Extended Collective Licensing for Use of Copyrighted Works for Machine Learning

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INTRODUCTION

The fast development of generative artificial intelligence ("AI") services—such as ChatGPT, Midjourney, Dall-E—have within a short period of time gained immense uptake and popularity.[1] At the same time, such services have given rise to fundamental challenges from a copyright perspective. Court proceedings have been initiated in many jurisdictions on the compatibility of such services with copyright legislation.

Some scholars see the development of AI as a gradual process, to be dealt with, like earlier technologies, through incremental adaptation of the copyright framework.[2] For others, AI represents so fundamental an innovation—a disruptive technology,[3] a game changer,[4] an apocalypse[5]—that it threatens to shake copyright law to its very foundations. The *Economist* has described the challenges as a "battle royal."[6]

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1. *See How AI Will Divide the Best from the Rest*, ECONOMIST (Feb. 13, 2025), https://www.economist.com/finance-and-economics/2025/02/13/how-ai-will-divide-the-best-from-the-rest [https://perma.cc/R2F9-XVQW].

2. *See* Jane C. Ginsburg & Luke Ali Budiardjo, *Authors and Machines*, 34 BERKELEY TECH. L.J. (2019).

3. *See* WORLD INTELL. PROP. ORG., WIPO TECHNOLOGY TRENDS 2019: ARTIFICIAL INTELLIGENCE 25 (2019).

4. *See* ANASTASIYA KISELEVA, 4IP COUNCIL, *WHAT IS ARTIFICIAL INTELLIGENCE AND WHY DOES IT MATTER FOR COPYRIGHT* (2019).

5. *See* Hannah Parkinson, *AI Can Write Just Like Me. Brace for the Robot Apocalypse*, GUARDIAN (Feb. 15, 2019), https://www.theguardian.com/commentisfree/2019/feb/15/ai-write-robot-openai-gpt2-elon-musk [https://perma.cc/MA29-UQST] [https://web.archive.org/web/20250125004651/https://www.theguardian.com/commentisfree/2019/feb/15/ai-write-robot-openai-gpt2-elon-musk].

6. *See* Schumpeter, *A Battle Royal Is Brewing over Copyright and AI*, ECONOMIST (Mar. 15, 2023), https://www.economist.com/business/2023/03/15/a-battle-royal-is-brewing-over-copyright-and-ai [https://perma.cc/659T-C44U] [https://web.archive.org/web/20250109043322/https://www.economist.com/business/2023/03/15/a-battle-royal-is-brewing-over-copyright-and-ai]. Merriam-Webster defines a "battle royal" as "a fight participated in by more than two combatants . . . especially one in which the last fighter in the ring or the

These technological and legal developments—and related economic consequences—have, in turn, raised political and scholarly interest in the issues at stake. For example, the World Intellectual Property Organization ("WIPO") has dedicated studies and seminars to the topic,[7] the Association Littéraire et Artistique Internationale ("ALAI") 2023 Congress in Paris focused on AI and copyright,[8] and several jurisdictions have or are considering specific provisions in copyright law of relevance to this emerging technology.[9] Entire symposia, including this one—the Kernochan Center's 2024 annual symposium *The Past, Present and Future of Copyright Licensing*[10]—are dedicated to related copyright issues.[11]

A copyright-related question that has gained much attention is whether the output generated by generative AI services can obtain copyright protection,[12] and if so, who the author is.[13] Another question, which is the focus of this contribution, is whether

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last fighter standing is declared the winner." *Battle Royal*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/battle%20royale [https://perma.cc/L493-QK6J] [https://web.archive.org/web/20250211225839/https://www.merriam-webster.com/dictionary/battle%20royale] (last visited Feb. 11, 2025).

7. *See Artificial Intelligence and Intellectual Property*, WORLD INTELL. PROP. ORG., https://www.wipo.int/about-ip/en/frontier_technologies/ai_and_ip.html [https://web.archive.org/web/20250115085036/https://www.wipo.int/about-ip/en/frontier_technologies/ai_and_ip.html] (last visited Jan. 15, 2025). Recently, issues related to Copyright and Artificial Intelligence have been brought on the agenda of the WIPO Standing Committee on Copyright and Related Rights ("SCCR"). *See* World Intell. Prop. Org. [WIPO], *Summary by the Chair*, SCCR/44/SUMMARY (Nov. 8, 2023).

8. *See* ASSOCIATION LITTÉRAIRE ET ARTISTIQUE INTERNATIONALE, https://alai-paris2023.org/ [https://perma.cc/RW67-6N64] [https://web.archive.org/web/20250125010728/https://www.alai.org/en/congresses-and-study-days/] (last visited Jan. 24, 2025).

9. I was invited as a speaker to a public hearing organized by the Swedish Parliament's Committee on Cultural Affairs, on the topic of *AI and Copyright—Consequences for the Cultural Sectors*, held on April 18, 2024. *See also Copyright and Artificial Intelligence*, COPYRIGHT.GOV, https://www.copyright.gov/ai/ [https://perma.cc/63XX-RSHR] [https://web.archive.org/web/20250117225210/https://www.copyright.gov/ai/] (last visited Feb. 9, 2025); *Copyright and AI: Consultation*, GOV.UK, https://www.gov.uk/government/consultations/copyright-and-artificial-intelligence/copyright-and-artificial-intelligence#c-our-proposed-approach [https://perma.cc/4CBV-PLUK] [https://web.archive.org/web/20250212031801/https://www.gov.uk/government/consultations/copyright-and-artificial-intelligence/copyright-and-artificial-intelligence#c-our-proposed-approach] (Dec. 17, 2024); EUROPEAN COMMISSION, TRENDS AND DEVELOPMENTS IN ARTIFICIAL INTELLIGENCE: CHALLENGES TO THE INTELLECTUAL PROPERTY RIGHTS FRAMEWORK (2020).

10. This Article is based on the Author's presentation at this Symposium, as part of a panel on the topic of "Collective Licensing and Antitrust Concerns."

11. At the same time as this Symposium, the biannual Nordic Copyright Symposium was held in Copenhagen on the topic "Copyright and AI." Several seminars and other activities organized by the Swedish Copyright Society (the Swedish ALAI Group), have focused on AI-related topics. In addition, on September 12–13, the National Library of Sweden in collaboration with *inter alia* the Swedish Intellectual Property Office ("PRV"), organized a conference titled "Digital Knowledge—The Library and Copyright in a Global Digital Economy."

12. *See, e.g.*, U.S. COPYRIGHT OFF., COPYRIGHT AND ARTIFICIAL INTELLIGENCE, PART 2: COPYRIGHTABILITY (2025).

13. *See, e.g.*, Johan Axhamn, *Copyright and Artificial Intelligence—With a Focus on the Area of Music*, *in* FESTSKRIFT TIL JØRGEN BLOMQVIST [FESTSCHRIFT FOR JØRGEN BLOMQVIST] 33, 33–86 (2021).

the use of copyright protected content as part of the "training" of the AI—i.e., machine learning—constitutes copyright-relevant use, i.e., falls within the rights protected by copyright.[14] And if so, whether the so-called extended collective licensing model could be a relevant vehicle (or mechanism) for clearing rights for such use. Related to aspects of extended collective licensing, issues have been raised around whether there are challenges associated with competition law that need to be taken into account.

Against this backdrop, this Article is structured as follows. Section I, deals with machine learning and copyright, i.e., whether and to what extent the use of copyright-protected content as part of the "training" of the AI (machine learning) constitutes copyright-relevant use. Section II describes and discusses whether the extended collective licensing model could be a relevant mechanism for such use. Section III focuses on some challenges from a competition law perspective, and also relates to some relevant provisions in the EU directive on collective rights management. Section IV sets out some concluding remarks.

