Kluwer Copyright Blog

# European Copyright Society Opinion on Copyright and Generative AI

Severine Dusollier (SciencesPo Law School), Martin Kretschmer (CREATe, University of Glasgow), Thomas Margoni (KU Leuven Centre for IT & IP Law), Peter Mezei (University of Szeged, Hungary), João Pedro Quintais (Institute for Information Law (IViR)), and Ole-Andreas Rognstad (University of Oslo) · Friday, February 7th, 2025

The European Copyright Society (ECS) has published its Opinion on copyright and generative AI. The Executive Summary is reproduced below and the full Opinion is available here and here.


**Executive Summary**

The ECS considers that the current development of generative artificial intelligence (AI), under the regulatory framework set up by the Directive on Copyright in the Digital Single Market (CDSM) of 2019 and the AI Act of 2024 (Regulation (EU) 2024/1689), leaves legal uncertainties and several open questions. The following issues require, in the view of the ECS, urgent consideration by the European Union:

***1. The determination of the scope of the text and data mining (TDM) exception***: the exception enacted in Arts. 3 and 4 of the CDSM Directive at a time when the Generative AI development could not have been fully anticipated, can be interpreted as covering some operations of training of a Generative AI model, but certainly not all aspects or stages of the life cycle of AI models and systems, from curating a dataset for training to the generation of an image, text or other media, by users. The exact scope of the TDM exception, and hence the copyright status of acts carried out at each stage of development and operation of Generative AI models and systems, should be further studied and analysed. That would require a decision as to whether acts of reproduction or public communication occur and which actors are liable for such acts. Under such assessment, the possibility of commercial use of models trained for scientific research and the effect of the exercise of the opt-out provided by Art. 4 CDSM Directive, on the availability of lawfully accessible sources for the research exception provided by Art. 3 CDSM Directive, merit particular attention.

***2. The content of the obligation under Art. 53(1)(c) of the AI Act related to the reservations of rights***: in particular, the technologies that can be used to express the opt-out should be identified and regularly reviewed; the rightholders entitled to opt-out and the opt-out modalities, including the timing and the location, should be clarified.

***3. The scope and modalities of the transparency obligation laid down by Art. 53(1)(d) of the AI Act:*** in particular, the relevant information to be included in the summary and the impact of the transparency obligation on the assessment of the lawful access criterion contained in Arts. 3 and 4 CDSM Directive should be clarified.

***4. The privileges for Research and for Open Source models:*** the importance of research and the key role of open source data and software in the field of AI should guide the interpretation of the CDSM Directive and the AI Act, and lead to needed clarification of some of their provisions, with the objective of preserving the fundamental rights of research, academic freedom and education. The uncertainties raised by the Hamburg court decision in the LAION case, as to the interface between Art. 3 and Art. 4 of the CDSM Directive, should particularly be addressed in order to avoid general purpose AI (GPAI) model providers relying on training for the purposes of research, hereby escaping the more restrictive frame of the exception of Art. 4.

***5. The articulation between the CDSM Directive and the AI Act***: the CDSM directive is a private law instrument organizing a protection of private rights on a territorial basis, whereas the AI Act is a public law that regulates the safety of AI products, as a condition for importation and use in the EU. That raises several issues in the articulation of both legislative texts, notably the territorial scope of the obligations imposed, the entities covered by the different obligations, the effect of the AI Office's voluntary Code of Practice, the distinct modes of enforcement of the obligation laid down by the CDSM Directive and by the AI Act. These points should be clarified.

***6. The fair remuneration of authors and performers*** for all acts of exploitation of their works and performances occurring in the life cycle of Generative AI models and systems (including when an opt-out from the application of Art. 4 CDSM Directive has been exercised and when their works or performances are included in a dataset that has been licensed to an AI provider) needs to be reaffirmed as a fundamental principle of the EU acquis. The Commission should look at the best ways to ensure such a remuneration, including remuneration rights or other compensation mechanisms, in concert with Member States.

*The European Copyright Society (ECS) was founded in January 2012 with the aim of creating a platform for critical and independent scholarly thinking on European Copyright Law and policy. Its members are scholars and academics from various countries of Europe, seeking to articulate and promote their views of the overall public interest on all topics in the field of authors rights, neighbouring rights and related matters. The ECS is neither funded nor instructed by any particular stakeholders. Its Opinions represent the independent views of a majority of ECS members. The ECS sees it as part of its mission to give opinions on cases pending at the Court of Justice of the EU (hereinafter CJEU or Court).*

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