

Abstract

The Significance of “Technological Measures” in the Anne Frank Fonds judgment and Its Implications for Generative AI

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The tension between the online accessibility of works in the digital environment and the territoriality of copyright has been a recurring issue in EU copyright law. The Anne Frank Fonds judgment concerned a situation in which the same work was in the public domain in some Member States but remained protected by copyright in others. The issue was whether a communication to the public occurred in a protected Member State where geo-blocking measures had been implemented, but users could nevertheless circumvent those measures through a VPN or similar service.

In this case, the CJEU did not consider that communication to the public in the protected Member State could be established merely on the basis of accessibility. Instead, it focused on whether the geo-blocking measures implemented by the website operator to restrict access by users in the protected Member State constituted effective technological measures in accordance with the state of the art. While technological measures have traditionally been understood primarily as protective tools designed to prevent or deter unauthorised access to, or use of, works, the Anne Frank Fonds judgment regarded effective technological measures as capable of delineating the scope of online communication to the public and the scope of the rightholder’s consent.

This reasoning also has important implications for the regulation

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of generative AI training. The training of generative AI models often involves the large-scale collection, reproduction and analysis of publicly available website content. In this context, the mere fact that a work is available on the open website does not necessarily mean that the rightholder has authorised its use for TDM or AI training. In particular, where a rightholder indicates, through machine-readable means such as robots.txt, metadata or TDMRep, that AI training is not authorised, the question may arise whether such indications have the same legal nature as traditional access-control technological protection measures.

Against this background, this article analyses the reasoning of the *Anne Frank Fonds* judgment and examines the discussion of “technological measures” in connection with machine-readable rights reservations under Article 4(3) of the DSM Directive and Article 53(1)(c) of the EU AI Act. It then draws implications for the regulation of copyright issues arising from generative AI in Korea.

Keywords

geo-blocking, effective technical measures, VPN circumvention, DSM Directive Article 4(3), TDM opt-out, EU AI Act Article 53(1)(c), machine-readable rights reservations, generative AI training