I. MACHINE LEARNING AND COPYRIGHT

In general, machine learning is commonly seen as a subset of AI and involves identifying patterns in preexisting data, which can then be applied to new data.[15] The technique is based on algorithms that are fed large quantities of data (big data), so-called training data, in order to comprehend connections and correlations.[16]

From a copyright perspective, the question has been raised whether machine learning entails a use of copyright protected content that is "copyright relevant," i.e., whether such use falls within the scope of the exclusive rights provided to authors and other right holders in copyright law. More specifically, the question is whether such use constitutes a "reproduction" from a copyright perspective.[17]

The international norms in this regard are not entirely clear. Article 9 of the Berne Convention sets out a broad scope of the right of reproduction, covering reproductions "in any manner or form."[18] However, it is not entirely clear whether the right of

14. *See, e.g.*, U.S. COPYRIGHT OFF., COPYRIGHT AND ARTIFICIAL INTELLIGENCE, PART 1: DIGITAL REPLICAS (2024). *See also* Martin Kretschmer, Thomas Margoni, & Pinar Oruç, *Copyright Law and the Lifecycle of Machine Learning Models*, 55 INT'L REV. INTELL. PROP. & COMPETITION L. 110–38 (2024).

15. *See, e.g.*, *Communication from the European Commission: Artificial Intelligence for Europe*, COM (2018) 237 final (Apr. 25, 2018).

16. *See, e.g.*, Will Knight, *The Dark Secret at the Heart of AI*, MIT TECH. REV. (Apr. 11, 2017), https://www.technologyreview.com/2017/04/11/5113/the-dark-secret-at-the-heart-of-ai/ [https://perma.cc/7LZ5-7CW3] [https://web.archive.org/web/20250209064205/https://www.technologyreview.com/2017/04/11/5113/the-dark-secret-at-the-heart-of-ai/].

17. *See* Axhamn, *supra* note 11; U.S. COPYRIGHT OFF., *supra* note 14; Kretschmer et al., *supra* note 14. *See also* Rossana Ducato & Alain Strowel, *Ensuring Text and Data Mining: Remaining Issues with the EU Copyright Exceptions and Possible Ways Out*, 43 EUR. INTELL. PROP. L. REV. 322 (2021); Martin Senftleben, *Ensuring Text and Data Mining: Remaining Issues with the EU Copyright Exceptions and Possible Ways Out*, 53 INT'L REV. INTELL. PROP. & COMPETITION L. 1477–1505 (2022).

18. Berne Convention for the Protection of Literary and Artistic Works art. 9, Sept. 28, 1979, S. TREATY DOC. NO. 99-27 (1986).

reproduction, as set out in the Berne Convention, covers "temporary forms of reproduction," i.e., forms of reproduction that have a limited existence in time—for instance, because they only exist in digital form in the working memory of a computer or other digital equipment. If there are any reproductions carried out during machine learning, then these reproductions are temporary.

The question of whether temporary reproductions should fall within the exclusive rights is a debated and controversial copyright issue.[19] In an analog environment, mere enjoyment or consumption of a work—such as watching or listening to it—does not constitute a copyright-relevant use. In a digital environment, however, the situation is different, as every use of a work results in the creation of temporary reproductions. This can occur both in the servers and routers involved in transmitting the work via the Internet and in the RAM of individual users' computers during activities such as web browsing, display on a screen, or playback of a work on a computer.[20]

The question whether Article 9 of the Berne Convention covers temporary forms of reproduction was subject to intensive discussions during the 1996 diplomatic conference on the adoption of the WIPO Copyright Treaty ("WCT") and the WIPO Performances and Phonograms Treaty ("WPPT")—the so-called Internet Treaties.[21] Article 1(4) of the WCT, which constitutes a so-called special agreement in accordance with Article 20 of the Berne Convention, holds that "Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention."[22] In addition, so-called Agreed Statements to this Article hold that:

> The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.[23]

The Agreed Statements do not provide a clear answer as to whether temporary forms of reproduction are relevant under international copyright law, as they leave open what is meant by the term "storage."[24] At the same time, it is clear that the WCT,

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19. *See* Ole-Andreas Rognstad, *Restructuring the Economic Rights in Copyright—Some Reflections on an 'Alternative Model'*, 62 J. COPYRIGHT SOC'Y 503, 535 (2015).

20. *See* SILKE VON LEWINSKI, INTERNATIONAL COPYRIGHT LAW AND POLICY ¶ 17.52 (2008); Johan Axhamn, *Tillfälliga framställningar av exemplar och rättsligt skydd för åtkomstspärrar i digital miljö* [*Temporary Reproductions of Copies and Legal Protection for Access Controls in the Digital Environment*], *in* VÄNBOK TILL CLAES SANDGREN [FESTSCHRIFT FOR CLAES SANDGREN] 13 (Madell et al. eds., 2011) (Swed.).

21. *See WIPO Internet Treaties*, WIPO, https://www.wipo.int/en/web/copyright/activities/internet_treaties [https://perma.cc/S357-QMVY] [https://web.archive.org/web/20250401134326/https://www.wipo.int/en/web/copyright/activities/internet_treaties] (last visited Apr. 1, 2025).

22. WIPO Copyright Treaty (WCT) art. 1(4), Dec. 20, 1996, 2186 U.N.T.S. 121.

23. WIPO Copyright Treaty (WCT) Agreed Statements, Dec. 20, 1996, 2186 U.N.T.S. 121, 160.

24. *See* WIPO, 2 RECORDS OF THE DIPLOMATIC CONFERENCE ON CERTAIN COPYRIGHT AND NEIGHBORING RIGHTS QUESTIONS ¶ 1086 (1996). *See also* SAM RICKETSON & JANE GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND ¶¶ 11.74–.75 (2006);

which constitutes a so-called special agreement in accordance with Article 20 of the Berne Convention, cannot impose binding limitations on the obligations arising from the Berne Convention.[25]

The wording and drafting of the second sentence of these Agreed Statements was highly contentious during the diplomatic conference in 1996 and even subject to a vote[26]—which is very rare in the WIPO context.[27] The reason for this is that it was understood that the question of whether to include temporary forms of reproduction in the authors' exclusive rights was related to underlying justifications for copyright protection.[28] The (then) European Communities, which in principle favored a strong protection for authors, were supportive of including temporary forms within the scope of the exclusive right of reproduction.[29] On the other hand, the United States and others favoring a more utilitarian perspective on copyright, opposed the inclusion of temporary forms of reproduction in the exclusive right.[30]

When implementing the WCT and WPPT into EU legislation, the EU opted to make it clear that the right of reproduction also includes temporary forms of reproduction. This is reflected in Article 2 of Directive 2001/29.[31] This article holds that "Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part . . . ."[32] It is held in Recital 21 to the Directive that "[a] broad definition of these acts is needed to ensure legal certainty within the internal market."[33] In addition, Recital 9 stresses that "[a]ny harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation."[34]

The right of reproduction, as recognized within the EU, is thus quite broad. To alleviate this, also taking into account that some temporary forms of reproduction are necessary for the functioning of digital equipment, some temporary forms of

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MICHEL WALTER & SILKE VON LEWINSKI, EUROPEAN COPYRIGHT LAW: A COMMENTARY ¶¶ 11.0.33, 11.5.12 (2010); VON LEWINSKI, *supra* note 20, ¶¶ 5.118,17.57–.58.

25. *See, e.g.*, RICKETSON & GINSBURG, *supra* note 24, ¶¶ 11.27, 11.69–.75, 19.56; VON LEWINSKI, *supra* note 20, ¶¶ 5.118, 17.52–.58 (2008).

26. *See* WIPO, *supra* note 24, ¶¶ 1083 *et seq.*

27. *See* Holger Hestermeyer, *World Intellectual Property Organization*, *in* ELGAR ENCYCLOPEDIA OF INTERNATIONAL ECONOMIC LAW (Krista Nadakavukaren Schefer & Thomas Cottier eds., 2025).

