

# Position Paper

November 2023

## Bitkom Position on the AI Act Trilogue Negotiations on requirements referring to copyright

### Summary

Copyright-related provisions have only been part of the debate on the AI Act since the European Parliament's proposal in June 2023. The European Parliament proposes transparency obligations for providers of foundation models with regard to training data protected under copyright. These obligations are intended to support the enforcement of existing copyright provisions in the context of foundation models.

Bitkom continues to take the position that copyright provisions should not be part of the AI Act at all. Should the trilogue negotiations result in the inclusion of specific provisions on copyright, Bitkom takes the opportunity to raise serious concerns about the existing proposals and to propose a practical and proportionate solution to this highly relevant and fundamental issue.

Bitkom considers the proposed provisions as technically infeasible, a barrier to innovation, overly broad, a risk for trade secrets as well as proprietary information and of doubtful usefulness. Rightholders' interests in transparency and control over the use of their works for AI training are well met by the existing copyright framework and technical measures that are already widely used. Therefore, Bitkom proposes to delete the proposed obligations. Instead, and more closely in line with the stated objective of supporting enforcement of existing copyright provisions, Bitkom suggests, that within the scope of Art. 28b providers shall be required to report on how they comply with existing technical regulation, in particular regarding opt-outs expressed by rightholders in line with Art. 4 of Directive 2019/790/EU.

### General Remarks

Since the end of last year, a heated debate has been sparked about how to regulate General Purpose AI, foundation models and generative AI. Provisions on copyright and provisions with an impact on copyright are part of the discussions since the proposal of the European Parliament in June 2023.

Bitkom continues in general to take the position that requirements referring to copyright should not be part of the AI Act at all, be it under the proposed General

Purpose AI Regulation or under the Foundation Model approach. Such requirements do not belong in the AI Act, which deals with product safety and market entry regulation. Therefore it should not be overloaded with additional areas of regulation. Copyright specific provisions do not concern product safety nor market entry regulation and should be defined separately – as whole – from the AI Act, if required.

In any case the trilogue negotiations should actually result in an agreement to include specific provisions on copyright, Bitkom is taking the opportunity to raise serious concern against the existing proposals and to propose a practical and proportionate solution to this highly relevant and fundamental issue.

## Positions by the EU COM, Council, and EP

In the EU COM proposal published in April 2021, no copyright-related provisions were mentioned.

In its General Approach of November 2022, the Council did not introduce a provision in respect of copyright either.

In its amendments of June 2023, among other things, and in contrast to both the EU COM as well as the Council, the EP for the first time introduces copyright related obligations on providers of “(...) *foundation models used in AI systems specifically intended to generate, with varying levels of autonomy, content such as complex text, images, audio, or video (“generative AI”) and providers who specialise a foundation model into a generative AI system (...)*” (Art. 28b(4) AI-Act). Inter alia, said providers shall be obliged to

- “(...) *train, and where applicable, design and develop the foundation model in such a way as to ensure adequate safeguards against the generation of content in breach of Union law in line with the generally-acknowledged state of the art, and without prejudice to fundamental rights, including the freedom of expression (...)*” (Art. 28b(4b) AI-Act); and
- “(...) *without prejudice to Union or national or Union legislation on copyright, [to] document and make publicly available a sufficiently detailed summary of the use of training data protected under copyright law. (...)*” (Art. 28b(4c) AI-Act)

## The Spanish Presidency’s preparation for the trilogue and the German Government’s position

Regarding copyright aspects, the Spanish Council Presidency, in preparation for the trilogue negotiations on Oct. 24<sup>th</sup> 2023, on the one hand noted the need for targeted provisions to facilitate the enforcement of copyright rules, and on the other hand proposed the following changes to the Parliament's proposal:

- *“Providers of foundation models should demonstrate that they have taken adequate measures to ensure the models are trained in compliance with applicable Union copyright law, in particular respect the opt-out from the TDM exception”;*
- *furthermore, providers of foundation models shall “make publicly available a sufficiently detailed summary about the content used for training and information about their policies to manage copyright-related aspects.”;*

Finally, the Spanish Presidency proposes that *“the Office should provide a template to ensure uniform application of this obligation.”*

The German government proposed transparency obligations for providers of general-purpose AI regarding information on the provider's handling of copyright and training data. According to the German government, these transparency requirements should be proportionate, technically feasible, contain information with respect to permitted Text- and Data-Mining but above all under the reservation of security- and legitimate confidentiality interests.

## Bitkom Position

In general, the Bitkom position on requirements referring to copyright in the scope of the AI is guided by the following core principles:

- In view its intended purpose, regulation shall always address an evaluated concern following an impact assessment.
- Responsibilities and cooperation shall be allocated in fair and logical manner between different interests along the value chain of AI-System development.
- Not only shall regulation be technology neutral, but it should always be in accordance with the European legal system and its doctrine as a whole.
- Clear, specific, and coherent definitions and legal certainty are critical to ensure AI adoption.

