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# **Copyright and Generative AI from a Human Rights perspective, Or How to Deal With the Conflict Between Scientific Development in AI Technology and the Remuneration Interests of Creators?**

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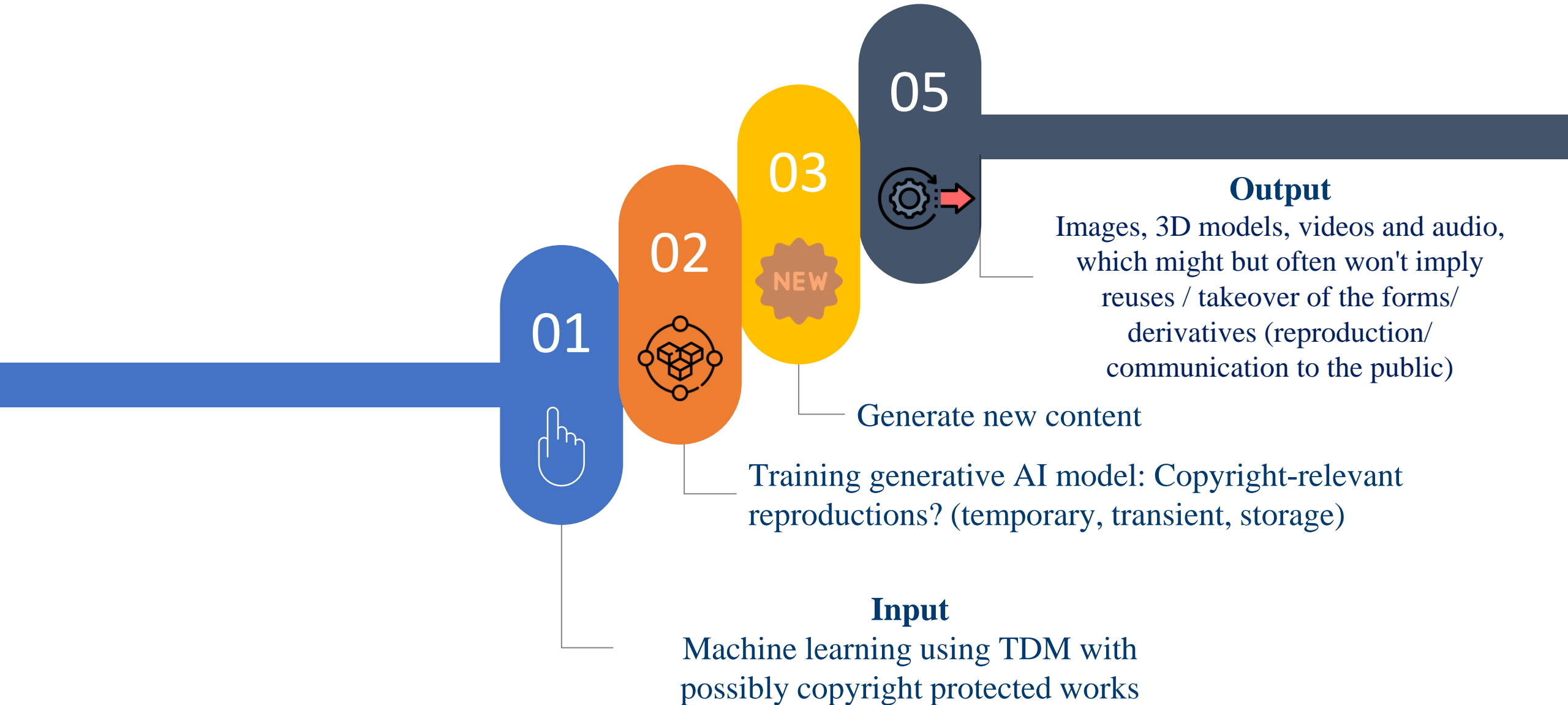
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## **INTRODUCTION**