28. *See* WIPO, *supra* note 24, ¶¶ 247–324, 648, 877–81, 909–26, 1046–1152. For a discussion, see RICKETSON & GINSBURG, *supra* note 24, ¶¶ 11.27, 11.69–.75, 19.56; VON LEWINSKI, *supra* note 20, ¶¶ 5.118, 17.52–.58; *The EC Legal Advisory Board's Reply to the Green Paper on Copyright and Related Rights in the Information Society*, 12 COMPUT. L. & SEC. REP. 143, 148 (1996); Johan Axhamn, *EU-domstolen tolkar originalitetskriteriet och inskränkningen till förmån för vissa tillfälliga former av mångfaldigande* [*The Court of Justice of the European Union Interprets the Originality Requirement and the Exception in Favor of Certain Temporary Forms of Reproduction*], 4 NORDIC INTELL. PROP. L. REV. 339, 352 (2010) (Swed.).

29. See WIPO, *supra* note 24, ¶¶ 253, 341–48.

30. *See id.*, ¶¶ 260–62, 1047, 1092.

31. Directive 2001/29/EC of the European Parliament and of the Council on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, art. 2, 2001 O.J. (L 167).

32. *Id.*

33. *Id.*, recital (21).

34. *Id.*, recital (9).

reproduction are removed from the scope of Article 2. Article 5(1) of Directive 2001/29 includes a mandatory limitation on certain forms of temporary reproductions, "which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use[,] of a work . . . and which [has] no independent economic significance."[35] The rationale for this mandatory limitation is set out in Recital 33 to the Directive, based on which one can draw the conclusion that the limitation takes aim at "caching" as part of transmissions of copyright content in digital networks (such as the internet), and internet "browsing" and similar types of uses.[36]

With the development of AI services and related techniques of machine learning, it has been deemed that Article 5(1) is probably not relevant for the temporary reproductions carried out as part of a machine learning process. This is because machine learning does not relate to either points "a" or "b" in Article 5(1).[37]

The same technological developments, related to big data, that have led to the establishment of AI services, have also enabled automated computational analysis of information in digital form, such as text, sounds, images, or data. Against this backdrop, and provided the need for increased legal certainty in the context of "innovative text and data mining research tools,"[38] the Commission proposed in 2016 that the Directive on Copyright in the Digital Single Market should include a limitation for this purpose.[39] Article 3 of the proposal thus sets out the following:

> 1. Member States shall provide for an exception to the rights provided for in Article 2 of Directive 2001/29/EC, Articles 5(a) and 7(1) of Directive 96/9/EC and Article 11(1) of this Directive for reproductions and extractions made by research organisations in order to carry out text and data mining of works or other subject-matter to which they have lawful access for the purposes of scientific research.
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> 2. Any contractual provision contrary to the exception provided for in paragraph 1 shall be unenforceable.
>
> 3. Rightholders shall be allowed to apply measures to ensure the security and integrity of the networks and databases where the works or other subject-matter are hosted. Such measures shall not go beyond what is necessary to achieve that objective.
>
> 4. Member States shall encourage rightholders and research organisations to define commonly-agreed best practices concerning the application of the measures referred to in paragraph 3.[40]

35. *Id.*, art. 5(1).

36. *Id.*, recital (33).

37. *See, e.g.*, Axhamn, *supra* note 11; *cf. Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market*, at 14, COM (2016) 593 final (Sept. 14, 2016) [hereinafter, Proposal for Directive on Copyright].

38. *Proposal for Directive on Copyright, supra* note 37, at 2.

39. *Id.* at 2–4.

40. *Id.* at 24.

The proposed Article 3 was intended to allow uses for commercial scientific research purposes, but limited the benefit of the limitation to some beneficiaries.[41] The Commission had considered other options—such as self-regulation initiatives from the industry, a mandatory limitation for non-commercial scientific research purposes, and a general provision on text and data mining not limited to specific beneficiaries—but decided on this more targeted option.[42] This selected option was "deemed to be the most proportionate one."[43]

With only a few amendments, this limitation for specific text and data mining ("TDM") activities related to research became part of the adopted directive. However, of interest here is that the final adopted Digital Single Market ("DSM") Directive,[44] also includes a more general limitation on TDM set out in Article 4 of the Directive. This article sets out the following:

> 1. Member States shall provide for an exception or limitation to the rights provided for in Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, Article 4(1)(a) and (b) of Directive 2009/24/EC and Article 15(1) of this Directive for reproductions and extractions of lawfully accessible works and other subject matter for the purposes of text and data mining.
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> 2. Reproductions and extractions made pursuant to paragraph 1 may be retained for as long as is necessary for the purposes of text and data mining.
>
> 3. The exception or limitation provided for in paragraph 1 shall apply on condition that the use of works and other subject matter referred to in that paragraph has not been expressly reserved by their rightholders in an appropriate manner, such as machine-readable means in the case of content made publicly available online.
>
> 4. This Article shall not affect the application of Article 3 of this Directive.[45]

The notion of "text and data mining" is defined is Article 2(2) of the DSM Directive as "any automated analytical technique aimed at analysing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations[.]"[46]

The rationales for Article 4, which was added to the Directive during the negotiations in the Council and the Parliament, are set out in Recital 18 in the preamble.[47] It is explained there that in addition to their significance in the context of scientific research, text and data mining techniques are widely used both by private and public entities to analyze large amounts of data in different areas of life and for various

41. *Id.* at 8.
42. *Id.*
43. *Id.*
44. Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130) 92 [hereinafter, DSM Directive].
45. *Id.*, art. 4.
46. *Id.*, art. 2(2).
47. *Id.*, recital (18).

purposes, including for government services, complex business decisions and the development of new applications or technologies. It is further stressed in the same recital that right holders should remain able to license the uses of their works or other subject matter falling outside the scope of the mandatory exception for text and data mining for the purposes of scientific research, i.e., the limitation set out in Article 3 of the Directive. Finally, it is stressed in this recital that consideration should be given to the fact that users of text and data mining could be faced with legal uncertainty as to whether reproductions and extractions made for the purposes of text and data mining can be carried out on lawfully accessed works or other subject matter. Thus, in order to provide for more legal certainty in such cases and to encourage innovation also in the private sector, the Directive provides for a more general limitation for reproductions and extractions of works or other subject matter, for the purposes of text and data mining.

Following the adoption of the DSM Directive, the question has been raised whether the general TDM limitation in Article 4 is applicable and relevant for the use of copyrighted works as part of a machine learning process. Several different views have been expressed, to a large extent related to the underlying interests that are at stake. At one extreme, it has been submitted that machine learning activities do not even entail copyright relevant reproductions.[48]

In addition, as indicated above, the international norms do not provide a final answer to whether temporary forms of reproduction fall within the right of reproduction as recognized in the Berne Convention and the WCT. However, it seems reasonable to conclude that at least EU copyright legislation—with a broad right of reproduction also covering temporary forms of reproduction—includes machine learning activities.[49] The machine learning technology is, however, still under development, and there might be circumstances where such activities do not entail a copyright-relevant (temporary) reproduction.

If we take as a starting point that machine learning activities do entail relevant reproductions, the question arises whether such reproductions fall within the scope of the general TDM limitation in Article 4 of the DSM Directive.[50] It may be surprising that the answer to this question is not settled. A main reason for this is that this article was not part of the Commission's initial proposal. The reasons and rationales for this limitation and its intended scope are thus not clear. We can only rely on what is stated in the preamble to the Directive.

In any case, for Article 4 to apply, certain preconditions need to be fulfilled. As a starting point, Article 4(1) holds that the limitation is applicable only to "lawfully

48. *See* TOBIAS KEMPAS, ARTIFICIELL INTELLIGENS OCH IMMATERIALRÄTT: I SVERIGE OCH EU [ARTIFICIAL INTELLIGENCE AND INTELLECTUAL PROPERTY LAW: IN SWEDEN AND THE EU] 171 *et. seq.* (2023) (Swed.).

49. *See* JEAN-PAUL TRAILLE ET AL., STUDY ON THE LEGAL FRAMEWORK OF TEXT AND DATA MINING (TDM) 31, 40 (2014).