Based on these principles, we reject the regulatory approach referring to copyright-related aspects in the AI Act.

## The proposed transparency obligations are of doubtful usefulness

The AI Act is concerned with product safety and market regulation. The proposed provisions go far beyond that. The approach set out by the EP and the Council's presidency is not only addressing just one isolated aspect of copyright-related issues in the development and use of AI Systems, but more over does not address an evaluated concern, as it has not been subject to any impact assessment.

Rightsholders' interests in transparency and control over the use of their works for AI training are well met by the existing copyright framework, in particular Article 4 of

Directive 2019/790/EU and technical measures already widely in use. Article 4 of Directive 2019/790/EU offers a fair economic location advantage that fairly balances the interests of rightsholders as well as content users and should be used as such:

Article 4 of the Directive 2019/790/EU on the one hand allows Text- and Data-Mining with regard to – among others – the training of models and on the other hand grants rightsholders the possibility to opt-out of their works being used for said Text- and Data-Mining (Art. 4(3) Directive 2019/790/EU).

Not every content online is protected by copyright and moreover, the scope of copyright protection differs in different countries. It is not feasible for providers to evaluate possible copyright protection for each individual training data in each country. This is the reason why rightholders have the possibility to opt-out of their content to be used for said Text- and Data-Mining. Technical ways to enforce an opt-out that are relatively easy to implement already exist and are widely used. One of these ways is the robots exclusion protocol (robots.txt). It is used to indicate which part of a website is allowed to be visited by a crawler, web robot or similar. This is also why, an opt-out has to be expressed in machine-readable means in order to be legally appropriate (Art. 4(3) Directive 2019/790/EU) and practicable.

The proposed obligations are not only technically unfeasible and overly broad, but they are furthermore unrelated to product safety and market regulation. For this reason, they represent a radical system deviation within the AI-Act. Beyond that, the proposed obligations further carry the risk of disclosing trade secrets and proprietary information – a risk also recognised by the German Government.

A transparency regime as suggested by the European Parliament and co-legislators is above all also a barrier to innovation. The requirements would impose additional obligations, which could, not only for startups but for all developers and providers across the board, be daunting in their abundance and potential depth of detail. The proposed rules would present a significant competitive risk and inhibiting factor not only for developers, but also for investors.

We therefore propose that all provisions on making sufficiently detailed summaries of copyright-protected training data publicly available be deleted. We instead suggest that providers be required to report on how they comply with existing technical regulation, in particular, with regard to opt-outs expressed by rightholders in accordance with Art. 4 of Directive 2019/790/EU. This requirement would more appropriately support the enforcement of existing copyright provisions, as intended by the co-legislators. However, such reporting should be under the reservation of confidentiality and security interests, and should only apply where the necessary information on the training process is available to providers in the first place.

## The office's flexibility deficit on providing a template

The Council's presidency suggests, as described above, that the Office shall provide a *"template to ensure uniform application of transparency obligations"*. First, the Office's role with regard to copyright is new to the discussion and highly unclear. In addition,

the technical realities are highly complex and dynamic. This is especially true - but not limited - to differences in model training. Therefore, a regulation which can face these dynamics needs to be flexible itself. We question the flexibility not just of such a template-based approach but also of the Office itself. It is unclear whether the Office has the necessary resources and the technical know-how to match the dynamics and complexity in the field.

We therefore suggest to delete such provision suggested by the Council's presidency in order not to risk further obstacles on innovation.

## Attachment

### Amendments worded

#### Art. 28b (4c)

*Text proposed by the EP*

4. c) without prejudice to Union or national or Union legislation on copyright, document and make publicly available a sufficiently detailed summary of the use of training data protected under copyright law.

*Amendment*

4. c) ~~without prejudice to Union or national or Union legislation on copyright, document and make publicly available a sufficiently detailed summary of the use of training data protected under copyright law.~~ **publish a clear and easily comprehensible report for each such foundation model on its compliance with Art. 4 of Directive 2019/790/EU.**

**This provision shall not oblige providers to disclose trade secrets within the meaning of Directive 2016/943/EU or other confidential or proprietary data or information.**

Bitkom represents more than 2,200 companies from the digital economy. They generate an annual turnover of 200 billion euros in Germany and employ more than 2 million people. Among the members are 1,000 small and medium-sized businesses, over 500 start-ups and almost all global players. These companies provide services in software, IT, telecommunications or the internet, produce hardware and consumer electronics, work in digital media, create content, operate platforms or are in other ways affiliated with the digital economy. 82 percent of the members' headquarters are in Germany, 8 percent in the rest of the EU and 7 percent in the US. 3 percent are from other regions of the world. Bitkom promotes and drives the digital transformation of the German economy and advocates for citizens to participate in and benefit from digitalisation. At the heart of Bitkom's concerns are ensuring a strong European digital policy and a fully integrated digital single market, as well as making Germany a key driver of digital change in Europe and the world.

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AK IP

AK AI

#### Copyright

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