

VISCHER

AI & Copyright. Friends or foes?

David Rosenthal, VISCHER AG
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The Times Sues OpenAI and Microsoft Over A.I. Use of Copyrighted Work

Millions of articles from The New York Times were used to train chatbots that now compete with it, the lawsuit said.

German Court Says Non-Commercial AI Training Data Meets Scientific Research Exception to Copyright Infringement

Anthropic Agrees to Pay \$1.5 Billion to Settle Lawsuit With Book Authors

The settlement is the largest payout in the history of U.S. copyright cases and could lead more A.I. companies to pay rights

Sources: [nytimes.com](https://www.nytimes.com), [theguardian.com](https://www.theguardian.com), [reuters.com](https://www.reuters.com), [bruegel.org](https://www.bruegel.org), [ipwatchdog.com](https://www.ipwatchdog.com)

The European Union is still caught in an AI copyright bind

Salesforce sued by authors over artificial intelligence software

Anthropic did not breach copyright when training AI on books without permission, court rules

A situation where interests are well-balanced after all?

Not yet – a big divide and many emotions

- "I have never worried about my future as an artist until now. Generative AI is unlike any other technology that has come before. It is a technology that uniquely consumes and exploits the hard work, creativity, and innovation of others. No other tool is like this. What I found, when first researching AI, **horrified me.**" – Karla Ortiz (Artist), July 12, 2023*
- "I think that **AI is good.** It is something that I first developed expertise in back in the late 80s, and have followed it ever since. It is a matter of getting the regulatory construct, the intellectual property construct, all the other underlying policies that you need when a new, I think positive - in a positive term, disruptive technology hits the field." – Thom Tillis (Senator), July 12, 2023

* U.S. Senate Hearing (https://www.judiciary.senate.gov/artificial-intelligence-and-intellectual-property_part-ii-copyright)

Training AI models with third-party content

- **In principle permissible ...**
 - Using copyrighted works that are legally publicly available
 - Provided they are not included in the output (no "memorisation")
- **Current Swiss law: Various legal concepts may apply**
 - Is training a relevant use at all if the works are not in the output?
 - Is there a copy in the model that is perceptible by a human?
 - Even if: Does the individual work "fade" in the "crowd", which can result in it becoming irrelevant under copyright law
 - Is there an "inner distance" between the original work and the memorised version, which can result in it being permitted?
 - If none of the above helps: Statutory exceptions may also apply



