European Games Developer Federation

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EGDF approach Copyright and AI

About EGDF

1. **The European Games Developer Federation e.f. (EGDF)[1]** unites national trade associations representing game developer studios based in 19 European countries: Austria (PGDA), Belgium (FLEGA), Czechia (GDACZ), Denmark (Producentforeningen), Finland (Suomen pelinkehittäjät), France (SNJV), Germany (GAME), Italy (IIDEA), Malta (MVGSA), Netherlands (DGA), Norway (Produsentforeningen), Poland (PGA), Romania (RGDA), Serbia (SGA), Spain (DEV), Sweden (Spelplan-ASGD), Slovakia (SGDA), Turkey (TOGED) and the United Kingdom (TIGA). Through its members, EGDF represents more than 2,500 game developer studios, most of them SMEs, employing more than 35,000 people.

2. **The games industry** represents one of Europe's most compelling economic success stories, relying on a strong IP framework, and is a rapidly growing segment of the creative industries. The European digital single market area is the third-largest market for video games globally. In 2019, Europe's video games market was worth €21bn, and the industry has registered a growth rate of 55% over the past five years in key European markets[2]. All in all, there are around 5,000 game developer studios and publishers in Europe, employing close to 80,000 people.[3]

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[1] For more information, please visit www.egdf.eu
[2] ISFE Key Facts 2020 from GameTrack Data by Ipsos MORI and commissioned by ISFE https://www.isfe.eu/data-key-facts/
[3] European Games Industry in 2018:
http://www.egdf.eu/wp-content/uploads/2020/08/European-Report-on-the-Game-Development-Industry-in-2018.pdf

1. AI and the games industry

The games industry is the forerunner of AI in the cultural and creative sector

There are no major European gaming devices or platforms left on digital markets. However, European game developers are among the global leaders in digital content. Consequently, cultural and creative industries, particularly the games industry, should be one of the key sectors where the Commission should accelerate the use of new and novel technologies.

The games industry is the forerunner of the digital era. The ever-increasing technological requirements of new games are pushing the boundaries of technological and business innovation. During the last decade, the games industry was a pioneer of big data analytics and community management. Now, it is taking the same role in the use of AI in the creative process.

AI is widely used in the games industry, for example, in creating content, improving animation quality, creating in-game avatars for players to communicate with, identifying bugs, optimising and personalising game difficulty, automating player support and combatting cheating and fraud. The Unity engine is an excellent example of the potential multiplier effects that technologies from the games industry can have on other sectors. The Unity engine was initially developed for games but is now used in the animation, car and architecture industries[4].

The game technology developers are devoted to building ethical AI

A trustworthy and responsible AI approach is important also for low risk AI applications like video games. First of all, the video game sector promotes responsible data management. It takes great care to protect player data – whether used traditionally or by AI and to make sure the data is used in a manner consistent with privacy principles and regulations, such as the GDPR.

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[4] For more information, please visit: https://unity.com/madewith

Secondly, the leading games industry tech developers have published their guiding principles for AI development. Based on them, AI development in the games industry can be summed up as being based on the following principles[5]:

- **Be fair and inclusive and avoid creating or reinforcing unfair bias** Particular attention should be paid to protect vulnerable groups such as children and minorities

- Build and test your **AI for reliability and safety**

- **Develop AI for ethically acceptable purposes, be accountable to and responsible for people,** and do not use AI to take unfair advantage of them

- **Be trustworthy and secure that AI Is in line with privacy and data protection and security design principles**

- **Be transparent, honest and clear with people using the product.** It is particularly important to be transparent about the algorithmic decision making/AI system's capabilities and limitations, allowing people to set realistic expectations

2. AI and copyright

Principles for regulating the copyright protection of AI-generated content

The possible new regulatory approach on the copyright protection of AI-generated content must follow the following principles:

- **Neutrality:** Instead of building sectoral approaches, the possible new regulations should strictly follow technology-, content- and business-model neutrality.

- **Harmonisation:** The regulatory framework for the copyright protection of AI-generated content should be fully harmonised.

- **Uniformity:** The European Union must provide clear and unambiguous definitions for key concepts of the possible new

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[5] For more information, please visit for example:
- Unity: https://blogs.unity3d.com/2018/11/28/introducing-unitys-guiding-principles-for-ethical-ai/
- Microsoft: https://www.microsoft.com/en-us/ai/responsible-ai?activetab=pivot1%3aprimaryr6
- Google: https://ai.google/principles/
- Sony: https://super-ai.diascreative.net/sony-group-ai-ethics-guidelines

regulations (e.g., AI). The definitions should be the same across policy sectors (e.g. currently drafted Artificial Intelligence Act). The legislative environments for the different sectors must constitute a consistent whole.

- **Pro-innovation:** Ironically, the complex music licensing environment has been a key driver of innovation behind the recent boom of AI-generated music (see for example Jukedeck[6], Wolfram Tones[7], Muzoti[8] or Aiva[9]) that is now starting to replace humans in the creative process. Instead of encouraging the minimisation of human involvement, any new regulatory environment should be built to encourage investment in R&D on AI-generated content, and the use of AI and AI-generated content by human creators. On the one hand, this requires good copyright protection of AI-generated content. And on the other hand, it requires a regulatory environment that encourages the use of human-generated content in the training of AI.

