

Law, Governance and Technology Series 69

Rosa Ballardini

Rob van den Hoven van Genderen

Sari Järvinen *Editors*

# Emotional Data Applications and Regulation of Artificial Intelligence in Society

 Springer

# **Law, Governance and Technology Series**

Volume 69

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Rosa Ballardini • Rob van den Hoven van  
Genderen • Sari Järvinen  
Editors

# Emotional Data Applications and Regulation of Artificial Intelligence in Society

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# Emotional AI and the Consensus-Based Remuneration Regime in Southeast Asia



Artha Dermawan and Péter Mezei

**Abstract** Some emotional generative AI (GenAI) companies have acquired the power to extract copyright-protected works from anyone in their orbit without prior authorisation. Such monopolistic abuses could potentially disrupt the market for these copyrighted works, thereby forming the basis for numerous lawsuits across multiple jurisdictions. Indeed, the creative industry will be greatly affected by this phenomenon, let alone rights-holders in the Global South including the Association of Southeast Asian Nations (the ASEAN) who have been suffering from ineffective copyright enforcement and restricted freedom of expression for generations. This chapter discusses how to remunerate rights-holders whose work is unlawfully used to train GenAI systems, focusing on the ASEAN and how their non-interference principle (the ASEAN Way) could address this issue. Moreover, a limited Brussels Effect on Text- and Data-Mining (TDM) regulation in the ASEAN is presented. This chapter finds that the ASEAN Way remains relevant to serve as the foundation for remunerating rights-holders in the ASEAN. Furthermore, this chapter proposes that through the Initiation of GenAI Training Remuneration (TDR), stakeholders, following the spirit of ‘Gotong Royong’ in the Malay Archipelago, could achieve a consensus on a pro-rata model on the amount and method of remuneration for machine learning by emotional GenAI applications.

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## 1 Introduction

By introducing complex challenges around the creation, use, and distribution of emotionally attached content, the rapid evolution of emotional generative AI (GenAI) is reshaping the copyright landscape.<sup>1</sup> At the forefront of the contemporary copyright debate is the issue of how emotional content generated by AI should be protected and managed. This chapter specifically addresses the unlicensed use of copyright-protected works, replete with emotional expression, for training such emotional GenAI systems. These systems are trained through sophisticated Text-and Data-Mining (TDM) processes to interpret and replicate the complex human emotional expression within literary and artistic works, thereby raising new challenges within copyright law.<sup>2</sup>

The data used during TDM comes from three primary sources: the first comprises data that is not subject to copyright or is in the public domain; the second includes data that is under copyright but is made available under permissive licenses, such as Creative Commons; and the third, and most legally contentious, involves copyright-protected data utilised without permission. This latter category can be further divided into uses that either infringe upon or do not infringe upon the market for the copyright-protected work.<sup>3</sup> This discourse is particularly concerned with uses that could undermine the market value of the original work, rather than its non-commercial aspects. Amid this landscape, the appropriation of copyright-protected emotional expressions for TDM—which could threaten the market value of such expression—has precipitated copyright litigation by rights-holders across numerous jurisdictions.<sup>4</sup> These litigations refute the notion that employing emotionally attached creative works—such as the intricate melodies of musical compositions, the poignant strokes of visual arts, and the rich narratives of literary pieces—for the purpose of training GenAI constitutes a breach of copyright protection.

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<sup>1</sup>Works of art created by humans are intrinsically tied to the emotions of their creators and often resonate deeply with their owners. This connection is deeply rooted in various art theories, which posit that art is a fundamental expression of human emotion. Art serves as a medium through which individuals convey their feelings, experiences, and perceptions. Each piece of art is a reflection of the emotional state of its creator at the time of its inception, making it a powerful form of personal and universal communication. Moreover, as previously discussed in the introduction of this book, emotional GenAI is capable of not only generating literary and artistic works, but also emotionally attached content that could entertain its users. See, Shahid et al. (2023), pp. 1–9.

<sup>2</sup>Alpaydin (2004), p. 2.

<sup>3</sup>Sobel (2021), pp. 222–223.

<sup>4</sup>See ‘Lawsuits v. AI.’ Available at: <https://chatgptiseatingtheworld.com/2023/10/19/master-list-of-lawsuits-v-ai-chatgpt-openai-microsoft-meta-midjourney-other-ai-cos/>.

In most jurisdictions, including the European Union (EU)<sup>5</sup> and the Association of Southeast Asian Nations (the ASEAN),<sup>6</sup> emotional artistic expressions—products of human intellect—enjoy robust copyright protection. However, the emergence of emotional GenAI highlights the irreplaceable qualities of human authors, such as emotional intelligence and creativity, which AI cannot replicate. The unauthorized use of these works for AI training, particularly when it competes with or substitutes the original market, suggests the need for remuneration. Indeed, recognizing and rewarding the inherent value and profound impact of human-made content on audience engagement is essential, ensuring authors' creativity and individuality are respected within the digital age's copyright framework.

