IBM

Intellectual Property Law
Mailpoint 110
IBM United Kingdom Limited
Hursley Park
Winchester
Hampshire SO21 2JN
Telephone: +44 (0) 1962 815000
Fax: +44 (0) 1962 818927
Email: IBMUKIPLAW@uk.ibm.com

2 September 2019

Comments to Ministerie van Justitie en Veiligheid regarding Implementatiewetsvoorstel Richtlijn auteursrecht in de digitale eengemaakte markt implementing the commercial text and data mining provisions of the DIRECTIVE (EU) 2019/790

International Business Machines Corporation [IBM] welcomes the opportunity to comment on the Implementatiewetsvoorstel Richtlijn auteursrecht in de digitale eengemaakte markt implementing the commercial text and data mining provisions of the 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 and amending Directives 96/9/EC and 2001/29/EC [DSM Directive].

Artificial Intelligence [AI] is a set of technologies that has risen in importance exponentially over the last few years, particularly with respect to digital transformation. A diverse and numerous set of industries and sectors are already benefitting from its value, and that set continues to grow.

Text and data mining [TDM] is a critical tool for use in AI and data analytics solutions -- TDM is a form of technology-enabled analytics that allows discovering correlations and identifying useful knowledge from information that rests undiscovered in data sets, large and small, in ways that can be processed and harnessed for a myriad of valuable purposes.

Globally, in several jurisdictions, such as Japan and the United States, researchers are already permitted to carry out TDM for both commercial and non-commercial purposes. There is no doubt that digital transformation has been slower than expected in Europe – one reason may be because of the status of current legislation, which is causing organisations to undertake TDM and associated AI activity in other jurisdictions, which are perceived to be more AI-friendly.

Against this backdrop, IBM welcomes the recent commercial TDM exception in the DSM Directive as this is an important public signal to make Europe competitive, in order to attract and retain investment and talent in AI. Further, as the Netherlands works towards transposing the DSM Directive into national law, IBM appreciates the opportunity to provide comments to the Ministerie van Justitie en Veiligheid.

In general, it is a vital next step that any legal and technical hurdles in transposition are kept as low as possible, to ensure that commercial entities (from large corporations with globally distributed locations and personnel, to start ups and SMEs) are able to fully support and engage in commercial take up of TDM in Europe. Further, it is critical that we as lawmakers and policymakers keep at the forefront of our minds the researchers and technical teams who are on the ground and who will be the key implementers of the TDM provisions of the DSM Directive – it is essential that they have legal and technical certainty moving forward.

As such, IBM suggests that language in the transposition related to terms such as "lawful access" and "as long as necessary" in Article 4(1) and (2) respectively, is kept as broad and open as possible, allow for developments in TDM technology and to ensure that researchers and technical teams are not

encumbered unnecessarily and arbitrarily in their TDM activities, a view supported e.g., in Recital 18 of the DSM Directive.

Further, with regards to Article 4(3) and particularly, the reservation of rights for online content, there are several issues to be considered. It is important that legal/technical hurdles in any transposition of Article 4(3) are kept to a minimum, because the scale at which TDM and AI solutions function can already be massive and with ongoing technology improvements, the scale is set to only further increase – thus, any legal/technical hurdles will quickly have ramifications on speed-to-market and progress of AI solutions. Any transposition must be kept broad and flexible enough to accommodate improvements in the advancement of the technology of de facto or standard practices.

With reference to Recital 18, at present, machine readability (as well as cognition) of online terms and conditions is difficult to near impossible for most systems except for the most sophisticated technology. Further, in some instances, it can be difficult to determine where online terms are located/which of the available sets of online terms are applicable.

As such, IBM suggests that, at present, the most feasible method for checking reservation of rights for online content is by using common metadata. Using metadata would overcome the issue of readability, as tools to parse metadata can be implemented fairly trivially and economically. Further, use of metadata would also overcome the issue of an indeterminate location for any reservation of rights information, for example, by structuring the metadata according to a predefined format/syntax (e.g., using tags) that can be parsed at a predefined location (e.g., a robots.txt file or equivalent, which is a protocol/format that is used widely by web crawlers and web robots today).

Further, IBM suggests that for online content, TDM be permitted if prior reasonable efforts have been made to check rights reservations with respect to examining machine readable and understandable data (such as the robots.txt file).

In summary, it is incredibly positive for Europe that commercial TDM will become feasible under the new law. However, as Member States begin to transpose the DSM Directive into national law, we advocate that any legal and technical hurdles are kept as low as possible, in the interests of fostering continued progression and innovation of AI and its related economic and societal benefits for Europe.

IBM is more than happy to be further involved in these continuing discussions.

Terry Ilardi
Senior Counsel, IP Policy

Jean-Marc Leclerc
Government and Regulatory Affairs Executive
jmleclerc@be.ibm.com

Anita Shaw
UK & European Patent Attorney
anita_shaw@uk.ibm.com