

The concept of lawful access and its implications for user freedoms in the EU copyright *acquis*: Opinion of the European Copyright Society

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Executive summary

The advent of digital technologies and connected patterns of production and consumption has progressively displaced ownership in favour of access as the predominant mode of enjoyment of works of authorship and other information goods. This transition from acquiring physical copies to subscribing to digital services has become prevalent across various sectors and has even enabled new commercial, cultural and scientific practices. However, it also marks a major shift in the theory and function of copyright: it transforms a right primarily concerned with regulating certain exploitations and circulations of works into one capable of controlling individual acts of access and use.

EU copyright law increasingly reflects this shift through conditions of lawfulness. These appear across the *acquis* in different forms: the “lawful acquirer” in the Software Directive, the “lawful user” in the Database Directive, “lawful use” and “lawful source” in the Information Society Directive and CJEU case law, and “lawful access” in the Text and Data Mining (TDM) provisions of the Copyright in the Digital Single Market Directive (CDSMD). These expressions are not merely terminological variants. They perform a boundary-setting function by determining when exceptions and limitations may be relied upon, and therefore when certain acts may take place without right holders’ authorization.

This function is especially important for text and data mining (TDM), machine learning and the training of AI models. Articles 3 and 4 CDSMD make lawful access a condition for the TDM exceptions, but do not define the concept. Recital 14 CDSMD refers to access based on open access policies, contractual arrangements, other lawful means and content freely available online. Developments under the AI Act and the General-Purpose AI Code of Practice further support the view that lawful access cannot be reduced to

prior authorization for each individual work. It must also be assessed by reference to lawful conduct, due diligence and the relevant regulatory context.

The principal risk, surfaced in decisions such as *ACI Adam* or *VOB*, is that lawful access, lawful use or lawful source might be equated with right holders' authorization. An interpretation of this kind would undermine the nature and function of exceptions and limitations. Since an exception presupposes that authorization is not required, making authorization the sole condition of lawfulness would create circularity and deprive exceptions of practical effect.

At the same time, lawfulness cannot be understood as an unlimited permission to access or use protected works. It must operate within identifiable legal boundaries, including effective technological protection measures, valid and enforceable contractual restrictions where not overridden by mandatory law, and other legally binding limits. Its application must also be guided by contextual principles, including the meaning of content "freely available online", the knowledge and role of the user, the purpose and commercial or non-commercial character of the activity, the applicable fundamental rights framework, and the three-step test.

Accordingly, this Opinion seeks to provide normative and interpretative guidance for courts and legislators by developing a concept of lawfulness that is legally coherent, context-sensitive and capable of preserving the effectiveness of copyright exceptions. The analysis leads to the following five recommendations.

Recommendations:

1. Lawfulness cannot be reduced to right holders' authorization. This applies in particular to exceptions and limitations conditioned on lawful access, lawful use or lawful source. The text, structure and function of EU copyright law support this conclusion. Since an exception to an exclusive right presupposes that authorization is not required, making authorization the sole condition of lawfulness would create circularity and would risk rendering exceptions ineffective.
2. Beyond authorization by right holders, there are other clear cases in which lawfulness is undisputed. These include situations where the law authorizes the relevant activity, including through exceptions, limitations or other free uses under copyright law or other legal sources; situations that fall outside the scope of an exclusive right; and situations where the relevant exclusive right has been exhausted.

3. Situations not expressly regulated by law require a context-specific assessment. That assessment must respect the hard boundaries of lawfulness, including effective technological protection measures, valid and enforceable contractual provisions or rights reservations, and other legally binding restrictions. It must also be guided by softer interpretative criteria, including whether content is freely available online, the user's knowledge, the nature and purpose of the activity, the relevant fundamental rights framework and, where applicable, the three-step test. The interpretation adopted must preserve the policy objectives and effectiveness of the rule at issue.
4. Scientific research deserves special treatment within this framework. Article 3 CDSMD reflects a deliberate legislative choice to privilege scientific research through a mandatory exception limited to specific beneficiaries and purposes. In light of the public-interest function of research and its connection to academic freedom under EU law, lawful access should be interpreted in a manner that preserves the effectiveness of that exception and avoids disproportionate source-verification obligations for research organisations and cultural heritage institutions.
5. Other special situations have been identified and further ones may emerge. These include general-purpose AI, open-source software and AI models, and other contexts in which access, use and lawfulness interact with public-interest objectives, open licensing practices or technological innovation. Such situations should be assessed under the framework proposed in this Opinion. As a general principle, where a new situation warrants treatment comparable to that granted to scientific research, the conditions of lawfulness should be interpreted in a manner that favours the relevant activity, subject to the applicable legal safeguards.

Opinion

1) Introduction

With the advent of digital technologies and ensuing patterns of production and consumption, access has progressively substituted ownership as the default mode for enjoying information goods and creative works. This transition from acquiring physical copies to subscribing to digital services has become prevalent in many sectors and has even given rise to new forms of business models and creative practices.

Within the EU copyright *acquis*, this shift from ownership to access represents a major change in the theory and function of copyright. It transforms a right originally conceived to regulate copies of works into a form of regulation of individualised uses of works with negative impact on individual freedoms, authors autonomy and creative agency. It is undisputable, however, that the evolution of EU copyright law has largely, and perhaps unconsciously, embraced this shift, as shown by the increasing use of concepts such as lawful use or lawful access to condition the validity of copyright exceptions or limitations.

The observation that access has emerged as the new regulatory paradigm for information markets and cultural good demands a deeper reflection. The way in which access is defined or qualified carries profound legal and policy implications. Within the European *acquis*, access has been increasingly subjected to a qualification of “lawfulness.” Although seemingly reasonable and logical, the precise meaning of this qualification may have far-reaching consequences.

The recent emergence of the “lawful access” concept in the Copyright in the Digital Single Market Directive (CDSMD¹) is illustrative. While operating as a key condition for the text and data mining (TDM) exceptions, lawful access does not receive an unequivocal definition in the Directive. Nor

¹ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market (CDSMD).

does the case law developed by the Court of Justice of the European Union (CJEU or the Court) offer a stable or uniform conceptualization of the term.