Furthermore, there is a concerted effort to address the implications of emotional GenAI technologies and to safeguard the interests of rights-holders from any potential adverse effects. Within the international arena, jurisdictions including the EU<sup>7</sup> and the ASEAN<sup>8</sup> are at the forefront, enacting regulations and frameworks that ensure the development and use of emotional GenAI is conducted with transparency and accountability. However, to date only the EU, Singapore, and Japan have demonstrably sought to protect rights-holders by introducing TDM exceptions.<sup>9</sup>

This chapter explores how the ASEAN member states, through the proposed ASEAN Guide on AI Governance and Ethics (ASEAN AI Framework) and the principle of non-interference (the ASEAN Way), could protect rights-holders and effectively accommodate TDM within the community. By drawing a comparative analysis with the EU copyright directives, it is suggested that ASEAN could benefit from adopting an author-focused, consensus-based “common approach” for regulating the use of emotionally attached copyright-protected materials in the TDM process. Rooted in the principles of the ASEAN Way, this approach could lead to the establishment of a remuneration scheme that involves Collective Management Organisations (CMOs), emotional GenAI companies, and the rights-holders or

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<sup>5</sup>See Directive 2001/29/EC of The European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

<sup>6</sup>See WIPO, ‘The Strategic Use of Intellectual Property to Enhance Competitiveness in Select Industries in ASEAN’ (WIPO-ASEAN Study). Available at: [https://www.wipo.int/edocs/pubdocs/en/intproperty/953/wipo\\_pub\\_953.pdf](https://www.wipo.int/edocs/pubdocs/en/intproperty/953/wipo_pub_953.pdf).

<sup>7</sup>Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act). Available at: <https://eur-lex.europa.eu/eli/reg/2024/1689/oj>.

<sup>8</sup>The ASEAN Guide on AI Governance and Ethics highlights the importance of copyright protection within the development and deployment of AI technologies. The guide mandates that AI developers and deployers ensure compliance with existing copyright laws, emphasizing the need for transparency and proper documentation of data used in training AI models. The ASEAN, ‘ASEAN Guide on AI Governance and Ethics’ (The ASEAN Secretariat, 2024). Available at: <https://asean.org/book/asean-guide-on-ai-governance-and-ethics/>.

<sup>9</sup>Ueno (2021), p. 213.

their representatives, ensuring fair compensation for the emotional creativity captured and utilised by these advanced AI systems.

## 2 The ASEAN Way: An Introduction

### 2.1 *Background on the ASEAN and the ASEAN Way*

On 8 August 1967, the ASEAN was established under the ASEAN Declaration (Bangkok Declaration) to foster political and economic collaboration and regional stability.<sup>10</sup> Its economic vision is to create a single market and production base, characterised by competitiveness, equitable economic development, and full integration into the global economy.<sup>11</sup> In contrast to the EU's shared values and laws, ASEAN champions the 'ASEAN Way',<sup>12</sup> embodying consensus and non-interference in internal affairs, particularly those concerning politics and security, to bolster community stability.<sup>13</sup> Unlike the EU's fixed institutions such as the Parliament, Commission, and Court of Justice, leadership within ASEAN rotates annually between member states and is coordinated by a secretariat based in Jakarta. Policymaking is primarily conducted during the ASEAN Summit. Comprising the foreign ministers, the ASEAN Coordinating Council (ACC) plays a pivotal role in policymaking, organises the ASEAN Summit, and oversees the execution of its agreements and decisions. The ACC also stipulates the rules for the ASEAN's ad-hoc ministerial meetings, which address pressing issues.<sup>14</sup>

### 2.2 *The ASEAN Intellectual Property Framework*

In pursuit of enhanced economic integration and the swift realisation of the ASEAN Free Trade Area, the ASEAN Member States ratified the ASEAN Framework Agreement on Intellectual Property Cooperation in December 1995, aiming to

<sup>10</sup>The ASEAN, 'The Founding of ASEAN'. Available at: <https://asean.org/the-founding-of-asean/#:~:text=The%20Association%20of%20Southeast%20Asian,%2C%20Philippines%2C%20Singapore%20and%20Thailand.>

<sup>11</sup>The ASEAN, 'Economic Community'. Available at: [https://asean.org/our-communities/economic-community/#:~:text=Ministerial%20Meetings%20\(AEM\)-,Highly%20Integrated%20and%20Cohesive%20Economy,as%20the%20global%20supply%20chain.](https://asean.org/our-communities/economic-community/#:~:text=Ministerial%20Meetings%20(AEM)-,Highly%20Integrated%20and%20Cohesive%20Economy,as%20the%20global%20supply%20chain.)

<sup>12</sup>Art. 2(2)(e) of the ASEAN Charter emphasises that ASEAN and its member states shall act in accordance with the "non-interference in the internal affairs of ASEAN member states. See, the ASEAN Charter. Available at: <https://asean.org/asean-charter/>. See, Howe and Park (2017), pp. 1–15.

<sup>13</sup>Lengeling (2020). Available at: [https://www.ibei.org/ibei-student-paper-57\\_240434.pdf](https://www.ibei.org/ibei-student-paper-57_240434.pdf).

