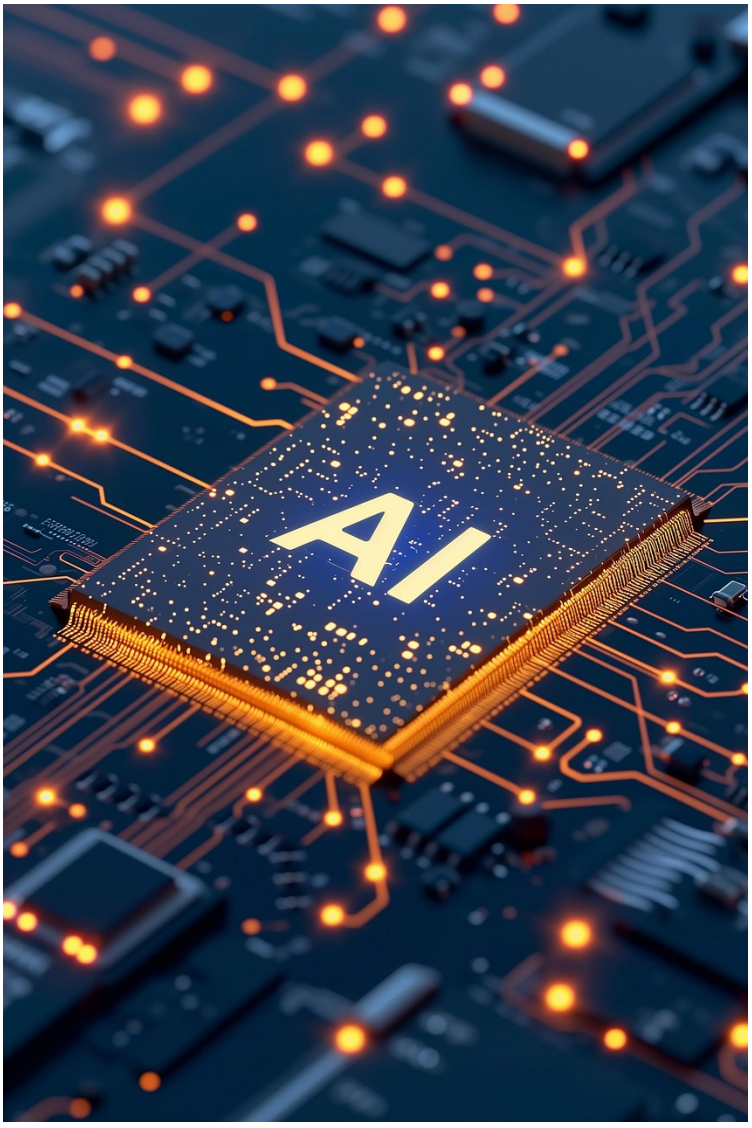
Kluwer Copyright Blog

The AI Act provisions relating to copyright – Possibility of private enforcement? Germany as an example – Part 1

Jan Bernd Nordemann, Arman Rasouli (NORDEMANN) · Monday, February 3rd, 2025



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The EU AI Act contains some provisions that have a copyright connection. Examples are the obligation for providers of general-purpose AI models to establish a policy to respect the rights reservation in Art. 4(3) DSM Directive 2019/790 (Art. 53(1)(c) AI Act) and their obligation to provide a sufficiently detailed summary about the content used for AI training (Art. 53(1)(d) AI Act). Under a Continental-European understanding, these provisions, like the rest of the AI Act, are public law (administrative law) provisions.

The purpose of this article is to analyse to what extent it is possible to enforce under private law violations of these "copyright" provisions in Article 53 AI Act. This needs to be done separately and independently from the enforcement through EU copyright law. Our analysis is done using the example of private enforcement under German law. Here, possible options are Section 823(2) German Civil Code [Bürgerliches Gesetzbuch, BGB] and Section 3a German Act Against Unfair Competition [Gesetz gegen den

unlauteren Wettbewerb, UWG]. It will be shown that this requires not only an in-depth analysis of these German law provisions but also of Union law and more specifically whether the AI Act allows private enforcement.

This post is a summary of a more detailed analysis by the authors published on SSRN. It relies on a German article published in Zeitschrift für Urheber- und Medienrecht (ZUM) 2024, pages 780-789. Part 1 provides an overview of the relevant provisions and enforcement via Section 823(2) of the German Civil Code, while part 2 will explore enforcement via Section 3a of the German Act Against Unfair Competition, compare the two methods of enforcement and set out some conclusions.

I. Regulatory "copyright" content of the provisions in Article 53(1)(c) and (d) AI Act

Article 53 AI Act initially deals with "Obligations for providers of general-purpose AI models". Article 53(1)(c) AI Act specifically requires providers to "put in place a policy to comply with Union law on copyright and related rights, and to identify and comply with, including through state-of-the-art technologies, a reservation of rights expressed pursuant to Article 4(3) of Directive (EU) 2019/790" ("DSM Directive").

The referenced Article 4(3) DSM Directive is part of the "text-and-data-mining" (TDM) exception, according to which copyrighted works may be used for text and data mining under certain additional conditions. Whether the TDM exception applies to the training of generative AI should be irrelevant for the present case, since Article 53(1)(c) AI Act is a public law provision in a Regulation that can be understood as product safety law.

