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Dear Karen,

RE: Interplay between Articles 3 and 15 CDSMD

I have been requested to provide a legal opinion regarding the interplay between the text and data mining ('TDM') exception in Article 3 and the press publishers' right in Article 15 of Directive 2019/790 ('CDSMD').

More specifically, I have been asked to advise on the potential risk that the information society service providers ('ISSPs') at which Article 15 is addressed might indirectly benefit from the TDM exception through partnerships with research organizations ('ROs') and cultural heritage institutions ('CHIs') – that is: the beneficiaries of Article 3 – with the result that they could use press publishers' content without any authorization from them.

I have been also informed that Denmark is in the process of completing its transposition of the CDSMD.

While the analysis developed here is from the perspective of EU law, recommendations will be provided on how Article 3 CDSMD could be implemented into national law in a way that reduces the risk that ISSPs may seek to rely on that TDM exception to circumvent their licensing obligation under Article 15 CDSMD.

The following issues are tackled in the analysis below:

1. How and to what extent private partners of ROs and CHIs can rely on the TDM exception under Article 3 CDSMD;
2. Whether a national legislature can limit the applicability of Article 3 CDSMD solely to EU-based private partners;
3. Whether and to what extent the possibility for private partners to benefit from Article 3 CDSMD can limit the effectiveness of Article 15 CDSMD and the fostering of a licensing market for press content.

A **summary and specific recommendations** are subsequently provided in the final part of this document.

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1. How and to what extent private partners of ROs and CHIs can rely on the TDM exception under Article 3 CDSMD

As a preliminary point and among other things, it is relevant to note that:

i. The beneficiaries of Article 3 CDSMD are specifically ROs and CHIs ;
ii. The availability of the exception is premised on the lawful access to the protected content in relation to which TDM activities are to be undertaken;
iii. The purpose of the acts of extraction and reproduction must be scientific research;
iv. The exception in Article 3 covers acts of extraction and reproduction in relation to different types of works and protected subject-matter.

All the points above are relevant to define the modalities and extent to which private partners, including ISSPs, may benefit from Article 3:

i. Beneficiaries

Recital 11 CDSMD states that, in line with the existing EU research policy, which encourages universities and research institutes to collaborate with the private sector, ROs (but the same is true of CHIs) should benefit from the exception in Article 3 also when their research activities are carried out in the framework of public-private partnerships.

In such cases, ROs continue to be the beneficiaries of the exception, but their private partners could carry out TDM activities, including by using their own technological tools.

All this said, in situations in which commercial undertakings have a **decisive influence** on a RO, which allows such undertakings to exercise control because of **structural situations**, e.g., through their qualification as shareholders or members, which could result in preferential access to the results of the research, Article 3 shall not apply (recital 12).

In these instances, in fact, a RO shall *not* be considered a 'research organization' for the purposes of Article 3. The same appears to apply to CHIs.

ii. Lawful access requirement

In line with Article 7(1) CDSMD, it is not possible for rightholders to opt-out or restrict the availability of the exception in Article 3 CDSMD.

This said, the notion of 'lawful access' (recital 14) is to be intended as referring to content the access to which has been secured through a **licence/subscription or for which no restrictions are in place**.

Press publishers appear prevented from restricting TDM through terms of service or other means. Such a conclusion follows from both (a) recital 14, which removes the possibility for rightholders to restrict the doing of TDM activities in relation to content that ROs and CHIs have secured lawful access to, e.g., through machine-readable means, including metadata and terms and conditions of a website or a service (cf recital 18 and Article 4(3)), and content that is technically freely accessible online, and (b) the very wording of Article 7(1) CDSMD.

In turn, if ROs and CHIs have, e.g., purchased a subscription to a press publisher's content, they can undertake the acts allowed under Article 3 CDSMD, including in the context of partnerships with third parties.

iii. Scientific research purpose

The notion of 'scientific research' is not defined in the CDSMD. Recital 12 merely clarifies that the term 'scientific research' encompasses both the **natural sciences and the human sciences**.

In turn, in line with consistent case law of the Court of Justice of the European Union ('CJEU')[1] as well as the understanding of TDM (Article 2, No 2)[2], it appears likely that 'scientific research' must be understood in light of its **ordinary meaning**. As such, the concept may be intended as encompassing any activity aimed at generating information that allows to uncover new knowledge or insights that are based on or characterized by the methods and principles of science.

Importantly, the **end goal** of the scientific research activity at issue, e.g., whether it is aimed at generating a profit or is used for profit-making purposes, **might not be decisive**.[3]

iv. Acts covered

The exception in Article 3 in any event only applies specifically to the acts listed in the provision, that is: extraction and reproduction in relation to copyright works and other protected subject-matter, **not also the subsequent communication/making available to the public of the results** of TDM.