50. *See* Tim Dornis, *The Training of Generative AI Is Not Text and Data Mining*, EUR. INTELL. PROP. REV., (forthcoming 2025).

accessible" works, etc.[51] Lawful access refers to access granted with the consent of the rights holder or based on a limitation to the exclusive right. It is therefore possible to obtain lawful access to a work, for example, by purchasing a copy of it or by acquiring a license, such as a subscription, that grants the right to use the work. Similarly, anyone who has access to a work based on a limitation to copyright law also has lawful access to the work. However, limitations may set out conditions that regulate how the work may be used. In such cases, these conditions must be observed. The requirement for lawful access also means that copies may only be made from a lawful source.[52]

In addition, it is stated in Article 4(3) that the general limitation for the purposes of TDM shall apply on condition that the use of works and other subject matter referred to in that paragraph has not been expressly reserved ("opt out") by their right holders in an appropriate manner, such as machine-readable means in the case of content made publicly available online.[53] Such an opt-out may be made through a unilateral declaration or in an agreement and must pertain to text and data mining. The reservation must be explicit and communicated in such a way that users can reasonably be expected to take note of it. For works made available online, it is likely required that the rights holder reserves the right through machine-readable methods, i.e., in a format that can be read without the need for manual review—e.g., metadata and terms and conditions of a website or a service.

Following the adoption of the DSM Directive and its implementation into the national copyright legislation of the EU Member States, the general understanding on the market seems to be that right holders and their organizations should now be prepared to opt out unless they have already done so.[54] However, as indicated above, many organizations representing authors seem to have been caught by surprise by the implication and potential broad scope of the general TDM limitation.[55] Thus, it seems as if almost no categories of authors had opted out at the time when the DSM Directive was supposed to have been implemented in the EU Member States. In any case, it seems reasonable that organizations representing authors should develop standards for opting out, preferably together with developers of generative AI services or organizations representing such services.[56]

51. DSM Directive, *supra* note 44, art. 4(1).

52. *See also id.*, recital (18) .

53. *Id.*, art. 4(3).

54. *See* Gina Maria Ziaja, *The Text and Data Mining Opt-Out in Article 4(3) CDSMD: Adequate Veto Right for Rightholders or a Suffocating Blanket for European Artificial Intelligence Innovations?*, 19 J. INTELL. PROP. LAW & PRAC., 453, 453–59 (2024).

55. *See* EUR. COPYRIGHT SOC'Y, COPYRIGHT AND GENERATIVE AI: OPINION OF THE EUROPEAN COPYRIGHT SOCIETY (2025), https://europeancopyrightsociety.org/wp-content/uploads/2025/02/ecs_opinion_genai_january2025.pdf [https://perma.cc/M2TE-6U9E] [https://web.archive.org/web/20250305192011/https://europeancopyrightsociety.org/wp-content/uploads/2025/02/ecs_opinion_genai_january2025.pdf].

56. This was also one of the main takeaways from this Author's presentation before the Swedish Parliament's Committee on Cultural Affairs in April 2024.

The limitations concerning TDM have been impacted by subsequent legal developments within the EU. During 2024, the so-called AI Act was adopted.[57] This Act, which is an EU Regulation, is a highly detailed regulatory framework with a focus on "high-risk" AI. The purpose of the AI Act is to improve the functioning of the EU internal market and promote the uptake of human-centric and trustworthy AI, while ensuring a high level of protection of health, safety, fundamental rights enshrined in the EU Charter of Fundamental Rights,[58] including democracy, the rule of law and environmental protection, against the harmful effects of AI systems in the Union and supporting innovation.[59]

However, against the backdrop of the development of generative AI services during the last few years, Article 53 of and Recitals 104 to 109 in the preamble to the adopted AI Act also includes some provisions that are relevant from a copyright perspective and which supplement the TDM limitations in the DSM Directive. These provisions set out norms on transparency regarding works used as training data. The transparency requirement does not, however, set out requirements on a work-by-work basis but rather on a more general level—"a sufficiently detailed summary about the content used for training of the general-purpose AI model." This summary should be accordance with a "template" that is to be provided by a new body within the European Commission—the so-called AI Office.[60] The Office has already made available a first outline of such a template.[61]

The AI Act also includes requirements that developers of generative AI systems should be compatible with relevant copyright legislation. More specifically, the AI Act includes references to the general TDM limitation in the DSM Directive, including that the developers of AI should follow any relevant "opt out" by right holders. This "linkage" between the AI Act and the TDM limitation has been much criticized by right holders, as this implies that the TDM limitation is applicable in situations involving

57. *See* Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 Laying Down Harmonised Rules on Artificial Intelligence and Amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), 2024 O.J. (L. 1689) [hereinafter, AI Act].

58. See Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326) 391.

59. *See* AI Act, *supra* note 57, art. 1.

60. *See European AI Office*, EUR. COMM'N, https://digital-strategy.ec.europa.eu/en/policies/ai-office [https://perma.cc/RRF3-XCV5] [https://web.archive.org/web/20250411191634/https://digital-strategy.ec.europa.eu/en/policies/ai-office] (last visited Apr. 11, 2025).

61. *See* EUR. AI OFF., CODE OF PRACTICE FOR GENERAL-PURPOSE AI: TEMPLATE FOR SUMMARY OF TRAINING DATA, WORKING GROUP 1—COPYRIGHT-RELATED RULES (MEETING OF JAN. 17, 2025), https://openfuture.eu/wp-content/uploads/2025/01/250117ai-office-template-presentation.pdf [https://perma.cc/59ZK-L4AV] [https://web.archive.org/web/20250406033849/https://openfuture.eu/wp-content/uploads/2025/01/250117ai-office-template-presentation.pdf].

machine learning.[62] Right holders and their organizations (CMOs) have to a large extent favored licensing solutions, such as extended collective licensing.[63]

In summary, the current situation in the EU is that machine learning seems to require a reproduction—i.e., machine learning constitutes a copyright relevant use which the right holders as a starting point can control, unless a limitation to copyright is applicable. The recently introduced general limitation for TDM in Article 4 of the DSM Directive seems to be applicable to (*inter alia*) machine learning situations, at least in the light of the recently adopted EU AI Act. However, this limitation provides the right holders with a possibility to opt out of the limitation. It is likely that organizations representing right holders will develop standards for such opt-outs, possibly together with developers of generative AI systems.[64]

If the right holders opt out of the general TDM limitation, we will end up in a situation where there is likely a strong demand for the use of existing copyright protected content as training data, but where such use requires the consent of the right holders—or some legislative intervention. Several proposals have been discussed, e.g., in the legal literature. Some scholars have even gone so far as proposing that the current general TDM limitation in Article 4 should be amended by a removal of the possibility of opting out—i.e., a removal of the third paragraph in this article.[65] It has been suggested that such a removal could be combined with the introduction of a right to remuneration, similar to the systems of private copying levies in some European countries.[66] Other scholars have suggested that the limitation for TDM is restructured as a compulsory license or similar.[67] Another alternative, which this Author suggests could be a fair and balanced mechanism for obtaining the necessary consents, is the so-

62. *See CISAC Backs the Joint Letter of Creators and Rightholders Organisations*, CISAC, https://www.cisac.org/Newsroom/articles/cisac-backs-joint-letter-creators-and-rightholders-organisations [https://perma.cc/VT4G-F99C] [https://web.archive.org/web/20250411192148/https://www.cisac.org/Newsroom/articles/cisac-backs-joint-letter-creators-and-rightholders-organisations] (last visited Apr. 11, 2025).

63. *See* JOINT STATEMENT BY A COALITION OF AUTHORS, PERFORMERS, AND OTHER RIGHTSHOLDERS ACTIVE ACROSS THE EU'S CULTURAL AND CREATIVE SECTORS REGARDING THE THIRD DRAFT OF THE EU AI ACT'S GPAI CODE OF PRACTICE, https://authorsocieties.eu/content/uploads/2025/03/right-holders-joint-statement-on-the-third-draft-code-of-practice-28-march-2025.pdf [https://perma.cc/6K9T-9NU5] [https://web.archive.org/web/20250418055738/https://authorsocieties.eu/content/uploads/2025/03/right-holders-joint-statement-on-the-third-draft-code-of-practice-28-march-2025.pdf] (last visited May 10, 2025).

