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Position Paper

June 2026

Call for Evidence on the Copyright DSM Directive

Summary

The evaluation of the DSM Directive should consider its growing interaction with other EU regulatory frameworks, notably the AI Act, the DSA and the GDPR. In practice, overlaps, inconsistencies and cumulative compliance obligations create legal uncertainty, disproportionately affecting cross-border digital services, SMEs and start-ups. Greater alignment is necessary to ensure legal certainty, effective copyright protection and innovation-friendly frameworks.

A central issue in the current debate is the ability to analyse lawfully accessible information at scale. A reliable TDM framework is key digital infrastructure, not only for AI development but also for research, cybersecurity, healthcare and broader economic productivity. The DSM Directive already provides an important basis for such uses, but its effectiveness depends on a clear, harmonised and innovation-friendly interpretation.

Articles 3 and 4 of the DSM Directive are crucial for research and data-driven innovation. However, the distinction between commercial and non-commercial research does not reflect modern collaborative research practices and may hinder knowledge transfer. Article 4 has proven effective by providing a workable legal basis for large-scale computational analysis across the full AI lifecycle, enabling applications across sectors, from AI development and healthcare to financial services, manufacturing and cybersecurity. Its effectiveness, however, depends on access to data and is undermined by uncertainty regarding opt-out mechanisms, the interaction with contractual arrangements, technical barriers and diverging national interpretations.

In collective licensing (Articles 12-14), extended collective licensing mechanisms have limited relevance in digital and cross-border environments without legal certainty, reliable rights information and effective safeguards. Fragmented rights and insufficient transparency may increase transaction costs. Negotiation mechanisms may help but should remain voluntary, efficient and proportionate, avoiding additional burdens.

Regarding Article 15 and Article 17, legal uncertainty continues to affect the digital content market. For press publishers, a balanced application of Art. 15 is needed to preserve linking, discoverability and innovation. For Art. 17, the German implementation creates legal and operational challenges, including unclear licensing obligations, risks of double remuneration, overblocking concerns and misalignment with the DSA.

The fair remuneration provisions (Articles 18–22) raise practical challenges. While appropriate remuneration is legitimate, it must reflect diverse digital business models. Transparency obligations create significant administrative burdens and are difficult in complex value chains, where data may be unavailable. Concerns arise regarding confidential business information and legal uncertainty. Contract adjustment mechanisms face difficulties, where revenue attribution is complex. Overall, clearer rules and stronger proportionality are needed.

We believe that the identified challenges related to the DSM Directive can be effectively addressed without reopening it, through consistent interpretation, guidance and improved coordination between Member States. Any review or targeted initiatives that may follow should prioritise improving the effective implementation and practical operability of the existing rules.

With regard to the Commission's initiative on the optional scientific research exception under the InfoSoc Directive, it should conduct a comprehensive evaluation of the Directive, assessing whether its exceptions remain effective in the digital environment.

This review should also cover the private copying exception (Art. 5(2)(b)). Divergent national levy regimes create legal uncertainty, distort competition and increase administrative burdens. The assessment should consider how »private copying« is defined today, whether compensation reflects actual harm, and whether current systems fragment the internal market.

Impact of the DSM Directive on the digital use of protected content for education, research and preservation (Articles 3-7)

Article 3 – TDM for the purposes of scientific research

While Article 3 has provided opportunities for some researchers to engage in TDM, many barriers remain.

- In particular, the current regime fails to recognise that research is often collaborative. It may involve a mix of non-commercial and commercial actors. As the researcher advocacy organisation KnowledgeRights21 notes, »Universities, research organisations, and private companies all collaborate on AI projects and frequently this will happen in an international context. In many cases, cross-border collaboration might not only be beneficial but inevitable.« University researchers often partner with start-ups and private industry both to conduct research and to commercialise research outputs. Researchers may also work with for-profit journalists, e.g. to use text and data mining to analyse large corpora of works and glean useful public insights.

