

Proposal for 9th ICIL conference participation

July 11-13, 2019 @ Rome, Italy

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

Authors:

Dr. Marinos Papadopoulos

Attorney-at-Law

&

Dr. Christos Zampakolas

Archivist/Librarian

&

Mrs. Paraskevi Ganatsiou

Coordinator of Educational Work in the field of Sustainability
at Regional Directorate for Education of the Ionian Islands.



Επιχειρησιακό Πρόγραμμα
Ανάπτυξη Ανθρώπινου Δυναμικού,
Εκπαίδευση και Διά Βίου Μάθηση
Ειδική Υπηρεσία Διαχείρισης

Με τη συγχρηματοδότηση της Ελλάδας και της Ευρωπαϊκής Ένωσης



Proposal for Conference Participation in the framework of ongoing Research
Under the supervision of Associate Professor Maria Kanellopoulou-Bottis

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

¹ See **COM(2015) 192 final**, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, A Digital Single Market Strategy for Europe, available at URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2015%3A192%3AFIN> [last check, November 20, 2018].

in the process of discussion and forthcoming voting before the European Parliament in the form of provision(s) included in a new Directive on Copyright in the Digital Single Market. TDM is included in the proposal for a Directive of the European parliament and of the Council on copyright in the Digital Single Market—Proposal COM(2016)593 final 2016/0280(COD) that was submitted to the European Parliament.

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.² In a broad sense, TDM is called any activity where computer technology is used to index, analyze, evaluate and interpret mass quantities of content and data.³ 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.⁴ 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.⁵ 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.

³ Caspers, M., Guibault, L., McNeice, K., Piperidis, S., Pouli, K., Eskevich, M., Gavriilidou, M., (2016), ***Reducing Barriers and Increasing Uptake of Text and Data Mining for Research Environments using a Collaborative Knowledge and Open Information Approach***, Baseline report of policies and barriers of TDM in Europe (extended version of D3.3), p.9, available at URL: https://cordis.europa.eu/project/rcn/197301_en.html [last check, Jan.20, 2019].

⁴ Geiger, C., Frosio, G., and Bulayenko, O., (2018), ***The Exception for Text and Data Mining (TDM) in the Proposed Directive on Copyright in the Digital Single Market-Legal Aspects***, pp.5-6, available at URL: [http://www.europarl.europa.eu/RegData/etudes/IDAN/2018/604941/IPOL_IDA\(2018\)604941_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2018/604941/IPOL_IDA(2018)604941_EN.pdf) [last check, Jan.20, 2019].

⁵ See Senftleben, M. (2017), ***The Perfect Match – Civil Law Judges and Open-Ended Fair Use Provisions***, 33 *American University International Law Review*, No.1, pp.231-286, available at URL: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3002275 [last check, November 20, 2018]; Hugenholtz, B.P., (2016), ***Flexible Copyright: Can EU Author's Rights Accommodate Fair Use?***, in Irini Stamatoudi (ed.), *New Developments in EU and International Copyright Law*, Leiden, Netherlands: Kluwer Law International, pp. 417-433; Hugenholtz, B.P., and Senftleben, M., (2012), ***Fair Use in Europe: in Search of Flexibilities***, Amsterdam Law School Research Paper No. 2012-39 - Institute for Information Law Research Paper No.2012-39, available at URL: <https://ssrn.com/abstract=2013239> [last check, November 20, 2018]; Senftleben, M., (2014), ***Comparative Approaches to Fair Use: An Important Impulse for Reforms in EU Copyright Law***, in Graeme Dinwoodie (ed.), *Methods and Perspectives in Intellectual Property*, Cheltenham, UK: Edward Elgar; Dnes, A., (2013), ***Should the UK Move to a Fair-Use Copyright Exception***, 44 *International Review of Intellectual Property and Competition Law*, No.4, pp. 418-444; Van der Noll, R., Gompel, S., Guibault, L., Weda, J., Poort, J., Akker, I., and Breemen, K., (2012), ***Flexible Copyright: The Law and Economics of Introducing an Open Norm in the Netherlands***, SEO Economic Research Report N. 2012-60, available at URL: https://www.ivir.nl/publicaties/download/Flexible_Copyright.pdf [last check, November 20, 2018]; Geiger, C., (2008), ***Flexibilising Copyright – Remedies to the Privatisation of Information by Copyright Law***, 39 *International Review of Intellectual Property and Competition Law*, No.2, pp. 178-197, available at URL: https://www.researchgate.net/publication/43233985_Flexibilising_Copyright_-_Remedies_to_the_Privatisation_of_Information_by_Copyright_Law [last check, November 20, 2018].

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.