This uncertainty is striking. The concept now plays a central role in regulating access to online content for TDM purposes and, by extension, for machine learning and the training of artificial intelligence (AI) models. We argue that the concept of “lawful access” has been elevated to a sort of (loosely defined) regulatory interface between the protection of private (e.g., intellectual property rights, private economic entitlements) and public (e.g., fundamental rights and freedoms, market regulation, cultural and educational policies) interests. The concept therefore performs an important boundary-setting function. It seeks to enable legitimate (re)uses and forms of innovation while also preventing the misappropriation of human creativity. While the notion of lawfulness is present in many other contexts, including Article 5(3)(d) of the Information Society Directive (ISD)² or Article 2 of Regulation (EU) 2017/1563,³ our focus is on creativity and technological innovation.

Accordingly, this opinion explores the theoretical underpinnings and the practical implications of allocating such a crucial public-private regulatory function to the underdeveloped concept of lawfulness in access to and use of creative content. It seeks to provide normative and interpretative guidance on the proper conceptualization of this expression by developing a notion of lawful access and use informed by legal, policy and technological principles. The objective is to offer courts and legislators a framework for interpreting “conditions of lawfulness” when future litigation or legislative reform arise.

² Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (ISD).

³ Regulation (EU) 2017/1563 of the European Parliament and of the Council of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled.

2) The historical development of lawfulness

This section offers a succinct chronological overview of the different appearances of the concept of “lawfulness” in EU law in relation to the acquisition, use or access of works.

a) The Software Directive: the lawful acquirer

The first use of the concept in the form of “lawful acquirer” can be found in the Computer Programs Directive of 1991 (Software Directive),⁴ the oldest directive in European copyright law. This directive applied copyright for the first time to the then novel challenge of digitization. One of the most significant decisions was to include the acts of reproduction and adaptation necessary for the intended use of computer programs within the scope of copyright protection in Article 4 (a) and (b). This provided software producers with a legal basis for linking the use of programs by end-users to the conclusion of a licence agreement. This extension of exclusive rights was at least partially offset by the limitation provision in Article 5, which granted certain, albeit rather limited, minimum rights to the “lawful acquirer” of a copy of the program.

According to the Directive, the “lawful acquirer” shall not require authorization from the right holder for the acts referred to in Article 4 (a) and (b) where they are necessary for the use of the computer program in accordance with its intended purpose, including for error correction. These minimum rights apply irrespective of whether the “lawful acquirer” has concluded a licence agreement with the right holder. However, Article 5(1) does not prohibit end-user licence agreements since it starts with the words “in the absence of specific contractual provisions”. This compromise preserved the possibility of end-user licence agreements on the one hand but also granted the “lawful acquirer” a minimum level of user rights without concluding a licence agreement on the other.

It is also generally accepted that the core user rights set forth in Article 5(1) cannot be waived by contract. According to Article 5 (1), (2) and (3), these minimum rights also include error

⁴ Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version).

correction, the creation of a backup copy, and the observation, examination, and testing of the functioning computer program. In *Top System SA v État belge* (Case C-13/20), the CJEU ruled that a “lawful acquirer” may decompile or reverse engineer the program to correct errors affecting its operation without the right holder's consent, provided it is necessary and not restricted by contract. The concept of the “lawful acquirer” (or “person having a right to use” in Article 5(2) and (3)) thus functions as a form of market regulation, offering the user legal certainty regarding the use of the computer program even in the absence of a contractual relationship.

b) The Database Directive: lawful users

The 1996 Database Directive⁵, as the second instrument on digital copyright in the EU, follows the model of the Software Directive and develops it further in various respects. Article 5(a) includes temporary reproductions within the scope of copyright protection for database works. Article 6(1) derogates from this by stating that “the lawful user of a database or of a copy thereof” may perform “any of the acts listed in Article 5 which is necessary for the purposes of access to the contents of the databases and its normal use.” Such a use shall not require the authorization of the right holder. For the sui generis database producer's right, Article 8(1) mirrors the privilege for “lawful users” of the database and combines it with duties of such users vis-à-vis the maker of the database. Unlike the Software Directive, Article 6(1) Database Directive does not provide for the possibility of deviating contractual conditions. Quite the opposite, according to Article 15, any contractual provision contrary to Articles 6 (1) and 8 shall be null and void.

c) The Information Society Directive (ISD): temporary copies and lawful use

The concept of lawful use is also present in the 2001 ISD. Article 5(1) ISD created a mandatory exception for temporary acts of reproduction when five cumulative conditions are met, namely the reproduction must be: (1) temporary, (2) transient or incidental, (3) an integral and essential part

⁵ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

of a technological process, (4) the sole purpose of which is to enable ... a *lawful use* of a work, and (5) the act has no independent economic significance.

In *Infopaq I* and *Infopaq II* the CJEU offered valuable interpretative guidance.⁶ With regard to the requirement of lawful use the Court re-stated that excused temporary acts of reproduction must pursue the purpose to “enable [...] the lawful use of a protected work, which is in turn fulfilled when such use is authorised by the right holder or where it is not restricted by the applicable legislation”.⁷ In relation to the latter requirement, the Court held that acts such as the preparation of genuinely independent news summaries,⁸ on-screen and cached copies,⁹ and ephemeral satellite decoder reproductions,¹⁰ are examples of lawful uses. Conversely, it excluded lawful use in the case of the temporary reproductions made during the streaming of a copyright-protected work from a third-party website without the right holder’s authorisation.¹¹

Importantly, the CJEU, in interpreting the conditions of Article 5(1), including the concept of lawful use, consistently stated that the function of Article 5(1) is to ‘allow and ensure the development and operation of new technologies, and safeguard a fair balance between the rights and interests of rights holders and of users of protected works who wish to avail themselves of those technologies’.¹²

⁶ Respectively, Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* ECLI:EU:C:2009:465 (*Infopaq I*); Case C-302/10 *Infopaq International A/S v Danske Dagblades Forening* ECLI:EU:C:2012:16 (*Infopaq II*).

