EVA

European Visual Artists

EVA LEGAL PAPER

THE REGULATION of the EUROPEAN PARLIAMENT and of the COUNCIL LAYING DOWN HARMONISED RULES in the FIELD OF AI **(ARTIFICIAL INTELLIGENCE ACT)** and RELATED UNION LEGISLATION

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1. INTRODUCTION

European Visual Artists (EVA) is the single voice of European visual artists, promoting European creativity by raising awareness about artists' rights and their precarious livelihoods across Europe. EVA embodies 31 Collective Management Organisations (CMOs) in 28 countries, representing over 150.000 authors of fine arts, painters, sculptors, photographers, illustrators, designers, graphic designers, street artists and architects.

We welcome the "*Proposal for a Regulation laying down harmonised rules on Artificial intelligence*" (AI Act), as there is an urgent need to identify risks and regulate uses related to AI. Artificial Intelligence is a powerful and impactful technology which is increasingly used in creative and cultural industries. It provides many benefits, but it also comes with critical risks that, if not properly addressed, could affect the livelihoods of visual artists.

Visual artists are finding themselves in the absurd situation of having to compete with generative AI which is trained on their works and uses their style. Artists are losing jobs because AI-generated art is low-cost and fast to acquire. AI companies make fortunes from commercialising their generative art platforms whereas artists do not get anything. This has given rise to cases such as *Andersen et al v. Stability AI Ltd.*[1]

Visual artists, who are in most cases self-employed, are vulnerable and need adequate protection of their rights on several levels, against the diverse problems that they are being confronted with.

[1]https://cases.justia.com/federal/district-courts/california/candce/3:2023cv00201/407208/67/0.pdf?ts=1685964605

2. CONSENT – AN ESSENTIAL PRINCIPLE OF COPYRIGHT LAW

Copyright entails economic rights which allow the rightsholders to benefit from the use of their works by others, to **authorize** or **prevent** certain uses and to receive remuneration. In other words, copyright entails the right to property which is a fundamental right that is protected on both international and European levels (Article 17 of **the EU Charter of Fundamental Rights**[2], Article 17 of **the Universal Declaration of Human Rights**[3], Article 15 of **The International Covenant on Economic, Social and Cultural Rights**[4], Article 1 of Protocol No. 1 of **The European Convention on Human Rights**[5]). Moreover, copyright is recognised as a fundamental right by the jurisprudence of the European Court of Human Rights (Neij and Sunde Kolmisoppi v. Sweden (dec.)[6]; SIA AKKA/LAA v. Latvia, § 41[7], Anheuser-Busch Inc. v. Portugal [GC], § 72[8]).

Any use of artworks for the training of generative AI without the prior consent of the author (or a CMO) and/or without compensation may entail deprivation of property of the copyright holder, and violation of the international treaties.

Moreover, artists have no say in how their copyrighted works are being used by AI companies, regardless of whether the use affects their moral or economic rights, and furthermore, they receive neither notification of use nor compensation for the possible harm caused. Such a situation goes against the Aquis Communautaire of copyright.

[2] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT
[3] https://www.un.org/en/about-us/universal-declaration-of-human-rights
[4]https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights
[5] https://www.echr.coe.int/documents/d/echr/convention_eng
[6] https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-117513%22]}
[7] https://curia.europa.eu/juris/document/document.jsf?text=&docid=194436&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=720344
[8] https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-3698%22]}

Solution:

According to the case law of the ECtHR, there does not have to be a formal act of dispossession for an act to be considered an interference with possessions.

Accordingly, where artworks are used without any prior consent of the author or the CMO or any agreement as to remuneration, this may have such severe consequences that could be assimilated to deprivation of property (A*sDAC v. the Republic of Moldova*[9]).

The EU Charter of Fundamental Rights and the European Convention on Human Rights allow for such deprivation of property only when it is provided for by law, is subject to fair compensation or is in the public interest.

The **need to maintain a balance between the rights of authors and the public interest,** particularly education, research and access to information, as reflected in the Berne Convention, is also underlined in the Preamble of the WIPO Copyright Treaty (adopted on December 20, 1996).

Therefore, t**he AI Act should include the conditions of use of artworks for training generative-AI, the justification for use in the public interest, and compensation.** A lack of the latter may violate the fundamental right to property of the copyright holder.

Through the AI Act, lawmakers can provide legal clarity for the use of visual art in generative-AI, and in particular with Article 28 (4) of the consolidated AI Act, requiring AI companies to ensure "*adequate safeguards against the generation of content in breach of Union law*", hence against copyright infringements.

