Creative Commons Statement on the Opt-Out Exception Regime / Rights Reservation Regime for Text and Data Mining under Article 4 of the EU Directive on Copyright in the Digital Single Market

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Summary Position

The terms of the Creative Commons (CC) licenses cannot be construed or interpreted as a reservation of a right in the context of Article 4 of the EU Directive on Copyright in the Digital Single Market (EU 2019/790) or any of its national transposition instruments. CC licenses do not operate as an opt-out of an exception or limitation to copyright. Both the language (legal code) and purpose (spirit) of the licenses prohibit such an interpretation:

(1) The language in the licenses specifically makes clear that they are not intended to impose any restrictions beyond what copyright imposes and that they do not override exceptions and limitations.

(2) The licenses are designed to permit *more* uses than the default all-rights-reserved so any interpretation that they do reserve rights in the context of Article 4 runs contrary to the overall design and purpose of the licenses.

Context

The 2019 European Union Directive on Copyright in the Digital Single Market (EU 2019/790)[1] establishes at Article 4 an exception for text and data mining (TDM). This exception is available to any organization or individual who wishes to undertake TDM on works that are protected by third-party copyright or related rights. Its objective is to foster activities related to big data and artificial intelligence in Europe. While the implementation of the directive is still underway in most EU countries, some national laws have already transposed the provisions of Article 4.[2]

Rightholders can choose to opt out of this exception regime and require users to request authorization to undertake TDM by expressly reserving their rights. Article 4(3) states that the exception or limitation does not apply if the use of the works or other subject matter for TDM purposes has been expressly reserved by the rightholder. This reservation of rights needs to be done "in an appropriate manner, such as machine-readable means in the case of content made publicly available online."[3] The opt-out mechanism was arguably intended as a form of

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[1] Available online: https://eur-lex.europa.eu/eli/dir/2019/790/oj.
[2] See: Communia Association, DSM Directive Implementation Tracker, https://www.notion.so/communia/DSM-Directive-Implementation-Tracker-361cfae48e814440b353b32692bba879
[3] Art. 4(3) reads: "The exception or limitation provided for in paragraph 1 shall apply on condition that the use of works and other subject matter referred to in that paragraph has not been expressly reserved by their rightholders in an appropriate manner, such as machine-readable means in the case of content made publicly available online." See also Recital 18: "This exception or limitation should only apply where the work or other subject matter is accessed

contractual override, which would explain why Article 4 is not protected from contractual override by Article 7(1), unlike all the other new exceptions.

Question: do the terms of the CC license constitute a reservation of rights?

The application of Article 4 (as transposed in national law) potentially raises several questions with regard to the interpretation of CC licenses, including: do the terms of the CC licenses, and in particular the terms of the NoDerivatives (ND) and NonCommercial (NC) clauses, constitute a reservation of rights "in an appropriate manner" (such as "machine-readable means") for TDM, under article 4 and Recital 18 (and any national transposition text)?

Comments

It should first be noted that TDM activities do not always implicate copyright. Whether one has to comply with the CC license terms and conditions to conduct TDM will depend on whether the type of mining activity implicates copyright or any applicable *sui generis* database rights. If one is not exercising an exclusive right held by the rightholder (such as the right of reproduction or extraction from a database), then one does not need to rely on the license to mine. Because there are many different methods for conducting text and data mining, however, there may be some types of mining activities that will implicate the licensed rights.[4]

If we are to accept the position that use of a work for TDM should be considered as an exercise of an exclusive right subject to the terms of the CC license, we need to analyze whether Article 4 constitutes an exception for the purpose of the Creative Commons public license, Sec. 1(d). The systematic and functional interpretations of the provisions of Article 4 categorize it as an exception, therefore there is no doubt that under applicable law, Article 4 is considered an exception or limitation as per the definition of an exception in CC licenses.[5]

A textual argument: the language of the license

If the use of a CC-licensed work for TDM purposes is covered by the exception established at Article 4, the license is not triggered. Indeed, if a use falls under the scope of an exception or limitation to copyright, the CC license terms do <u>not</u> apply. In other words, only in such cases

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lawfully by the beneficiary, including when it has been made available to the public online, and insofar as the rightholders have not reserved in an appropriate manner the rights to make reproductions and extractions for text and data mining. In the case of content that has been made publicly available online, it should only be considered appropriate to reserve those rights by the use of machine-readable means, including metadata and terms and conditions of a website or a service. Other uses should not be affected by the reservation of rights for the purposes of text and data mining. In other cases, it can be appropriate to reserve the rights by other means, such as contractual agreements or a unilateral declaration. Rightholders should be able to apply measures to ensure that their reservations in this regard are respected. This exception or limitation should leave intact the mandatory exception for text and data mining for scientific research purposes provided for in this Directive, as well as the existing exception for temporary acts of reproduction provided for in Article 5(1) of Directive 2001/29/EC."