2. Whether a national legislature can limit the applicability of Article 3 CDSMD solely to EU-based private partners

The CDSMD does not tackle specifically whether the beneficiaries of Article 3 must be based in the EU, nor does it address the situation of their private partners. Al this said, it appears that:

- The **beneficiaries of the exception may need to be established in the EU**: in light of the wording of Article 9, which is specifically referred to CHIs under Article 8 CDSMD, there appears to be an implied understanding that, also under Article 3, a CHI must be established in the EU to be eligible for the application of the exception therein. The same may apply to ROs.
- However, the **private partners of ROs and CHIs may *not* need to be established in the EU**. Such an interpretation appears supported by the consideration that where there is a requirement of an EU establishment (including to benefit, e.g., from Article 15 protection) the CDSMD expressly says so. If one takes the exception for preservation of cultural heritage under Article 6, recital 28 appears to limit the possibility for CHIs to rely

[1] *Constantin Film*, C-264/19, EU:C:2020:542, at [29], referring to *Spiegel Online*, C-516/17, EU:C:2019:625, at [65] and *Tom Kabinet*, C-263/18, EU:C:2019:1111, at [38] and the case law cited therein. See also *Atresmedia*, C-147/19, EU:C:2020:935, at [33], regarding such an approach as "settled case-law".

[2] See also the Impact Assessment accompanying the EC Proposal for what would become the CDSMD, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52016SC0301, §4.3.1.

[3] *Contra* I Stamatoudi – P Torremans, 'The Digital Single Market Directive', in I Stamatoudi – P Torremans (eds), *EU Copyright Law. A Commentary* (Edward Elgar:2021), 2nd edn, §17.94.

on third parties to undertake the activities covered by that provision if the third party (or the CHI) is not established in the EU.

All the above said, it is important to note that the CDSMD does not define the **notion of 'establishment'**. Thus, the concept is to be intended in accordance with general EU law principles and CJEU case law. The concept of 'establishment' has been broadly construed and generally implies the permanent or semi-permanent settlement of a person or a company for economic reasons.[4] In the case of legal persons, this means that 'establishment' is not limited to the main seat, branch or agency, but also encompasses the likes of "an office managed by the undertakings' own staff or by a person who is independent but authorized to act on a permanent basis for the undertaking"[5] or even presence in a Member State through commercial agreements with local operators.[6] In any case, the notion of establishment entails a "permanent presence in the host Member State and, where immovable property is purchased and held, that property should be actively managed".[7]

3. Whether and to what extent the possibility for private partners to benefit from Article 3 CDSMD can limit the effectiveness of Article 15 CDSMD and the fostering of a licensing market for press content

It should be noted at the outset that the scope of application of Articles 3 and 15 CDSMD overlaps *in part*, in the sense that both provisions concern **acts of reproduction**. This said, **Article 15 goes beyond Article 3** because it also covers acts of making available to the public of press publications.

Thus, the possibility for ISSPs to benefit indirectly from Article 3 through partnerships with ROs and CHIs could serve to circumvent the application of Article 15 insofar as **acts of reproduction of press publications** are concerned.

This said, as detailed above at §1, acts of reproduction under Article 3 are allowed if (i) the RO or CHI at issue has lawful access to the content at issue and (ii) they are justified by the purpose of scientific research. In turn:

- The situations in which an overlap may exist between Articles 3 and 15 is where **both conditions (i) and (ii) above are satisfied** and, in any event,
- The TDM exception **does not cover subsequent acts of making available**. Hence, it appears that the licensing obligation under Article 15 shall not be trumped by the exception under Article 3 if the ISSP at issue make available to the public the results of TDM, provided that such results incorporate a press publication or part thereof.

The same conclusion applies to, e.g., news articles or photographic content incorporated in a press publication and protected by rights other than Article 15, notably copyright and other related rights (e.g., the related right for non-original photographs, as allowed under Article 6 of the Term Directive 2006/116).

[4] Very recently, see Opinion of Advocate General Szpunar in *LEA*, C-10/22, EU:C:2023:437, fn 39.

[5] *Commission of the European Communities v Federal Republic of Germany*, Case 205/84, EU:C:1986:463, at [21].

[6] *Gambelli*, C-243/01, EU:C:2003:597, at [14].

[7] *Centro di Musicologia Walter Stauffer*, C-386/04, EU:C:2006:568, at [19].

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Summary

1. Private partners of ROs and CHIs benefitting from Article 3

- **Private partners may indirectly benefit from the TDM exception** in Article 3 insofar as (a) ROs and CHIs have lawful access to the content to be extracted/reproduced and (b) they do not exercise a decisive influence on them. In any event, Article 3 only applies to acts of extraction and reproduction.

- In turn, this may suggest that – in the context of, e.g., AI training processes – a distinction needs to be made between **input and output text/content**:
  - The extraction and use of the input text/data may be covered by the exception under Article 3 but
  - The output, e.g., an AI-generated news article would not *if* such output incorporates third-party protected content, including press publishers' works and other protected subject-matter.

2. EU establishment requirement for private partners

- The CDSMD is silent on the question whether the private partners of the beneficiaries of Article 3 need to be **established in the EU**. It is arguable that **no such requirement** does subsists.

- This said, even admitting that the existence of an EU establishment requirement, the notion of establishment has been interpreted loosely and broadly, with the result that for a third-country ISSP it might be possible to **circumvent** quite easily any such requirement imposed at the national level by, e.g., simply setting up an office in the EU. The most relevant third-country ISSPs have done so already.