<sup>14</sup>Art. 7 of the ASEAN Charter.

facilitate closer collaboration in IP and related domains as a cornerstone for economic development.<sup>15</sup> This accord contemplates cooperation across all major IP sectors.<sup>16</sup>

Article 3 of the agreement underscores key collaborative efforts: bolstering IP enforcement and protection, fortifying IP administration, enhancing IP legislation, and founding an ASEAN IP Association. The implementation of the agreement is evidenced by various initiatives, notably the ASEAN Intellectual Property Rights Action Plan 2016–2025. However, despite these advancements, IP academics broadly acknowledge that the goals of cooperation remain partially unfulfilled.<sup>17</sup>

### 3 Analysis of the Text- and Data-Mining Exceptions and Emotional GenAI

#### 3.1 *EU Experiences: A Limited Brussels-Effect on the Regulation of AI?*

Ever since the creation of the concept of the “digital single market”,<sup>18</sup> the number of regulatory sources on online spaces has skyrocketed. Various EU sources of law, especially the General Data Protection Regulation (GDPR),<sup>19</sup> have become reference points on a global level. In other countries, the use of EU norms as a source of domestic legislation has often been coined as “Brussels-effect”.<sup>20</sup> With the exponential growth of use of AI technologies, the EU has taken steps to regulate this field as well. For some time, the EU’s approach looked like a mosaic of fragmented sections in the Copyright in the Digital Single Market (CDSM) Directive<sup>21</sup> or the

<sup>15</sup>ASEAN Framework Agreement on Intellectual Property Cooperation Bangkok, 15 December 1995. Available at: <https://asean.org/wp-content/uploads/2021/01/ASEAN-FRAMEWORK-AGREEMENT-ON-INTELLECTUAL-PROPERTY-COOPERATION-BANGKOK-15-DEC-1995.pdf>.

<sup>16</sup>Art. 3(1), *ibid.*

<sup>17</sup>Barizah (2017), pp. 95–112.

<sup>18</sup>Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Single Market for Intellectual Property Rights – Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe, COM/2011/0287 final, p. 9 et seq.

<sup>19</sup>Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance).

<sup>20</sup>Bradford (2020).

<sup>21</sup>Directive 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, OJ L 130, 17.5.2019 (CDSM Directive). The CDSM Directive has introduced the text- and data-mining exceptions (Articles 3–4); as well as certain other rules, predominantly related to the new

Digital Services Act.<sup>22</sup> Copyright-relevant provisions found their way into the EU's recent horizontal and holistic regulation on the secure but innovative use of AI technologies, namely the AI Act, too.<sup>23</sup>

The CDSM Directive introduced two new exceptions or limitations for TDM in order to deal with the “automated computational analysis of information in digital form, such as text, sounds, images or data”.<sup>24</sup> While Article 3 covers a specific, but broad exception allowing research organisations<sup>25</sup> to carry out TDM, Article 4 allows anyone to mine text or data under more limited circumstances. As Article 3 is designed to benefit only non-profit organisations acting in line with their public mission goals, Article 4 remains the primary source of TDM for developers of commercial GenAI algorithms and applications.

Article 4 allows users to reproduce lawfully accessible works and other protected subject matters, including the extraction of parts of a database, and retain such information as long as it is necessary for the purpose of automated analysis of text and/or data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations.<sup>26</sup> To counterbalance the use of information for commercial purposes, rights-holders are allowed to reserve their rights for TDM. Such reservation shall be expressed in an “appropriate manner, such as machine-readable means”,<sup>27</sup> including “metadata and terms and conditions of a website or a service”.<sup>28</sup>

A number of uncertainties surround the new rules in general and its relevance for GenAI specifically. These concerns stem, first, from the fact that while EU Member States are obliged to introduce their domestic version of Article 4, the directive itself allows for flexible transplantation (e.g. the introduction of an exception or a limitation). Nonetheless, one of the first comprehensive and comparative analyses of the implementation of the new TDM rules evidenced that EU Member States followed a rather “defensive” approach by implementing these provisions almost verbatim.<sup>29</sup>

Therefore, we might need to look at those numerous open terms of Article 4 and the accompanying recitals, which include “lawfully accessible” works and other

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platform liability under Article 17, that necessitate the reliance on automated technologies for, e.g. content recognition or complaint-and-redress mechanisms.

<sup>22</sup> Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance).

<sup>23</sup> The EU AI Act, n.8. There are two provisions relevant to the copyright, see Article 53(1)(c) and (d).

<sup>24</sup> Recital 8 CDSM Directive.

<sup>25</sup> Article 2(1) CDSM Directive.

<sup>26</sup> For the definition of (commercial) TDM, see altogether Article 2(2), Article 4(1)-(2) and recital 18 CDSM Directive.

<sup>27</sup> Article 4(3) CDSM Directive.

<sup>28</sup> Recital 18 CDSM Directive.

<sup>29</sup> Sganga et al. (January 16, 2023). Available at <https://ssrn.com/abstract=4325376>, p. 523.

subject matter;<sup>30</sup> retaining copies “as long as necessary” for the purposes of TDM;<sup>31</sup> and the reservation of rights via “computer-readable means”.

From these uncertainties, the rights reservation (or simply “opt-out”) rules under Article 4(3) require a closer look as they clearly reflect that even if the TDM exceptions were designed in light of the developments of AI,<sup>32</sup> they were not drafted in light of GenAI. Both the substance and the functioning of such an opt-out is a mystery. How shall the “computer readable form” of reservations be deployed? What is the proper scope (general v. specific) and the timing (ex ante v. ex post) of opting out? Who is entitled and obliged to deploy such reservations (namely, shall reservations be expressed by the rights-holders or can GenAI developers control opting out by their own procedures?)? Moreover, it remains open how the lawful access and the rights reservation prongs of Article 4 interplay. Can an expressed term of an end-user license agreement to exclude the lawfulness of TDM practically outrule the necessity of any computer readable reservation of rights at the same time? Last but not least, can (and should) a rights reservation slow down the massive use of training data for machine learning purposes?

