Kluwer Copyright Blog

The AI Act provisions relating to copyright – Possibility of private enforcement? Germany as an example – Part 2

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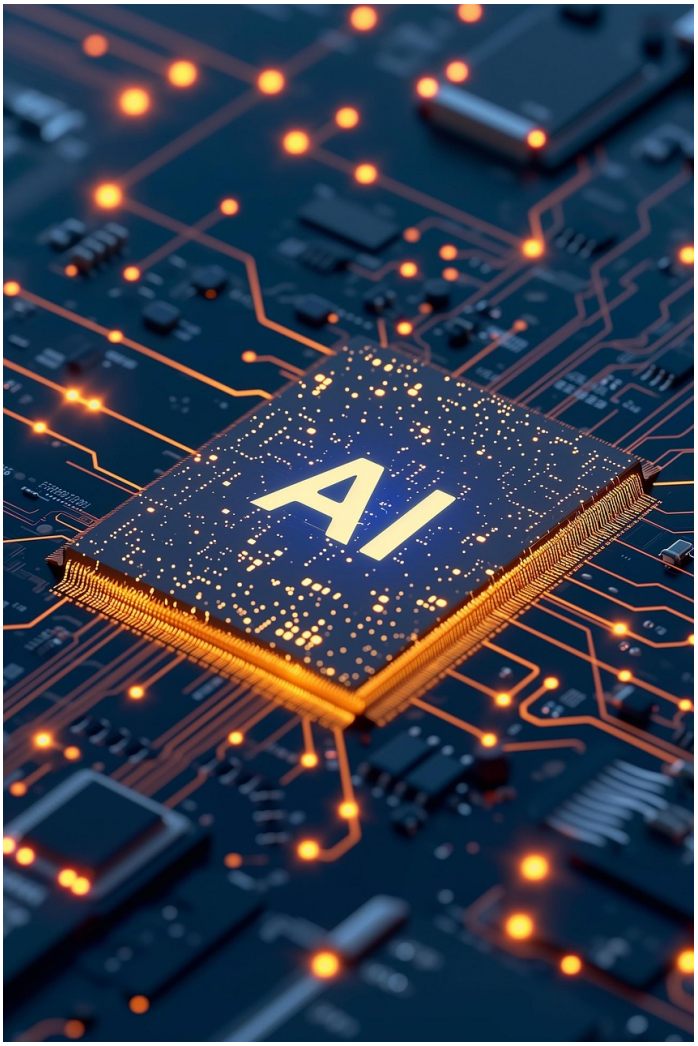
Part 1 of this post provided an overview of the relevant provisions of the AI Act and explored enforcement via Section 823(2) of the German Civil Code. This part 2 will look at enforcement via Section 3a of the German Act Against Unfair Competition, compare the two methods of enforcement and set out some conclusions.



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2. Enforcement via Section 3a of the German Act Against Unfair Competition

Another possibility for enforcing the AI Act provisions under German civil law could be Section 3a German Act Against Unfair Competition [Gesetz gegen den unlauteren Wettbewerb, UWG] (English version available here).

The UWG is part of competition law and serves to protect market participants from unfair business practices. As sanctions, the UWG provides a right to prohibitory injunctive relief or removal in Section 8 and a right to compensation in Section 9. Section 10 also provides the possibility of confiscation of profits.

The provision governing legal standing to sue is particularly interesting. For example, Section 8(3) UWG allows competitors such as other general purpose AI (GPAI) model providers to assert claims as competitors to sue for an injunction. It would be interesting as well if authors or

rightholders were entitled to take action as “competitors” in a broader sense. Standing could be based on a multi-level competitive relationship which according to the case law of the BGH is sufficient to be recognized as “competitor” (on the upstream market; see *BGH – nickelfrei*). Such competitors on the upstream license market could also be authors or rightholders. (See for GEMA, the collective management organisation for music in Germany *BGH – gemafrei*).

2.1. Requirements for a “provision”

For a provision to be enforceable under Section 3a UWG, it must firstly be a suitable provision governing market conduct. To meet this, the provision must at least also be intended to regulate market conduct in the interests of market participants.

Secondly, the provision breached must not provide for an exhaustive (exclusive) system of sanctions.

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

It follows from recital 106 AI Act that Article 53(1)(c) AI Act is intended to ensure a “level playing field among providers of general-purpose AI models”. Firstly, one can deduce from this that the provision protects, at least among others, competitors as market participants from unequal competitive conditions.

In particular, the statutory obligation is not merely a restriction on market entry prior to the offering of a model on the market (in which case there would be no suitable regulation of market conduct). Recital 108 shows that compliance with the obligation is to be “monitored” on an ongoing basis. Thus, one can assume that it is a provision with a dual function (market access and market conduct regulation), which may be a suitable provision within the meaning of Section 3a UWG.

Finally, the wording of recital 106 “This is necessary” also suggests a finality – that is, even the intention – that market conduct should be regulated in the interests of market participants in particular.

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

Recital 107 and its wording “to facilitate parties with legitimate interests, including copyright holders, to exercise and enforce their rights under Union law” must be taken into account. With regard to Section 3a UWG, the group of people mentioned above can be further limited to rightholders specifically in their capacity as licensors – i.e. as market participants.