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# Generative AI



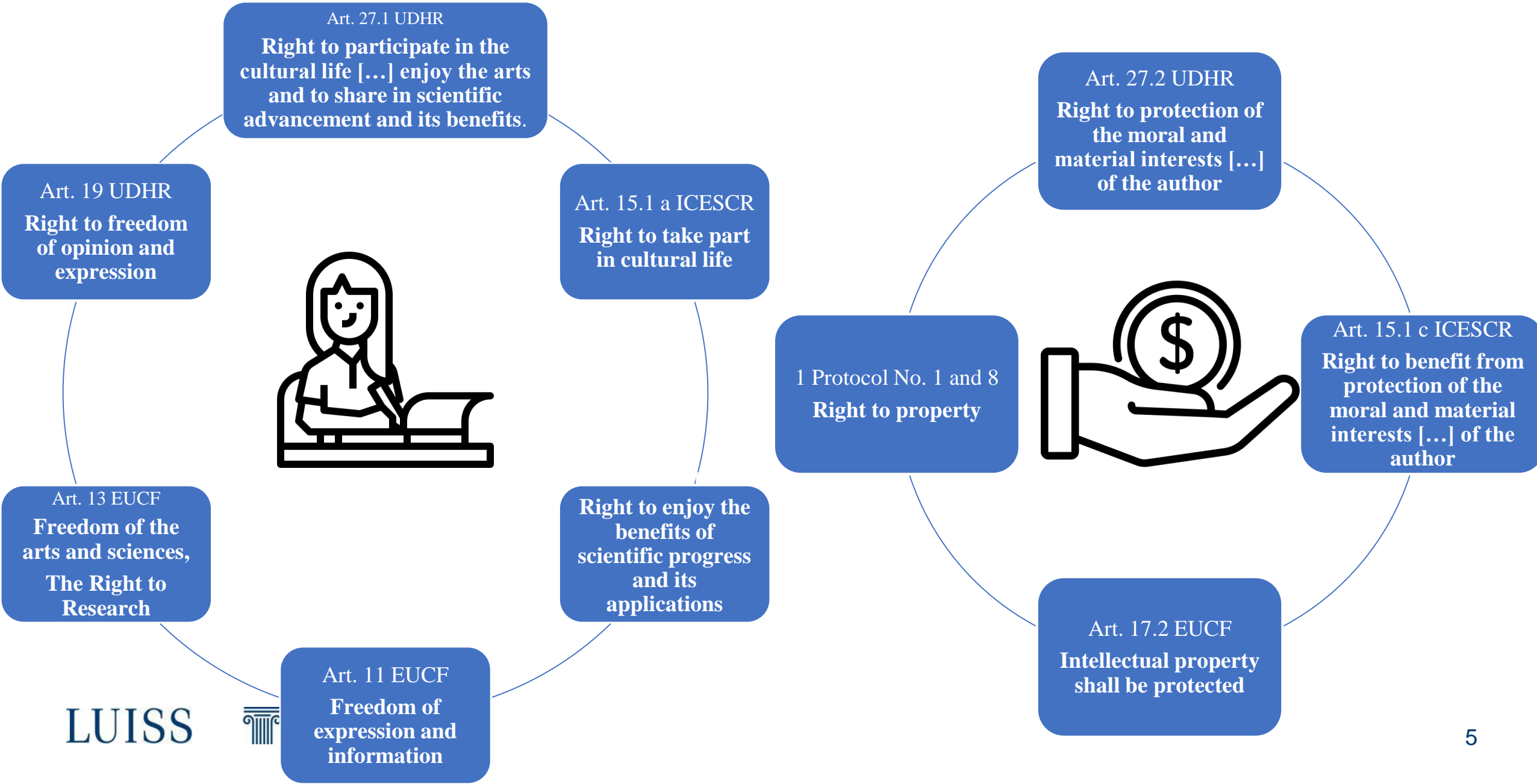
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# **HUMAN RIGHTS FRAMEWORK FOR COPYRIGHT**

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# Underlying Human Rights Framework – Overview



