THE MULTI-LAYERED REGULATION OF RIGHTS RESERVATION (OPT-OUT) UNDER EU COPYRIGHT LAW AND THE AI ACT –

FOR THE BENEFIT OF WHOM?

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COPYRIGHT IN THE SPOTLIGHT:
30 YEARS HELLENIC COPYRIGHT ORGANIZATION
Athens
7 March 2025

A NEVER ENDING STORY…

A Saviour or A Dead End? Reservation of Rights in The Age Of Generative AI

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Artificial intelligence; Copyright; Data mining; Digital content; EU law

EIPR (2024) 461-469.

The commercial TDM exception is a ***complex equation***: missing regulation on

→ the timing,

→ the location,

→ the scope and

→ the declarer of rights reservation

→ and on the overlaps with other norms.

Lots have happened since early 2024! E.g. AI Act; Code of Practice; case law (Kneschke v. LAION + HowardsHome).

A NEVER ENDING STORY…

Three focal points:

→ does the training of GenAI (GPAI models) fit into CDSM §4 & AI Act §53 et seq?

→ What did we learn from the draft Code of Practice (v2.0)?

→ What did we learn from existing case law?

Available via SSRN. Forthcoming in Westkamp/Shemtov (Edward Elgar 2025).

TRAINING GENAI FITS INTO §4 CDSM / §53 AI ACT

Contra (originalist understanding):

> Importantly, the AI Act recognizes the relevance of TDM to AI training, but in no way does it indicate that TDM is synonymous with AI training or that everything in-between TDM and AI training is covered by Articles 3 or 4 of the DSM Directive.

Eleonora Rosati: Infringing AI: Liability for AI-Generated Outputs under International, EU, and UK Copyright Law, European Journal of Risk Regulation (2024) 7-8.

See more: Schack (2024); Dornis (2025).

TRAINING GENAI FITS INTO §4 CDSM / §53 AI ACT

Arguments in favour:

→ CDSM was ***designed purposefully broad*** / covers a technology horizontally, not a narrow, specific one;

→ ***TDM = reproduction*** (Art. 2 InfoSoc Directive) or extraction (Art. 6(2)(b) and 9(b) Database Directive) per CDSM (more on that: Szkalej/Senftleben 2024);

→ Regulatory pasticcio: ***recital 105 & Article 53*** AI Act on TDM & GPAI models.

BUT:

→ ex post uses are not exempted under §4 CDSM and §53 AI Act (see more on that: Dornis 2024, ECS 2025).

AI ACT §53(1)(C)

***Putting in place* a policy document…**

→ draw up, publish, keep up-to-date, effectuate.

***Identify and comply with* rights reservations…**

→ meaningful policy per *effet utile*;

→ Article 53(4) – three alternatives: Code of Practice; harmonized standard; individual demonstration.

Copyright and Generative AI:

Opinion of the European Copyright Society

January 2025

CODE OF PRACTICE (SECOND DRAFT, DECEMBER 2024)

11 measures + 16 key performance indicators, including…

→ make reasonable efforts to assess whether third-party datasets complied with copyright law (measure 2.3);

→ to commit („reasonable and proportionate efforts") ensuring lawful access to the training data (measure 2.4);

→ not to crawl pirate websites (measure 2.5);

→ to identify forms of appropriate expressions of rights reservations other than robots.txt + „rights reservation at source or work level" (measure 2.7); or

→ to prevent overfitting (measure 2.9).

AI ACT §53(1)(D)

„Draw up and make publicly available a sufficiently detailed summary about the content used for training the GPAI model"

→ identical meaning for draw up, publish, meaningful etc. + *effet utile*

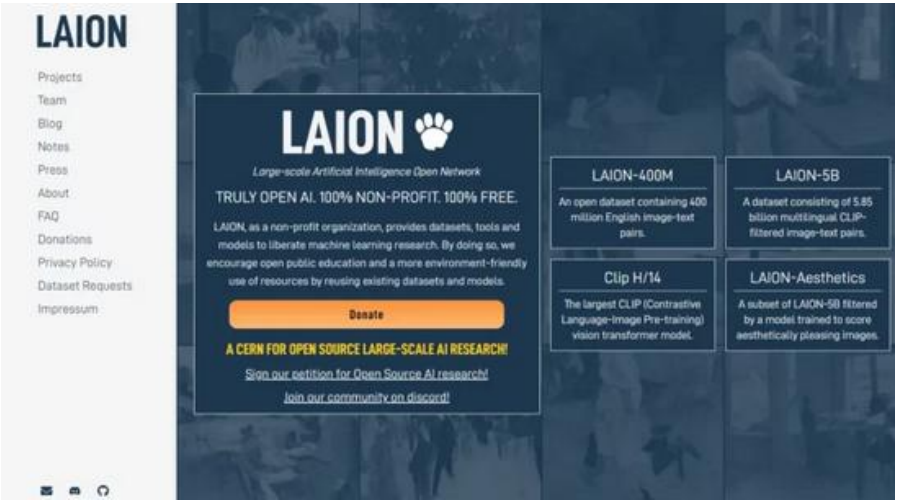
→ summary = comprehensive, but not complete;

→ content, not data;

→ sufficiently detailed → will be covered by the AI Office's template;

→ compare to the *Californian GenAI: Training Data Transparency Act* → „high-level summary", including data on the sources or owners of used datasets; description how the datasets further the intended purposes of the GenAI system or service; the number and description of data points; whether the dataset includes protected subject matter (or public domain?)

CASE LAW



LG Hamburg, Urt. v. 27.9.2024 (310 O 227/23) - LAION (in dictum): reservation was expressed by an *authorized person*; *not to be specifically or consciously addressed to certain users*; reservation was *clearly formulated*; human readable = *machine comprehensible*.

The case is limited to special questions – *lacking clarifications* on the location and timing of the reservation + reliance on „human languages" *endangers minor languages* (and prefers English at the same time).

CASE LAW

DPG Media et al. v. HowardsHome, Rechtbank Amsterdam, C/13/737170 / HA ZA 23-690, ECLI:NL:RBAMS:2024:6563 (October 30, 2024)

→ plaintiff's reservation of rights were *not machine-readable*, as

- robots.txt protocol excluded only specific AI bots, and not defendant's scraping technology;
- puts extra burden on rightsholders = is that in line with CDSM's intended purpose?
- Divergence between the LAION and HowardsHome judgements regarding the meaning of machine-readable.

(NOT A REAL) CONCLUSION…

→ The rights reservation dilemma is far from being fixed – only elements of the complex equation are clarified (to a certain degree) → *no chance for a one-size-fits-all solution* (per Keller)?

→ Lack of clarity for *transparent deployment of reservations* → EC's tender to study the feasibility of a central registry?

→ Existing (growing) body of *licensing practices* – lack of clarity of their substance + Spanish proposal for an ECL system.

→ *Machine unlearning/disgorgement* as a sanction? Concerns regarding that…

→ Is the *regulatory approach* really the solution? Compare to the Paris AI Summit (Macron, von der Leyen ~ pro-innovation talks).

THANKS FOR YOUR ATTENTION!