64. This was also one of the main takeaways from this Author's presentation before the Swedish Parliament's Committee on Cultural Affairs in April 2024. *See also* Louise de Béthune, *Balancing the Scales: Navigating Text and Data Mining, Awaiting Standardization*, KU LEUVEN (Mar. 18, 2025), https://www.law.kuleuven.be/citip/blog/balancing-the-scales-navigating-text-and-data-mining-awaiting-standardisation/ [https://perma.cc/5L8D-5BQS].

65. *See* João Pedro Quintais, *Generative AI, Copyright and the AI Act*, 56 COMPUT. L. & SEC. REV. 106 (2025).

66. *See* Christophe Geiger & Vincenzo Iaia, *The Forgotten Creator: Towards a Statutory Remuneration Right for Machine Learning of Generative AI*, 52 COMPUT. L. & SEC. REV. 1 (2024).

67. *See* Martin Senftleben, *Generative AI and Author Remuneration*, 54 INT'L REV. INTELL. PROP. & COMPETITION L. 1535 (2023).

called extended collective licensing model.[68] This model is further described in the next section.

II. EXTENDED COLLECTIVE LICENSING

A. GENERAL

There are several national models or arrangements for collective licensing that have been labelled as "extended collective licensing."[69] I will here further describe the model which has been developed in Sweden and the other Nordic countries since the 1960s—the "Nordic ECL model."[70] With the adoption of the DSM Directive, this model, and similar models in other European countries, are now considered fully compatible with EU copyright law. Article 12 of this Directive sets out general requirements for such models.

The Nordic ECL model will be described in Section II.B. This will be followed by a description of the requirements set out in Article 12 of the DSM Directive and how this relates to the Nordic ECL model in Section II.C. This will be followed by a discussion on the viability of the ECL model to machine learning in Section II.D.

B. THE NORDIC ECL MODEL

The Nordic countries, who by tradition have cooperated in the field of copyright legislation[71], introduced the first ECL provision in their respective national copyright acts at the beginning of the 1960s.[72] This statutory provision aimed to solve the public service broadcasters' need for legal certainty in their use of works in the field of primary broadcasting of music. Considering the vast number of works involved, it was deemed not viable that the broadcasting organizations, who had collective agreements with national Collective Management Organizations ("CMOs"), should have to bear the administrative costs of finding out which authors were not members of the CMOs. The administrative effort of finding such non-members and negotiating a license with them were considered to give rise to considerable transaction costs. In practice the

68. This was also one of the main takeaways from this Author's presentation before the Swedish Parliament's Committee on Cultural Affairs in April 2024.

69. *See* Tuomas Mattila & Jukka Liedes, *Extended Collective Licensing and Other CLEE-Mechanisms in European Copyright Law*, 2 NORDIC INTELL. PROP. L. REV. 118 (2024).

70. *See also* Jan Rosén, *The Nordic Extended Collective License—Its Characteristics, Qualities, and Flaws*, 6 NORDIC INTELL. PROP. L. REV. 542 (2017) (Swed.).

71. *See* Mogens Koktvedgaard, *The Nordic Cooperation in the Field of Copyright Law—The Last 25 Years*, *in* FESTSCHRIFT FÜR ADOLF DIETZ [FESTSCHRIFT FOR ADOLF DIETZ] 557 (2001) (Ger.). *See also* Johan Axhamn, *Some Supplementary Reflections on the Impact of EU law on Nordic Cooperation in the Field of Copyright*, 1 NORDIC INTELL. PROP. L. REV. 104 (2020) (Swed.).

72. These developments leading up to the introduction of the adoption of the first ECL provision has previously been described by this Author. Johan Axhamn, *The Consistency of the Nordic Extended Collective Licencing Model with International Copyright Conventions and EU Copyright Norms*, 6 NORDIC INTELL. PROP. L. REV. 563 (2017).

broadcasting organizations had begun to broadcast without verifying whether the music was covered by the agreements, thus neglecting the need for prior permission. The national CMOs had accepted this (illegal) practice and provided the broadcasters with a guarantee against claims for compensation (damages) by non-members, including foreign right holders. However, the problem still remained that the broadcasters' use of non-members' rights—sometimes referred to as "outsiders' rights"—still constituted copyright infringement for which they stood the risk of criminal sanctions. This situation led the Nordic legislators to consider possible solutions for legislative support to make the current practice legal, bearing in mind that any solution had to be coherent with international obligations.[73]

The public broadcasters' initial proposal was the introduction of a compulsory license (to be managed collectively). The proposal was, however, bluntly rejected by the right holders' organizations and the committee preparing the legislative proposal. It was deemed too far-reaching considering the right holders' exclusive rights. It was also considered unfair to give the broadcasters a special position compared to other users. In any case, the broadcasters were held to have the administrative resources to, by themselves or in cooperation with the right holders' organization, find and negotiate the necessary permissions from non-members.[74]

The second solution proposed by the broadcasters, which got support from both the right holders' and the Nordic legislators, was the ECL model.[75] The essential component of this proposed model was that it, subject to an agreement between a representative CMO and a user, conferred to the relevant broadcasting organization the right to broadcast published literary and musical works similar to the ones covered by the agreement despite the fact that the authors of those works were not represented by the organization. This is the so-called "extended effect"—provided by law—of the collective agreement. If a broadcaster used a work belonging to a non-member, the author was given a right to remuneration. Non-members were given the right to express reservations against the application of the provisions ("opt out").[76]

The model created through the establishment of the first ECL provision took the form of a legislative provision supporting the system which had in practice already been developed by the CMOs and the broadcasters. Even if the primary purpose of the introduction of the ECL model can be said to have been to protect the users, the model

73. *See* Proposition [Prop.] 1960:17, Kungl. Maj:ts proposition nr 17 år 1960 till riksdagen med förslag till lag om upphovsrätt till litterära och konstnärliga verk, m. m. [government bill], at 147 (Swed.).

74. *Id.*

75. The creation of the ECL system is traditionally attributed to the Swedish professor Svante Bergström who coined the term "extended collective licence." *See* Svante Bergström, *Program för upphovsrätten* [*Program for Copyright Law*], *in* RÄTTSVETENSKAPLIGA STUDIER ÄGNADE MINNET AV PHILLIPS HULT [STUDIES IN LAW DEDICATED TO THE MEMORY OF PHILLIPS HULT] 58 (1960) (Swed.). Indeed, the ECL model has been described as a Nordic legal "invention" in the copyright field. *See* Gunnar Karnell, *Extended Collective License Clauses and Agreements in Nordic Copyright Law*, 10 COLUM. J.L. & ARTS 73, 81 (1985); Tarja Koskinen-Olsson, *Collective Management in the Nordic Countries*, *in* COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 283 (2010).

76. *See* Proposition [Prop.] 1979/1980:132 om ändring i upphovsrättslagen (1960:729), m.m. [government bill], at 13 *et seq.*, 65, 75 *et seq.* (Swed.).

achieved a balance between users' and right holders' interests which is closer to ordinary collective rights management than compulsory licensing. The two main reasons put forward for this assessment is that it only applies on condition that there is a freely negotiated agreement between a representative CMO and a user, and that the outsider has the possibility to opt out.[77] At the same time, for the model to work in practice, it presupposes the existence of a representative CMO with a sound culture of good governance and transparency.[78] Within the EU, rules on good governance and transparency have been introduced by the Directive on collective management of copyright and related rights.[79]

The second area where the ECL model was introduced was photocopying for educational purposes in the 1980s. This field of use shared many of the characteristics of primary broadcasting, such as mass use, related high transaction costs, and a legitimate need for legislative support in an area of great public importance. A traditional limitation—i.e., use is permitted without need to obtain prior consent—was rejected by the legislature as it was deemed to be too far-reaching to the detriment of the right holders, and also in violation of international obligations. The solution of a compulsory license (to be managed collectively) was also rejected as it was deemed better to build on the existing collective agreements—thus safeguarding the principle of voluntary negotiation. It was held that this would normally yield a higher remuneration to the right holders than a compulsory license. In favoring a solution based on an ECL provision over a compulsory license it was stressed that the introduction of an ECL provision presupposed that the market of collective agreements functioned well in practice, i.e., that the educational institutions and the CMO were prepared to conclude agreements so that the intended use could be carried out.[80]

However, the field of photocopying in educational institutions differed in several important respects from primary broadcasting. It was practically impossible to monitor the precise use of an individual work and hence calculate and distribute individual remuneration. The collective agreements often stated only the payment of a lump sum from the users to the CMO based on some rudimentary statistics on extent of use at a few educational institutions. Also, in practice the remuneration scheme detailing the level of remuneration from the organization to the members was often not part of the agreement between the CMO and the user. The remuneration scheme was rather an issue internal to the organization.[81]

77. *See* Axhamn, *supra* note 72, at 565.