As far as Article 53(1)(c) AI Act is concerned, one must also mention recital 106. This is a notable provision. It states that the obligation to observe reservations of rights asserted in the scope of Article 4(3) DSM Directive applies "regardless of the jurisdiction in which the copyright-relevant acts underpinning the training of those general-purpose AI models take place". From this it can be taken that AI providers who undertake training outside the EU and are beyond the reach of EU copyright laws due to the country of protection principle (Article 8(1) of the Rome II Regulation) are nevertheless obliged by Article 53(1)(c) AI Act to comply with the reservation of rights under Article 4(3) DSM Directive. *Peukert* (GRUR International 2024, 497 at 505 et seq.) refers to this as the "maximalist interpretation" as the opposite of the "minimalist interpretation" which only includes training taking place within the EU. However, this approach contradicts the wording of recital 106. Peukert suggests an "intermediate solution" which includes all obligations regardless of the country in which the training takes place and only requires that the content is hosted in the EU. We have doubts as to such an intermediate solution as this differentiation cannot be derived from the legal text.

Article 53(1)(d) stipulates the obligation to "draw up and make publicly available a sufficiently detailed summary about the content used for the training of the AI model".

II. Private Enforcement

1. Enforcement via Section 823(2) of the German Civil Code

For private enforcement, Section 823(2) of the German Civil Code [Bürgerliches Gesetzbuch, BGB] (English version available here) is an option.

With the help of this provision, it is possible to privately enforce the breach of provisions from civil, criminal and public law. A prerequisite for the enforcement of a provision under Section 823(2) BGB is that it serves to protect the individual who raises the claim.

For a provision to be protective for an individual within the meaning of Section 823(2) BGB, the highest German civil court, Federal Court of Justice [Bundesgerichtshof, BGH], requires that the provision at least also serves to protect individuals against the violation of a specific legal interest (individual protection). Moreover, it is necessary that to allow a claim under Section 823(2) BGB appears acceptable in the light of a uniform overall legal concept of liability with regard to the interests of the legislature. In the present case, however, EU law must additionally be consulted because of the European law nature of the provisions. For EU law, the case law of the CJEU must particularly be taken into account:

1.1. Functional subjectivisation and other tendencies in CJEU case law

Despite the different justifications, it can be seen that the CJEU is fundamentally open to private enforcement – recently in its decision *QB v Mercedes-Benz*. Back in its *Muñoz decision* in 2002, the CJEU justified the possibility of obtaining damages privately on the grounds that private enforcement, in addition to administrative proceedings, was particularly suited to strengthening the practical working of EU law ("functional subjectivisation"). Ultimately, however, it should be noted that there are still no clear criteria from the CJEU. Therefore, (1) it seems most relevant to look at whether the private enforcement would help effective and practical enforceability of the regulations (*effet utile*). Additionally (2), the "direct link" requirement that the CJEU used in the above-mentioned *Mercedes-Benz decision* mustbe examined – although its precise nature and content remain unclear in CJEU case law.

1.2. Protective nature of the individual provisions in Art. 53(1)(c) and (d) AI Act

1.2.1. Article 53(1)(c) in conjunction with recital 106 AI Act

Article 53(1)(c) and recital 106 AI Act concern the reservation of rights under Article 4(3) of the DSM Directive. That is a provision from the area of copyright law, a typical example of an individual right. The AI Act gives the copyright rule a second (and territorially broader) application as a public law product safety provision with third-party protective effect. It is not just about the general protection of the market.

Moreover, it was already pointed out during the drafting phase (inter alia by the European

Parliament) that the mechanisms of the draft AI Act likely would not be sufficient to effectively enforce the legal provisions. Nothing decisive has changed about that. It is hard to imagine that the authorities maintain an overview of compliance with the reservations of rights and issue administrative sanctions on all relevant violations. The right to lodge a complaint under Article 85 AI Act does not change this much either, because the bottleneck of official sanctioning remains. Consequently, in our view, the conditions for functional subjectivisation are also met.

An additional aspect is that the general purpose AI model provider's disregard of the reservation of rights creates a kind of "direct link" between the provider and the rightholder, on which a possible liability can be based according to CJEU principles. Thus, there are good arguments for the assumption that Article 53(1)(c) with recital 106 AI Act allows and even requires the option of private enforcement in case of violations.

1.2.2. Article 53(1)(d) AI Act

It is still unclear what the scope and content of the "sufficiently detailed summary" should be. This question can remain unanswered here, however. In any case, it cannot be denied that the private involvement of rightholders is helpful to ensure even more effective enforcement of the provision in line with the EU principle of *effet utile*.

Furthermore, a closer look at recital 107, linking directly to Article 53(1)(d) AI Act, makes clear that the aim of the requirement is to make it easier for "parties with legitimate interests, including copyright holders, to exercise and enforce their rights under Union law". This defines and limits the group of people who are directly protected so that individual protection can also be assumed here.

Moreover, the duty to provide information should establish a "direct link" with rightholders, certainly in cases where these people have to be named. In this respect, the duty to provide information also serves to uncover copyright infringements and to enable rightholders to take action against the general purpose AI model provider.

1.2.3. Further requirements according to German case law

Moreover, the granting of claims under Section 823(2) BGB is acceptable in the light of a uniform concept of liability. In particular, the intention is for a high level of protection to be ensured in relation to the fundamental rights enshrined in the Charter – including in Article 17 of the EU CFR protecting copyright – meaning that it can be assumed that the legislature also had in mind the possibility of tortious enforcement in the sense of effective, proportionate and dissuasive penalties and the *effet utile* principle.

Moreover, it is not apparent that there is a conflict with enforcement via copyright law to the effect that the legislature intended the obligations under the AI Act to be enforced under civil law only via copyright law instruments. This is because the provisions of the AI Act are specifically not copyright law-related, but rather public-law product safety (see above).

Consequently, Article 53(1)(c) in conjunction with recital 106 AI Act and Article 53(1)(d) AI Act

should be enforceable via Section 823(2) BGB.

Part 2 of this post will explore enforcement via Section 3a of the German Act Against Unfair Competition, compare the two methods of enforcement and set out some conclusions.

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