Comment

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4 October 2022
AI Tech & Policy Talks, Digital Law Center, University of Geneva
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TDM Exceptions in Comparison

- **Narrow**
  - UK
  - CDSM Directive
  - But contractual / technological override is prohibited

- **Broad**
  - Singapore
  - Switzerland
  - Japan
  - But contractual / technological override is not prohibited
## TDM Exceptions in Comparison

<table>
<thead>
<tr>
<th>Type of TDM</th>
<th>UK</th>
<th>EU Directive</th>
<th>Switzerland</th>
<th>Japan</th>
</tr>
</thead>
<tbody>
<tr>
<td>For non-commercial scientific research</td>
<td>OK</td>
<td>OK</td>
<td>OK</td>
<td>OK</td>
</tr>
<tr>
<td>For commercial research</td>
<td>OK</td>
<td>OK (but opt-out possible)</td>
<td>OK</td>
<td>OK</td>
</tr>
<tr>
<td>Exploitations other than reproduction (e.g. Distribution, communication to the public)</td>
<td>OK</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Woks/subject-matter not lawfully acquired (No lawful access requirement)</td>
<td></td>
<td></td>
<td>OK</td>
<td></td>
</tr>
<tr>
<td>Prohibition of contractual override</td>
<td>Yes</td>
<td>Yes (for scientific research)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Prohibition of technological override</td>
<td></td>
<td></td>
<td></td>
<td>Yes</td>
</tr>
</tbody>
</table>
...With respect to foundational concepts of copyright, the law protects the original expression of ideas, not ideas themselves, nor mere facts or data. Accordingly, text and data mining should not be considered a copyright infringement, but a matter external to copyright’s scope. It follows that a copyright exception is a problematic intervention to regulate the use of unprotected ideas, principles, facts and data, often contained in literary works or other types of texts (text mining) or in structured and/or unstructured datasets (data mining).
II.4. Was the EU TDM exception needed? Brief theoretical considerations

As stated in the Introduction, copyright protects the original expression of ideas, not ideas themselves, mere facts or data. Accordingly, whereas TDM should not be considered a copyright infringement, it is not through a copyright exception that the issue is best addressed. The reason is that TDM mainly refers to the use of unprotected ideas, principles, facts and data, often contained in literary works or other types of texts (text mining) or in structured and/or unstructured datasets (data mining). TDM is simply external to copyright’s scope.

If the above is plausible, then it should become clearer why addressing TDM as a copyright exception is conceptually wrong and theoretically flawed. Ideas, facts and data are not copyrightable elements, therefore there should be no need for a copyright exception in order to use those elements, even when they are contained in protected works.
TDM and Scope of Copyright

General conclusions

- **Property-based approach to data** is problematic. AI applications based on machine learning and other data-intensive approaches, i.e., where an algorithm needs to be trained on data, can only be developed based on a narrow (or wider but non-imperative) copyright exception. Is this the intended function of copyright? To be the ultimate judge of whether, how, and by whom technological development can happen and which direction should it take?

- **Property rights create issues of access** (authorization to use) and establish **conditions** (availability, price, purposes). Is the intended function of copyright to offer data holders control over data-based downstream markets such as AI development? What consequences may this frame lead to?

- **Access to data for AI in EU may be limited to those:**
  - Who are willing/can pay the price (will EU AI be then more expensive/less competitive than US AI? Or Japan? CH? UK AI?)
  - Train outside the EU in “cheaper” legal systems and use so trained AI in EU or import pretrained models: but what would be the impact in the EU to employ AI trained on a body of data embedding a system of knowledge, values and rules belonging to a different tradition? E.g.: See Art. 17, would we import in the EU a US based concept of “parody” via close-to-mandatory filtering obligations?
  - Or train in the EU anyway and hide the sources, leading to opacity in the training process (which would plausibly contrast with high-risk AI in AIA) – not a desirable mix of incentives for innovation.

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The Japanese TDM exception belongs to the so-called “flexible copyright exception for ‘non-enjoyment’ purposes” (Art.30-4) introduced in 2018.

The basic idea behind this provision is that copyright is a right protecting only an interest in the ‘inherent’ exploitations which are aimed at ‘enjoying’ or causing someone to enjoy a work.

See in detail, Tatsuhiro Ueno, The Flexible Copyright Exception for “Non-Enjoyment” Purposes: Recent Amendment in Japan and its Implication, 70(2) GRUR International 145-152 (2021)
Internal Limit to Copyright?

Japanese TDM exception can be considered as the ‘internal limit’ to the scope of copyright, rather than the ‘external limit’ to copyright.

See in detail, Tatsuhiro Ueno, The Flexible Copyright Exception for “Non-Enjoyment” Purposes: Recent Amendment in Japan and its Implication, 70(2) GRUR International 145-152 (2021)
Internal Limit to Copyright?

Also in Europe, there are some theories which try to exclude TDM activities from the scope of copyright, based on:

– ‘Use as a work’ (A. Strowel)
– ‘Reasonable exploitation’ (O. Rognstad & J. Poort)
– ‘Redefined scope of exploitation’ (S. Dusollier)
– ‘Was the EU TDM exception needed?’ (T. Margoni & M. Kretschmer)
Thank you

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