## Human Rights Framework provides for Guidance

- **Right to Science and Culture and Freedom of Artistic Expression**

Arts. 27.1 UDHR, 15.1 a and b ICESCR, Arts. 11 and 13 EUCF, 19 UDHR,

### **Art. 27.1 UDHR**

*Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.*

- **Protection of moral and material interests of creators**

Art. 27.2 UDHR, 15.1 c ICESCR, (Art. 17.2 EUCF, Art. 1 Protocol 1 ECHR)

### **Art. 27.2 UDHR**

*Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*

- Human Rights Framework **does not protect AI: AI itself** does not enjoy the mentioned constitutional right; There is no human rights protection for machines or the **ones operating machines**

# What General Principles can be derived from the Human Rights Framework?

- AI is essential for human beings to explore new avenues of artistic and scientific expression: **The right to science and culture supports a right to train and develop generative AI systems** via machine learning technology
- **Anthropocentric approach:** the human rights framework puts emphasis on the **author**
- Copyright is a tool to protect creators and creativity; **The Human Rights framework does not secure the amortization of economic investment in AI technology**; Generative AI system only protected if used as an **instrument of the human creator** – not a substitute
- Protection of the material interests: Right to a **fair remuneration of the author in the case of commercial use of his work**, *unless there are strong justification to do so out of competing human rights*
- **Protection of the moral interest:** Can authors prohibit that their works are used for AI training, e.g. for discriminatory and/or racist purposes?

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# THE LEGALITY OF AI-GENERATED CONTENT TRAINED ON COPYRIGHT PROTECTED WORKS

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# U.S. Approach: AI-learning as fair-use?



- Using works for TDM is **widely considered a fair-use** (see *Authors Guild v. Google* and *Authors Guild v. HathiTrust*)
- But: **No final decisions** in relation to training of generative AI-systems so far
- Several lawsuits engaged against AI system producers in the US, claiming that these uses do not fall under the fair use-exception of US Copyright law because of the effect of the use upon the potential market; the argument is that the impact on the exploitation of the work is different then with TDM so that the reasoning can not be applied; exactly the opposite in the EU, where training of AI is squeezed at all costs in the TDM framework
- Several scholars argue it is *likely* Fair-Use (M. Sag, “Copyright Safety for Generative AI”, 2023; M.A. Lemley, “How Generative AI Turns Copyright Law on its Head”, 2023 etc.), but all add that there is an uncertainty if courts will follow.
- → **No legal certainty** at the moment; also, might be influenced by the result in EU? Will there be a “Brussel effect”? Rather hope for a “Strasbourg effect”?

# EU Approach: Text and Data Mining is covered by Exceptions and Limitations

Use of datasets: Text and Data Mining (TDM)

Machine-learning algorithm enables generative AI system to create literary and artistic content on its own – based on the computational analysis (TDM) of human works that served as training material



Within **EU legislative framework**, there are the newly introduced limitations and exceptions for Text and Data Mining-purposes: Directive of 17 April 2019 on copyright in the Digital Single Market (CDSM- Directive)

**BUT...**

**TDM exceptions were not designed to cover  
machine learning by generative AI systems!**



# Limitations and Exceptions for TDM purposes

- Art. 3 introduces an exception for text and data mining for scientific research which solely benefits research organizations and cultural heritage institutions, while
- Art. 4 introduces an exception for text and data mining which is not restricted to specific institutions, and therefore could be relevant in the context of AI as these systems are usually operated by private commercial companies not covered by article 3.
- According to Art. 4 (2): “*reproductions and extractions made pursuant to paragraph 1 may be retained for as long as is necessary for the purposes of text and data mining*”, this could be relevant to solve any possible question of storage of protected works by the AI in the learning process. However, the third paragraph of Article 4 conditions the application of the exception to the fact that the use of works and other subject matters “*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*”.

