GESAC POSITION ON GENERATIVE AI AND COPYRIGHT

At a time when EU institutions are considering various options to address the impact of GenAI on authors' rights, **GESAC believes that a targeted legislative intervention is urgently needed** to ensure that creators can participate fairly in the growing AI market and that Europe's cultural and creative ecosystem remains sustainable.

Such urgency has been clearly reflected in recent work by the EU co-legislators.[1] **GESAC fully aligns with these political assessments** suggesting EU level intervention and considers that they provide a clear and legitimate basis for a dedicated EU legislative initiative as set out in our below views.

MAIN REASONS FOR INTERVENTION

1. **The unauthorised use of protected works by GenAI services continues on a massive scale**.

2. The **CDSM Directive only addresses certain acts of reproduction linked to TDM** and does not cover the full range of copyright-relevant acts involved in developing, operating and offering GenAI services. Although exclusive rights should apply, GenAI services refuse application of any rights to their acts and the absence of enforceable transparency and cooperation mechanisms in any case renders the rights ineffective in practice.

3. The **implementation instruments adopted by the AI Office** have **significantly weakened the practical effectiveness of the AI Act's copyright-related provisions.**

4. **The few licences that exist are concentrated among major rightsholders and global AI** companies, mainly as **result of US-based litigation** settlements. They do not cover European repertoire, and those services still refuse to obtain licences from authors' societies based on EU laws.

5. **AI-generated content is increasingly** used by digital service providers, broadcasters and public spaces, **competing directly with original works** and thus substituting them. This **substitution effect** also raises challenges to the application of existing copyright rules, particularly where protected works are not recognisable in the output.

Neither reopening the CDSM Directive, nor adjusting the AI Act would provide the needed legal certainty, and corrective measures based on enforcement only of those laws would also fail to address the issue comprehensively.

A legislative initiative is required to restore balance, stop ongoing infringements and ensure effective and continuous protection of authors' rights in the GenAI environment, enabling a well-functioning licensing market for GenAI services and appropriate remuneration across the GenAI value chain.

SCOPE OF TARGETED LEGISLATION

1. Use of protected works as <u>input</u> to GenAI services

- Clarifying that **EU copyright and enforcement rules always apply to GenAI services available in the EU**, regardless of where training takes place, whenever the actual or potential harm occurs in the EU, a view also clearly expressed by the Member States and EP. This is a prerequisite to allow a licensing market.

- Introducing **transparency obligations specifically designed for copyright protection covering the full AI value chain**. GenAI services should be required to cooperate in good faith with CMOs and rightsholders with a view to conclude licensing agreements, as they undertake copyright-relevant acts when offering their services.

- Introducing an automatic **rebuttable presumption of use to rebalance the burden of proof** that should apply **when GenAI services refuse to cooperate and negotiate licences with rightsholders and/or fail to provide the adequate transparency required by these new rules** (what is required in the Transparency Template is not workable and falls below what is acceptable for creators). It should cover both the training and functioning stages (*e.g.* retrieval-augmented generation, memorisation, responding to prompts, *etc.*). GenAI services should be required to hold licences unless they can demonstrate no protected works were ever used.

[1] The Danish Presidency Summary Report on "Fostering a well-functioning framework for licensing in the age of AI" highlights that a strong majority of Member States calls for additional measures, and the European Parliament (EP)'s Resolution on "Generative AI and Copyright", stresses that current copyright law is insufficient to address GenAI-related licensing challenges and explicitly calling for an additional legal framework

2. Substitution and dilution effect in output markets

AI-generated content is increasingly replacing original human-created works in streaming services, broadcasting, digital platforms and several other markets – creating unfair competition with protected repertoire and a distorted competitive environment. Yet such AI-generated content can only exist because AI models were trained, developed or operated using original creative works in the first place, even where pieces of original works are no longer identifiable in the outputs.

Addressing output substitution is as important as ensuring legal certainty in input licensing markets. While working on protecting the value at the input stage, we should not allow it to be massively diluted and substituted at the output stage. **Substitution already exposes European creators to serious revenue losses** (around 21–28%) as evidenced by recent national, international and internal sectoral studies.[2]

The GenAI market is not and never will be only about access to identical copies of existing works. Nor will it remain limited to remixes, mash-ups or cover versions of existing works licensed within "walled gardens". AI outputs unfairly substitute original works across many markets that are primary sources of revenue for creators also where original works cannot be detected.

The output market requires a new legal solution, and the forthcoming legislative initiative is the chance to address this unfairness at EU level.

To ensure the continuous remuneration of authors and other rightsholders, the proposal should:

- While ensuring that synthetic content (output) itself is not copyright protected, **provide a copyright-based solution** to enable creators' continuous remuneration from the use of AI outputs, irrespective of such outputs not containing identifiable elements of original works;
- **Establish a legal basis** for a remuneration claim regarding the output either through the creation of a new right, or the extension of existing rights to such usages, or a new dedicated scheme;
- **Preserve the application of copyright where licensing models are possible** based on the use of specific protected works in the input or output stages, **and introduce such a remuneration claim where outputs do not include identifiable parts** of original works and licensing is therefore impossible;
- **Consider collective management as the essential mechanism** to prevent market concentration by a few major players, promote European cultural diversity and innovation, provide legal certainty for third-party users and GenAI services using such content as substitution, and incentivise use of human created works;
- **Apply to third parties using such content** (such as streaming platforms, restaurants, shops, etc.), **as well as the GenAI services**, **if/where they offer such content in substitution** to and in competition with original works as a main or additional part of their service (AI Overviews, social media platforms offering their AI-generated content to match user uploads, etc.).

NON-SOLUTIONS

GESAC cautions against proposals that would add complexity without addressing core problems.

As regards the input stage, without guarantees in substantive law, a central EU-wide opt-out registry and/or a mediation mechanism would only delay compliance, perpetuate current large-scale infringements, and thus would not help the creation of a functioning licensing market. Corrective enforcement measures trying only to implement the current law without substantive law proposals would also fail to provide a satisfactory and longstanding solution.

As regards the output stage, considering the growing nature of GenAI markets, working only on labelling and technical measures to prevent infringements in the output would remain a very simplistic approach. On the other hand, relying mainly on continuous litigation based on copies of original works in output (which can eventually diminish as models get more sophisticated) cannot be a legally and economically sustainable solution for creators and other rightholders.

[2] Goldmedia, AI and Music: Market Development of AI in the Music Sector and Impact on Music Authors and Creators in Germany and France; Know Media, Estudio sobre el impacto económico y social de la IA en la creación musical y sus efectos en otros ámbitos de la cultura; HBS Economics, The Economic Impact of Generative AI on the Danish Music Industry; PMP Strategy, Study on the Economic Impact of Generative AI in the Music and Audiovisual Industries.