- Unfortunately, the existing regime inhibits these uses, as Article 3 only applies to certain forms of non-profit research. That's why KnowledgeRights21 and others advocate for »[r]emov[al] [of] the artificial commercial/non-commercial divide: The EU must abolish this unnecessary distinction hindering research-industry collaborations and undermining knowledge valorisation.« Similarly, they note that »Europe's laws currently impose an artificial and unhelpful distinction between commercial and non-commercial research, imposing significantly higher costs on science and commerce even when the impact on demand for original works is zero or negligible. This discriminates against Europe's SMEs and start-ups, which** operate in markets with much bigger players based in other jurisdictions, but also undermines knowledge transfer between universities and businesses.«
- What's more, some policymakers and litigants have challenged the idea that Article 3 even applies to various activities, including the development of datasets and AI training. For instance, litigation such as Kneschke v. LAION creates a chilling effect through the sheer cost and legal risk.
- Researchers also continue to face barriers to accessing materials for use in TDM, as well as contractual and technical restrictions that purport to restrict TDM and AI training.

In addition, access to suitable training and research data is increasingly recognised as a central bottleneck for AI development in Europe. This is particularly problematic because contemporary research is inherently collaborative, international and embedded in broader innovation ecosystems involving universities, research organisations, start-ups and industry. The current distinction between commercial and non-commercial actors does not reflect these realities and risks limiting both research capacity and knowledge transfer from science to application. A more flexible framework is therefore needed to better accommodate public-private collaboration and modern research practices.

We believe that the identified challenges related to the DSM Directive can be effectively addressed without reopening it, through consistent interpretation, guidance and improved coordination between Member States.

Article 4 – Exception or Limitation for TDM

Article 4 of the DSM Directive and the German transposition in Section § 44b UrhG have proven to be very effective in enabling TDM. From the perspective of AI developers and the wider digital economy, the exception provides a workable and legally certain basis for large-scale computational analysis, reduces transaction costs and avoids the impracticability of individual licensing. This is particularly important for generative AI and big data applications, which rely on broad, reliable access to data at scale across sectors and jurisdictions within the European Union.

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The exception has been instrumental in supporting a wide range of use cases across the AI lifecycle. TDM underpins all stages of development, including dataset creation and curation, model training and pre-training, fine-tuning, domain adaptation, evaluation, safety testing, bias detection and ongoing improvement. In practice, this enables:

- The development of general-purpose AI and foundation models on diverse corpora (text, images and code), including bias detection and removal, evaluation and performance measurement
- Natural language processing applications such as machine translation, summarisation and search
- Data analytics in sectors such as healthcare, finance and mobility
- The detection of patterns, anomalies and trends in large datasets for commercial and industrial purposes

More concretely, TDM supports applications across the economy, including:

- AI development: training and fine-tuning LLMs on large and specialised datasets (e.g. scientific literature and technical documentation)
- Healthcare: mining biomedical literature and clinical data to accelerate drug discovery and improve diagnostics
- Energy: analysing climate research and technical documentation for forecasting and infrastructure planning
- Manufacturing and automotive: improving design, quality assurance and predictive maintenance through the analysis of engineering and operational data
- Financial services: analysing legal texts, regulatory filings and news data for risk modelling, compliance and fraud detection
- Product and brand monitoring: analysing user-generated content to identify trends, feedback and complaints
- Threat intelligence and security: monitoring publicly available information to detect vulnerabilities and risks
- Knowledge portals and customer service: enabling automated question-answering based on internal and external knowledge bases

These examples illustrate that Article 4 is not limited to large language models, but underpins a broad ecosystem of data-driven applications, including cybersecurity, fraud detection, regulatory compliance, search, recommendation systems, knowledge management, industrial analytics and scientific discovery. The exception is therefore a foundational enabler of innovation across sectors.

At the same time, the effectiveness of § 44b UrhG depends critically on practical access to data. This includes not only the legal permission to carry out TDM, but also the ability to obtain and use data without undue technical, contractual or legal barriers. In practice, unclear opt-out mechanisms, fragmented licensing practices, contractual restrictions and technical blocking measures can undermine the intended effect of the exception.

Legal uncertainty regarding the scope and application of the TDM exception—particularly in the context of generative AI—further weakens the reliability of the framework. Diverging interpretations among stakeholders, as well as unresolved questions around lawful access, opt-outs and downstream uses, can deter investment, slow innovation and place European developers at a competitive disadvantage.

The limitations also concern uncertainty around rights reservations, including what constitutes a valid and sufficiently machine-readable opt-out, how such reservations can be identified at scale, and the lack of widely deployed, granular technical standards. Inconsistent implementation across Member States and insufficient interoperability create avoidable compliance burdens while reducing legal certainty for both companies and rightholders. In this context, **Robots.txt** remains the most scalable and widely adopted de facto standard: independent studies such as the 2024 Web Almanac found that robots.txt is used by the vast majority (almost 84 percent) of the sites it measured, and that some sites increasingly include rules for AI crawlers such as GPTBot; centralised registries would face fundamental challenges of completeness, currency and computational overhead, disproportionately burdening SMEs.