In short, rightholders can “opt out” of the exception, which potentially can make the provision rather ineffective if there is a high number of rightholders that are doing

## Can we apply Art. 4 CDSM and its “opt out”-mechanism ‘as it is’ to generative AI?

- European Commission considers that the existing legislative framework is perfectly fit for the purpose and that “**creation of art works by AI does not deserve a specific legislative intervention**”, **since the TDM exceptions with their possibility of opt-out apply**, “providing balance between the protection of rightholders including artists and the facilitation of TDM, including by AI developers”

Commissioner Thierry Breton, 31 March 2023 on on Behalf of the European Commission

- **Art. 53, 1 c) AI Act (version of 13 March 2024):**

*Providers of general-purpose AI models shall*

*c) put in place a policy to comply with Union copyright law, and in particular to identify and comply with, including through state-of-the art technologies, a reservation of rights expressed pursuant to Article 4(3) of Directive (EU) 2019/790*

Recital 105: “Where the rights to opt out has been expressly reserved in an appropriate manner, providers of general-purpose AI models **need to obtain an authorisation from rightholders** if they want to carry out text and data mining over such works”.

# Can we apply Art. 4 CDSM and its “opt out”-mechanism ‘as it is’ to generative AI?

- It would inhibit the development of this technology and thus make Europe totally unattractive for AI developers.
- Provision carries a lot of uncertainties
  - When exactly is a content online “lawfully available” to use?
  - How exactly to exercise the opt-out?
  - And who should be able to decide about this, the author or its derivative rightsholder?

## **Risk that the opt-out is used to subject to license obligations the use of existing works for training purposes.**

Problems: - The author might not necessarily benefit directly from this situation as it will likely be the rightsholders that will license the uses, with the authors having to (re)negotiate successfully with their producers to get additional remunerations

- Benefits only the very big AI tech companies (not start ups and individual innovators)
- High level of legal uncertainty for AI developers as it is difficult to assess the legal situation for every work/ use

This could result in a loose-loose scenario (for authors no control and no money; for society, slower AI development, concentrated with Big tech)

# LIMITATION-BASED REMUNERATION PROPOSAL

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## Possible Solution

- It might be interesting to reflect on a possible statutory remuneration to the benefit of the author for the use of his works in the context of commercial TDM activities for generative-AI purposes:
- A specific unwaivable remuneration right to the **direct benefit of creators** could be elaborated for the use of their work to train machines, possibly subjecting this right to mandatory collective management to make sure it can be rapidly implemented.
- Model: EU private copy exception, introduced because 1.) use was impossible to control (pragmatic), 2. to safeguard the right to privacy (HR)
- These global collections of private copying levies according to a study from 2020 totaling **EUR 1,046 million** in 2018 (CISAC, BIEM & Stichting de Thuiskopie, “Private Copying Global Study 2020”, Nov. 2020, p. 8)





## Possible Solution

- The remuneration obligation follows from the Human Rights Framework, especially the protection of moral and material interests of the author (Art. 27 (2) UDHR, Art. 15 (1) (c) ICESCR, 17 (2) EUCF, Art. 1 Protocol No. 1 and 8 ECHR).

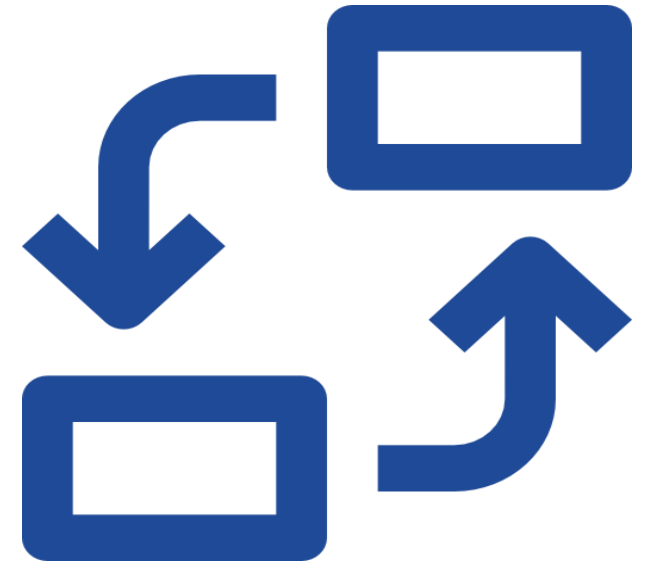
From these provisions, a **general right to fair remuneration of the author for the commercial use of his work** can be derived, *unless there are strong justifications resulting from competing fundamental rights to do so* (for example the Right to research **Geiger/Jütte, 2023**).

