



The Text and Data Mining exceptions in the EU: unfinished business?

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Illustration: Davide Bonazzi, Text and data mining, copyrightuser.org

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- Introduction

- Discussion in Europe about interaction between TDM and copyright since at least the start of the 2010s
- Discussion about introducing a copyright TDM exception at EU level crystallised with the 2016 EC directive proposal and ensuing debate
- This presentation is a follow-up on my 2018 article in the Law Review Propriétés Intellectuelles (available in [English](#) and [French](#)) where I argued for the EU to adopt a very broad TDM Exception
- Discuss the two TDM exceptions in the 2019 DSM Directive

The Text and Data Mining exceptions in the EU: unfinished business?

- **Structure of the presentation**
 - I. What is Text and Data Mining (TDM) and what problem it raises with respect to copyright?
 - II. Existing National TDM exceptions
 - III. TDM exceptions in the EU DSM directive 2019
 - IV. Assessment of the directive

I. Data mining vs copyright

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- Text and data mining (TDM)
 - Art. 2(2) DSM Directive: “text and data mining’ means 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”
 - Endless potential applications for research and innovation and beyond
 - Copyright angle: How did the content end up on the computer ?
Who owns data?

I. Data mining vs copyright

- **EU Copyright framework 2001/29 (InfoSoc)**
 - Strong copyright vs closed-list of narrowly interpreted exceptions
 - A la carte menu of optional exceptions
 - Article 5 3) a) exception for “use for the sole purpose of illustration for teaching or scientific research”
 - Circa 2010: No specific TDM exception in either national or EU law

I. Data mining vs copyright

- **Framing the debate on an exception**
 - Contractual solution vs copyright exception
 - Beneficiaries? (Researchers? Public? Private? Journalists? Everybody?)
 - For what use (research) ? For what purpose (commercial or not)? On what type of content (academic papers, pop music, youtube videos...)?
 - What guarantees for the rightholders? What happens to the processed copies? Important to understand their fears
- **A discussion driven by international comparisons and competition (US Fair Use + Japan)**

II. Member states in the race for a TDM exception

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- The UK as a EU trailblazer
 - 2011 Hargreaves review
 - 2014 Reforms of IP, including copyright exceptions (some quite daring)
 - 2014 UK TDM exception



Picture: Britain's Prime Minister David Cameron speaks at the Business in the Community annual general meeting in London December 2, 2010. REUTERS/Andrew Winning

II. Member states in the race for a TDM exception

- **s 29A Copyright Design and Patent Act**
 - Allows data mining for non-commercial research provided the researcher has lawful access to the source
 - Prevents researchers from transferring the copied data to a third party, unless agreement from the rightholder
 - No contractual override but rightholders can use technological measures
 - Quite broad exception notably in terms of beneficiaries
 - TDM exception understood as extension of article 5 3 a) Directive

II. Member states in the race for a TDM exception

- France: a reluctant second (or third)
 - Government against an exception in France and elsewhere
 - Strong sentiment by stakeholders and Digital Council in favour of following UK example
 - Intense debate in Parliament, leading to a compromise position



Picture: President Francois Hollande in 2017 AP- Christophe Ena

II. Member states in the race for a TDM exception

- France: a reluctant second (or third)
 - 2016 Law : new TDM exceptions
 - Only for texts, no audio-visual
 - For public research, excluding all commercial activity



Picture: President Francois Hollande in 2017 AP- Christophe Ena

II. Member states in the race for a TDM exception

- Other jurisdictions
 - Estonia (2016)
 - Germany (2017)
 - Ireland (attempts in 2016, 2018)

III. The TDM exceptions in the DSM Directive

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- 2016 Commission proposal - A mandatory TDM exception for research organisations (article 3) (ie all member states have to implement it)
- Step in right direction but commentators in favour of broader TDM exception, especially on beneficiaries (Rosati; Geiger, Frosio, Bulayenko; Ducato and Strowel, Margoni, Kretschmer, LIBER, EARE...., me)
- Council and Parliament propose a two tier-solution
 - A mandatory exception for research AND cultural heritage institutions
 - An exception for everybody BUIT optional AND overridable exception

Two mandatory exceptions

- **Article 3 : TDM for the purposes of scientific research**
 - Exception to reproduction, database and press publishers rights
 - Applies to all content
 - For reproductions made by research organisations and cultural heritage institutions
 - In order to carry out, for the purposes of scientific research, TDM of works to which they have lawful access.
- Copies shall be stored with an appropriate level of security and may be retained for scientific research (New, added by Council)

Two mandatory exceptions

- **Article 3 : TDM for the purposes of scientific research**
 - Rightholders allowed to secure their networks and databases
 - Those measures must be proportionate
 - MS shall encourage stakeholder to agree best practices in terms of storage of corpus and securing networks
 - This exception cannot be overridden by contract (Article 7)

Two mandatory exceptions

- **Article 4 - Exception or limitation for text and data mining**
 - Member States shall provide for an exception for reproductions for the purpose of TDM
 - Reproductions can be retained for as long as necessary
 - Rightholders can oppose the implementation of this TDM exception “in an appropriate manner, such as machine readable means in the case of content made publicly available online”.
 - This exception can be overridden by contract (Article 7)

IV. Preliminary and concluding thoughts

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- **Pros**

- Principle of a TDM exception is recognised with two mandatory exceptions that Member States have to implement
- Strong and wide exception for research institutions
- A potentially interesting exception for everyone else

- **Cons**

- Still limited compared with US
- Limited room to manoeuvre for MS
- Article 4 and the necessity for rightholders to reserve their right

IV. Preliminary and concluding thoughts

- Things to look out for
 - Competition between MS during implementation - Position of the UK (after Brexit)? Of (Macron's) France? Ireland....
 - Practical problems for rightholders - distinguishing users (researchers vs others) / what level of granularity? Interaction with DRMs
 - Best practices on storage and security - A possible compromise?
 - Which national institutions will collect and store the processed copies?

Thank you!