[9] https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-206726%22]}

Proposed amendment:

EVA proposes the inclusion of a guarantee of respect of fundamental rights as intended by the European Commission, as part of the ex-ante obligations adopted in Article 11 on "Technical documentation" to be provided by high-risk AI Systems prior to their introduction into the Internal market, and for such documentation to be kept up to date.

This technical documentation must prove to the auditor that prior authorisation for the use of the protected images has been obtained from the owners of Intellectual Property Rights, and that they have been given access to the information on the use of the digital reproductions of their protected works through the intermediary of the relevant CMO. In addition to the above, it must be demonstrated to the auditor that the use made has been adequately remunerated by obtaining a license with extended effect from the corresponding CMO in accordance with the provisions of Article 12 of the DSM Directive.

3. THE EXCEPTIONS OF THE DSM DIRECTIVE ARE INCOMPATIBLE WITH AI USES

Articles 3 and 4 of the DSM Directive provide for two exceptions allowing the use of protected data to train AI: for scientific non-commercial research purposes and cultural heritage institutions, as well as for data analytics, for any commercial use as long as the rightsholders don't reserve their rights. If rightsholders disagree, then they need to opt-out.

Opting out as explained in Recital 18 of the DSM Directive, allows for reservation of rights by machine-readable means, for instance via metadata or by use of the terms and conditions of a website or service. But whereas these conditions may be exercisable for literary, musical or cinematographic creations, they are not adapted to visual artists, whose vast repertoires of works circulate on the internet, without any technical barriers and are subject to a disproportionate amount of unauthorised use. Meaning that the required machine-readable data is easily withdrawn from the artworks or is not transferred to the multiple copies made of the image of an artwork.

Not only is it unclear how to opt-out "by machine readable means", since there is no guidance on a standardised procedure, but it is also unclear whether an author has to opt-out for each work individually and whether such a process is feasible in a decentralised digital environment. Besides, artists have no guarantee about whether opting-out would have a retroactive effect and lead to the unlearning of already mined copyrighted works, and hence undo the harm done to them.

Lawmakers did not have the extensive use of works in generative AI-models such as Dall-E and Midjourney in mind when creating the DSM directive. Considering the importance of data input for companies developing AI, it is problematic if the future of these businesses is shaped on the interpretation of a single copyright exception. Article 4 could lead to a practice of free use with no opt-out possibilities, which from the wording of the text was clearly not the intended purpose. AI companies cannot rely on Article 4 of the DSM Directive for the free use of visual works because it does not foresee prior consent, while visual artists in most cases cannot opt-out by machine readable means.

Also, it is highly questionable whether Art. 4 is in line with the "three-step test" required by international conventions (Berne Convention, WIPO Copyright Treaty, TRIPS Agreement). These expressly provide that limitations or exceptions to copyright may be introduced only *"in certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author"*. Free use of visual works in

AI training without any remuneration/compensation system, and particularly without (effective) opt-out opportunities, would both conflict with normal exploitation of visual works and harm the legitimate interests of the rightsholders.

Solution:

This problem could be addressed by giving the rightsholders the possibility of opting-out for their entire repertoire, possibly collectively, via a standardised procedure developed at EU level or to receive remuneration as compensation, but

also, **by introducing an opt-in system where AI companies must obtain the authors' consent to exploit their works through CMOs, and hence returning to the principle that any use of a copyrighted work requires the prior authorisation of its author.** Thanks to CMOs, AI companies can in fact easily obtain blanket licenses covering a wide range of visual works. The legal obligation would resemble the one applying to internet platforms according to Article 17 (4) a of the DSM directive, with the possibility for the CMOs to use licencing models according to Article 12, hence using collective management to solve a similar "value gap" problem.

This would also provide a solution to compliance with Article 28 (4) b which requires AI companies to "*ensure adequate safeguards against the generation of content in breach of Union law*", hence without prejudice to the copyright legislation.

Proposed amendments:

In order improve the implementability of the current Articles 3 and 4 of the DSM Directive and to ensure, on the one hand, proper compliance with Article 9 of the Berne Convention and, therefore, the establishment of a corresponding compensation to rightsholders when exceptions affecting the normal exploitation of works are established, and on the other hand to ensure proper compliance with the opt-out requirement contained in Article 4(3) of the DSM Directive, **EVA proposes the incorporation under TITLE XII (Final Provisions) of the AI Act, of new articles to introduce the following measures:**

- **The duty to inform rightsholders, through their CMO, about the use of their protected works**, both in relation to text and data mining for scientific research purposes and for commercial purposes as set out in Articles 3 and 4 respectively of the DSM Directive.
- **The right to access information by rightsholders via their CMO**, on how their works are used for the purposes outlined in Articles 3 and 4 and if the uses are legitimate.