Needless to say, while we are struggling with these open questions, the number of different opt-out models has grown exponentially. These include, e.g. the ex-ante “TDM Reservation Protocol” that creators might deploy on their websites,<sup>33</sup> or the ex-ante masking of copyright protected images by creators via Glaze.<sup>34</sup> There are numerous solutions for the ex-post reservation of rights (that is following the reproduction or extraction of text or data), e.g. Spawning AI’s service<sup>35</sup> or Stability AI’s own opt-out system.<sup>36</sup> Quite recently, OpenAI has launched both an ex-ante disallowment of scraping solution and an ex-post opt-out mechanism;<sup>37</sup> and Google also published a new ex-ante “scalable control” mechanism through robots.txt, called Google Extended.<sup>38</sup> Whether (any or all of) these solutions fit into the statutory concept of rights reservation is far from being clear.<sup>39</sup>

In light of this, it is questionable whether the CDSM Directive has reached a *de facto* full harmonization on this field. Indeed, we are rather convinced that the CDSM Directive needs some (re)calibration to effectively apply for GenAI.

In the EU, the regulation of GenAI is far from being final. Although the AI Act has passed the so-called trilogue phase of the negotiations, it is not yet formally accepted and published. This regulation is aimed to provide for a compact, holistic

<sup>30</sup> Compare to Rosati (2021), pp. 76–77.

<sup>31</sup> Ibid., p. 89.

<sup>32</sup> Compare to the text of recital 8 CDSM Directive, cited in the accompanying text to footnote 25.

<sup>33</sup> See <https://www.w3.org/2022/tdmrep/>.

<sup>34</sup> See <https://glaze.cs.uchicago.edu/>.

<sup>35</sup> See <https://spawning.ai/>.

<sup>36</sup> See <https://stability.ai/faq>.

<sup>37</sup> See [https://share.hsforms.com/1\\_OuT5tfFSpic89PqN6r1CQ4sk30](https://share.hsforms.com/1_OuT5tfFSpic89PqN6r1CQ4sk30).

<sup>38</sup> See <https://blog.google/technology/ai/an-update-on-web-publisher-controls/>.

<sup>39</sup> In greater detail see Mezei (2024), pp. 461–469.

set of rules on AI, including GenAI. Among other provisions, on the *input* side of machine learning, GenAI requires that general purpose AI providers shall, on the one hand, “put in place a policy to respect Union copyright law in particular to identify and respect, including through state of the art technologies, the reservations of rights expressed pursuant to Article 4(3) of Directive (EU) 2019/790”;<sup>40</sup> and, on the other hand “draw up and make publicly available a sufficiently detailed summary about the content used for training of the general-purpose AI model, according to a template provided by the AI Office”.<sup>41</sup> These new requirements would necessitate GenAI providers to seriously log and report publicly and in a detailed form their practices so that rights-holders can judge whether their contents were used for machine learning purposes. On the *output* side, the draft AI Act intends to oblige users of deep fake applications to disclose the deep fake nature of the content as well as the name of the creator of such outputs.<sup>42</sup> This transparency obligation is limited in case such use is necessary to exercise the right to freedom of expression and the right to freedom of the arts and sciences.<sup>43</sup> However, the same paragraph recommends a special rule for “evidently artistic, creative, satirical, fictional analogous work or programme”, where the transparency obligations are “limited to disclosure of the existence of such generated or manipulated content in an appropriate manner that does not hamper the display or enjoyment of the work”.<sup>44</sup>

Although these transparency requirements look straightforward, it is hard to foresee their practical functioning, and they are not completely unique at all. Although “transparency” is one of the magic keywords for the regulation of AI, policy-makers are prompted to design such requirements in line with their own legal system’s standards. Such transparency standards might differ heavily from these draft ideas of the European Parliament.

We believe that the EU approach towards regulating TDM might only have a limited “Brussels-effect” on extra-EU jurisdictions.<sup>45</sup> This belief is partially supported by the concerns and open questions surrounding the existing TDM exceptions as well as the new, but not truly unique transparency requirements under the AI Act. Equally importantly, the pace of the legislative process is simply slow in the EU. By the time the AI Act is applicable in the EU, other jurisdictions shall have their own rules in place—otherwise they will fall behind in the global AI race.

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<sup>40</sup> Article 53(1)(c) of the EU AI Act, see, n.8.

<sup>41</sup> Article 53(1)(d) of the EU AI Act.

<sup>42</sup> *Ibid.*, Article 50(4). Although deep fake contents form only a fragment of GenAI outputs, but they pose serious concerns related to the ethical nature of GenAI. See, Willman (April 17, 2023) (<https://variety.com/2023/music/news/fake-ai-generated-drake-weeknd-collaboration-heart-on-my-sleeve-1235585451/>).

<sup>43</sup> *Ibid.*, recital 134.

<sup>44</sup> *Ibid.*, Article 52(3).

<sup>45</sup> Compare to Siegmann and Anderljung (August 2022) (<https://arxiv.org/ftp/arxiv/papers/2208/2208.12645.pdf>); Almada and Radu (2024), pp. 1–18, doi: 10.1017/glj.2023.108.

It is therefore advisable for nations of, e.g. the ASEAN, to consider whether they can approach GenAI and TDM in line with their own traditions. Hence, we shall cast our eyes on these countries' traditional understanding of copyright and their possibilities as regards regulating AI.

