Kluwer Copyright Blog

Navigating User Lawfulness in European Copyright Law: From Lawful Use to Lawful Access

Tatiana Synodinou (University of Cyprus) · Wednesday, March 19th, 2025

Image created by AI

The concept of lawfulness in relation to user status or user acts has been gradually established in EU digital copyright law as a condition for the enjoyment of certain copyright exceptions.

However, the concept has proliferated inconsistently, lacking a clear normative content and shape. There is variant terminology: "lawful acquirer of a computer program" or "a person having a right to use a computer program" (Directive 2009/24), "lawful user" of a database" (Directive 96/9), "lawful use" (Article 5.1 of the Infosoc Directive). As regards the meaning of the concept, in Recital 33 of the Infosoc Directive "lawful use" is flexibly defined as any use which is authorised by the right holder or not restricted by law.

A first question that needs to be asked is whether, despite the different terminology and context, the variant expressions of lawfulness should be perceived as having the same meaning. In this context, these norms could be interpreted on the basis of recital 33 of the Infosoc Directive. That would mean that a lawful user is the person having the right to use the work (in our case the computer program or the database) either based on the authorisation of the right holder or on the basis of other legal grounds (not restricted by law).

But is this all? No. The CJEU seems to have taken on the task of implicitly expanding and further elaborating the concept of lawfulness in relation to users' acts.

In ACI Adam, the CJEU introduced "lawfulness" as a prerequisite for the enjoyment of the private

copy exception, when affirming that the benefit of the private copy exception concerns only reproductions made from a "lawful source". It is noteworthy that the assessment of "lawfulness" is strictly linked to the source of the copy and does not take into consideration the end-user's knowledge in relation to the unlawfulness of the source of the copy. This line of reasoning was also adopted in the subsequent V*ereniging Openbare Bibliotheken v. Stichting Leenrecht* (case C?174/15), where the Court held that the public lending exception cannot be applied to the making available by a public library of a digital copy of a book in the case where that copy was obtained from an unlawful source.

In the Copydan judgment, the CJEU was more explicit regarding the conditions governing the "lawful source". In the Court's view, the focal point for assessing the lawfulness of the source is the right holder's consent to provide access to the work. By doing so, the Court adopted a more restrictive approach than that in recital 33 of the Infosoc Directive and the relevant case law of the CJEU in Infopaq II and the Football Premier League cases.

And an important question arises here. Shall we apprehend the concept of lawfulness holistically or are there distinct, separate and different criteria for the assessment of lawfulness for each separate case where the condition appears?

The answer to this question has become much more critical regarding the lawful access criterion for the enjoyment of the text and data mining exceptions of the CSDM Directive. The Directive does not define lawful access. An interpretation is provided in Recital 14, where it is stated that:

> "Lawful access should be understood as covering access to content based on:
>
> – an open access policy or
>
> – through contractual arrangements between rightholders and research organisations or cultural heritage institutions, such as subscriptions
>
> -or through other lawful means
>
> Lawful access should also cover access to content that is freely available online".

So, here we have three alternative definitions of lawful access.

First, a subjective approach, which is also found in part in Recital 33 of the Infosoc Directive and the "lawful source" case law, which links the lawful access to the consent (will/ authorisation) of the right holder: lawfulness can be based on contractual arrangements, on subscriptions, on open access licenses.

Second, a catch -all clause similar to the "*not restricted by law*" lawful use basis of recital 33, which is, however, tautological: lawful access is access secured through other lawful means.

And third, and this a novel point, lawful access covers access to content that is freely available online, thus content that is available online without technical restrictions. The underlying idea is that the right holder who has made available content online freely is presumed to have implicitly authorised access to the work for all Internet users. The legal basis here is still the consent, but we could refer here to an "objectified consent" of the right holder to have authorised the free access to the work. This definition appears to follow the CJEU's line of reasoning in the Svensson and VG

Bild Kunst cases. This shall be seen as an evolution of the concept of “lawfulness” that enriches its normative content with a more liberal approach which considers the reality of online access to content.

A literal interpretation of the free access basis of lawful use in recital 14 of the CDSM Directive could *a priori* mean that if a copyright protected work is found on free access (non-technically restricted) online, then it should be lawful to conduct text and data mining, without taking into consideration any contractual restrictions or even the unlawful source of the work.

But is this so simple and is this all? Unfortunately, not. Indeed, this approach disregards the previous case law of the CJEU in the “lawful source” cases. And, here, the unity or disparity dilemma appears. Is the “lawful source” prerequisite a special condition that must be met only in relation to the private copy exception , in relation to e-lending or only anywhere else where is it specifically established ? Or, on the contrary, is it part of an emerging EU copyright acquis on user “lawfulness” that is also applicable in the specific case of the TDM exceptions?

Disregarding the “lawful source” requirement in the case of the research TDM exception facilitates research organisations to conduct TDM On the contrary, accepting that the “*lawful source*” requirement is also applicable when mining content that is freely available online would mean that the concept of free access must be more restrictively interpreted. This implies that the free access must have been authorised from the right holder. For example, where a website in the dark web hosts an illegal database of protected e-books, mining these books would be illegal, regardless of whether the access to the database is free or not.

Certainly, the CJEU’s findings in cases of communication to the public of illegal content (mainly the GS Media and The Pirate Bay cases) could theoretically offer a more moderate response, by taking into account the nonprofit character of the use (which is also the case for a research organisation benefiting from the exception of Article 3 of the CDSM Directive) and how easy it is for a not for profit user to assess the lawful or unlawful character of the source. It should also be borne in mind, however, that this approach which is based on extracontractual liability is a paradox in copyright law. In any case, there is significant uncertainty on how the lawful access/free access criteria will be interpreted, and this could seriously jeopardise the application of the text and data mining exceptions.

The question is also raised in the Second Draft General-Purpose AI Code of Practice. First, Signatories of the Code of Practice (Code) commit to ensuring copyright compliance when acquiring datasets for training AI models, verifying the dataset’s copyright status, and assessing third-party assurances. They must also make reasonable and proportionate efforts to ensure that they have lawful access to copyright-protected content in accordance with Article 4(1) of Directive (EU) 2019/790 when engaging in text and data mining. Additionally, they are required to exclude piracy websites from their training datasets and may refer to official exclusion lists from relevant authorities.

Overall, user “lawfulness” has evolved into a complex conceptual framework, characterized by varying and often conflicting expressions, that requires thorough exploration and codification.

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

This entry was posted on Wednesday, March 19th, 2025 at 1:29 pm and is filed under inter alia, for ensuring that EU law is interpreted and applied in a consistent way in all EU countries. If a national court is in doubt about the interpretation or validity of an EU law, it can ask the Court for clarification. The same mechanism can be used to determine whether a national law or practice is compatible with EU law. The CJEU also resolves legal disputes between national governments and EU institutions, and can take action against EU institutions on behalf of individuals, companies or organisations.">CJEU, Digital Single Market, European Union, Exceptions and Limitations, Exhaustion
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.