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The idea of an open norm for Text and Data Mining in the EU Copyright Law

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Abstract:

Text and Data Mining (hereinafter, TDM) in the field of scientific research turns out to be a pivotal issue in the process of Copyright harmonization in the European legal environment. In the quest for greater legal certainty through harmonized exceptions and limitations to Copyright in the EU, the proposal for a mandatory exception on TDM is prominent. TDM is deemed to be a leverage for enhancing scientific research in Europe. In the European Digital Single Market Strategy1 which considers three pillars in its foundation, the first one focuses on better access for consumers and businesses to online goods and services across Europe. The achievement of this goal requires the rapid removal of key differences between the online and offline worlds to break down barriers to cross-border online activity. To this end, the European Commission has been working on proposed solutions that include TDM as a means for the cross-border use of content for specific purposes (e.g. research, education, etc.) in the European market. TDM still

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TDM leverages on state-of-the-art information technology. It is understood as the automated computational analysis of information in digital form, such as text, sounds, images or data that is enabled through the use of new computational technologies. In a broad sense, TDM is called any activity where computer technology is used to index, analyze, evaluate and interpret masses of content and data. TDM works in a manner which includes identifying input materials to be analyzed, copying substantial quantities of said materials, processing them by turning them into a machine-readable format so that structured data can be extracted, extracting data and recombining them to identify patterns into the final output. In its operation TDM touches upon the rights of the copyright holders of works included in the input.

The EU legislator has considered—at least for the time being—recommendations made by various scholars upon the TDM and how it should be regulated in the proposed Directive on copyright in the Digital Single Market. The suggestion that it is best to have a mandatory exception for TDM which would be inspired from, and contain partly the same conditions as the scientific research exception, but which would have its own characteristics prevailed. The introduction of a new mandatory exception in copyright and the database law was proposed to take the form of either an exception specifically permitting TDM for the purpose of scientific research or an open norm exception like the one presented in Ian Hargreaves et al. 2014 expert group report which had urged the UK government to press the EU to change its copyright law.

The idea for an open norm in European Copyright law is not new; it’s an old challenge in the minds of scholars in the European legal environment that consider the competitiveness of the US open norm tradition in the Copyright Law. The introduction of an open norm— or general exception—similar to US fair use has long been considered in EU legal scholarship and policy debate. Supporters of the open norm option in TDM claim that the open norm could introduce flexibility so as to

2 See Proposal COM(2016)593 final 2016/0280(COD), Recital 8; see, also, European Commission, (2016), ibid., according to which Text and Data Mining (TDM) is a term commonly used to describe the automated processing ("machine reading") of large volumes of text and data to uncover new knowledge or insights.


allow TDM activities to take place, along with other types of activities that would pass the test.

This 2019 ICIL conference proposed participation aims at presenting the open norm suggestion made before the EU Commission as an option for enhancing the most-needed flexibility in the “acquis communautaire” of the European Copyright Law.