- **Clarity and reliability:** In order to build a predictable regulatory framework, the regulation itself has to be clear and understandable, not just the guidance documents. The current significant market uncertainty around the implementation and impact of the DSM Copyright Directiveis an excellent example of the harmful outcomes of poor regulation.

- **Global approach:** Digital markets are, by their nature, global rather than regional. Therefore, EGDF fully supports the efforts to minimise the fragmentation of global digital markets by pushing worldwide regulatory standards on the copyright of AI-generated content. Even when the European Union and third countries disagree on a joint approach, the different regulatory approaches must be as transparent as possible for European companies that operate globally.

Preparations for the future improvement of the European copyright framework should not be started before the DSM Copyright Directive is fully implemented on the member state level

Many of the key copyright questions related to the use of AI in the games industry are connected with the different ways EU member states are

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[6] Jukedeck was an UK besed AI start up that was recently purchased by TikTok owner Bytedance
https://www.reuters.com/article/us-china-bytedance-idUKKCN1UJ0NN
[7] For more information please visit: https://tones.wolfram.com
[8] For more information please visit: https://www.muzoti.com
[9] For more information please visit: https://www.aiva.ai

going to implement the DSM Copyright Directive)[10]. Therefore, the Commission should carefully map the current state of the European copyright framework during 2022 before going forward with preparations for further regulatory changes.

The key areas of further clarification

The key areas that would require further clarification are:

- **The threshold of originality in the context of copyright protection for AI-generated content:** Currently, the threshold of originality needed for copyright protection is defined differently in different countries. In some countries, human involvement is required, and in some not. In different EU member states, different levels of skill, labour and judgement are needed to achieve copyright protection.

- **Implementing the text and data mining (TDM) exception to allow training the AI with copyright-protected content:** All Member States should clarify that processing data for AI training should be encompassed within the TDM exception. Furthermore, it is still unclear how far commercial activities will fall under the scope of the TDM exception in different member states and under what conditions.

- **Moral rights and AI**

  - First of all, it is essential to keep in mind that copyright exceptions also apply to moral rights. Consequently, the national implementation of the text and data mining exception will also clarify the extent to which authors are allowed to use their moral rights to limit the use of their copyright-protected content for training an AI. However, the text and data mining exception is not the only exception that might impact AI training. For example, the panorama exception might affect the training of A- based on 3D images from public spaces. In any case, moral rights related to the use of AI to process copyright-protected content should be fully harmonised, as different national rules are fragmenting the digital single market area.

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[10] 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: https://eur-lex.europa.eu/eli/dir/2019/790/oj

- Secondly, the applicability of moral rights should be evaluated on a case-by-case basis. The moral right of integrity, for example, is more likely to apply when an AI is used to mimic or slightly modify an artistic work. It is less likely to apply when AI is used, for example, to make the work available in a higher resolution.

- **A new sui generis economic right to protect AI-generated content:** In the long run, to secure investment in R&D on AI-generated content that does not include any human involvement, the European Commission should explore the possibility of creating fully harmonised and transferable sui generis economic rights for AI-generated content. It is worth noting that this already seems to be the direction in which the markets are going in their standard contract terms. On the other hand, Aiva, for example, allows the transfer of all economic rights of their AI-generated content against a monthly fee[11]. Similarly, the Unity game engine that includes AI-generated content also transfers all rights to the game developer against a monthly fee[12]. On the other hand, the Unreal game engine, which also includes AI-generated content, takes a 5% licensing fee of revenues exceeding USD 1million[13].

AI mimicking an artist style

There is no silver bullet in the fight against copycat games

Already now, in the pre-AI era, copycat games made by human beings are a common problem. Extending copyright protection to cover style is not the solution as it would cause significant uncertainty about when one is committing a copyright infringement while developing further an artistic style. Consequently, this question should not be seen as an AI-specific problem. Instead, it should be approached as a general challenge that requires a multitude of different tools to be tackled:

- **Copyright:** Strong IPR protection tools are needed to defend against trademark and copyright infringements.

- **Consumer protection:** Consumer protection authorities and digital distribution platforms should work harder to remove games that

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[11] For more information please visit: https://www.aiva.ai
[12] For more information, please visit https://unity3d.com/unity/faq/2491
[13] For more information, please visit: https://www.unrealengine.com/en-US/faq

mislead consumers to believe that they are original games or new games developed by European game developers or publishers.

AI-made or AI-assisted labels

Information obligations towards end-consumers are more a consumer protection or AI regulation topic than a copyright issue. AI-based tools are already widely used in creative industries, and their use is only likely to increase in the near future. Therefore, an AI-made or AI-assisted label would be so common that they are not likely to bring added value for the end-user. The use of such labels should be limited to high-risk use of AI that poses significant and evident risks to health and safety or fundamental rights.

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