Recital 108 also applies to this provision, so that here too it can be said that it is at least a provision with a dual function.

It should also be considered that Article 53(1)(d) is closely interlinked with the other “copyright” obligation of the AI Act, i.e. Art. 53(1)(c). The obligation to provide a reasonably detailed

summary can even be viewed as a necessary intermediate step to enable enforcement of rights in relation to the reservation of rights. Therefore, in order to determine its purpose, the provision of Article 53(1)(d) must be considered in its overall context, i.e. in connection with both recitals 106 and 107 as well as Article 53(1)(c) AI Act. From that it follows that point (d) at least also regulates market conduct in the interests of market participants.

Ultimately, Article 53(1)(c) and (d) AI Act appear to be market conduct rules within the meaning of Section 3a UWG. Market conduct rules of this type have already been enforced in other cases with the help of the provision (*Higher Regional Court of Cologne on Section 6 of the German Product Safety Act)*.

2.2 Competing legal consequences

Finally, enforcement of the provisions could be excluded if either the Act itself or copyright law is deemed to have exhaustive character regarding enforcement.

2.2.1 Directly exhaustive requirements AI Act

It cannot be assumed that the AI Act is intended to be an exhaustive regulation.

The AI Act does not mention in relation to “enforcement” under Article 1(2)(f) that this should be harmonised, in contrast to other areas.

Furthermore, a comparison of legal remedies and sanctions in Chapter IX, Section 4 and Chapter XIII AI Act with Chapter VIII of the GDPR, shows that the provisions in the data protection regulation are considerably more detailed. In particular, the AI Act itself does not provide for a claim for damages (see Article 82 AI Act). Nevertheless, the CJEU allowed competitors the option of taking action via the UWG in the case of GDPR breaches (CJEU, judgment of 4.10.2024 – C-21/23 – Lindenapotheke).

2.2.2 Indirectly exhaustive provisions of copyright law

The fact that copyright law itself provides claims and legal remedies to penalise rights infringements (in particular, Section 97 of the German Copyright Act [Urheberrechtsgesetz, UrhG]) does not mean that private enforcement via Section 3a UWG is excluded.

As a principle, under German case law, the BGH denies the enforcement of copyrights and related rights through competition law (*BGH – elektronische Pressearchive*).

But this should not mean that the “copyright” provisions in Art. 53(1) AI Act cannot be enforced through the UWG. While the provisions in the AI Act do affect areas of copyright law through their relation to Article 4(3) of the DSM Directive, in essence they constitute public-law product safety rules (see above) and therefore cannot be classified as copyright law in the narrower sense. Thus, enforcement via Section 3a UWG should not be affected.

III. Comparison of the legal consequences of claims under the German Civil Code and under the German Act Against Unfair Competition.

As far as the legal consequences or the subject matter of the claim are concerned, Section 823(2) BGB initially offers a claim for damages. Under German law, its content is determined with the principle of restitution in kind, according to which the injured party is (only) to be placed in the position in which he would have been without the damage – not any better. Moreover, the three calculation options for copyright infringements (Section 97(2) sentences 1 to 3) are not available, since the relevant infringement is only of public-law product safety provisions (see above). This means that the two calculation options for claims for damages available in the case of copyright infringement, namely infringer's profit and adequate (fictious) license fee (Section 97(2) sentences 2 to 3 UrhG) do not apply.

The negatory claim for injunctive relief or removal based on Section 823(2) BGB in conjunction with Section 1004(1) BGB, should therefore be of particular interest in preventing the offering of the GPAI model that is taking place under violation of the provisions AI Act. One disadvantage of this claim is that the rightholder loses standing as soon as the work in question is removed from the training data (as far as possible) or the disclosure obligation is met.

In contrast, Section 3a UWG is based solely on the (un)fairness of the competition, so that the parties with standing can assert the claim (Prohibitory injunctive relief and damages [Section 8 (1) and 9 UWG]) independently of the individual infringement. Here, too, it should be noted that only the principle of restitution in kind is decisive for claims for damages. This means that the two additional calculation options do not apply to violations of the AI Act (see above). Confiscation of profits under Section 10 UWG could be interesting for the claimants as well.

IV. Conclusion

This post has investigated the question of whether private enforcement of the AI Act public-law product safety provisions should be possible under German law. The answer should be yes under Section 823(2) BGB and under Section 3a UWG. In this context, claims for prohibitory injunctive relief under Sections 1004, 823(2) BGB and Section 8(1), (3), Section 3a UWG are the most interesting.

Moreover, claims for injunctive relief under the UWG appear to be much more attractive because they can be used to assert a violation of the obligations under the AI Act for all copyrighted works and for all other protected objects, whereas under Section 823(2) BGB, legal action can only be taken against infringement of one's own individual rights.

Against this background, in Germany Article 53(1)(c) and (d) AI Act could be used to pursue the infringement of EU AI training rules pursuant to the AI act even if the AI training takes place outside the EU and no copyright infringement may established under the rules of an EU member state.

This article relies on an initial AI supported translation into English by Adam Ailsby, Belfast (www.ailsby.com).

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