⁷ *Infopaq II* (n 6) para 42; see also Joined Cases C-403/08 and C-429/08 *Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd* ECLI:EU:C:2011:631 (*FAPL*) para 168ff; Case C-527/15 *Stichting Brein v Wullems* ECLI:EU:C:2017:300 (*Filmspeler*) para 64.

⁸ *Infopaq I* (n 6) para 23.

⁹ Case C-360/13 *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd and Others* ECLI:EU:C:2014:1195 (*NLA*) para 25.

¹⁰ *FAPL* (n 7) para 167.

¹¹ *Filmspeler* (n 7) para 67.

¹² See *NLA* (n 9) para 24; *FAPL* (n 7) para 164.

d) The Information Society Directive (ISD): private copies and lawful source

The concept of lawfulness reappears in another form (that of “lawful source”) in the CJEU’s case law in relation to the private copy exception. First in *ACI Adam*¹³ and then in *Copydan*¹⁴, the CJEU has taken on the task of implicitly expanding and further elaborating the concept of user lawfulness by introducing it as a prerequisite for the enjoyment of the private copy exception when affirming that the exception concerns only reproductions made from “lawful sources”.

In *ACI Adam*, the CJEU does not provide a definition of what constitutes an “unlawful source”, but it bases its argumentation on a principle of strict interpretation of copyright exceptions and on the three-step test.¹⁵ In *Copydan*¹⁶, the CJEU was more explicit regarding the conditions governing “lawful source” and stated that reproductions made using unlawful sources are those which are made from protected works that are made available to the public without the right holder’s consent. By doing so, the CJEU appears to embody in its reasoning a logic of exclusive control of the uses of copyright-protected works, framing copyright exceptions as dependant on private ordering.

e) The Rental and Lending Directive: lawful sources

In the 2016 *VOB* case¹⁷ the CJEU clarified that the lending of digital copies of books, or e-lending, falls within the scope of the Rental and Lending Directive (RLD)¹⁸. This was an important clarification as it entails that, also for e-lending, Member States have the possibility to resort to the derogation contained in Article 6 (a remuneration scheme that benefits “at least authors”) as an

¹³ Case C-435/12 *ACI Adam BV and Others v Stichting de Thuis kopie and Stichting Onderhandeligen Thuis kopie vergoeding* ECLI:EU:C:2014:254.

¹⁴ Case C-463/12 *Copydan Båndkopi v Nokia Danmark A/S* ECLI:EU:C:2015:144.

¹⁵ *ACI Adam* (n 13) paras 31–37.

¹⁶ *Copydan* (n 14) paras 75–79.

¹⁷ Case C-174/15 *Vereniging Openbare Bibliotheken (VOB) v Stichting Leenrecht* ECLI:EU:C:2016:856.

¹⁸ Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property. The original Directive was enacted in 1992.

alternative to the exclusive right of Article 3.¹⁹ However, the CJEU, relying on its *ACI Adam* and *Copydan* doctrine, added that this is only possible when digital copies are obtained from a lawful source.²⁰ In the opinion of the Court, “to accept that a copy lent out by a public library may be obtained from an unlawful source would amount to tolerating, or even encouraging, the circulation of counterfeit or pirated works”.²¹

While it is imperative for copyright law to prevent the circulation of counterfeit or pirated works, the effect of requiring a “lawful source”, especially as defined in *Copydan*, is problematic if the only permitted source becomes a licensing agreement. It is doubtful whether libraries can lawfully digitize for the scope of e-lending their (already lawfully acquired) physical collections.²² In addition, the business model characterizing the evolving e-Book market makes it practically impossible to “buy” e-Books. Right holders can control each independent act of communication to the public, which extends to all forms of access to e-Books: sharing, renting, certain forms of lending, and even selling or re-selling an e-Book (see *Tom Kabinet*).²³

Accordingly, applying the *ACI Adam* and *Copydan* concept of “lawful source” to the case of e-lending has the paradoxical effect of nullifying the important point made by the Court in *VOB* that e-lending is a form of lending – and not of communication to the public – benefitting from the derogation of Article 6 RLD. This incongruency shows, once again, how a *prima facie* legitimate condition (lawfulness of the source) needs to be defined and interpreted in the light of the broader legal and policy framework in order to give proper effect to the important principles established in the law and avoid unwanted, even contradictory, outcomes.

¹⁹ M. Frigeri, M. Kretschmer, P. Mezei (2024) Copyright and eLending in public libraries: an incomplete revolution?, JIPITEC, 15, 156, para 1.

²⁰ *VOB* (n 17) para 72.

²¹ *VOB* (n 17) para 68.

²² *VOB* (n 17) paras 66–72; but see Case C-117/13 *Technische Universität Darmstadt v Eugen Ulmer KG* ECLI:EU:C:2014:2196, paras 36–49.

²³ Case C-263/18 *Nederlands Uitgeversverbond and Groep Algemene Uitgevers v Tom Kabinet Internet BV (Tom Kabinet)* ECLI:EU:C:2019:1111; Frigeri and others (n 19) para 1.

f) The CDSMD: Lawful access and the TDM provisions

Both Arts. 3 and 4 of the CDSMD establish a requirement of “lawful access” for TDM purposes. Although this requirement is not defined in Article 2, the preamble of the Directive offers important guidance. Recital 14 identifies four primary types of lawful access related to Article 3: access based on open access policies, access through contractual arrangements between right holders and research organizations (such as subscriptions), access through other lawful means, and access to content that is freely available online. On the other hand, Recital 18 provides one main example (“including”) of lawful access in relation to Article 4: access to content made available to the public online.

Regarding Article 3, the first three instances of Recital 14 appear quite straightforward. The fourth (content freely available online) introduces a concept which seems to be new in the legislative instruments of the EU copyright *acquis*.²⁴ The literature has debated the exact meaning of this requirement in an attempt to determine whether it should be interpreted within the framework developed by the CJEU as summarised in Sections *a. – e.* above, or whether the terminological inconsistency of the framework and the specific choice of wording in the CDSMD should be read as a legal basis and a legislative intention, respectively, to establish a new category in need of autonomous treatment.²⁵

3) Lawfulness as a condition for exceptions in EU law: terminological consistency or a versatile taxonomy?

