



AI and Copyright

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Executive summary

1. Video Games Europe supports the responsible development of AI technologies and a thriving and robust AI economy. As with many technological advances, the opportunities presented by the continuing development of AI systems are tremendous for consumers of video games products and services, but come with challenges and new legal questions surrounding both the copyrightability of works produced with assistance from AI systems and the use of copyrighted works as inputs.
2. The video games industry and its overall value chain rely inherently on both advances in technology and an effective copyright regime to allow creativity and investment in new works to be sustained over the longer term. Copyright law has been carefully scoped to achieve this balance and includes exceptions and limitations to permit rightsholders to prevent the copying of their works while allowing new ideas and concepts to develop. We believe that it is critical that the underlying goals, purposes and balance of the existing copyright regime are upheld to support innovation and to protect the rights of creators. This balance is, we believe, reflected in Articles 3 and 4 of the DSM Copyright Directive (Directive 2019/790).
3. AI applications in video games do not encroach on fundamental rights or the safety of individuals. We believe that the regulation of both generative and non-generative (i.e., analytic) AI should take a risk-based approach, where the sorts of uses in video games should be considered the lowest risk and subject to the least restrictive transparency, disclosure and reporting requirements. We also believe that transparency obligations must be reasonable and proportionate, and should take into account the protection of trade secrets.
4. We also believe that where foundation models (i.e., large AI models trained on enormous quantities of unlabeled data) are developed and used exclusively in internal, non-high-risk settings (i.e., not available to the public nor placed on the market), used for example to generate short pieces of dialogue in an open-world game, transparency and disclosure obligations should definitely not apply.
5. We do not believe that creative works should be burdened with labelling obligations in contexts where users already expect to interact with AI-assisted and AI-generated content, such as in video games. To demand otherwise could be highly disruptive to the user's in-game experience. Concerns over synthetic media and fraud, misinformation, invasion of privacy and other harms are not present in expressive works for entertainment that depict fictional worlds, such as video games.
6. AI technologies and how video games companies use them are still evolving, and until the surrounding issues have come into much clearer focus, we would encourage policy makers to continue to engage with industry stakeholders and to proceed with caution before making or recommending changes to either law, regulations or policy.

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AI and video games

AI has been used in video games for at least a decade as a tool for the generation of backgrounds and terrain, for the processing and analysing of data within games, for quality control purposes and for online safety purposes, such as advanced word filtering and URL filtering tools. The use of AI opponents in games goes back to classics like *Pac-Man* with its autonomous ghosts, each having distinct patterns and strategies, made possible through software. Today, AI including machine learning is widely used in video games to improve content creation, animation, sound and music, natural language processing, as well as to automate repetitive and tedious development tasks. For example, some game publishers and developers use image, text and code generator tools, both proprietary and licensed third-party, to generate output, whether to facilitate content generation, for ideation, concept testing and development, generating mock virtual worlds or short pieces of computer-controlled character dialogue.

Generative AI

Generative AI systems are models that use machine learning algorithms to train on existing content and then create new content, often with regard to user-provided parameters.

Generative AI is widely expected to take video game development to the next level by enabling developers to automate content creation processes, reducing development time, and offering a broader range of creative possibilities and user experiences. Generative AI can be used to generate many of a video game's components, such as code, narratives and visuals, accelerating many aspects of game development. Generative AI tools have the potential to vastly improve workflow and to reduce more redundant development and production costs (e.g., a script writing tool that frees writers to focus on the core plot and narrative rather than on NPC (non-player character) dialogue that is often short and mundane. Generative AI tools allow artists to spend more time on the creative aspects of making in-game artwork, while freeing up time from more tiresome aspects by, for example, fleshing out backgrounds once the general artistic direction has been set. Generative AI tools also show promise in facilitating safer experiences for players of video games online, as they can be used in connection with moderation of ancillary features like text chat to improve the quality, accuracy and speed of moderation.

Video games companies are today becoming sources for generative AI input, creators of generative AI output, developers of generative AI models and users of third-party generative AI tools. They see tremendous potential in AI and generative AI to expand creativity, to facilitate and make more efficient the development of games, and to improve the player experience. It is nevertheless important to emphasise that most AI applications used in video games to date are not generative, and that those that are, are usually

proprietary, rather than third-party, though the trend is toward increasing use of generative AI tools, both proprietary and third-party.

Training the models: Text and Data Mining

As in other creative sectors, generative AI in video games brings up questions regarding the use of copyrighted data for training and the protection of the new creations enabled by the technology. The first question is whether at the input layer of AI, machine learning on pre-existing datasets infringes copyright. Until quite recently, a developer or publisher's use of machine learning for non-creative use cases usually relied on data derived from the games themselves (such as a game's telemetry), and mostly analysed players' behaviour. Copyright issues were not relevant as the data was likely to be already owned by the video games company concerned, and the output of the machine learning was not usually a creative work. Where companies trained AI models using their own creative assets as inputs, the copyright infringement risk associated with the training process was non-existent or manageable.

More recently, AI development was taken into account in the mandatory text and data mining (TDM) exceptions to copyright infringement provided under the DSM Copyright Directive (Directive 2019/790), regulated in Articles 3 (Text and data mining for the purposes of scientific research) and 4 (Exception or limitation for the purposes of text and data mining). TDM is defined in Article 2(2) of the Directive as "*any automated analytical technique aimed at analysing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations*", as well as "*the automated computational analysis of information in digital form, such as text, sounds, images or data*" enabled by new technologies (Recital 8).