78. *See id.* at 568, 574. *See also* Johan Axhamn & Lucie Guibault, *Cross-Border Extended Collective Licensing A Solution to Online Dissemination of Europe's Cultural Heritage* 41 (Amsterdam Law School, Research Paper No. 22, 2012).

79. Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Use in the Internal Market, 2014 O.J. (L 84) 72.

80. *See* Proposition [Prop.] 1979/1980:132 om ändring i upphovsrättslagen (1960:729), m.m. [government bill], at 13, 65, 75 (Swed.).

81. Proposition [Prop.] 1979/1980:132 om ändring i upphovsrättslagen (1960:729), m.m. [government bill], at 13, 65, 75 (Swed.).

Against this background, it was deemed necessary not only to introduce a statutory provision on the extension effect regarding the contents of the agreement, but also a provision on equal treatment of outsiders vis-à-vis members regarding the internal remuneration scheme of the CMO and other benefits. However, to safeguard their essential interests, outsiders were granted the right to individual remuneration if the extent of the use could be proved. The right to opt out was maintained, however not the obligation of the user to refrain from use if he had special reasons to assume that the outsider would oppose it. To stimulate the coming into being of ECL agreements, the ECL provision was supplemented with rules on mediation between the user and the CMO. Similar to the ECL provision for primary broadcasting, this ECL was deemed by the Nordic legislators to be consistent with international obligations.[82]

The basic features of the ECL model introduced with the ECL provisions on photocopying in educational institutions has since been part of the "standard" ECL model now in use in the Nordic countries: extension effect of a collective agreement between a representative CMO and a user, principle of equal treatment, right to claim individual remuneration, a possibility to opt out, and provisions on mediation.[83]

Since the introduction of the ECL on photocopying, the Nordic legislators have expanded the model to areas of use with common characteristics as those found in primary broadcasting and photocopying for educational purposes. Where applicable the ECL provisions encompass also related (neighboring) rights *mutatis mutandis*. At present, statutory provisions are set out in the Swedish Copyright Act enabling extended collective licensing for the use of works and other copyright-protected subject matter in the following (specific) situations: (i) within government agencies, businesses, and organizations; (ii) in the context of education; (iii) by archives and libraries; (iv) by broadcasting organizations; and (v) for use within press publications.[84]

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82. *Id.*

83. *See* Axhamn, *supra* note 72, at 566.

84. The ECL provision for use of works and other copyright-protected subject matter within government agencies, businesses, and organizations was introduced into the Swedish Copyright Act in 2005, with the implementation of EU Directive 2001/29 (InfoSoc), when the limitation for making copies for private purposes was narrowed so as to exclude making copies for colleagues, etc. at work. *See* Svensk författningssamling [SFS] 2005:359 (Swed.); Proposition [Prop.] 2004/05:110 Upphovsrätten i informationssamhället– genomförande av direktiv 2001/29/EG, m.m. [government bill], at 247 *et seq.* (Swed.). The ECL provision for use of works and other copyright-protected subject matter in the context of education was introduced into the Swedish Copyright Act in 1980. *See* Svensk författningssamling [SFS] 1980:610 (Swed.); Proposition [Prop.] 1979/80:132 Ändring i upphovsrättslagen (1960:729), m.m. [government bill] (Swed.). The ECL provision for use of works and other copyright-protected subject matter by archives and libraries was introduced into the Swedish Copyright Act in 2013. *See* Svensk författningssamling [SFS] 2013:691 (Swed.); Proposition [Prop.] 2012/13:141 Förbättrade möjligheter till licensiering av upphovsrätt [government bill], at 39 *et seq.* (Swed.). The ECL provision for use of works and other copyright-protected subject matter by broadcasting organizations was introduced into the Swedish Copyright Act in 1960 (as the first ECL provision). *See* Svensk Författningssamling [SFS] 1960:729 (Swed.); Proposition [Prop.] 1960:17 Kungl. Maj:ts proposition nr 17 år 1960 till riksdagen med förslag till lag om upphovsrätt till litterära och konstnärliga verk, m.m. [government bill], at 147 *et seq.* (Swed.). The ECL provision for use of works and other copyright-protected subject matter for use within press publications was introduced into the Swedish Copyright Act in 2022 (related to the implementation of the EU Directive

The underlying rationales for implementing an ECL provision in new areas have been the following:[85]

> 1. Apparent demand for mass-use and legitimate public interest to make use legal.
> 2. Individual and collective agreements incapable of meeting the demand due to high transaction costs for clearing outsiders' rights.
> 3. Exception or compulsory licence (managed collectively) deemed too far-reaching, as the rightholders should be given remuneration for the use and this remuneration should be based on free negotiations.
> 4. Potential incompatibility of an exception or compulsory licence with international or EU copyright norms.
> 5. Where criteria mentioned in i)–iv) above are met, the introduction of an ECL provision is justified.

The specific ECL provisions are sectorial, as their respective scope is defined in the statutory ECL provisions. However, technical development tends to create more fields where ECL support is needed. To meet this demand and to relieve legislators from the burden of constant amendments to the national copyright act with additional ECL provisions, the Danish government introduced a general ECL provision in 2008. According to this provision, the contracting parties may define the specific use for which the provisions of law will accord the extension effect. The scope of the license is not explicitly defined by law; instead, it is stipulated that an extended collective license must be a prerequisite for the use. A similar provision was introduced in Sweden in 2013.[86]

C. COMPATIBILITY OF NORDIC ECL MODEL WITH EU AND INTERNATIONAL COPYRIGHT NORMS

1. General

As indicated above, the legislators in the Nordic countries have established ECL regimes over time in several areas of mass-use. This development has, however, also made the ECL provisions and indeed the Nordic ECL model as such, more and more

2019/790). *See* Svensk Författningssamling [SFS] 2022:1712 (Swed.); Proposition [Prop.] 2021/22:278 Upphovsrätten på den digitala inre marknaden [government bill], at 99 *et seq.* (Swed.).

85. *See* Proposition [Prop.] 1960:17 Kungl. Maj:ts proposition nr 17 år 1960 till riksdagen med förslag till lag om upphovsrätt till litterära och konstnärliga verk, m.m. [government bill], at 150; Proposition [Prop.] 1979/80:132 Om ändring i upphovsrättslagen (1960:729), m.m. [government bill], at 12; Proposition [Prop.] 2010/11:33 Återanvändning av upphovsrättsligt skyddat material i radio och tv [government bill], at 18; Proposition [Prop.] 2021/22:278 Upphovsrätten på den digitala inre marknaden [government bill], at 65, 75, 99.