- Opposing systematically AI systems and authors might not be a wise idea as they might very well cohabitate in the future and support each other



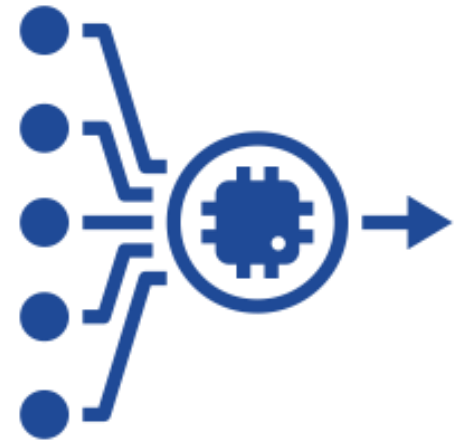
## The above takes on previous statutory remuneration proposals

- Replace the opt-out of article 4 CDSM by a statutory remuneration for commercial TDM activities (TDM brokers), in order not to penalize start-ups developing useful AI systems in the EU (**Geiger, Frosio, Bulayenko, 2018**).
- Replace the opt-out mechanism of Article 4 by a TDM exception for creative/generative purposes coupled with a **statutory remuneration** to the benefit of authors only, in coherence with a proposal tabled in the past of a statutory remuneration for creative uses



## The above takes on previous statutory remuneration proposals

- **Output-oriented AI levy system: M. Senftleben, 2023**
- Statutory remuneration would not be on the TDM use of protected works for AI machine learning purposes, but the *literary and artistic output* of generative AI systems serves as a reference point for a legal obligation to pay remuneration.
- This can be applied in a uniform manner to all providers of generative AI systems in the EU.
- Theory of the domain public payant
- **Input-based remuneration system** carries however significant advantage: legal certainty to AI developers; compatible with the European tradition of remunerated exceptions and established practice and case law with regard to the distribution rules in favor of creators of these kind of remunerations via collective management organizations; the idea of the domaine public payant, might not benefit from a broad support.



# Implementation of the Remuneration Right:

Transparency obligations could be used to calculate the remuneration

- Compromise amendments adopted on 13 March 2024 by the European Parliament have introduced transparency obligations in the **AI Act (Proposal for a regulation of the European Parliament and of the Council on laying down harmonized rules on Artificial Intelligence (Artificial Intelligence Act, COM(2021) 0206):**

**Art. 53, Par. 1 c) and d) Obligations for providers of general-purpose AI models**

*Providers of general-purpose AI models shall: (d) draw up and make publicly available a sufficiently detailed summary about the content used for training of the general-purpose AI model, according to a template provided by the AI Office.*

**Recital 107:** *“In order to increase transparency on the data that is used in the pre-training and training of general-purpose AI models, including text and data protected by copyright law, it is adequate that providers of such models draw up and make publicly available a sufficiently detailed summary of the content used for training the general-purpose Model”*

**Recital 108:** *“Obligations imposed on providers of general-purpose AI models to put in place a policy to comply with Union copyright law and make publicly available a summary of the content used for the training, the AI Office should monitor whether the provider has fulfilled those obligations”*

## Implementation of the remuneration right: The “Trust issue”

The remuneration to be paid needs to be monitored closely and preferably independently. **The AI Office**, which supervises the transparency obligation, could be tasked to monitor the remuneration system.

AI Office established by the EC on 24 January 2024; however, there is still little information about its composition and governance. The expertise in copyright issues is essential for the correct implementation and update of the copyright provisions articulated in the AI Act.

Reflection on the future role/composition of the AI office is needed!

Geiger/Iaia, “Towards an Independent EU Regulator for Copyright Issues of Generative AI: What Role for the AI Office?”, 2024 (forthcoming)

## AI may be just the tip of the iceberg: Reflection needed on the future of the governance of Copyright Online

In fast-moving technological environment, where social and innovation practices evolve rapidly, are the legislators and courts the best placed to elaborate the proper legal framework? A third way is needed to secure the fundamental rights online (theory of “**digital constitutionalism**”: introduces a reflection on the governance structures of the system and its regulatory framework)?

