intellectual property rights of the type of works (and other subject matter) in question, with the aim of ensuring that all of them can adequately participate in the value chain generated by these uses of these works (and other subject matter) protected by intellectual property rights which, in recent times, are proving to be particularly important in economic terms.

The proposed ECL framework

Under the proposed framework, a collective management organization (CMO) that is sufficiently representative (said representativeness to be certified by the Ministry of Culture) would be able to grant non-exclusive authorizations with extended effect to reproduce and extract works and other protected subject matter “for the purpose of developing general-purpose artificial intelligence models, including large generative artificial intelligence models, where this requires massive uses of protected works (and other protected subject matter) and, therefore, obtaining authorizations from intellectual property rightholders individually would be so burdensome and difficult as to make the required operation unlikely” (see Article 1(1) and Article 2(1) of the draft royal decree).

The rightholders would benefit from the safeguards provided for in Article 12 of the DSM Directive (see Article 1(1) and Article 2(1)). This means that the license would be extended to the rights of rightholders in the relevant type of works or other subject matter who have not authorised that CMO to represent them, but those rightholders would be able to opt-out from the ECL (see Article 1(1) and Article 5(1)). Following an ECL opt-out, the CMO would be required to communicate the scope of the exclusion to licensees and the licensees would be required to stop using the opted-out work (see Article 5(3) and Article 7(a)).

According to the draft royal decree, the grant of a license with an extended effect would be without prejudice to other contractual licenses granted for the same purposes and, the text goes, the application of exceptions and limitations would not be affected (see Article 1(2) and Article 2(2)).

The overlap between licenses and exceptions

The proposed ECL mechanism applies to the same categories of works and other subject matter referred to in Article 4(1) of the DSM Directive (see Article 2(1)) irrespective of an opt-out from the TDM exception. Despite the Spanish government’s intention, as stated in the explanatory memorandum, to offer a solution to address the obstacles posed by the expected massive opt-outs from the TDM exception, there is no provision in the proposed text of the royal decree limiting the license scope to TDM opted-out works.

As explained above, the draft royal decree only allows an exclusion of those works whose rightholders have exercised their right to object to the licensing of their works under the ECL framework (see Article 1(1) read in conjunction with Article 5(3)). In other words, the only subject matter that would fall outside the scope of application of the licensing mechanism would be ECL

opted-out works.

As a result of this broad scope of application, if adopted, the royal decree would create an unnecessary overlap between the extended collective licenses and the TDM exception, as both the license and the exception would apply to all works and other subject matter not opted-out from the exception, increasing the legal complexity for all interested parties.

It would therefore be imperative to clarify that the proposed ECL solution would only act as a fall-back option for clearing rights when the TDM exception does not apply, i.e. when the rightholders opt-out from the TDM exception. In the absence of a TDM opt-out, the exception should take precedence over the extended collective license.

In addition, the Spanish government should use this opportunity to review the implementation of both TDM exceptions, as currently they do not fully conform with the DSM Directive. The scientific research TDM exception apparently allows rightholders to opt-out from it, which goes against Article 3 and 7 of the DSM Directive, and the general-purpose TDM exception does not extend to all the neighbouring rights listed in Article 4(1) of the DSM Directive. The latter would of course deepen the legal uncertainty raised by the draft royal decree, as the proposed ECL mechanism would apply to the same categories of works and other subject matter referred to in Article 4(1) of the DSM Directive, whereas the national TDM exception would not.

This post was first published on the [Communia](#) blog.

^[1] *In Spanish: “Proyecto de Real Decreto por el que se regula la concesión de licencias colectivas ampliadas para la explotación masiva de obras y prestaciones protegidas por derechos de propiedad intelectual para el desarrollo de modelos de inteligencia artificial de uso general”*

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