[4] See: Creative Commons, FAQ,
https://creativecommons.org/faq/#can-i-conduct-textdata-mining-on-a-cc-licensed-database

[5] Systematically, Art. 4 is placed under Title II "MEASURES TO ADAPT EXCEPTIONS AND LIMITATIONS TO THE DIGITAL AND CROSS-BORDER ENVIRONMENT" and the same article is titled "Exception or limitation for text and data mining." Functionally, Art. 4 operates as a typical exception, exempting from authorization specifically identified rights of economic exploitation – a common feature of exceptions and limitations. Additionally, the repeated use of the expression "exception and limitation" in the text describing the provision corroborates the argument.

where the law restricts a certain use is the use covered by the license; if the use is covered by an exception, the license terms do not apply. By design, CC licenses do not reduce, limit, or restrict any rights under exceptions and limitations to copyright. This is a fundamental principle of CC licensing.[6]

Therefore, using a CC license to release content cannot constitute a reservation of rights in the framework of an exception regime. No internal element of CC licenses can be logically or systematically interpreted as a reservation of rights for the scope of Article 4. Where an exception or limitation has been created by law, the terms of the license cannot expressly reserve any right related to that use because CC licenses do not apply to uses covered by an exception or limitation, as the license itself is not operable in that framework. Since the license is not triggered, any element of the license (including any wording that could raise interpretative doubts about their nature or function as a reservation of rights ex Art. 4) is irrelevant because the license in this case has no validity.

What happens if the right has been explicitly reserved (external to and separate from the terms of the CC license)? Any "express reservation" of the use of the work ex Article 4(3) renders the exception ineffective. Therefore, since in the absence of an exception the license is triggered, the normal application of the irrevocable CC license terms apply. Thus, for example, a work under CC BY-NC used in the context of an Article 4-explicit reservation can still be mined for non commercial purposes (but not for commercial purposes), because the only function of an Article 4 reservation is limited to that article, it cannot contradict the broader obligations of a CC license, in this case the "NC" term). A similar argument can be made for ND (no derivatives) and SA (share-alike) when the result of mining is adapted material.[7] Any reservation done under Art. 4 will only operate within Art. 4, i.e. its effect is contained within the opt-out framework and does not affect the application of the exception provided under Article 3 or any other exception or limitation.

Additionally, an interpretation of Art. 4(3) as a form of reservation of rights that went beyond the sole scope of the Art. 4 exception would be in plain contrast with the wording of CC licenses and therefore incompatible with them. This seems a necessary conclusion of Section 7 "Other Terms and Conditions."[8] The only way in which an Article-4 reservation can be deemed compatible with the CC licenses is if it only operates within Article 4 (rendering the

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[6] See: Creative Commons, FAQ, https://creativecommons.org/faq/#do-creative-commons-licenses-affect-exceptions-and-limitations-to-copyright-such-as-fair-dealing-and-fair-use. See also the text of the CC license legal code, e.g. Section 2(a)(2) of the CC BY 4.0 license: "For the avoidance of doubt, where Exceptions and Limitations apply to Your use, this Public License does not apply, and You do not need to comply with its terms and conditions." Exceptions and limitations are defined in sec. 1(d) as "Exceptions and Limitations means fair use, fair dealing, and/or any other exception or limitation to Copyright and Similar Rights that applies to Your use of the Licensed Material."(https://creativecommons.org/licenses/by/4.0/legalcode)