86. Section 42k of the Swedish Copyright Act (1960:729). This general ECL provision was introduced into the Swedish Copyright Act in 2013. *See* Svensk författningssamling [SFS] 2013:691 (Swed.); Proposition [Prop.] 2012/13:141 Förbättrade möjligheter till licensiering av upphovsrätt [government bill] (Swed.).

exposed to challenges based on international and EU copyright norms.[87] For example, it has been held by some commentators that the Nordic ECL model is not compatible with the general norms on national treatment, prohibition on formalities and the three-step test set out in the international conventions.[88] In addition, during the same time as the DSM Directive was being negotiated, the Court of Justice of the European Union ("CJEU") issued a judgment—C-301/15, Soulier and Doke—in relation to a piece of French legislation, somewhat similar to the extended collective licensing model, in which the court held that the legislation constituted a limitation to the rights provided to authors.[89] This also gave rise to the need to clarify the status of ECL arrangements in relation to EU copyright norms. Prior to this case, Sweden and other EU Member States with collective licensing systems similar to the ECL model, relied heavily on Recital 18 to Directive 2001/29, the so-called InfoSoc Directive. According to this recital, the Directive "is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licences."[90] This recital was generally understood as classifying the ECL model (and similar models) not as limitations (or exceptions) to the exclusive rights, but as "arrangements concerning the management of rights". By not being classified as providing limitations, the ECL model would thus fall outside the scope of the three-step test and the closed list of permissible limitations and exceptions in Article 5 of the InfoSoc Directive.[91]

As regards national treatment and formalities, I will here refer to previous research in this area.[92] The focus here will be on the requirements for ECL and similar models set out in Article 12 of the DSM Directive. This article was proposed by Sweden and some other EU Member States during the negotiations on the Directive in the Council, to take aim at clarifying and possible solving some of the questions raised because of the Soulier and Doke case.[93]

2. Article 12 DSM Directive

Article 12 of the DSM Directive contains provisions aimed at ensuring that Member States can introduce—or maintain—rules that facilitate collective copyright licensing with extended effect and similar, while at the same time imposing certain fundamental

87. *See* Jane C. Ginsburg, *Extended Collective Licenses in International Treaty Perspective: Issues and Statutory Implementation*, 2 NORDIC INTELL. PROP. L. REV. 215 (2019).

88. *See* Thomas Riis & Jens Schovsbo, *Extended Collective Licenses and the Nordic Experience—It's a Hybrid but is It a Volvo or a Lemon?*, 33 COLUM. J. LAW & ARTS 471 (2010).

89. *See* Case C-301/15, Soulier v. Ministre de la Culture et de la Communication, ECLI:EU:C:2016:878 (Nov. 16, 2016).

90. Directive 2001/29/EC of the European Parliament and of the Council on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, recital (18), 2001 O.J. (L 167).

91. *See* Koskinen-Olsson, *supra* note 75, at 303; Riis & Schovsbo, *supra* note 88, at 482; Proposition [Prop.] 2004/05:110 Upphovsrätten i informationssamhället – genomförande av direktiv 2001/29/EG, m.m. [government bill], at 243 *et seq.* (Swed.).

92. *See* Riis & Schovsbo, *supra* note 88; Axhamn & Guibault, *supra* note 78; Axhamn, *supra* note 72.

93. *See* Anders Olin, *Developments in Sweden Since the 2022 Nordic Copyright Symposium in Kristiansand*, 1 NORDIC INTELL. PROP. L. REV. 14 (2025).

requirements on such arrangements.[94] It is optional for Member States to have such systems, but if they do, they will have to comply with the requirements set out in the article.

The licensing systems referred to in Article 12 are those found in some Member States, such as agreements with extended collective licensing effect, statutory mandates, or presumptions of representation (Article 12(1)).[95] These systems enable users to enter into agreements with organizations representing authors, granting them the right to use works by authors who are not represented by the organization. The Nordic ECL model is a system that falls within the scope of this Article. The national provisions on extended collective licenses must therefore meet the requirements set forth in the Directive.[96]

Article 12(2) sets out that Member States must ensure that the licensing system in place or introduced applies only to well-defined areas of use where it would typically be so burdensome and impractical to obtain permission from individual rights holders that the licensing transaction becomes unlikely due to the characteristics of the use or types of works involved. Member States must also ensure that such licensing systems protect the legitimate interests of rights holders.

The conditions set out in Article 12(2) are generally a precondition for ECL provisions. For example, in Sweden extended collective licenses are used in areas involving the use of a large number of works and other protected performances, where it is often not possible in advance to determine for which works a license must be obtained. Extended collective licenses enable a user to acquire all the rights needed for their operations through an agreement with a representative organization, while ensuring that the rights holders involved receive compensation. As described above, the extended collective licensing system has been designed with the need for such agreements to be confined to well-defined areas. These areas are ones where it is not practical to obtain permission from individual rights holders to address the needs of the usage.

Further, Article 12(3)(a) requires that the CMOs that enter into ECL agreements fulfil a certain level of representativeness. An organization must, based on its mandates, be sufficiently representative in terms of the rights holders of the type of works concerned and the rights subject to the license within the relevant Member State. This condition is generally fulfilled under Swedish and Nordic law: For an organization to be able to enter into agreements with extended collective licensing effect, it must represent a majority of authors of works used in Sweden within the relevant area.

In addition, Articles 12(3)(b) and (c) require that rights holders whose rights are covered by agreements but who are not represented by the contracting organization must be guaranteed equal treatment. Such external rights holders must also be able to

94. *See* DSM Directive, *supra* note 44, art. 12.

95. *See* Mattila & Liedes, *supra* note 69.

96. *See* Proposition [Prop.] 2021/22:278 Upphovsrätten på den digitala inre marknaden [government bill], at 75 (Swed.).

exclude their works from the relevant licensing system. The ECL provisions in place in Sweden normally includes a possibility to opt out.

Article 12(3)(d) requires that appropriate measures regarding information are taken. Rights holders must be able to access information concerning the possibilities of entering into agreements for such licenses, the licensing conducted in accordance with the provisions, and how rights holders can exclude their works from use. Such "informational" or "publicity" measures must be taken from a reasonable time before the works are used under a license. These measures must be effective, without requiring each rights holder to be personally informed. The recitals of the Directive state that such measures should be adequate throughout the license's validity period and should not impose a disproportionate administrative burden on users, management organizations, or rights holders.[97] The measures to be taken are also relatively general. This is particularly true regarding information about the mere possibility for a particular organization to enter into agreements with extended collective licensing effect. It should suffice for the organization to provide general information about its ability to enter into such agreements, the conditions for entering into such agreements, and what the agreement entails according to the legislation. Similarly, regarding information about the possibility of issuing prohibitions, it should be sufficient to inform about the options available under the legislation. The level of detail of the information should be guided by the need to provide individual rights holders with enough basis to assess whether their works are covered by a certain type of agreement entered into by the organization. In many cases, the group of rights holders intended to be protected by the information is very large. In line with this, the Directive explicitly states that it is not required to inform each rights holder personally. An aim of the information measures should be to ensure that external rightsholders unfamiliar with the type of agreements entered into by the organization with extended collective licensing effect, and the possibilities they have to prohibit the use of their works, are given a real opportunity to access the information. It should generally suffice for the relevant information to be provided on the organization's website. However, the method of providing the information should not be limited to any specific technology.[98]

III. COMPETITION LAW AND THE EU DIRECTIVE ON COLLECTIVE RIGHTS MANAGEMENT

A. GENERAL

Collective management of copyright gives rise to several concerns from a competition law perspective, especially related to the bargaining positions of CMOs in relation to users. This is relevant also—and maybe even more so—in situations where extended collective licensing is applied in relations between CMOs and users. There

97. *See* DSM Directive, *supra* note 44, recital (48).

98. *See* Proposition [Prop.] 2021/22:278 Upphovsrätten på den digitala inre marknaden [government bill], at 79–80 (Swed.).

are several cases from the Court of Justice of the European Union, as well as decisions from the European Commission, that deal with this relationship. These cases and decisions have been largely codified in the 2014 EU Directive on collective rights management (the "CRM Directive"),[99] especially provisions related to the regulation of the relationship between CMOs and users—which are set out in Articles 16 and 17 of this directive. As mentioned above, this directive serves to purpose to introduce increased transparency and good governance of collective management within the EU, and this thus also includes the (licensing) relationship between CMOs and users.