### 3.2 *Copyright Law in the ASEAN: Status Quo*

Within the ASEAN, a notable diversity in copyright laws exists among its members, largely shaped by three distinct legal traditions.<sup>46</sup> While Malaysia, Singapore, and Myanmar have aligned with common law principles,<sup>47</sup> nations such as Laos, Vietnam, Thailand, Cambodia, and Timor-Leste have integrated civil law into their copyright statutes.<sup>48</sup> Blending both common and civil law elements into its copyright regime, the Philippines stands out.<sup>49</sup> Traditionally adhering to civil law, Indonesia has moved with its copyright law amendments from 1982 to 2014 towards a distinctive system that reflects its own socio-political conditions and the demands of its burgeoning creative sectors.<sup>50</sup>

A critical examination reveals that the effectiveness of copyright enforcement in the ASEAN is compromised by several factors, including the absence of dedicated IP courts and the varying adherence to international copyright treaties. Notably, Cambodia, Myanmar, and Timor-Leste have not ratified pivotal agreements such as the Berne Convention and the WIPO Copyright Treaty. This disparity in copyright protection and enforcement underscores a broader issue within the ASEAN, placing rights-holders at a disadvantage and weakening their bargaining power. This situation is exacerbated by regulations that may not fully support rights-holders, such as restrictions on freedom of expression prevalent across the member states.<sup>51</sup> Moreover, the unauthorized use of copyright-protected works in emotional GenAI training not only challenges existing copyright laws but potentially places further strains on copyright holders.

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<sup>46</sup>Harding (2015), pp. 813–818.

<sup>47</sup>Relating to the legal traditions in Malaysia, see, Neoh (2010). For the legal tradition in Singapore, see, Tan and Chan (2015). On the legal tradition in Myanmar, see, Southalan (2006), pp. 4–24.

<sup>48</sup>Relating to the legal traditions in Laos, see, Ministry of Justice Law of Lao People's Democratic Republic, 'Customary Law and Practice in Lao PDR.' (2011). Available at: [https://www.undp.org/sites/g/files/zskgke326/files/migration/la/Customary\\_Law\\_Laos2011\\_english\\_master1.pdf](https://www.undp.org/sites/g/files/zskgke326/files/migration/la/Customary_Law_Laos2011_english_master1.pdf). For the legal tradition in Vietnam, see, Nguyen (1989), p. 141. On the civil law tradition in Thailand, see, Harding and Pongsapan (2021). For the legal tradition in Cambodia, see, Peng et al. (2012). On Timor Leste, see, Stanford Law School, 'Legal History and the Rule of Law in Timor-Leste.'

<sup>49</sup>Mahy and Sale (2015).

<sup>50</sup>Antons (2018), pp. 73–88.

<sup>51</sup>Artist at Risk Connection, 'Arresting Art: Repression, Censorship, and Artistic Freedom in Asia.' (2023), pp. 10–18. Available at: <https://culture360.asef.org/resources/arresting-art-repression-censorship-and-artistic-freedom-asia/>.



### 3.3 *The ASEAN AI Framework: The ASEAN Way and Author-Centric Approach*

#### 3.3.1 The ASEAN AI Framework

Given the state of rights-holders in the ASEAN, and taking into account the political instability which plays a significant role in ensuring effective copyright protection within the community, the question arises whether the ASEAN Way is still fit for this purpose. Is it the time for full copyright harmonization where each member state could intervene? A full economic integration and IP harmonization might be possible in the future since the ASEAN is already heading in that direction through the establishment of the ASEAN Free Trade Area (AFTA) in 1992<sup>52</sup> and the ASEAN Economic Community Blue Print 2025.<sup>53</sup> However, prior to setting such an important direction, the ASEAN Member states shall, e.g. end or at least reduce the development gap as agreed upon in the Phnom Penh Declaration,<sup>54</sup> disparities in IP creation, utilization and exploitation.<sup>55</sup>

In light of the rapid development of emotional GenAI, taking into account the political instability, the potential of market-encroaching uses of copyright-protected training data<sup>56</sup> and socio-cultural conditions in the ASEAN, a possible solution could be to include recommendations on the protection of copyright in the ASEAN AI Framework, and such protection could be developed based on the ASEAN Way. As such, the ASEAN approach in regulating AI could be different from the EU AI Act. Indeed, rather than something that is legally binding, the ASEAN-wide formalisation of AI policy could be based on ‘best practice by consensus’.<sup>57</sup>

The ASEAN Way of regulating AI could be combined with the author-centric approach, which aims to prioritize the rights and interests of individual creators in the ASEAN and should recognize the unique challenges posed by GenAI while seeking to ensure that rights-holders are fairly compensated for the use of their work.

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<sup>52</sup> ASEAN Secretariat, ‘Southeast Asia A Free Trade Area.’ (2002). Available at: <https://asean.org/wp-content/uploads/images/archive/pdf/AFTA.pdf>.

<sup>53</sup> ASEAN Secretariat, ‘ASEAN Economic Community Blue Print 2025.’ (2015). Available at: [https://asean.org/wp-content/uploads/2021/08/AECBP\\_2025r\\_FINAL.pdf](https://asean.org/wp-content/uploads/2021/08/AECBP_2025r_FINAL.pdf).

<sup>54</sup> ASEAN, Phnom Penh Declaration on ASEAN: One Community, One Destiny, 1 (2012). Available at [http://www.asean.org/archive/documents/pp\\_declaration\\_3%20April\\_FINAL.pdf](http://www.asean.org/archive/documents/pp_declaration_3%20April_FINAL.pdf).