The TDM exceptions introduced by the DSM Copyright Directive allow the reproduction of copyright-protected works for scientific research or for other purposes. Where TDM is carried out for purposes other than non-commercial research, the rules provide rightsholders with the choice of opting out in order to prevent their works being mined. This framework provides creators and other rightsholders with the ability to opt out of the use of their works by commercial AI developers. Our member companies are committed to fully respecting the law and the rights of creators who choose to opt out.

We think that the TDM exceptions in the DSM Copyright Directive provide a suitable legal framework at the input level and that policy makers should avoid the creation of a new layer to the EU legal framework that could distort competition, lead to a lack of clarity, the risk of legislative contradiction and legal uncertainty for businesses.

Content produced by generative AI

At the output level, the video games industry believes that the copyright status of content produced by generative AI should follow the same rules for copyright eligibility as any other content: if AI is used as a tool by an author – such as a game developer – in the creation of a work which still expresses his or her own creativity in an original way, then this new work should enjoy copyright protection.

Copyright law in the EU is centred around the original author as a human being. To obtain copyright protection, a creation must be a "work" and one must be the original author or have obtained the copyright by transfer. The concept of "work" is an autonomous and harmonised concept of EU law. The subject matter must be "original", meaning that it must reflect the author's personality and must also be "identifiable with sufficient precision

and objectivity” (Case C-683/17 *Cofemel*). There must be a link between an author’s creativity and the work produced. Where there is no human author, a work cannot be original and without originality, a work cannot be protected by copyright.

The European Commission has suggested a four-step test to determine copyright protection for AI-assisted output:

- Step 1 – The output must be a production in the literary, scientific or artistic domain
- Step 2 – It must be the result of human intellectual effort
- Step 3 – It must be original and reflect human creative choices
- Step 4 – It must be the expression of the human creator’s creativity.

Player-generated contributions

Game players’ contributions are expected to be a significant advancement of the games industry enabled by generative AI. Within this framework, game players are most likely to use AI tools provided by the games company or potentially third-party tools integrated into a game via an API. Insofar as copyright in any resulting outputs vests in the player, including in the player’s prompts, securing the transfer of ownership or the licensing of player copyright to the video game company may be achieved under contract (e.g., the relevant EULA or other terms of use).

Additional infringement risks may arise in this context as players seek to input prompts inspired by third party assets, for example to create characters, environments or items that exist in third-party games, films, TV programs or books. The risk of players creating UGC that infringes third-party rights already exists today. However, the introduction of generative AI tools may increase the incidence of infringement by making creation easier or, depending on the facts, may affect a publisher’s ability to rely on the hosting defence.

Transparency

Consistent with our position that policy makers should encourage a robust marketplace for emerging technologies, such as generative AI, we believe that any mandated disclosure of the use of copyrighted works used in machine learning would need careful consideration and balancing of priorities. For example, there should be no mandated disclosure when the AI developer owns or licenses the works at issue or the resulting output, or when mandated disclosure could jeopardise confidential information, trade secrets or other protected data.

Transparency and record-keeping mandates with respect to generative AI models also raise questions of feasibility. Any such requirements should be narrowly tailored to the particular purpose. Training materials for foundational models may constitute millions, or even billions, of data entries, the maintenance of which may become onerous for developers. We would recommend that any such mandates must consider both feasibility and relevance to the objective that they seek to achieve.

As stated above, we also believe that, in situations where foundation models are developed and used exclusively in internal, non-high-risk settings (i.e., not available to the public nor placed on the market), used for example to generate short pieces of dialogue for non-playable characters in an open-world game, transparency and disclosure obligations should not apply.

We also believe that information about the use of AI to generate content should not be mandatory when the AI is used merely as a tool in the creative process or is used in an ancillary manner or for purposes unrelated to the generation of the content itself. Indeed, as AI becomes more and more intertwined in production processes, a transparency obligation extending to the disclosure of the methods of creative processes could lead to disproportionate and counterproductive effects, with limited benefit to users who expect this already. We also believe that transparency obligations must take into account the protection of trade secrets.

Labelling

Creative works, including works created through the process of a player interacting with a video game, should not be burdened with labelling obligations in contexts where users are already expecting to interact with AI-assisted and AI-generated content. To demand otherwise would, we believe, be disruptive to a user's in-game experience.

International collaboration

Recognising the global nature of the video games industry, we believe that fostering international collaboration is essential. The EU should actively engage with other jurisdictions to establish common principles and standards for AI and copyright, facilitating a cohesive global framework that both encourages innovation and properly protects creators.

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About Video Games Europe

Since 1998, Video Games Europe has ensured that the voice of a responsible games ecosystem is heard and understood. Its mission is to support and celebrate the sector's creative and economic potential and to ensure that players around the world enjoy the benefits of great video game playing experiences. Video Games Europe represents 19 European and international video game companies and 13 national trade associations across the continent. Europe's video games sector is worth €24.5bn, and 53% of Europeans are video game players. We publish a yearly Key Facts report with the latest data on Europe's video games sector.