

Paris Congress - ALAI 2023

Artificial intelligence, copyright and related rights

June 22-23, 2023

The contours of the relationship²

1. Understanding

1.1 - Has your national or regional law adopted a legal definition of AI?

We are not aware of any.

1.2 - Can you provide some examples of current uses of AI and its productions in the cultural sector of your country?

1.3 - (Optional) What are the issues that have been exposed in your country on this subject: stakes, difficulties, orientations, proposals...?

1.4 - Are there any initiatives in your country or region aimed at regulating the use of AI in the cultural sectors?

We are not aware of any.

2. Understanding the upstream

2.1 - Are the AI system or its components likely to be protected by intellectual property rights (copyright and/or industrial property – patents, trade secrets . . .) ?

Yes. AI systems may often be protected as computer programs, databases, ... as long as qualifying under the requirements of the law.

2.2 - Can rights under copyright be enforced against the use of protected contents by AI training?

Does the insertion of a pre-existing work into the computer system implicate rights under copyright?

If so, in order to avoid a finding of infringement, are the copying or storage covered by an exception?

The possibility that, in some specific instances, the use of contents for purposes of AI training might qualify and be exempted under the temporary copies exception in Art.31.1 TRLPI (ex Art.5.1 InfoSoc Directive: to the extent that they are temporary acts of reproduction, which are transient and incidental, and an integral and essential part of a technological process ... and have no independent economic significance) has neither been considered nor decided by courts, so far. This is a possibility that may remain open ... at least, until some further guidance regarding its interpretation comes from courts or the CJEU.

² These responses have been prepared by prof. Raquel Xalabarder

Additionally, Spain has implemented the L&E for TDM purposes in Art.3-4 CDSM Directive. This implies that any acts of text and data mining, including those used for training AI systems, qualify as acts of exploitation under copyright that require an authorization (otherwise, there would be no need for L&E).

2.3 - In your country, are there any proposals to change the law and in which direction?

For example, by deeming that the incorporation of preexisting works into AI systems does not create an actionable "reproduction" of the works? Or by creating a new exception? Or by implementing a compulsory licensing system? Other solutions?

Spain implemented the DSMD, along with six other Directives, by Royal Decree-law (RDL) 24/2021, of 2 November,³ which was later validated by the Spanish Parliament on December 2nd. The RDL is a specific instrument that the Government may use in case of urgency to pass laws without the ordinary parliamentary proceedings and have them subsequently "validated" by the Parliament. The deadline to implement the DSMD had already expired (7 June 2021), and the Government turned to that instrument to avoid any sanctions, as it had happened with the belated implementation of other Directives. In addition to seeking its "validation", the government introduced a bill in the Parliament, with the same text as in the RDL, so that its contents could be assessed and passed as an ordinary law. The unexpected call for new elections at the end of July, has dissolved parliament and all parliamentary proceedings. This means that the task will have to be retaken as of September, all pointing towards a new "consolidated" legal text.

The Spanish government has used a very peculiar implementation strategy.⁴ Arts. 65 to 79 formally add new provisions to Spanish law, while Art 80 introduces specific amendments to the current Spanish Copyright Act, the TRLPI.⁵ As a result, the DSMD provisions are currently scattered among several instruments: the TRLPI itself (as modified by Art 80 RDL) and a few other stand-alone provisions in the RDL (Art 65 to 75). Both texts must be read together, adding complexity to the current implementation process. For instance, Art 66 RDL implements (more or less) verbatim the definitions in Art 2 DSMD,⁶ as well as other definitions which are not to be found in the DSMD; these definitions may not only be relevant for Arts 67 to 79 RDL, but also affect the provisions of the TRLPI text, as amended by Art 80 RDL.

Moving from form to substance, the Spanish government has done a very basic "de minimis" implementation of the DSMD. As far as TDM, it has done a very peculiar implementation.