<sup>55</sup> Ng (2013), p. 32. Available at: <https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1330&context=pilr>.

<sup>56</sup> See, Jérôme De Cooman, ‘The Economic Consequences of Generative AI on the Art Market.’ (RAILS, 2023). Available at: <https://blog.ai-laws.org/the-economic-consequences-of-generative-ai-on-the-art-market/?cn-reloaded=1&cn-reloaded=1>.

<sup>57</sup> Kristina F. S. Leng, ‘ASEAN’s New Dilemma: Managing the Artificial Intelligence Space.’ (ISEAS, 2023). Available at: <https://www.iseas.edu.sg/articles-commentaries/iseas-perspective/2023-65-aseans-new-dilemma-managing-the-artificial-intelligence-by-kristina-fong-siew-leng/>.

It also includes the development of mechanisms that allow rights-holders to retain control over their works, allowing them to determine how their work is used and distributed during GenAI training processes. Therefore, the ASEAN AI framework could be construed on the basis of consensus and trust from all stakeholders, i.e. GenAI companies, rights-holders and the public. This consensus-based deliberation may have been inspired by the concept of *Gotong Royong* adopted by several of the ASEAN Member States such as Indonesia, Malaysia, Singapore and Brunei Darussalam. In general, *Gotong Royong* could be defined as “helping each other,”<sup>58</sup> “sharing burdens”<sup>59</sup> or “mutual assistance”.<sup>60</sup> *Gotong Royong* is a local wisdom which served as the foundation for political discourse on the nature of power and the features of life in the Malay Archipelago.<sup>61</sup>

### 3.3.2 On the ASEAN Way: The Initiation of GenAI Training Data Remuneration

Drawing on an author-centric approach, the spirit of *Gotong Royong* and reflection on the EU’s approach to TDM, the ASEAN AI Framework could recommend several copyright protection measures as follows: First, Member States should be encouraged to introduce a TDM exception which provides an opt-out mechanism in an appropriate manner, i.e. through machine-readable means for rights-holders as well as a remuneration option, should the opt-out not be desirable.<sup>62</sup> So far, Singapore is the only ASEAN Member State that has provided TDM exceptions.<sup>63</sup> Such initiatives are greatly appreciated and yet unable to balance the various interest of market-encroaching uses implicate, given the absence of opt-out provisions.<sup>64</sup> Unlike the EU, the establishment of an effective opt-out mechanism with a remuneration option should be possible in the ASEAN considering that all Member States except Singapore have their own centralised copyright registration regimes and the ASEAN itself is moving towards a centralised IP database and registration, as envisaged in art. 3(1) of the ASEAN Framework Agreement on Intellectual Property Cooperation and the ASEAN Intellectual Property Rights Action Plan 2016–2025.

<sup>58</sup> Simarmata et al. (2020), pp. 15–20.

<sup>59</sup> Rahmi et al. (2001), pp. 119–134.

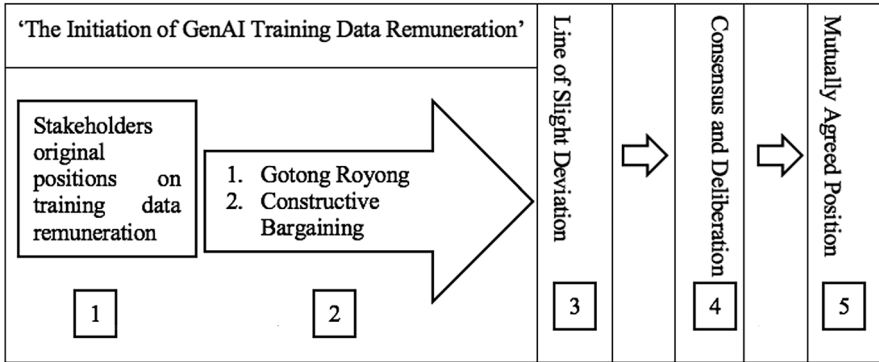
<sup>60</sup> Bowen (1986), pp. 545–561.

<sup>61</sup> See, Leong (2000), pp. 436–455; Abdullah and Rahman (2015), pp. 221–229.

<sup>62</sup> Sobel, *ibid.*, pp. 236–241.

<sup>63</sup> See, Singapore Copyright Act 2021, Art. 243. Available at: <https://sso.agc.gov.sg/Act/CA2021?ProvIds=P15-P28-#P15-P28->.

<sup>64</sup> However, in general, the Singapore TDM exceptions should be appreciated because it offers lawful access requirements and TDM provision that cannot be overridden by contract. See, art. 244 of the Copyright Act 2021.



**Fig. 1** The process of constructing the TDR in accordance with the ASEAN Way

Second, to ensure the protection of the training data, through their national collective management organization (CMO),<sup>65</sup> Member States could initiate the establishment of GenAI TDR, where the CMO could facilitate consensus, in accordance with the ASEAN Way, between GenAI companies and rights-holders or their representatives to mutually agree on a proportional model of remuneration,<sup>66</sup> and would do so with minimal transaction cost. The TDR could be in the form of a revenue sharing program or remuneration payments for the use of their works during the TDM process.<sup>67</sup>

As illustrated in Fig. 1 below, through the initiation of GenAI TDR, transparent and mutually agreed-upon remuneration arrangements, which include the amount and distribution method of the remuneration, could be reached. Additionally, such an author-centric consensus-based framework seems to conform well with Melamed and Calabresi’s distinction of property and liability rules.<sup>68</sup>

Third, to facilitate the implementation of the first and second recommendations, ASEAN Member States should be encouraged to develop the identification or labelling mechanism of the training data, the introduction of an evidence disclosure mechanism as well as the copyright clearance infrastructure. On labelling, one attractive solution could be the establishment of decentralised content identification

<sup>65</sup>CMO plays a critical role in protecting and managing the rights of creators by licensing their works, collecting royalties, and ensuring fair distribution of revenues to rights holders.