In conclusion, while § 44b UrhG has proven to be a cornerstone for enabling TDM and AI development, its full potential can only be realised if the framework is applied in a clear, harmonised and innovation-friendly manner, and if opt-out mechanisms are technically interoperable, legally reliable and workable at scale. Accordingly, neither § 44b UrhG nor Article 4 of the DSM Directive should be amended, restricted or made subject to additional conditions — including mandatory remuneration obligations or AI levies, which would be practically unworkable at the scale of modern training data and risk disadvantaging European developers vis-à-vis competitors in more permissive jurisdictions.

Impact of the DSM Measures to Facilitate Collective Licensing (Articles 12 – 14)

Article 12 – Collective Licensing with an Extended Effect

From the perspective of the digital economy, extended collective licensing mechanisms may be of limited relevance outside specific contexts in which individual licensing is genuinely impracticable. Their usefulness depends on legal certainty, reliable rights information, clear opt-out possibilities and safeguards for existing commercial licensing markets. In digital and cross-border environments, incomplete metadata, territorial complexity and unclear rights situations can limit the practical value of such mechanisms and may interfere with functioning market-based licensing solutions if not designed carefully.

Where repertoires are fragmented, rights are split across territories or uses, or information on represented works is incomplete or difficult to access, collective licensing risks creating additional legal uncertainty rather than reducing transaction costs. These challenges are particularly pronounced in digital and cross-border contexts, where a single act of use often involves multiple rights and rightsholders. To remain effective, collective licensing frameworks should therefore support coordinated licensing solutions, including practical »one-stop-shop« approaches. Otherwise, fragmented rights administration may undermine the transferability of rights and create unnecessary burdens for digital services.

Article 13 – Negotiation Mechanism

If negotiation mechanisms are to play a stronger role, they should be simple, fast, low-cost and confidential, and should facilitate voluntary agreements without becoming an additional procedural burden. Experience from collective rights management shows that such mechanisms work best when structured, timely and transparent engagement between stakeholders is ensured from an early stage. This can reduce transaction costs, improve market acceptance and avoid unrealistic licensing outcomes, while preserving freedom of contract and protecting commercially sensitive information.

Impact of the DSM Directive on Achieving a Well-Functioning Marketplace for Protected Content (Articles 15-17)

Article 15 – Protection of Press Publications Concerning Online Uses

From the perspective of the digital economy, Article 15 should be applied in a way that preserves the balance between the protection of press publishers and the functioning of the open internet. In practice, legal uncertainty remains around the boundary between protected uses, hyperlinking and the use of very short extracts, which creates compliance burdens and complicates the development of consistent cross-border services. It is therefore essential that the exceptions for linking and very short extracts are interpreted robustly, so that ordinary referencing, search and discoverability are not undermined. At the same time, Article 15 should remain grounded in its nature as an exclusive right, with platforms and publishers expected to negotiate outcomes in good faith, and voluntary licensing agreements can play an important role where extended uses of press content create added value, but such market-based solutions should be allowed to develop flexibly and should not be replaced by mandatory compensation or other mandatory mechanisms that interfere with freedom of contract. In particular, such mandatory mechanisms risk creating uncertainty, distorting negotiations, discouraging investment and innovation, and ultimately harming both publishers and digital services. Greater legal clarity on the scope of beneficiaries, proportionality in sanctions and data disclosure obligations, and harmonisation across Member States are therefore needed to ensure that Article 15 supports sustainable press ecosystems without weakening the digital single market.

Article 17 – Use of protected content by online content-sharing service providers (OCSSPs)

Several challenges arise from the fragmented national implementation of Article 17 across the EU, including in Germany through the Urheberrechts-Diensteanbieter-Gesetz (UrhDaG)

These include uncertainty about the scope of licensing obligations, including divergent interpretations of the »best efforts« standard, creating risks of overbroad licensing duties and inconsistent compliance approaches for platforms operating at scale. Additional national remuneration rights imposed directly on platforms (e.g., for uses permitted under exceptions or for »mutmaßlich erlaubte« content) introduce a double-payment risk and go beyond what Article 17 provides. Fragmented transpositions of mandatory user safeguards and exceptions create significant operational burdens, resulting in additional complexity and making it difficult to assess lawful uses consistently across Member States. More fundamentally, the current framework creates a structural risk of overblocking. Automated tools cannot reliably assess context-dependent copyright exceptions and limitations, such as quotation, criticism, parody, pastiche, public domain status or licensed uses. Where platforms face unclear liability risks and divergent national procedural expectations, there is a strong incentive to take conservative removal decisions, which can negatively affect lawful user expression.