²⁴ The expression “freely available online” has been used by the Court in cases such as *CV-Online Latvia* or *VG Bild-Kunst*, but without developing it into a clear legal category.

²⁵ T. Synodinou, G. Vrakas, Lawful Access as a Gatekeeper for TDM in the EU: An Analysis of the Scope of the Lawful Access Requirement under EU Copyright Exceptions, *Verfassungsblog*, 17 November 2025, <https://verfassungsblog.de/lawful-access-gatekeeper/>; M. Senftleben (2026) TDM, GenAI and the Copyright Three-Step Test, *International Review of Intellectual Property and Competition Law (IIC)*, 57, 67–107; T. Margoni (2024) TDM and Generative AI: Lawful Access and Opt-Outs, *Auteurs & Media*, 172; K. Szkalej (2025) The Paradox of Lawful Text and Data Mining? Some Experiences from the Research Sector and Where We (Should) Go from Here, *GRUR International*, 74(4), 307–319, <https://doi.org/10.1093/grurint/ikaf029>.

a) Similarities and differences in the conceptions of lawfulness.

The concept of lawfulness in relation to user acts is pluriform and has appeared in EU copyright legislation or was introduced by the CJEU's case law in relation to exceptions established for specific protected subject matter (computer programs, databases), and exceptions for all categories of copyright protected works (temporary copies, private copies, public lending, or TDM exceptions).

Both the terminology and the object of the specific expressions of user lawfulness point towards a versatile taxonomy. In the case of specific subject matter, the emphasis is on the user (lawful acquirer, lawful user), while the recognition of the lawful user as beneficiary of the exceptions marks also a paradigm shift towards the recognition of certain of these exceptions as mandatory, both in the sense that Member States shall provide for those exceptions and, more significantly, in the sense that these exceptions cannot be overridden by contractual terms.²⁶ In relation to the condition of lawful use in the context of the temporary copy exception, the focus has been given mainly to a flexible understanding of lawfulness in compliance with Recital 33 ISD (*Infopaq II*²⁷, *FAPL*²⁸), while in *Filmspeler*²⁹ lawfulness was conceived more holistically by taking into account the status of the user's knowledge in relation to the legality of the source of the copy of the work (the *mens rea* of kodi box users), who deliberately access a free and unauthorised database of protected works. In contrast, in the private copy cases the assessment of "lawfulness" is strictly linked to the source of the copy and does not take into consideration the end-user's knowledge in relation to the unlawfulness of the source of the copy. Significant differences also exist in how lawfulness is assessed by the CJEU. In some cases, the Court adopts a flexible approach. Access or use may be considered lawful because no legal rule restricts it or because it is justified on other legal grounds. In other cases, the Court applies stricter conditions and requires authorization from the right holder.

²⁶ See Article 8 of Directive 2009/24/EC (codified version of Directive 91/250); Article 15 of Directive 96/9/EC.

²⁷ *Infopaq II* (n 6) paras 44 and 45.

²⁸ *FAPL* (n 7) paras 170–172.

²⁹ *Filmspeler* (n 7) paras 65–70.

The diversity of the concept may be ascribed to an evolutionary path that reflects technological, economic and social advancements and the corresponding mutations of the copyright ecosystem (from acquisition of a copy as a basis of lawful use to lawful access based on express or implied consent for content that is freely available online).³⁰ Furthermore, it is noteworthy that the diverse expressions of user lawfulness have been attributed, as far as now, to a necessarily restrictive function. While the terms may differ (“lawful user/acquirer”, “lawful use”, “lawful source”, “lawful access”) the underlying common normative axiom is that the protected work must have been accessed lawfully.

However, despite its inherent restrictive function, the concept of lawfulness is marked by a certain elasticity. That is to say, depending on its interpretation, the concept could enable a comprehensive assessment of the conditions of access and use of a copyright protected work, which might take into account general principles of law (such as good faith in contractual relations, extracontractual liability standards, the knowledge of the user) as well as fundamental rights.

b) Between flexibility and certainty: a principled interpretative framework

In the previous section we showed that lawfulness is a flexible concept whose meaning depends on the use, technology, or situation to which it applies. The next step is to determine what counts as lawful within that flexible framework. This determination must be as precise as possible to ensure legal certainty, predictability, and consistency. These requirements follow not only from Recitals 11 and 18 CDSMD, but also from general principles of EU lawmaking.³¹ To that end, the following paragraphs proceed in two stages. They first identify the main “hard” or horizontal limits within which any definition of lawfulness must operate. Then they set out a number of “soft” principles that may guide the application of that definition in specific contexts.

³⁰ The underlying idea is that the right holder who has made available content online freely is presumed to have implicitly authorised access to the work for all Internet users. This shall be seen as an evolution of the concept of “lawfulness” that enriches its normative content with a more liberal approach which considers the reality of online access to content.

³¹ Article 7 TFEU; European Parliament, the Council of the European Union and the European Commission, “Interinstitutional Agreement on Better Law-Making”, Document 32016Q0512(01), of 13 April 2016.

i. Technological Protection Measures (TPMs)

A first “hard” boundary of lawfulness appears to be provided by effective Technological Protection Measures (TPMs). It seems indisputable that circumventing an effective TPM would make access or use unlawful. This conclusion finds ample support in the letter of the law. In relation to TDM, the cryptic Article 7(2) second sentence of the CDSMD³² points towards the ISD obligation on Member States to take appropriate measures to ensure that right holders make available to the beneficiary of an exception or limitation provided for in national law a non TPMed version of the work.³³ In *Nintendo* the CJEU has arguably limited the anti-circumvention protection of effective TPMs “only in the light of protecting that right holder against acts which require his authorisation”.³⁴ In relation to the temporary copies of Article 5(1) ISD the concept of lawful use defined as “not restricted by applicable legislation” performs a comparable function: the legal protection afforded by Article 6 ISD against the circumvention of an effective TPMs is a use “restricted by applicable legislation”. Finally, a similar effect is also found in relation to illegal access to information systems in the cited Article 3 of Directive 2013/40/EU, which explicitly mentions the infringement of a security measure.