3. Interplay between Articles 3 and 15

- Articles 3 and 15 CDSMD overlap *in part*. While both provisions concern **acts of reproduction, Article 15 goes beyond Article 3**, in that is also covers acts of making available to the public of press publications. All this means that:
  - The possibility for ISSPs to benefit indirectly from Article 3 through partnerships with ROs and CHIs has the ***potential*** **to circumvent the application of Article 15 only insofar as acts of reproduction of press publications are concerned**. However,
  - The licensing obligation under Article 15 shall not be trumped by the exception under Article 3 in the event that the ISSP at issue make available to the public the results of TDM, provided that such results incorporate a press publication or part thereof.

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Recommendations: How a national legislature can transpose Article 3 CDSMD in such a way that the risk that Article 15 is bypassed via Article 3 is reduced

In light of all that precedes, in order to reduce the risk that a national transposition of Article 3 CDSMD might negatively affect the application of Article 15, it is recommended that the following aspects are considered:

Recommendation	*Potential challenges*
(1) The resulting national transposition of Article 3 should **explicitly *only* cover acts restricted by the exclusive rights listed therein, that is acts of extraction and reproduction**. In this sense, it might be useful to contrast the EU text with, e.g., the Italian transposition of Article 3, which expressly allows the subsequent "communication to the public of the research results if expressed within new original works".[8] Such a broadening of the exception under Article 3 is likely to be regarded as being in breach of EU law.[9] The CJEU itself has clarified that a national exception or limitation cannot exceed what is allowed at the EU level.[10] Press publishers in Denmark should warn national lawmakers against the risk of exceeding the scope of the EU exception.	Limited. Despite that an exception covering acts restricted by copyright and related rights other than those specifically listed in Article 3 is arguably in breach of EU law, some (academic) commentators have however supported such approaches.[11]
(2) The **language of the preamble to the CDSMD** – specifically the parts in which it is stressed that the beneficiaries of Article 3 remain ROs and CHIs (recital 11) and that the exception shall not apply if a commercial undertaking has a decisive influence on a research organization (recital 12) – could be made part of the positive language of the resulting national provision. All this could be useful in guiding Danish authorities, including courts, in the correct	Limited.

[8] Article 70-ter(1) Italian Copyright Act.

[9] There are multiple instances in which the CJEU has preempted divergences in national law, including having regard to exclusive rights and exception and limitations. The principle of EU preemption has been codified in Article 2(1)–(2) TFEU (see K Lenaerts – P Van Nuffel – T Corthaut, *EU Constitutional Law* (Oxford University Press:2021), §5.026).

[10] Recently, *Spiegel Online*, C-516/17, EU:C:2019:625, and *Funke Medien*, C-469/17, EU:C:2019:623.

[11] See, e.g., B Calabrese, 'Scientific TDM exception and communication to the public: did Italians do it better … or at least not worse?' (2022) 17(5) Journal of Intellectual Property Law & Practice 399.

interpretation and application of the national provision resulting from the transposition of Article 3.	
(3) Lacking a definition in the CDSMD of the **notion of 'scientific research'**, the resulting national provision might adopt a narrow definition of what qualifies as scientific research, bearing in any case in mind that the CDSMD expressly refers to both scientific and social sciences research.	Such an approach would be in line with the transposition approaches in several Member States with regard to notions not defined in the CDSMD (e.g., the notion of 'very short' extract under Article 15), but has the potential to be challenged, specifically considering that over time that CJEU has consistently held that notions in EU legislation that make no reference to EU Member States' laws should be intended (i) as autonomous concepts of EU law, which are to be applied uniformly across the EU and (ii) in accordance with their everyday meaning.[12]
(4) While Article 3 CDSMD is not limited to **non-commercial TDM**, it might be suggested that the national transposition thereof should provide for such a limitation. In the past, the CJEU has specifically held that it might be possible for national legislatures to restrict the scope of application of an exception or limitation harmonized at the EU level.[13]	Such an approach might be challenging to implement successfully, mostly because it would be regarded as defeating the very purpose of Article 3, as well as the reason why it was adopted in the first place. That provision was indeed proposed to broaden the possibilities under Article 5(3)(a) of Directive 2001/29 ('InfoSoc Directive'), which some EU Member States had relied upon before the adoption of the CDSMD to introduce their own scientific TDM exceptions.[14]

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I remain at your disposal should you have any questions and/or wish to discuss further any of the points above.

Sincerely,

Eleonora Rosati

Stockholm, 28 May 2023

[12] *Austro-Mechana*, C-433/20, EU:C:2022:217, at [20], referring to *DOCERAM*, C-395/16, EU:C:2018:172, at [20] and the case law cited therein.

[13] *ACI Adam and Others*, C-435/12, EU:C:2014:254, at [27]. See also *Padawan*, C-467/08, EU:C:2010:620, at [36] and *DR and TV2 Danmark*, C-510/10, EU:C:2012:244, at [36].

[14] E Rosati, Copyright in the Digital Single Market. Article-by-Article Commentary to the Provisions of Directive 2019/790 (Oxford University Press:2021), 29-34.