The complaint and review process should remain workable and legally predictable; otherwise, platforms risk being pushed into adjudicating complex copyright questions without sufficient legal certainty. Moreover, liability risks remain unclear under divergent national approaches, potentially incentivising overblocking. Finally, territoriality and territorial fragmentation create additional difficulties for platforms operating cross-border, as identical user uploads may be treated differently depending on the Member State's implementation of exceptions and safeguards.

There is also a need for better alignment between Article 17-related obligations and the Digital Services Act. Overlaps or divergences regarding notice-and-action, complaint handling, transparency and platform governance can create additional legal uncertainty for services that must comply with both frameworks. Copyright compliance should not lead to conflicting procedural obligations or disproportionate monitoring expectations, and further regulatory stacking, including in relation to the AI Act, should be avoided.

Impact of the DSM Directive on Achieving Fair Remuneration in Exploitation Contracts for Authors and Performers (Articles 18-22)

Article 18 – Principle of Appropriate and Proportionate Remuneration

The principle of appropriate and proportionate remuneration is broadly legitimate. At the same time, its practical application should reflect the diversity of business models, sectors and production structures in the digital economy, where exploitation is often layered, technologically mediated and based on complex value chains. Overly rigid or one-size-fits-all approaches risk increasing legal uncertainty and transaction costs, interfering with individually negotiated arrangements and undermining efficient market solutions. Proportionality, sector-specific practice and contractual flexibility therefore remain essential.

In addition, remuneration frameworks should ensure that minimum standards do not become inflexible default models that fail to reflect the actual economic value of specific uses. In particular, rules should remain sensitive to causality and to the distinction between direct and indirect revenue attribution in digital markets.

Article 19 – Transparency Obligation

In Germany, the transparency obligations under Article 19 of the DSM Directive (§§ 32d ff. UrhG) create significant practical and legal challenges. The shift to automatic annual reporting imposes a substantial administrative burden, particularly in the audiovisual sector with large numbers of contributors and complex exploitation chains, diverting resources from core creative activities.

A central difficulty is that much of the required usage and revenue data is not collected or technically available, especially for secondary or downstream uses, multi-level licensing structures, sublicensing, multi-territory distribution and bundled business models. These constraints are often structural rather than exceptional and affect not only producers but also intermediaries such as broadcasters and streaming services. This limits the practical feasibility of comprehensive reporting obligations, especially for older contracts.

The framework also raises concerns about the disclosure of confidential business information, including trade secrets and commercially sensitive contractual data, and creates legal uncertainty regarding proportionality, comparable transparency and third-party reporting obligations. Without clearer safeguards, cost compensation and more realistic proportionality standards, the current system risks imposing obligations that go beyond what is practical or necessary. This concern is reinforced by the potential retroactive application to contracts for which relevant data was never collected.

Article 20 – Contract Adjustment Mechanism

In Germany, the contract adjustment mechanism under § 32a UrhG raises practical and interpretative challenges. The shift from »auffälliges Missverhältnis« to »eindeutig unverhältnismäßig niedrige Vergütung« creates legal uncertainty, as the quantitative difference between the two standards is unclear and decades of case law would be disrupted. Determining relevant revenues is difficult: only net revenues directly linked to the work should count, while flat or usage-independent payments complicate assessment. The time frame for the evaluation should be the time at which the contract was concluded, to account for the cross-subsidisation of less successful works. Overall, these ambiguities and practical hurdles may hinder the consistent and effective application of the adjustment mechanism.

In addition, the practical application of contract adjustment mechanisms becomes particularly difficult in complex digital exploitation environments. Revenue attribution may be hard to assess where exploitation is multi-layered, bundled across services, cross-subsidised or embedded in longer-term investment and windowing strategies, or where digital services combine different revenue streams and functionalities in a single offer.

In such settings, contract adjustment requires clear and predictable standards and a sufficiently precise connection between the work at issue and the revenues actually generated by its exploitation, in order to avoid excessive litigation risks and preserve legal certainty in contractual practice.

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 700 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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