ii. Contracts

Valid contractual provisions arguably follow a similar logic and may be classified as a second “hard” boundary to lawfulness. Contracts (or unilateral declarations with similar legal effects) appear particularly relevant in the case of Article 4 opt-outs in the CDSMD: once a right holder has validly reserved TDM uses for a work, access to it would become unlawful. This does not apply, of course, to situations where the law establishes otherwise, such as in the cases covered by Article 3 (see Article 4(1) and 7(1) CDSMD) or Article 5(2) and (3) Software Directive. A similar relevance of contractual arrangements is observable in the cited cases of the lawful acquirer of Article 5(1) Software Directive, in the legal source requirement found in *VOB*, and ultimately also in the CJEU stance expressed in the *ACI Adam* and *Copydan* rulings focusing on the initial consent of the right holder. In other words, the authorization by right holders is a clear indication of

³² “The first, third and fifth subparagraphs of Article 6(4) of Directive 2001/29/EC shall apply to Articles 3 to 6 of this Directive”.

³³ In these cases the rather complex and nationally fragmented procedure of Article 6 ISD should be followed.

³⁴ Case C-355/12 *Nintendo Co Ltd and Others v PC Box Srl and 9Net Srl* ECLI:EU:C:2014:25, para 25.

lawfulness. However, right holders' authorization (either in the form of a valid contractual provision or effective TPM) cannot form the only legal basis for lawful access.

iii. Beyond right holders' authorization

Recital 14 CDSMD is clear in this sense, where, next to contracts and open access policies, it lists "other lawful means" as well as "freely available online" as additional basis for lawful access. Furthermore, the fact that right holders' authorization cannot be the only legal basis for lawfulness is supported by a broader argument of general theory. By definition, an exception to an exclusive right identifies a situation where the authorization of right holders is not needed for the acts covered by the exception. If such an authorization was needed, there would not logically be space for an exception, representing that situation the default dynamic where an exclusive right is licensed (i.e., authorised) by right holders, usually via contracts. In other words, the very same definition of exception to an exclusive right is the absence of the need of authorization by the holder for the acts in question.

Therefore, creating a new condition of validity for an exception (lawful access/use/etc.) and pretending to define it as an act that needs to be authorised by its holder, is contradictory on a logical and terminological level as well as on a legal and doctrinal one. Consequently, to comply with the general principles of EU law, lawfulness can only mean *more* than authorization by right holders. This additional meaning must be defined, and a primary source is the text of the law itself. In the context of TDM, Recital 14 CDSMD is particularly relevant. It refers to access through "other lawful means" and to content that is "freely available online" as further examples of lawfulness.

iv. Other lawful means

Regarding "other lawful means" it seems implicit in the texture of the law that these cases cover at least forms of authorization statutorily established, for instance exceptions and limitations to copyright, as well as other forms of free uses outside the scope of rights of economic exploitation (in this sense see Recital 9 CDSMD or Recital 33 ISD) or the exhaustion of some of these rights

(e.g., Article 4(2) ISD).³⁵ This is systematically coherent. Within the field of intellectual property, and EU law more generally, it is not uncommon to identify “the law” or specific legal provisions as a valid basis to limit the scope, even entirely, of a right under EU law (see e.g., Article 3(2) Trade Secrets Directive; Article 6(1)(c) GDPR; or Article 15(b)(i) Data Act).

v. Freely available online

Recital 14 CDSMD includes also “freely available online” as a basis for lawfulness. However, establishing how far this novel notion can stretch the concept of “lawful access” is a matter of debate. Different interpretations are available. One plausible reading is that, outside of the clearly unlawful situations just described (effective TPMs and valid contracts), all other forms of access to content “freely available online” must be lawful. In other words, as long as the behaviour of an agent (e.g., a researcher) does not intentionally circumvent an effective TPM or breach a valid contractual provision, access is lawful, regardless of whether the work so accessed was made available with the consent of the author, thus also including situations that under the *ACI Adam* doctrine would qualify as unlawful sources. The reasons for this reconstruction, which is particularly attractive for cases of scientific research covered by Article 3 CDSMD, can be located in a literal, systematic, teleological and fundamental rights-based reading of the lawful access requirement in the CDSMD.³⁶ The reasons for treating scientific research as a special case are discussed in further detail below.

A second reading is similar in nature but affords a stronger relevance to the role of the knowledge element as developed by the CJEU in cases of communication to the public (e.g., *Svensson*³⁷, *GS Media*³⁸, *Filmspeler*, etc.). Following this line of argumentation, beneficiaries of Article 3 CDSMD will most likely also benefit from the presumption of not knowing that the accessed work was

³⁵ Rec 9 CDSMD and 33 ISD offer examples of acts that fall outside the scope of the rights reproduction, respectively in the case of TDM and temporary reproductions.

³⁶ Margoni (n 25).

³⁷ Case C-466/12 *Svensson and Others v Retriever Sverige AB* ECLI:EU:C:2014:76.

³⁸ Case C-160/15 *GS Media BV v Sanoma Media Netherlands BV and Others* ECLI:EU:C:2016:644.

made available without the consent of the author and thus are covered by such a presumption,³⁹ at least until the time when they acquire direct knowledge for instance via a notification. Accordingly, attributing a role to the subjective status of the agent seems in line with a discrete judicial approach of the CJEU as well as with general principles of law opposing the idea of knowingly benefiting from an illicit act. In the case of Article 4 CDSMD (which will often but not always cover commercial TDM), such presumption will likely not operate and thus a higher standard of care (such as verifying the origin of the datasets when operating commercially) applies.⁴⁰ This argument is *inter alia* able to address effectively the different spirit of TDM performed for scientific research on the one hand and TDM performed by commercial actors on the other.

