



# Switzerland as data scraping heaven?

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Techno-legal challenges of data scraping

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14 November 2023

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# Switzerland as scraping heaven?

- Loosely interpreted prohibitions under Unfair Competition Act
- Database Directive not implemented
- Copyright limitation for data mining: no opt out in case of research for private benefit?
- No responsibility for breach of contract by auxiliary person?

# Data scraping: Roles

- An aggregator using an automated analytical technique extracts data relate to
- physical or legal persons (data subjects) from existing data sets made available in digital form by
- an originator, in order to analyse it to generate information such as patterns, trends and correlations, store it, index it and make it available again (cf. DSM Art. 2 (2)).

Data scraping is not identical with unauthorised access to a data processing system.

Lawful access: right to read

# Data scraping

- Use of data to create :

<b>a)</b>	<b>something totally new:</b>	<b>comparison and comments on offers, analytical AI, e.g., language training models, quotation</b>
b)	something different from, but competing with the original:	comparative advertisement, collection of press clippings, generative AI: e.g., new artwork
c)	something identical or substantially identical with the original data set in form and objective:	takeover for republication of ads or offers



# Stable Diffusion



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## Data scraping

Different but competing: generative AI  
Getty Images (US), Inc. v. Stability AI, Inc.

# Data scraping

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Different but competing:  
generative AI

«A Recent Entrance to  
Paradise»;

Author: Creativity Machine  
(DABUS), courtesy of Stephen  
Thaler

Thaler v. Perlmutter, No. 22-1564  
(D.D.C. August 18, 2023), Judge  
Beryl A. Howell





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# Data scraping

- identical or substantially identical with the original data set in form and objective: takeover of ads for republication



# Copyright

- What is a copyright protected work?
- Does the data subject, author of copyrighted work etc. mind the copying?
- Two types of protection of photos:
  - Opere fotografiche, Art. 2 no. 7 Legge 22 aprile 1941; Lichtbildwerk, § 2 para. 1 Nr. 5 German UrhG; photographic works, Art. 2 para. 2 lit. g Swiss URG
  - Fotografie, Art. 87 Legge 22 aprile 1941; Lichtbild. § 72 UrhG; Photographic depictions, Art. 2 para. 3<sup>bis</sup> Swiss URG Swiss URG

# Copyright

- Swiss Copyright Act, Art. 24d Use of works for the purposes of scientific research
- <sup>1</sup> For the purposes of scientific research, it is permissible to reproduce a work if the copying is due to the use of a technical process and if the works to be copied can be lawfully accessed.

# Copyright

## DSM Directive

- Article 3 (Text and data mining for the purposes of scientific research) (1.) Member States shall provide for an exception to the rights <of reproduction etc.> for reproductions and extractions made by research organisations and cultural heritage institutions in order to carry out, for the purposes of scientific research, text and data mining of works or other subject matter to which they have lawful access.

# Copyright

## DSM Directive (continuation)

- Article 4 (Exception or limitation for text and data mining) (1.) Member States shall provide for an exception or limitation to the rights <of reproduction etc.> for reproductions and extractions of lawfully accessible works and other subject matter 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.

# Copyright

- Lawful access = the legal right to read a copyright work; subscription to a journal. open licence (Creative Commons) and Open Government Data.
- Lawful access  $\neq$  reservation of the right to data mining in favour of the rightsholder.
- Lawful access in clear disregard of explicit prohibition of data mining? Difference between (a)(totally new), (b)(different, but competing) or (c)(identical)

# Copyright

- Three step test:
- TRIPS Art. 13: "Members shall confine limitations and exceptions to exclusive rights to (i) certain special cases which (ii) do not conflict with a normal exploitation of the work and (iii) do not unreasonably prejudice the legitimate interests of the rights holder."