# Regulatory approach “en marche”, but still in the making

- **Digital Service Act (Regulation (EU) 2022/2065 ), Chapter IV, Articles 49 sq.** National Digital Services Coordinator (DSC): Independent domestic authority designated by a Member State, coordinated by European Board for Digital Services
- **General Data Protection Regulation (EU 2016/679, “GDPR”): European Data Protection Board (Articles 68-70):** Independent body of the Union which has legal personality, composed of the head of one supervisory authority of each Member State and of the European Data Protection Supervisor
- **Artificial Intelligence Act (Version 2024): AI Office (Art. 64); European AI Board (Article 65)**

Will contribute to the **effective cooperation** of the national supervisory authorities and the Commission

- **European Media Freedom Act (Version 2024): European Board for Media Services (Articles 8-12):**

Independent body composed of representatives of national media regulatory authorities

**Problem: - Difficult to coordinate national approaches/ institutions, no true harmonisation!**

- **Still a lot of research needed on institutional design to avoid biases**

## Towards a new independent EU Copyright Institution (Geiger & Mangal, GRUR Int. 2022, p. 933)

Possible tasks include:

- **Mediation/ ADR:** Would ensure that disputes arising with regard to the remuneration are settled impartially and in an efficient, but fundamental rights-compliant manner (involvement of courts (as an appeal?) to be determined); **avored by recent study by WIPO, “*Alternative Dispute Resolution Mechanisms for Business-to-Business Digital Copyright and Content-Related Disputes*”, Sept. 2021, Exec. Summary p. 7).**
- **Development of guidelines for interpretation of EU legislation to ensure legal certainty**
- **Developing binding best practices** together with stakeholders, moderated by an independent body
- **Provide and/ or commission empirical studies** to assess the potential impacts of the legislative framework on fundamental rights and creativity issues in the EU
- **Recommend - if proven necessary - improvements to policy makers** (“Think-tank” function)



## CONCLUSION AND OUTLOOK

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# Human Rights Framework for Generative A.I.:

## Protection for Human Creativity as Point of Reference leads to



Right to Science  
and Culture  
Freedom of  
Expression

### 1.) Right to train and use A.I., but ...

A.I. as a technical tool to serve human creators and to secure scientific and cultural advancement and new creative practices




**Generative A.I.**

### 2.) ... only with adequate remuneration: implementation of a statutory remuneration for ML by commercial AI system

- Revision of Art. 3 (broadening) and 4 CDSM (replace opt out by remuneration right)
- Limited right to oppose the use based on moral rights claim

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Protection of  
Material and  
Moral  
interests of  
creators

**There needs to be a captain in the EU Copyright Ship** to secure our fundamental values are reflected in the legal framework (protection of both creativity and human creators):

A reflection on the Copyright governance needs to be urgently started

“ ... The increasing relevance of the private sector in the digital environment has led to a situation where **digital spaces are mostly subject to the governance of private actors designing standards and procedures** competing with the protection ensured by traditional constitutional rights and safeguards.”

Giovanni De Gregorio, 2022

## Based on the following publications

- Christophe Geiger, “*Elaborating a Human Rights friendly Copyright Framework for Generative AI*”, ”, International Review for Intellectual Property and Competition Law (IIC) 2024, Issue 7 (forthcoming), available on ssrn: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4634992](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4634992)
- Christophe Geiger and Vincenzo Iaia, “*The Forgotten Creator: Towards a Statutory Remuneration Right for Machine Learning for Generative AI*”, Computer Law and Security Review 2024 , Vol. 52, No. 105925, p. 1, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4594873](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4594873)
- Christophe Geiger, “*When the Robots (try to) Take Over: Of Artificial Intelligence, Authors, Creativity and Copyright Protection*”, in: F. Thouvenin, A. Peukert, T. Jäger and C. Geiger (eds.), “Innovation- Creation- Markets, Festschrift Reto M. Hilty”, Springer, Berlin/Heidelberg, 2024, p. 67

**THANK YOU!**