One possible objection to embracing the knowledge element in this context is that knowledge can be acquired in different ways, even after the TDM process ended, for instance, when receiving a notification informing the agent that a certain work had not been made available with the consent of the author. At this point, the agent is under an obligation to remove that work. However, while removing a picture from a website (e.g., *Renckhoff*⁴¹) or a link from a blog (*GS Media*) can be easily done, removing potentially hundreds of thousands of works from a training dataset or from a trained model would be very costly, perhaps even impossible from a technical point of view in the case of a trained AI model. As such, the net effect of this dynamic would be to push this sector in the direction of a pure licensing market and render the TDM exceptions ineffective, an outcome incompatible with EU law, as clearly established for instance in *VOB*⁴² of *FAPL*.⁴³

Additionally, whether the element of knowledge – developed by the CJEU in relation to specific cases of communication to the public – should apply to the right of reproduction may raise systematic objections.⁴⁴ To be clear, the fact that most instances of lawful use or access refer to

³⁹ The requirements are formally different, but they will coincide in most situations. Article 3 is available to research organisation or cultural heritage institutions acting for research purposes while the presumption of “not knowledge” is applicable in cases of absence of for-profit purpose (see e.g. *GS Media* (n 37) paras 49–51).

⁴⁰ See *GS Media* (n 37) para 51.

⁴¹ Case C-161/17 *Land Nordrhein-Westfalen v Renckhoff* ECLI:EU:C:2018:634 (*Renckhoff*).

⁴² *VOB* (n 17) para 50.

⁴³ *FAPL* (n 7) para 163.

⁴⁴ TDM, temporary copies and private copies are all instances of reproduction, not communication to the public; the *VOB* case refers to public lending; the lawful acquirer of Article 5 Software Dir. does not need authorization for acts of reproduction and adaptation, etc.

cases of reproduction is not a decisive argument against the adoption of a standard developed for the different right communication to the public. But it does represent an element of discontinuity and may therefore justify a different treatment. Accepting knowledge as a defining component of lawfulness represents an important step whose consequences should be carefully assessed particularly in relation to “special” cases such as scientific research (further discussed below), which might therefore require different standards of knowledge.

Another aspect may play an important role in this analysis: is the meaning of “lawful access” in Articles 3 and 4 CDSMD the same? Whereas the logic of attributing an identical meaning to a concept that receives an almost identical formulation (“lawful access” in Article 3; “lawfully accessible” in Article 4) in two consecutive provisions of a same Directive is apparent, a deeper look at the history, scope, preamble and protected fundamental rights may suggest a different conclusion. Accordingly, defining the precise contours of lawfulness, even within two apparently close provisions, should likewise be object of a detailed analysis. The argument that scientific research as defined in Article 3 should again deserve a “special” treatment is further developed in the next section.

In conclusion, the requirement of lawfulness, and the activities attached to it, such as access, use, or source, appear to perform a similar regulatory function across different legal contexts. Yet they are also shaped by contingent circumstances. It is arguable that EU legislators and courts have used lawfulness to regulate information flows and creative markets. But the relevant subject matter differs significantly. The legal framework applies to different goods, such as software, databases, and e-books. It also applies to different activities, including private copying, temporary copying, and TDM. These rules were adopted in different historical periods, with 28 years separating the Software Directive from the CDSMD. They also respond to changing technological and socio-economic conditions, from the distribution of copies of software programs to the artificial generation of code.

For these reasons, any definition of lawfulness must remain within the “hard” boundaries identified above, namely effective TPMs, valid contracts, and other lawful means. At the same time, its application in a specific case must take account of the evolution and diversity of the subject matter

and activities that the legislature sought to regulate. Within this broader variety, some special cases require separate discussion.

c) The specialty of scientific research

The interpretation of “lawful access” in relation to scientific research must begin with the specific structure and purpose of Article 3 CDSMD. That provision reflects a deliberate legislative choice to privilege scientific research as a matter of public interest. Recital 11 states that legal uncertainty surrounding TDM for scientific research should be addressed by a mandatory exception. That objective is implemented inter alia through a narrowly circumscribed beneficiary concept. Article 2(1) CDSMD defines “research organisation” cumulatively and restrictively: the entity must pursue scientific research as its primary objective; it must operate on a non-profit basis or reinvest profits in research, or act pursuant to a recognised public-interest mission; and it must be structured so that no undertaking exercising decisive influence enjoys preferential access to its results. These conditions ensure that the exception serves genuinely public-oriented research rather than commercial exploitation by proxy.

Article 3 is further limited by a strict purpose requirement and by safeguards concerning storage, retention and security of copies. Taken together, these elements demonstrate that the Union legislature struck a specific balance: research organisations are granted broader freedom to carry out TDM, but only within a framework that confines the activity to scientific purposes and prevents structural capture by commercial actors.

That balance must inform the interpretation of “lawful access.” The wording of Article 3 refers to works “to which they have lawful access.” The focus is thus placed on the relationship between the beneficiary and the act of access. As seen above, Recital 14 clarifies that lawful access includes access based on open access policies, contractual arrangements such as subscriptions, other lawful means, and content “freely available online.” The introduction of this latter category would be deprived of autonomous meaning if it were reduced to a requirement that the original online posting be authorised in every instance. In the digital environment, the legal status of an upload is frequently indeterminate. Requiring research organisations to verify ex ante the lawfulness of each

source would, in many settings, render Article 3 ineffective and reintroduce precisely the legal uncertainty the legislature sought to remove.

The Court's case law on unlawful sources must be read in its specific context. In *ACI Adam* and *VOB*, the Court held that certain exceptions under the ISD cannot extend to copies derived from unlawful sources, in order to preserve the fair balance between right holders and users. In parallel, in its case-law on online communication to the public, including *Svensson*, *GS Media*, *Filmspelers*, *Renckhoff* and *Stichting Brein*, the Court has developed a context-sensitive approach that pays close attention to the role, knowledge and profit-making intent of the actor concerned. That jurisprudence demonstrates that the concept of lawfulness is not abstract and uniform across the *acquis*, but instrument-specific and closely linked to the objectives and structure of the provision at issue. It cannot therefore be transposed mechanically to Article 3 CDSMD, which was adopted precisely to facilitate scientific research and to reduce legal barriers in that domain.