Limitations and exceptions cannot:

1. be overly broad
2. rob rightholders of a substantive real or potential source of income, or
3. do disproportional harm to the rights holders

# Copyright

- Three step test:
- Different answers for the three types of purposes:
  - a. totally new: met
  - b. different, but competing: rather not mt
  - c. identical: not met

# Copyright

- Copyright arises with the creation of the work, regardless of whether it has already been published or whether it is to be published at all
- Even if it remains in the AI system forever, it is still a copy of the work, or a copy of a derivative work falling



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# Unfair competition



bravofly



# Unfair competition

- Art. 5 Exploiting the works of others
- A person acts unfairly in particular if it:
- .....
- b. exploits a third party's work product, such as an offer, calculation or plan, even though they must know that it was given or made accessible to them without authorisation;
- c. takes over and exploit another person's work product that is ready for the market by means of technical reproduction processes without any reasonable effort of their own.

# Unfair competition

- Art. 5 lit. c (Exploiting the works of others)
- Market-ready work result: product that can be commercially used, no further action needed.
- Technical reproduction
- Reproduction as such, no imitation or recreation
- Use with impact on the competition, *i.e.*, as or as part of a competing product.
- Double comparison of efforts

# Unfair competition

- Art. 5 lit. c (Exploiting the works of others)
- Double comparison of efforts:
  - First comparison: the actual effort of the originator is compared to the actual effort of the aggregator.
    - With or without consideration of efforts of the aggregator for improvements?
  - Second comparison: the effort of the aggregator is compared to the hypothetical effort that would be necessary to acquire the respective data and put together and publish the ads without recourse to the work result of the originator (independent creation).
  - The reproduction effort of the aggregator is inadequate if it is significantly lower than both the effort of the originator and those of an independent creation. It is adequate only if it is similar to or exceeds the effort of the originator and the effort of an independent creation.

# Unfair competition

- Art. 5 lit. c (Exploiting the works of others)
- Amortization
  - Has the originator already been able to amortise the costs for the development of its work result at the time of reproduction?
  - If yes, there is no disproportion between the expenses of the first and second applicant.
  - Even a small effort by the aggregator is deemed sufficient and not disproportionately low if the originator has already amortized its effort at the time of reproduction.

# Data privacy/protection

- The data subject has published or consented to the publication of his or her data.
- Data minimisation
  - Recital 39 and Art. 5 para. 1 lit. c GDPR
- Purpose limitation
  - Art. 6 para 3 Swiss Data Protection Act; Art. 5 para. 1 lit. b GDPR

# Contract law

- Accessing a website does not by itself mean to accept the T&C of that website
- What does it mean if the aggregator has expressed its unwillingness to ever accept any T&C?
- What if the originator has not put up any T&C?
  - In human-readable form
  - In machine-readable form
- John Doe v. GITHUB, Microsoft, OpenAI, (class action) USDC, ND California, San Francisco Division, case 3.22.cv.06823-KW



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## Contract law

- if the aggregator uses an auxiliary person to scrape the data?



# Key Takeaways

1. Legal treatment of data scraping must be different depending on whether on the purpose:  
for something totally new; for something different, but competing;  
for something identical
2. Data scraping as input for AI: many unresolved questions.
3. Fix the law on databases

# Key Contact

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Reinhard acts for a broad range of clients, mostly in the telecommunications and media sector, focusing on internet and cross-technology solutions. He represents clients in administrative procedures, litigation and arbitration and regularly sits as arbitrator (co-arbitrator and chairman). Reinhard helps to establish the legal structure for new business models in the area of new technologies and advises on software and data economy projects.

“Reinhard Oertli is a very experienced and talented lawyer, who is able to handle the most difficult matters of the IP law. He possesses vast knowledge in his field. His approach is custom-tailored, he studies the presented question in detail, and at the same time, he possesses the ability to present very complicated and nuanced issues in a vivid and simple way”

– Legal 500 EMEA, TMT, 2022

Thank you for your time and interest  
We look forward to hearing from you