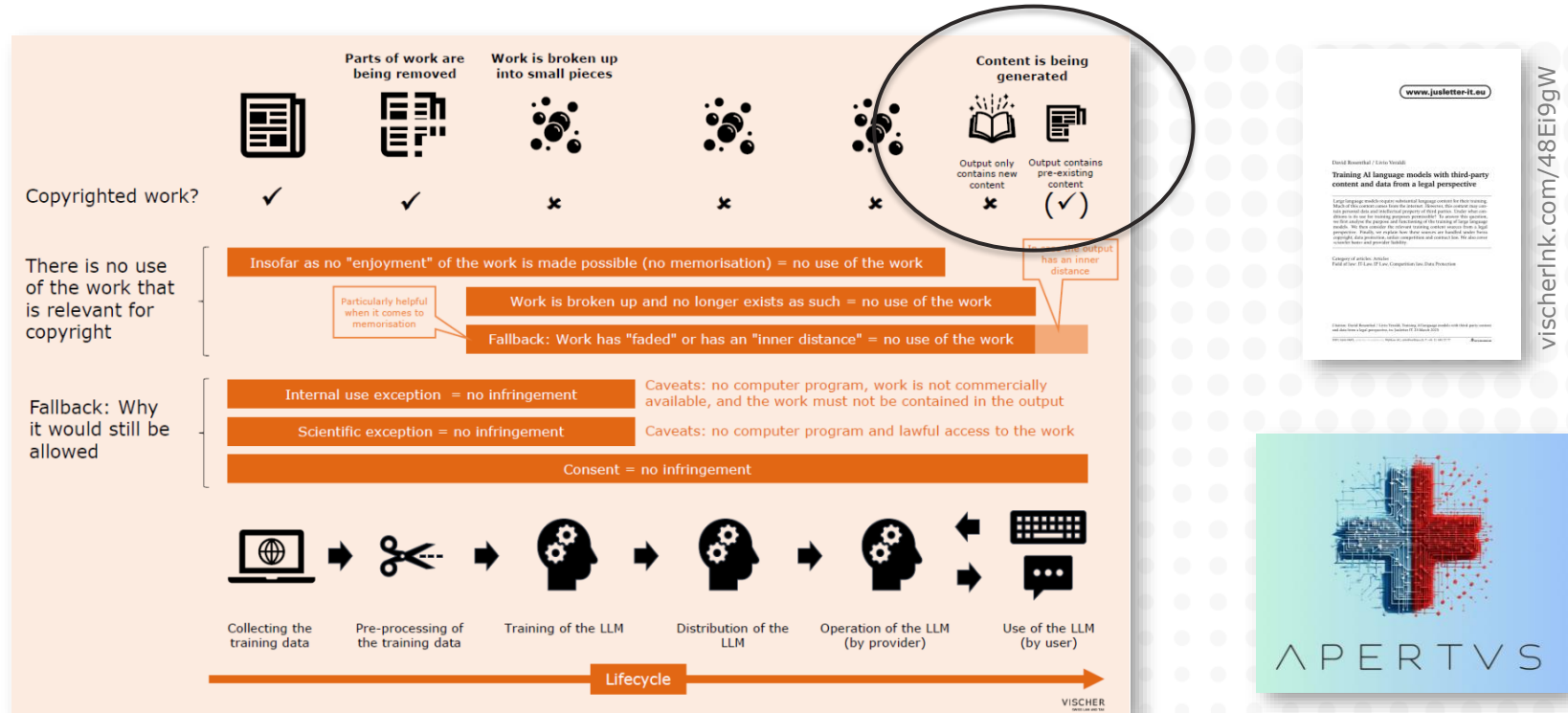
Statutory exceptions

In the US, the equivalent to these exceptions is the "fair use" doctrine

- **Switzerland: The statutory "scientific" exception**
 - "For the purpose of scientific research, it is permissible to reproduce a work if the reproduction is conditional on the use of a technical process and there is lawful access to the works to be reproduced." (Art. 24d para. 1 Swiss Copyright Act)
 - Scientific research = systematic, methodical search for new knowledge, regardless of the discipline
 - Fits well with LLM training (may even be commercial)
 - Access must be lawful (contractual agreements may be invalid)
 - Does not apply to computer software (important!)
- **EU: Similar exception exists ("Text & Data Mining")**
 - For non-academic use cases only where there is no "opt-out"

Current Swiss legal situation

What about the output?



Does the output violate copyright?

- Only the **user's prompt** and the model's reaction determine whether a copyright infringement has occurred
 - OK: "Provide me with an analysis of Harry Potter"
 - Not OK: "Write me volume 8 of Harry Potter."
- Is the developer of the model also **responsible** for this?
 - Not a question of training, but whether the provision of the model (or SaaS such as "ChatGPT") is considered a **participation** in the copyright infringement (e.g. by aiding or abetting it)
 - Analogue application of case law on **search engines**?
 - HGer ZH HG220030-O: Search engine not jointly responsible
 - BGE 145 III 72: A sufficiently close connection is necessary
 - BGE 140 III 616: User's perspective is relevant for exceptions

Processing of works *through* language models

- **Example:** Professor XY wants to import a licensed textbook into a generative AI tool so that students can then use the tool to ask questions about the content of the book
- Possible legal bases in Swiss copyright law?
 - **License conditions** may permit this use case
 - Use of the **teacher for teaching** in class* (statutory exception)
 - Reproduction for **internal information** or **documentation**, provided that the output is sufficiently summarised and reformulated so that it does not itself correspond to the work*
 - **Scientific exception:** What would be the research finding?

* In this case, only extracts of the book may be fed to the AI tool

Are crawler "bans" legally effective?