<sup>66</sup>Several legal scholars have proposed the remuneration options, such as among others: Sobel (2021), pp. 236–237; Lucchi (2023), pp. 17–21; Senftleben (2023); Geiger and Iaia (2023), pp. 1–15.

<sup>67</sup>Lucchi, *ibid.*, p. 19.

<sup>68</sup>Melamed and Calabresi’s distinction between property and liability rules lies in the allocation of control over the use of resources: property rules grant absolute control to the owner who can exclude others unless they agree to a voluntary transaction, while liability rules allow others to use the resource without the owner’s consent, provided they compensate the owner as determined by law. See, Calabresi and Melamed (1972), pp. 1089–1092. Available at: <https://cyber.harvard.edu/openlaw/DVD/articles/calabresi.html>.

that could be used as the protocol for the remuneration scheme, i.e. using ISCC codes (ISO/CD 24138)<sup>69</sup> and Verifiable Credentials (VCs)<sup>70</sup> to create trust in claims and attribution of the training data. This allows one to inseparably connect terms and a license to the digital media asset with no need for embedding, watermarking or centralised registry. This is because the robots.txt may work for content that is published online or embedded in html but not on the content that is not publicly accessible.<sup>71</sup> Furthermore, the identification of copyright protected works in the training data could potentially serve as signalling to the users/consumers and may prevent market-encroaching uses.<sup>72</sup>

### 3.3.3 Remuneration Calculation Methods: Flat Rates and Pro-Rata Model

Taking Melamed and Calabresi's distinction of property and liability rules as a benchmark for the remuneration, the initiation of GenAI TDR should be straightforward to implement. Using the music industry as an example, the establishment of GenAI TDR should not require additional transaction costs, as in the music industry, for example, information on artist remuneration should already exist in the CMO; and (ii) GenAI TDR will lead to a new licensing regime, where the parties involved may negotiate which licensing arrangement is suitable.<sup>73</sup> Through the initiation of the GenAI TDR, all parties should be encouraged to develop a menu of different agreements so all parties have options to best accommodate their needs. This approach would allow for flexibility and customization, ensuring that each ASEAN country can tailor the training data licensing to their specific requirements and priorities. During the initiation process, all parties involved may discuss the remuneration, could it be a lump-sum payment or an on-going remuneration. If the latter option is preferred, all parties could discuss the amount of flat rates, and the remuneration distribution method to be used. On the distribution regime, a difficult

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<sup>69</sup>These codes are a standardized system used to classify and identify different types of products and services. See, 'ISO/CD 24138, Information and Documentation – International Standard Content Code (ISCC).' Available at: <https://www.asist.org/2022/11/10/iso-cd-24138-information-and-documentation-international-standard-content-code-iscc/>.

<sup>70</sup>VCs could be used in AI training data to protect rights-holders from unauthorized use or manipulation of their data to ensure that AI models are trained on reliable and trustworthy information, ultimately leading to more ethical and responsible AI systems. See, 'Verifiable Credentials Data Model v1.1.' Available at: <https://www.w3.org/TR/vc-data-model/>.

<sup>71</sup>Santanu Kolay, et al., 'A Larger Scale Study of Robots.txt.' (2018) Available at: <https://dl.acm.org/doi/10.1145/1367497.1367711>.

<sup>72</sup>Jérôme De Cooman, n.56.

<sup>73</sup>Google and Universal Music are currently negotiating the licensing regime for the voice and melody being used in the GenAI training data. See, The Guardian, 'Google and Universal Music Working on Licensing Voices for AI-generated Songs.' (2023) Available at: <https://www.theguardian.com/technology/2023/aug/09/google-and-universal-music-working-on-licensing-voices-for-ai-generated-songs>.

question arises: which copyright-protected works in the training datasets would be given credit for the newly generated outputs produced by GenAI users? It seems that one possible allocation could be through the quantity of content that rights-holders have contributed to the datasets.

### Determination of Flat Rates

To determine the flat rates and to achieve economic success, GenAI providers may consider the number of subscriptions, advertising and procurement costs before establishing their average flat rates.<sup>74</sup> By taking the music industry as an example, in determining flat rates, GenAI providers could take around 30% of the entire subscriptions revenue to cover their overhead costs with the following formula: total subscriptions revenue  $\times$  30%.<sup>75</sup>