³ RDL 24/2021, of 21 November, implementing Directives 2019/2162 on covered bonds, 2019/1160 on cross-border distribution of collective investment undertakings, 2019/1024 on open data and the re-use of public sector information, 2019/790 on Copyright in the Digital Single Market, 2019/789 on online transmissions and retransmissions of television and radio programmes, 2021/1159 on temporary exemptions on importations and on certain supplies, in response to the COVID-19 pandemic, 2019/2161 on consumer protection rules, 2019/1161 on promotion of clean and energy-efficient road transport vehicles, available (in Spanish) at: <https://www.boe.es/eli/es/rdl/2021/11/02/24>

⁴ For a criticism, see R. BERCOVITZ, *La Transposición de las Directivas de la UE sobre propiedad intelectual* (31 March 2022), available at <https://www.propiedad-intelectual.dursa.com/en/blog/articulos-propiedad-intelectual>

⁵ Real Decreto Legislativo 1/1996, of 12 April, approving the Consolidated Text of the Law of Intellectual Property (TRLPI), available (in Spanish) at <https://www.boe.es/eli/es/rdlg/1996/04/12/1/con>

⁶ Definitions are a necessary part of the DSMD implementation, but they could have been implemented under each provision, as necessary, rather than in a general "Definitions" provision. The only notable exception is the definition of press publication in Art 15 DSMD which is not included in the list of definitions in Art 65 RDL but, directly, in Art 129bis TRLPI (as amended by Art 80 RDL).

Spanish TRPLI did not provide for any exception or limitation for purposes of text and data mining. Art 67 RDL implemented Arts 3 and 4 CDSMD in one single provision, failing, on the one hand, to secure the mandatory scope of Art 3 CDSMD regarding TDM for purposes of scientific research (which cannot be subject to rightholders' reservation) and, on the other, to consider an eventual request for fair compensation for TDM for other purposes (as allowed under Art 4).

Art 67.1 RDL sets an exception (non-compensated),⁷ of a general nature (in favour of any person) authorizing the reproduction and extraction of lawfully accessible works and other protected subject matter (including databases, see Art 67.5 and .7 RDL) for purposes of text and data mining; setting the same conditions found in Art 4.2 and .3 CDSMD: to retain them for as long as necessary (Art 67.2 RDL) and on condition that the use has not been expressly reserved by their rightholders « by machine-readable means or other appropriate means » (Art.67.3 RDL).⁸

Only then, as Art.67.4 RDL, specific provisions are set regarding « reproductions and extractions made by research organisations and cultural heritage institutions in order to carry out, for the purposes of scientific research, text and data mining » subject to the same conditions found in Art 3 .2, .3 and .4 CDSMD, respectively : copies shall be stored with an appropriate level of security and may be retained for the verification of research results; rightholders are allowed to apply measures to ensure the security and integrity of the networks and databases where the works or other subject matter are hosted, and such measures shall not go beyond what is necessary to achieve that objective; and rightholders, research organisations and cultural heritage institutions may define commonly agreed best practices, while the Public Administration may also foster them.

Altogether, this seems to defeat the mandatory nature and scope of the TDM exception for scientific research purposes set in Art 3 CDSMD, which was not opened to rightholders' reservation, and fails to secure the EU wide uniformity sought by Art 3 CDSMD.

Two rather minor issues also deserve attention. First, the harmonized definition of TDM in Art 2.2 CDSMD is slightly enlarged with « or similar elements »;⁹ however, since the list of « patterns, trends and correlations » sought by TDM is not exhaustive, we see no major problem in it. Second, Art 67.6 RDL defines the meaning of acts that are authorized by this exception, as far as computer programs; namely, no authorization by the rightholder will be necessary to perform the following acts for purposes of TDM under this article : « a) the total or partial reproduction, even for personal use, of a computer program, by any means and in any form, whether permanent or transitory... and b) the translation, adaptation, arrangement or any other transformation of a computer program and the reproduction of the results of such acts, without prejudice to the rights of the person who transforms the computer program. » This later one may go beyond the formal scope of Arts 3 and 4 CDSMD?

⁷ Of course, nothing prevents parties to agree to compensation schemes, be it on a voluntary manner or as part of their agreed "best practices," but Art 67 RDL completely forsakes the opportunity to require compensation for TDM for purposes other than scientific research.