The special status of research under Union law reinforces that conclusion.⁴⁵ Academic freedom and the freedom of scientific research are protected under Article 13 of the Charter of Fundamental Rights. The CDSMD itself recognises the societal value of research and the limited harm to right holders resulting from the Article 3 exception. Within that constitutional and legislative framework, restrictions on research activities must be interpreted in a manner that preserves the effectiveness of the exception and respects the Union's commitment to knowledge creation, innovation and democratic participation.

d) The specialty of general-purpose AI (GPAI)

Developments under the AI Act confirm the need for a conduct-based understanding of lawful access. Article 53(1)(c) of the AI Act requires providers of general-purpose AI (GPAI) models to put in place a policy to comply with Union copyright law, in particular to identify and respect rights reservations under Article 4(3) CDSMD. The Copyright Chapter of the GPAI Code of

⁴⁵ European Copyright Society (2025), An EU Copyright Framework for Research: Opinion of the European Copyright Society, available at: https://europeancopyrightsociety.org/wp-content/uploads/2025/07/ecs_copyright-framework-for-research.pdf.

Practice,⁴⁶ notably Measure 1.2, operationalises that obligation in the context of web crawling. It requires providers not to circumvent effective TPMs, including paywalls and subscription systems, and to exclude websites that have been recognised by courts or public authorities in the Union as persistently infringing copyright on a commercial scale. Significantly, the measure does not impose a general obligation to verify the authorisation status of every individual work encountered online. It translates “lawfully accessible” into a standard of lawful conduct and due diligence.

Additionally, it is worth noting that if those conduct-based requirements are considered sufficient to ensure compliance with Article 4 CDSMD for commercial GPAI model providers, it would be incoherent and disproportionate to subject research organisations under Article 3 to stricter lawful-source verification obligations. Such an approach would invert the differentiated structure of the Directive by imposing the heaviest compliance burden on the very actors whom the legislature intended to privilege in the public interest. The differentiated regulatory design of Articles 3 and 4 presupposes that commercial actors are subject to broader exploitation rights combined with an opt-out mechanism, whereas research organisations benefit from a mandatory exception within a confined institutional and purposive framework.

e) The specialty of Open-source software and AI models

Whether AI coding assistants, such as Github Copilot, ChatGPT4, Google Gemini or Claude can be trained on free and open-source software (FOSS) is another interesting case deserving a dedicated analysis. The question is of considerable relevance given that AI coding assistants largely rely on FOSS as training data, proprietary closed source code not being available for such a use by third parties.

Whether the reproductions necessary for the training of these models are permitted on the basis of statutory limitations or only on the basis of FOSS licences – and if so, under what conditions – has

⁴⁶ Code of Practice for General-Purpose AI Models, Copyright Chapter (Working Group Alexander Peukert/Céline Castets-Renard), 2025, <https://digital-strategy.ec.europa.eu/en/policies/contents-code-gpai>. See also European Commission, Commission Opinion on the assessment of the General Purpose AI Code of Practice within the meaning of Article 56 of Regulation (EU) 2024/1689, C(2025) 5261 final; AI Board, Conclusion of the Artificial Intelligence Board on the Assessment of the General-Purpose AI Code of Practice pursuant to Article 56 of Regulation 2024/1689, <https://ec.europa.eu/newsroom/dae/redirection/document/118687>.

not yet been decided by the courts.⁴⁷ In Europe, the TDM exception in Article 4 CDSMD is the focus of most debate.⁴⁸ Recital 14 CDSMD explicitly mentions works published on the base of “an open access policy”. This may well suggest that the TDM exception should apply to open-source software, unless rights holders have opted-out. However, from the point of view of the open-source community such an interpretation could lead to an undesirable outcome: their software could be used for AI training without having to comply with the conditions of FOSS licences, including the keeping of the notices referring to the applicable licence, the mentioning of the authors and the application of the same licence to derivative works. A possible solution may be to combine the usual copyright notice accompanying FOSS licences with a reservation of rights in accordance with Article 4(3) CDSMD. Other projects grounded in similar “open” principles and licences, including Wikipèdia, are likewise considering the impact of AI training on their open datasets and how elements such as attribution or other licensing restrictions may legally survive training activities.⁴⁹

f) The specialty of lawfulness in the three-step test

Lawfulness has been considered in a few CJEU decisions regarding the three-step test. In *Infopaq II*, discussing information retrieval services, the Court clarified that as long as the five conditions of Article 5(1) including “lawful use” are met, the three-step test of Article 5(5) ISD is satisfied.⁵⁰ As discussed in more detail above, the Court clarified the importance of the exception for temporary acts of reproduction (and thus of its constituent elements including lawful use) as an essential element to “ensure the development and operation of new technologies” and “safeguard a fair balance between the rights ... of right holders ... and of users ... who wish to avail themselves of those new technologies”.⁵¹

⁴⁷ In the United States, *Doe v GitHub* No 22-cv-06823-JST (ND Cal) addressed whether code snippets in the output of GitHub violated the copyright provisions of the DMCA; possible reproductions in the training process were not part of the complaint.

⁴⁸ Software is not listed in Article’s 3 scope.

⁴⁹ See e.g., the entry “Artificial intelligence in Wikimedia projects”, https://en.wikipedia.org/wiki/Artificial_intelligence_in_Wikimedia_projects (accessed 10 June 2026).

⁵⁰ *Infopaq II* (n 6) para 57.

⁵¹ *FAPL* (n 7) para 164; *NLA* (n 9) para 24.