### Determination of Remuneration: The Pro-Rata Model

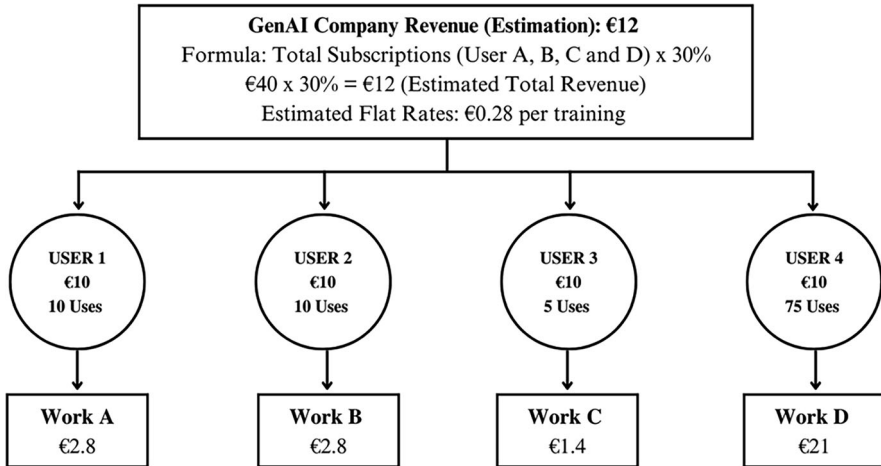
Having established the amount of the flat rate, it is important to determine on how the money collected by the AI Gen providers through the flat rate is allocated to the rights-holders. By nature, a remuneration based on allocating the amount of content contributed by the rights-holders to the dataset would be pro-rata. If GenAI algorithms consider large amount of works from ‘Author X’ to be the right fit to generate an output based on the prompt provided by the users, then ‘Author X’ should be entitled to a higher amount of remuneration. Therefore, in the GenAI business model, the problem lies in consumption behaviour, not in the way the remuneration gets distributed.

Going further, the pro-rata model would perform better than the user-centric approach considering that the user’s activity in enjoying a task becomes the benchmark for determining remuneration. However, with the GenAI system, users are unable to decide which copyright-protected works to be used in the training data to generate an output based on a particular prompt. In the pro-rata model, GenAI companies could take all the money generated from users, whether through advertisements or subscriptions, and put it in a big pot. They then could divide that pot by the total number of the copyright-protected work of rights-holder being used during the training process.<sup>76</sup> As can be seen in Fig. 2 below, with a subscription of €10 as an example, GenAI providers could take around 30% of the entire subscriptions

<sup>74</sup>Meyn et al. (2023), pp. 114–131.

<sup>75</sup>Calculation as follows: Total subscriptions revenue  $\times$  30% = On-demand music platforms revenue. For example the total revenue is €40 (4 users  $\times$  €10)  $\times$  30% = €12. GenAI providers then will take €12 as their training data revenue to cover overhead costs. Taking the music industry as an example, *see*, Pedersen (2020), p. 4. Available at: <https://www.koda.dk/media/224782/meta-study-of-user-centric-distribution-model-for-music-streaming.pdf>.

<sup>76</sup>Taking the pro-rata model in music industry as an example. *See*, Pedersen, *ibid.*, p. 4.



Calculation method for each copyright-protected works being used to train GenAI model:

$$Ra = \frac{Sa}{T} \times Rt$$

**Fig. 2** Overview of GenAI Training Data Remuneration Calculation with the Pro Rata Model (Where: Ra = revenue for Track A; Sa = streams of Track A; T = total number of streams; Rt = Net total licensing revenue. The Illustration is based on a similar calculation at Pedersen, *ibid.*, p. 5)

revenue to cover their overhead costs.<sup>77</sup> In the pro-rata model, all revenues per month are put together according to the number of total number of the copyright protected work being used during TDM and shared between individual generations of AI outputs.<sup>78</sup>

Going further, the pro-rata model could potentially establish a human-centric approach that significantly benefits rights-holders. Its core principle, which advocates for remuneration proportional to the volume of content each rights-holder contributes to emotional AI’s training datasets, underscores a dedication to fairness and the acknowledgment of individual efforts. This approach inherently values the creative labour of rights-holders by proposing a system where the total revenue from emotional AI companies—whether via advertisements or subscriptions—is distributed based on the usage extent of their work in training data. This method could potentially ensure a more equitable financial benefit distribution while respecting the intrinsic human creativity and effort that underlie copyright-protected works.

<sup>77</sup> Calculation as follows: Total subscriptions revenue × 30% = On-demand music platforms revenue. €40 (4 users × €10) × 30% = €12. On-demand music platforms then will take €12 as their streaming revenue to cover overhead costs. See, Pedersen, *ibid.*, p. 5.

<sup>78</sup> Muikku (2017) at 5(14). Available at: [http://www.digitalmedia.fi/wp-content/uploads/2018/02/UC\\_report\\_final\\_171213.pdf](http://www.digitalmedia.fi/wp-content/uploads/2018/02/UC_report_final_171213.pdf).

## 4 Conclusion

In the previous section, we systematically analysed the approach of the EU and the ASEAN as regards TDM. As indicated earlier, the EU approach was among the first to regulate this certain aspect of automated/AI-supported use of text and data. However, the ultimate EU rules cannot honestly be treated to be the best example for nations of Asia. Both the fundamentals of ASEAN nations' legal systems differ significantly from those of the civil or common law traditions of EU Member States, and the author-centric approach, elaborated above, is a much better fit for such countries' copyright law. This paper therefore argues that external examples, most notably that of the EU, can serve as a reasonable starting point for the regulation of TDM for emotional GenAI applications, but ASEAN nations shall follow their own traditions in setting the requirements for the use of such AI technologies. As a part of the TDR, the pro-rata model might provide a human-centric solution that recognizes individual contributions, potentially leading to a fairer distribution of remuneration by allocating revenue from emotional AI companies according to the use of copyright-protected works in training data.

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