4. A NEW VALUE GAP DERIVING FROM THE LACK OF COMPENSATION TO ARTISTS

The DSM directive was put in place to provide new remuneration possibilities to artists and other creators and to close the value gap between these creators and those exploiting their works. However, in the current situation where AI companies are commercializing works created from mined copyrighted works without offering any compensation to the artists, the social and financial situation of artists in the EU is not likely to improve. Such disparities have forced several artists to switch to other professions. But how will AI be able to evolve when less creative content is available for machine learning? There can be no AI-generated art without the works of human artists.

Pursuant to the ECtHR's jurisprudence, and especially with regard to the case of AsDAC v. the Republic of Moldova mentioned above, the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference and a total lack of compensation could be considered justifiable under Article 1 of Protocol No. 1 to the Convention only in exceptional circumstances. Therefore, the use of artworks to train generative AI requires adequate compensation for visual artists.

Solution:

The compensation for the use of artworks to train generative AI could be managed by the CMOs. In fact, the ECtHR stated, in *SIA AKKA/LAA v. Latvia*, that CMOs hold rights that constitute intellectual property, within the meaning of Article 1 of Protocol No. 1, in the form of the works and the economic interests deriving from them which were transferred to them by their members. The ECtHR went on to state that in order to comply with Article 1 of Protocol No. 1 to the Convention, any measure constituting the interference with the intellectual property of the artists represented by CMOs must be lawful, in accordance with the general interest, and a balance between the demands of the public interest involved and the CMO's fundamental right of property must have been struck.

As to the amount of compensation for deprivation of property, once again according to the jurisprudence of the ECtHR, **it should be reasonably related to its "market" value** as any other approach could open the door to a degree of uncertainty or even arbitrariness.

Another option would be the introduction into the AI Act of a remuneration right that could take the form of a new type of neighbouring right, as suggested by Senftleben[10] in his most recent article on remuneration for AI purposes.

Proposed amendments:

EVA proposes that proportional and fair remuneration for artists is introduced under TITLE XII (Final Provisions). The remuneration is compensation for the exceptions established in Articles 3 and 4 of the DSM Directive affecting the normal exploitation of the artworks. It could be achieved by means of licences with extended effect granted by the corresponding CMO.

[10] See: M. Senftleben, 'Generative AI and Author Remuneration', June 14 2023, Available at SSRN: https://ssrn.com/abstract=4478370 or http://dx.doi.org/10.2139/ssrn.4478370.

5. LACK OF TRANSPARENCY ON HOW ARTWORKS ARE USED BY AI COMPANIES

Text and Data mining is particularly harmful to artists, who are not aware of the uses made of their works due to a lack of transparency from AI companies. These companies do not usually provide the necessary tools for artists to verify these uses and remain opaque on how artworks are used by generative models to create new artworks. And yet, artists need to know how their basic moral rights, such as the right to paternity, may be affected.

Solution:

We welcome Article 28 (4) c, making providers of generative AI responsible to deliver "*a sufficiently detailed summary of the use of training data protected under copyright*". However, **it is crucial to impose further transparency obligations to not only make sure that the works are used with the consent of the rightsholders, but also to provide full access to databases, or equivalent records of information (including from relevant third parties), that would allow artists to verify whether or not their works are being used, which specific works are concerned, how these are being utilised and by whom.**

Artists should have a right of access in order to know which works and data are used in the selection and extraction work. This right will provide them with the similar capacity granted to European citizens in the General Data Protection Regulation of the European Union, enabling access to this information and, where appropriate, the right of rectification, opposition, and even the right to erasure of the data or the total or partial reproductions of their works.

Proposed amendments:

EVA recommends the inclusion in Article 12 a) on "Record keeping", that the registration obligations, in the case of AI systems aimed at the realisation of generated art, a guarantee that the necessary level of traceability to enable the rightsholders to know if their works are used for data mining is provided.

In relation to Article 13. 3), b) on "Transparency and provision of information", we propose adding another point "VI" to clarify that the output is generated by AI systems and not by human beings, all this in relation to the characteristics, capabilities and limitations of the operation of the high-risk AI system in question.

6. CONCLUSION

EVA would like to thank the European institutions for considering the concerns of visual artists in the drafting of the first AI regulation ever.

The lives of many artists are defined by precariousness and a lack of resources to do their work. To ensure that European culture will thrive tomorrow, European artists must be protected today.

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