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## ***Policy questionnaire on the relationship between GenAI and copyright and related rights – Presidency summary***

On December 20, 2024, the Presidency of the Council of the European Union published a [summary of the Member States' responses to a policy questionnaire on the relationship between GenAI and copyright](#). Although the contributions of certain Member States may sometimes be second-guessed, they are regrettably not identified. The document nevertheless provides useful insights as to the current perspectives, which can be summed as follows:

- Further clarity is required with regards to the **TDM exception**, both as to:
  - (1) its **applicability to AI training** (some Member States arguing that such exception only relates to the right of making “reproduction and extraction” and does not extend to systems that are later made public or commercialized); as well as to
  - (2) **the way the opt-out mechanism can be implemented** (highlighting the position given from the [LG Hamburg in the LAION case](#) according to which a readable provision in terms of service would suffice). A majority of Member States highlight the need to have common standards for exercising the opt-out, potentially through the work currently carried out on that issue by the Copyright Infrastructure Task Force (CITF), or at least the creation of online information resource available for such implementation. Taking into account the fact that most AI systems are trained outside of the EU, some Member States questioned the potential application of this exception and the related opt out mechanism to such providers (with reference to Recital 106 of the AI Act). One may mention that [Prof. Peukert](#) addressed that question recently and rather answered in an affirmative way, although Peukert still refers to the location of the server as a likely relevant criterion).
- As to **copyrightability**, a majority of Member States consider that:
  - (1) there is **no need to create a sui generis right on AI generated content** (as Ukraine did) or to amend existing copyright laws (should such a right nevertheless be created, a shorter term of protection than the usual copyright term would then be appropriate)
  - (2) human involvement and creativity in the creation process should continue to be a decisive factor, so that a **distinction** would have to be made between **AI generated content** that should not be copyrightable (a view which sounds in line in my view with the USCO practice) and **AI assisted content** that could. Interestingly, the collective management organization (CMO) of one Member State (not identified) had its agreements with rightholders modified so as to prevent the registration of AI generated content.

- With regards to **transparency**, most Members consider that the priority should be to analyse how the EU AI Act will be implemented before introducing new transparency obligations (some considering that only AI generated content should trigger such obligation, in opposition to AI assisted content).
- As to **licensing**, several Member States consider that the current opt-out regime of Art. 4(3) of the DSM Directive together with the AI Act's transparency obligations should be sufficient to stimulate the conclusion of licenses between rightholders and AI companies. A majority however stressed that, in light of the mass scale of AI-related copyright uses, **collective management** should play an important role in the process of collecting remunerations. Although a significant number of Member States view the setting of **remuneration schemes** to be desirable (an approach some however disfavor, considering that an individual licensing approach enabling rightholders to exercise their exclusive rights should only be discarded if the existence of a market failure is evidenced), views differ as to the way such remuneration should be collected, *i.e.* under mandatory collective management or extended collective licensing scheme. Member States were in agreement that such remuneration schemes should differentiate between EU SMEs, startups and large technology companies to ensure **competitiveness** and avoid further market concentration. A **common licensing solution** for the whole EU market was – rightfully in my view – deemed desirable for the whole EU market.
- At this stage, Member States deem it **unnecessary** to introduce a specific **liability regime** in relation to copyright infringement in the context of GenAI. Some further consider that the negotiations of the AI Liability Directive may provide an appropriate forum to discuss such questions, respectively that a mechanism similar to the one provided for in Art. 17 of the DSM Directive could potentially be applied. Mentions were also made in relation to the possible introduction of contributory or secondary liability as well as safe harbor rules.
- Interestingly, although this point is only mentioned, I find it worth highlighting it here: some Member States propose the **establishment of a presumption of use and the shifting of the burden of proof** onto the providers of AI tools in demonstrating that a specific work was not used during their training activities. In my view, this is key. Without addressing here the substantive issue as to whether copyright is infringed or not, current pending litigations in the US demonstrate that AI providers challenge the legal standing of copyright holders by arguing that it is up to them to demonstrate that their copyrighted works haven't been ingested as input data to train algorithms; needless, the hurdle is particularly high taking into account the asymmetry of information between the parties on these models (I have some doubts that the mere use of a tool such as <haveibeentrainedon.com> would be considered sufficient for such a demonstration). Such a rebuttable presumption would in my view be more than welcome.
- The **need for international cooperation** to be potentially led by the WIPO Standing Committee on Copyright and Related Rights (SCCR) was highlighted by Member States, some wondering how the EU framework could be enforced against AI providers seated outside of the EU, regardless of server location (referring to Recital 106 of the EU AI Act).