⁸ We must point out at what looks like a wrong transcription of Art 4.3 CDSMD which refers to the possibility of rightholders' express reservation "in an appropriate manner, such as machine-readable means in the case of content made publicly available online". Instead, Art 67.3 RDL reads: « The authorization in paragraph 1 shall not apply when rightholders have expressly reserved the use of works to machine-readable means or other appropriate means. » We read Art 67.3 RDL "in the light of" Art 4.3 CDSMD, but this is something that should be corrected by the Parliament.

⁹ Art 66.1 RDL: « '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, correlations or similar elements »

2.4 - Do the "terms of service" of the platforms available in your country authorize the copying and storage for the purpose of constituting "training data" and the creation of "AI outputs" of the works posted by the users of the platform? If so, give examples of the relevant Terms of Service.

TDM licensing of academic publishing (mainly, academic journals) is well advanced worldwide;¹⁰ not so much so in Spain. We have not been able to locate any terms of service authorizing TDM uses. On the contrary, the examples found (terms of service from Spanish publishers) would prohibit them.

In its database license, Tirant lo blanch does not make any specific reference to TDM; it only authorizes (Art.3) *"With the license agreement we guarantee your right to use these contents, for its normal and habitual use as a legal operator, for its personal, non-commercial use. The license authorizes you to upload or record the content included on the website on your computer for the purpose of reading or using it in an and eventually copy them to another computer that you personally own. The license does not authorize you to modify in any way the books and other content you may have used. Any modification or elaboration of the digitized files that you acquire on this page is expressly prohibited by international law and national laws. It is expressly prohibited the creation of hypertext links (links) to any component element of the web pages of the Portal without the authorization of the company."* https://tirant.com/Docs/Cond_serv_uso_BBDD.pdf

The terms of use on the Tirant lo blanch's website, despite not formally referring to TDM, specifically prohibits it: *"The CLIENT cannot copy, duplicate, reproduce, lend, sell, download, resell, republish, transmit any part of this website or its Content, whether for commercial or non-commercial use. THE CLIENT cannot sublicense, decompile, rent, sell, reverse engineer, or create derivative works of this website or its Content. THE CLIENT may not use framing techniques to hide the brand, logo or other portions of the website without the prior written authorization of EDITORIAL TIRANT LO BLANCH. The CLIENT cannot extract, whether through a permanent or temporary transfer, any substantial part of the contents of the Databases to other supports, regardless of the means or form used, nor may they repeatedly and systematically reuse any of the parts of the content of the databases. The CLIENT cannot use automated software or a manual process, as well as robots or spiders to copy or monitor the EDITORIAL TIRANT LO BLANCH service and/or its content without the prior written authorization of EDITORIAL TIRANT LO BLANCH. The CLIENT may not manipulate or use the Content of EDITORIAL TIRANT LO BLANCH to create publications and/or services of any kind and, especially, those that may be comparable or compete in any way with the publications and/or Content that EDITORIAL TIRANT LO BLANCH offers now or may offer in the future. The inclusion of EDITORIAL TIRANT LO BLANCH content in any database, of any kind, regardless of its format or whether it is public or private, paid or free, is expressly prohibited."* <https://www.tirantonline.com/tol/informacion/avisolegal>

Similarly, Aranzadi – Thomson Reuters, and despite not formally referring to it, prohibits TDM uses on their digital publications (except as authorized by statutory L&E) : *"Prohibitions: The user cannot reproduce, download, print, store, publish, transmit, retransmit, assign, distribute, broadcast, make available to the public, sell, resell, reproduce or store in databases or in any other way use the Electronic Book or part thereof, in any manner or by any means, except (i) as expressly authorized in this license, (ii) with Aranzadi's prior written consent, or (iii) to the extent such use is protected by any of the limits to intellectual property rights provided by law."* <https://www.thomsonreuters.es/es/tienda/condiciones.html>

¹⁰ See, for instance, Elsevier <https://www.elsevier.com/about/policies/text-and-data-mining> ; Cambridge University Press <https://www.cambridge.org/core/services/open-research/text-and-data-mining>

2.5 - Are you aware of the conclusion of individual or collective licenses on this point? If yes, in which fields of creation? Under what conditions? If so, give examples.

No, we are not aware of any.