B. RELATIONSHIP BETWEEN CMOS AND USERS

Article 16 of the CRM Directive sets out conditions on licensing. Article 16(1), first paragraph, holds that CMOs and users shall conduct negotiations for the licensing of rights in good faith. For this purpose, CMOs and users shall provide each other with all necessary information. These provisions apply to situations *where* a collective management organization and a user are engaged in negotiations with each other, i.e., the parties are negotiating. The provisions do not imply that the parties must reach an agreement (i.e., the exclusivity, the right to refuse, is retained), and not even an obligation for the parties *to* negotiate with each other. Instead, the provisions establish that *when* collective management organizations and users do engage in negotiations, they must do so in good faith.[100]

The first paragraph of Article 16(2) sets out that licensing terms shall be based on objective and non-discriminatory criteria.[101] The objectivity requirement in the Directive likely means that a CMO may not charge fees for its services to users that are significantly higher than those charged in other EU Member States. The non-discrimination requirement likely means that a collective management organization must apply equal terms for equivalent transactions with users.[102]

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99. Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Use in the Internal Market, 2014 O.J. (L 84) 72.

100. *See* Statens Offentliga Utredningar [SOU] 2015:47 Kollektiv rättighetsförvaltning på upphovsrättsområdet [government report series], at 304 (Swed.).

101. The second sentence of the first paragraph of article 16(2) sets out an exception to this general rule. According to this exception when licensing rights, CMOs shall not be required to use, as a precedent for other online services, licensing terms agreed with a user where the user is providing a new type of online service which has been available to the public in the Union for less than three years. This exception is explained in recital 32 in the preamble to the Directive. It is there held that in the digital environment, collective management organizations are regularly required to license their repertoire for totally new forms of exploitation and business models. In such cases, and in order to foster an environment conducive to the development of such licenses, without prejudice to the application of competition law rules, collective management organizations should have the flexibility required to provide, as swiftly as possible, individualized licenses for innovative online services, without the risk that the terms of those licenses could be used as a precedent for determining the terms for other licenses. For a discussion, see João Pedro Quintais, *Proposal for a Directive on Collective Rights Management and (Some) Multi-Territorial Licensing*, 35 EUR. INTELL. PROP. REV. 65, 71 (2013).

102. *See* Statens Offentliga Utredningar [SOU] 2015:47 Kollektiv rättighetsförvaltning på upphovsrättsområdet [government report series], at 305 (Swed.).

The second paragraph of Article 16(2) submits that as a general principle, right holders shall receive appropriate remuneration for the use of their rights. Tariffs for exclusive rights shall be reasonable in relation to, inter alia, the economic value of the use of the rights in trade, taking into account the nature and scope of the use of the work and other subject matter, as well as in relation to the economic value of the service provided by the collective management organization. These conditions related to tariffs are inspired by references to "reasonable" and "appropriate" remuneration in other EU Directives o copyright, as well as case law and decisions from the area of EU competition law on prohibition of abuse of a dominant position ("unlawful monopolization").[103]

Furthermore, CMOs shall inform the user concerned of the criteria used for the setting of those tariffs. This entails a certain degree of transparency in determining, for example, tariffs and other licensing conditions. The requirement that the information should concern the criteria used for the calculation means that it is normally sufficient for the CMO to disclose the principles by which it determines the tariffs. The CMO is not required to provide a detailed account of how the tariffs have been calculated in an individual case.[104]

Further, Article 16(3) submits that CMOs shall reply without undue delay to requests from users, indicating, inter alia, the information needed in order for the CMO to offer a license. Upon receipt of all relevant information, the CMO shall, without undue delay, either offer a license or provide the user with a reasoned statement explaining why it does not intend to license a particular service. However, the provision does not impose an obligation to offer a license.[105]

As a final provision related to licensing, Article 16(4) holds that a CMO shall allow users to communicate with it by electronic means, including, where appropriate, for the purpose of reporting on the use of the license.

Article 17 on users' obligations stipulates that users provide a CMO, within an agreed or pre-established time and in an agreed or pre-established format, with such relevant information at their disposal on the use of the rights represented by the CMO as is necessary for the collection of rights revenue and for the distribution and payment of amounts due to right holders. When deciding on the format for the provision of such information, CMOs and users shall take into account, as far as possible, voluntary industry standards.

Article 17 is explained in Recital 33 to the Directive. It is held there that the information required by CMOs should be limited to what is reasonable, necessary and at the users' disposal in order to enable such organizations to perform their functions, taking into account the specific situation of small and medium-sized enterprises. In general, the information that the user must provide is thus limited to what the CMO

103. *See* Case C-52/07, Kanal 5 v. Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM), ECLI:EU:C:2008:703 (Dec. 11, 2008); Case C-395/87, Ministère public v. Jean-Louis Tournier, 1989 E.C.R. 2521.

104. *See* Proposition [Prop.] 2015/2016:181 Kollektiv förvaltning av upphovsrätt [government bill], at 185 (Swed.).

105. *See id.*

needs to collect, allocate, and distribute remuneration to the rights holders. This includes the information necessary for the CMO to determine the amount of remuneration owed and to whom it should be paid. This may include details on which works and performances have been used, as well as the nature and extent of their use.[106]

IV. CONCLUDING DISCUSSION

The advent of generative AI services has given rise to several challenges from a copyright perspective. One of these challenges is whether the development of such services—via machine learning techniques—entails a copyright relevant use, in the form of reproductions, of content protected by copyright. As indicated above, it is likely that such technique entails temporary forms of reproduction. The international conventions on copyright do not require that contracting states protect temporary forms of reproduction by copyright law, and jurisdictions differ in this regard. Within the EU, temporary forms of reproductions are covered by the right of reproduction. This has led to a very broad right of reproduction, and the need to introduce limitations to this right. A general limitation on temporary forms of reproductions was established in 2001, but this only entails temporary forms of reproduction that are necessary for caching and browsing and similar uses.

With the adoption of the DSM Directive in 2019, a general limitation for the purpose of TDM was introduced. It seems as if this limitation could permit temporary forms of reproduction that are necessary for machine learning activities, and this understanding of the limitation is also implied by related provisions in the recently adopted EU AI Act. However, there is a possibility to opt out of this general TDM provision, and it is very likely that right holders will take this opportunity. Standards will likely be developed in this area. This will lead to a situation where use of copyright protected content will need the permission of the right holders. As individual consent for such use might be highly impractical, a possible solution could be collective licensing on the basis of the extended collective licensing model. This model—or licensing mechanism—provides the right holders with the possibility to control use of their works and other subject matter for machine learning purposes, and also provides them with remuneration. This model could thus be a solution that strikes a "fair" balance between the interests at stake—the interest in permitting the use of existing copyright protected content for the development of AI services, while at the same time providing the right holders with control and remuneration.

Article 12 of the DSM Directive sets out general conditions for ECL models, and in this way makes them compatible with general copyright norms. This could also be an inspiration for other jurisdictions that are considering "balanced" solutions for making use of copyright protected content lawful.

Collective licensing, especially licensing based on legislative support such as an ECL mechanism, provides the CMOs with a strong bargaining position in relation to potential users. Within the EU, Article 16 of the CRM directive sets out conditions for

106. *See id.* at 186.

the relationship between CMOs and users, related to licensing, such as requirements on negotiation in good faith and the calculation of tariffs, and Article 17 sets out requirements on users' reporting. Such provisions could be considered also by other jurisdictions that are contemplating whether to introduce ECL provisions for making use of copyright protected content lawful.

As indicated above, the Nordic countries have a longstanding tradition of collective management, which has resulted in a well-developed structure and culture of activities of CMOs. In other words, the functioning and legitimacy of the Nordic ECL model has been dependent on the existence of a well-developed structure and culture of collective management. Undeniably, for any ECL system to function in practice, it is necessary for there to be representative CMOs that can negotiate and enter into relevant collective licensing agreements, as well as collect and distribute remuneration to right holders in an efficient and responsible manner, in a way which brings about trust from both right holders and users. In the Nordic countries, the ECL model was developed on the basis of or in parallel with the establishment of relevant and representative CMOs. Lack of established and reliable CMOs might prove to be a structural challenge for an ECL system to work in practice in other jurisdictions that are considering to adopt such a system.