

Use of the VdFS-repertoire for AI-training purposes (collective declaration of reservation of rights pursuant to Section 42h Paragraph 6 of the Austrian Copyright Act)

Generative artificial intelligence (AI) has entered the public consciousness, at the latest, since the release of ChatGPT in November 2022. Since then, applications related to generative AI-services have developed rapidly and will continue to grow - particularly in the field of artistic works and performances. The ability of generative AI to reproduce and transform copyright-protected works and performances of any kind presents many opportunities for the audiovisual market but also entails risks regarding fair compensation and the livelihoods of film-creators and performing artists in the audiovisual sector. Numerous studies on various AI-models have shown that training data is stored in a way that, among other things, enables an exact reproduction of a specific (film) work or a specific acting performance.

As a collecting society, we see our role as supporting the development of AI-applications in the creative sector by, on the one hand, recognizing the existing potential for innovation and, on the other hand, safeguarding and protecting the interests, rights, and claims of the filmmakers we represent to the best of our ability. Generative AI-models frequently use works and performances that are protected by copyright for their training. Both the input and output regularly involve the reproduction of pre-existing works and performances.

Under Section 15 of the Austrian Copyright Act, this right is, in principle, exclusively reserved for film-authors and performing artists in the audiovisual sector. An exception to this is provided for in Section 42h Paragraph 6 of the Austrian Copyright Act, which permits the free use of works for “text and data mining (TDM)” for commercial purposes. This refers to a process in which large quantities of text and data in digital form are analyzed, extracted, and utilized, for example, to gain information by identifying patterns, trends, and correlations.

According to Section 42h Paragraph 6 of the Austrian Copyright Act, such use is permitted only as long as the rights holder does not declare a reservation of rights (so-called “opting out”). This national provision implements Article 4 Paragraph 3 of the European DSM-Directive (Directive 2019/790/EU) and is intended to enable authors and performing artists to control the commercial use of their protected works and performances. The European legislator thereby intends to ensure that rightholders can be adequately and effectively compensated for the use of their works and performances.

Legal Basis (EU and national)

I. DSM-Directive (Directive 2019/790/EU)

Article 4 - Exception or limitation for text and data mining

- 1. Member States shall provide for an exception or limitation to the rights provided for in Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, Article 4(1)(a) and (b) of Directive 2009/24/EC and Article 15(1) of this Directive for reproductions and extractions of lawfully accessible works and other subject matter for the purposes of text and data mining.*
 - 2. Reproductions and extractions made pursuant to paragraph 1 may be retained for as long as is necessary for the purposes of text and data mining.*
 - 3. The exception or limitation provided for in paragraph 1 shall apply on condition that the use of works and other subject matter referred to in that paragraph has not been expressly reserved by their rightholders in an appropriate manner, such as machine-readable means in the case of content made publicly available online.*
 - 4. This Article shall not affect the application of Article 3 of this Directive.*
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II. Federal Act on Copyright in Literary and Artistic Works and on Related Rights (Austrian Copyright Act).

§ 42h of the Austrian Copyright Act - Text and Data Mining

(6) Any person may reproduce a work for their own use in order to automatically analyze texts and data in digital form and to obtain information, including information on patterns, trends, and correlations, provided that they have lawful access to the work. However, this does not apply if the reproduction is expressly prohibited and this prohibition is appropriately indicated by a restriction on use - for example, in the case of works made publicly available on the Internet using machine-readable means. A reproduction made pursuant to this paragraph may be retained for as long as necessary for the purposes of data analysis and information extraction.

The extent to which commercial applications of generative AI services are legally covered by Section 42h of the Austrian Copyright Act has not (yet) been conclusively clarified.

VdFS - Collecting Society of Audiovisual Authors - has had the authority to make a collective declaration of the reservation of rights ("opting out") on behalf of its beneficiaries granted to it in the representation agreement (https://www.vdfs.at/media/vdfs_membership_contract.pdf) as follows (see Section 3.3.):

The rights holder also entrusts VdFS with the inclusion or agreement of a reservation of rights within the meaning of § 42h (6) of the Austrian Copyright Act, in particular on the VdFS website, without VdFS bearing any liability for the validity of such a reservation of rights with regard to the disputed requirements for its validity.

We hereby note that VdFS, on behalf of its beneficiaries, publicly declares on its website the reservation of rights pursuant to § 42h paragraph 6 of the Austrian Copyright Act ("opting out") for all uses of the audiovisual works and performances represented by VdFS since the aforementioned legal provisions took effect.

This reservation of rights, which is also visible on the VdFS-member-list (https://www.vdfs.at/media/vdfs_mitgliederliste.pdf), also covers uses outside of Austria in accordance with the legal systems applicable in the respective foreign countries.

VdFS points out that licensees (film-producers, broadcasters, streaming services, etc.) who reproduce and make publicly available works and performances from the repertoire represented by VdFS are obligated to declare this reservation of rights in connection with the reproduction (Section 15 of the Austrian Copyright Act) and making available (Section 18a of the Austrian Copyright Act) in a machine-readable form in such a way that third parties (such as providers of generative AI-services) cannot use the licensed works and performances without compensation under Section 42h of the Austrian Copyright Act.

Due to the aforementioned reservation of rights, the exclusive rights of the VdFS-beneficiaries (film-authors and performing artists in the audiovisual sector) are restored, and third parties are consequently not entitled to reproduce the VdFS-repertoire or make it available to third parties for TDM- and/or AI-based uses without the consent of the rightholders.