On the other hand, in *ACI Adam*, when examining the private copy exception, the Court argued that a national provision that does not distinguish between *lawful and unlawful sources* in its implementation of Article 5(2)(b) ISD would adversely affect the normal exploitation of the work (step 2) and unreasonably prejudice the interest of right holders (step 3).⁵²

Regarding TDM, absent any case law from the CJEU, scholarship has argued that the nature of “lawful access” seems closer to cases of temporary copies in technological processes than to cases of private copy. This difference is justified by the fact that private copies “made from an unlawful source would encourage the circulation of counterfeited or pirated works, thus inevitably reducing the volume of sales or of other lawful transactions relating to the protected work” and thus encroaching on the normal exploitation and legitimate interest parameters.⁵³ Conversely, in cases of temporary copies, and arguably of TDM, there are no copies that may operate a substitution effect and therefore conflict with the normal exploitation of the work.⁵⁴ Temporary copies and copies made in TDM processes are often provisional in nature and serve only the purposes of allowing a technological process. In the case of TDM, they enable the analysis of “text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations”.⁵⁵ TDM copies are thus not suitable to “encourage the circulation of counterfeited or pirated works”, nor they reduce “the volume of sales or of other lawful transactions relating to the protected work” as described in the different case of the private copies in *ACI Adam* requiring a lawful source.

Consequently, in light of the specific wording of Recital 14 CDSMD, in particular its reference to content that is “freely available online”, and of the specific nature and limited scope of Article 3 CDSMD focusing on scientific research, the concept of lawful access broadly interpreted does not seem to conflict openly with the three-step test.⁵⁶ In particular, as evidenced above, the initial

⁵² *ACI Adam* (n 13) paras 39 and 40; *Senfleben* (n 25) sec 3.3.

⁵³ M. Senfleben (2026) GenAI and the Copyright Three-Step Test – Do TDM Exceptions for AI Training Conflict with a Work's Normal Exploitation?, GRUR International, 75(1), <https://doi.org/10.1093/grurint/ikaf113>.

⁵⁴ In addition, see Panel Report, United States – Section 110(5) of the US Copyright Act (WT/DS160/R, 15 June 2000) <https://doi.org/10.30875/40287e1f-en>.

⁵⁵ Article 2(2) CDSMD.

⁵⁶ For a detailed analysis of the compatibility of the CDSMD TDM exceptions with the European and international three-step test, see M. Senfleben (2022) Compliance of National TDM Rules with International Copyright Law – An Overrated Nonissue?, available at <https://dx.doi.org/10.2139/ssrn.4134651>.

authorization of the rights holder cannot be used as the exclusive legal basis for the validity of an exception. This logic necessarily reflects in the way in which the test, and in particular its second step, should be interpreted.⁵⁷

This interpretation is confined to acts of TDM, that is, acts involving the use of protected works as input for the training of AI models. As the literature makes clear, cases in which the output of a generative AI system, whose underlying model was trained through TDM activities, generates copies of protected works raise a distinct legal issue. Where, for example, the output of a generative AI application reproduces a protected work, this is better understood as a separate category of use and, arguably, as a case of *prima facie* infringement, unless justified by another legal basis.⁵⁸

4) Conclusions

Lawfulness, in its various manifestations, regulates cultural production and information markets by distinguishing legitimate from illegitimate behaviour. It provides a flexible interpretative tool for assessing how EU copyright law applies in specific contexts, including software, databases, private copying, temporary copying, e-lending, TDM, and GPAI. This assessment cannot be made in the abstract. It must reflect the relevant technological and economic context. At the same time, legal certainty must be safeguarded and thus the flexibility of lawfulness is guided, and sometimes constrained, by a broader legal framework that provides both “hard” boundaries and “soft” guiding principles. Reconstructing this framework is not straightforward. It requires attention to historical, doctrinal, and theoretical layers. Yet it is necessary to ensure the legal certainty and consistency required by EU law in order to favour economic and social development as well as legal compliance. The following recommendations may be drawn from the analysis developed in the previous sections.

⁵⁷ Arguably, right holders will have incentives to see any unauthorized use as conflicting with the normal exploitation of their works, but for the reasons explained above, this interpretation is logically unsustainable and in contrast with international and EU interpretations of the 3ST.

⁵⁸ Senftleben (n 25) 89-90, and the doctrine cited therein, especially fn 153.

1. Lawfulness cannot be reduced to right holders' authorization. This applies in particular to exceptions and limitations conditioned on lawful access, lawful use or lawful source. The text, structure and function of EU copyright law support this conclusion. Since an exception to an exclusive right presupposes that authorization is not required, making authorization the sole condition of lawfulness would create circularity and would risk rendering exceptions ineffective.
2. Beyond authorization by right holders, there are other clear cases in which lawfulness is undisputed. These include situations where the law authorizes the relevant activity, including through exceptions, limitations or other free uses under copyright law or other legal sources; situations that fall outside the scope of an exclusive right; and situations where the relevant exclusive right has been exhausted.
3. Situations not expressly regulated by law require a context-specific assessment. That assessment must respect the hard boundaries of lawfulness, including effective technological protection measures, valid and enforceable contractual provisions or rights reservations, and other legally binding restrictions. It must also be guided by softer interpretative criteria, including whether content is freely available online, the user's knowledge, the nature and purpose of the activity, the relevant fundamental rights framework and, where applicable, the three-step test. The interpretation adopted must preserve the policy objectives and effectiveness of the rule at issue.
4. Scientific research deserves special treatment within this framework. Article 3 CDSMD reflects a deliberate legislative choice to privilege scientific research through a mandatory exception limited to specific beneficiaries and purposes. In light of the public-interest function of research and its connection to academic freedom under EU law, lawful access should be interpreted in a manner that preserves the effectiveness of that exception and avoids disproportionate source-verification obligations for research organisations and cultural heritage institutions.

5. Other special situations have been identified and further ones may emerge. These include general-purpose AI, open-source software and AI models, and other contexts in which access, use and lawfulness interact with public-interest objectives, open licensing practices or technological innovation. Such situations should be assessed under the framework proposed in this Opinion. As a general principle, where a new situation warrants treatment comparable to that granted to scientific research, the conditions of lawfulness should be interpreted in a manner that favours the relevant activity, subject to the applicable legal safeguards.

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