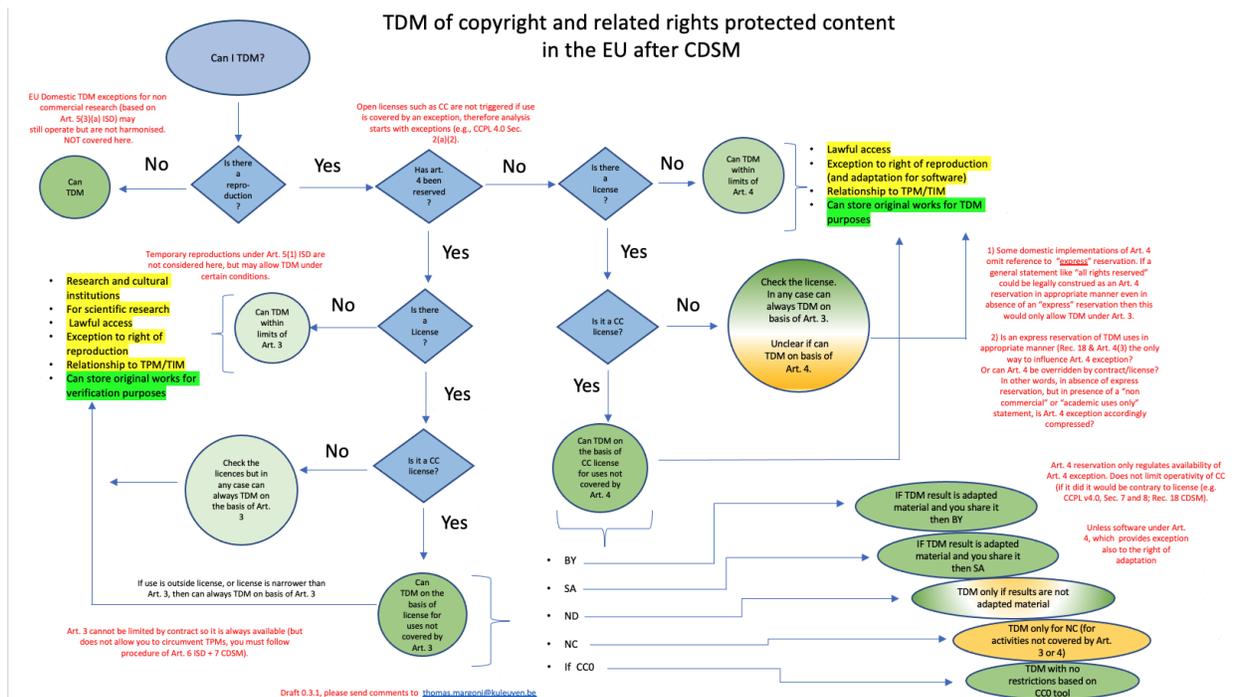[7] See: https://wiki.creativecommons.org/wiki/Content_mining

[8] "The Licensor shall not be bound by any additional or different terms or conditions communicated by You unless expressly agreed. Any arrangements, understandings, or agreements regarding the Licensed Material not stated herein are separate from and independent of the terms and conditions of this Public License."

exception unavailable); any other external effect of a reservation would be in contrast with a CC license and thus not valid.

A purpose-based argument: the spirit of the license

Following a teleological argument, the core function of CC licenses in the digital world is clearly present in the text of the licenses as well as in their preamble. This function consists in allowing a wider sharing of information. Any other interpretation would frustrate not only the wording but also the spirit of the licenses. It would be an incongruous result if the CC licenses — intended to permit uses reserved to the copyright holder but not to create any additional exclusive rights — had the effect of being *more* restrictive in this aspect than the default exclusive rights of a copyright holder. Hence, CC licenses cannot act as a reservation of rights because the spirit of the license is to permit more uses, not create restrictions beyond copyright. [9]

Flowchart - TDM and use of CC-licensed content in the EU

Further reading

Margoni T., Kretschmer M.; "A deeper look into the EU Text and Data Mining exceptions: Harmonisation, data ownership, and the future of technology" (2021). CREATe Working Paper 2021/7, https://zenodo.org/record/5082012

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[9] This conclusion is supported by Section 8 – Interpretation, "For the avoidance of doubt, this Public License does not, and shall not be interpreted to, reduce, limit, restrict, or impose conditions on any use of the Licensed Material that could lawfully be made without permission under this Public License."

Flynn S., et al; "Implementing User Rights for Research in the Field of Artificial Intelligence: A Call for International Action" (2020). Joint PIJIP/TLS Research Paper Series. 48. https://digitalcommons.wcl.american.edu/research/48

Geiger C., et al; "The Exception for Text and Data Mining (TDM) in the Proposed Directive on Copyright in the Digital Single Market - Legal Aspects" (2018). Study commissioned by the European Parliament. https://www.europarl.europa.eu/RegData/etudes/IDAN/2018/604941/IPOL_IDA(2018)604941_EN.pdf

Trialle J-P, et al; "Study on the legal framework of text and data mining (TDM), European Union 2014, https://op.europa.eu/en/publication-detail/-/publication/074ddf78-01e9-4a1d-9895-65290705e2a5/language-en

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