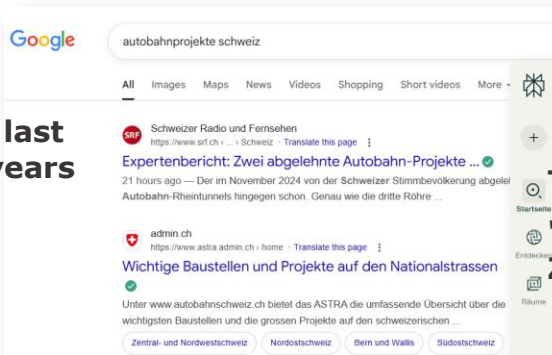
- An objection on the website (e.g., robots.txt) is **not binding**
- An **objection** destroys the presumption of consent and in EU law, it prevents the TDM exception for non-academic cases
 - Unclear: Must the objection be machine-readable or not?
 - However, it does not prevent other legal "grounds" from applying
- **Agreed terms of use** may have to be complied with
 - However, they may be difficult to enforce and even ineffective against the Swiss scientific exception (lawful access is sufficient)
- **Legally effective? No, not really ...**
 - Better: Use a login with terms of use (e.g., paywalls) or block "crawlers" in the net (e.g., Cloudflare, vischerlnk.com/4qjk7K2)

The fallout ...

- **Problem no. 1**
 - AI model training is done without compensating the right owners for their works used (contribution: arxiv.org/abs/2504.06219)
- **Problem no. 2**
 - AI extracting "only" information from copyrighted works, not the works as such (e.g., Retrieval Augmented Generation or "RAG")
 - Is this something copyright should/can limit or even prohibit?
- **Problem no. 3**
 - AI generated content is substitution of human creative content on a (potentially large) scale (e.g., photography, video, text, music)
 - Not a traditional copyright violation, but should this issue still be addressed using copyright law?

Agents instead of eyeballs ...

The last
30 years



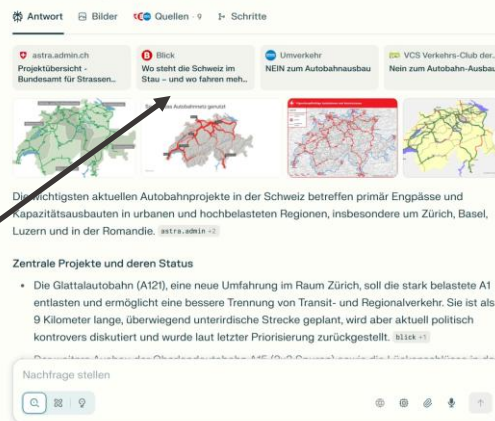
The future?
"Google
Zero"

Google itself has changed. While ten years ago they presented a list of links and said that success was getting you off their site as quickly as possible, today they've added an answer box and more recently AI Overviews which answer users' questions without them having to leave Google.com. With the answer box, researchers have found that [75 percent](#) of mobile queries were answered without users leaving Google. With the more recent launch of AI Overviews it's even higher.

<https://blog.cloudflare.com/content-independence-day-no-ai-crawl-without-compensation/>



autobahnprojekte schweiz



May I limit my
website for humans
only?

Should people be
prohibited from
using agents?

What if media can
no longer afford the
creation of content
that we rely on
(also for AI)?

Perplexity

Google

The reaction ...

The image shows a banner from the website of Steiger Legal. The banner has a dark red background with a large, stylized graphic of a hammer striking a robot head. The robot head is black with white eyes and a white mouth. The hammer is black and is positioned as if it has just struck the robot head. The text on the banner is white and reads: "Motion Gössi (24.4596): Droht ein faktisches Verbot für generative KI in der Schweiz?". Below this text, it says "6. August 2025, Rechtsanwalt Martin Steiger". In the top left corner, the Steiger Legal logo is visible. In the top right corner, there is a navigation menu with the following items: "Aktuelles", "Profil", "Kompetenzen", and "Publik". To the right of the banner, there is a white speech bubble with the text: "Could there be a de facto ban on generative AI in Switzerland?". The background of the slide features a pattern of light gray dots.

S[®] Steiger Legal

Aktuelles Profil Kompetenzen Publik

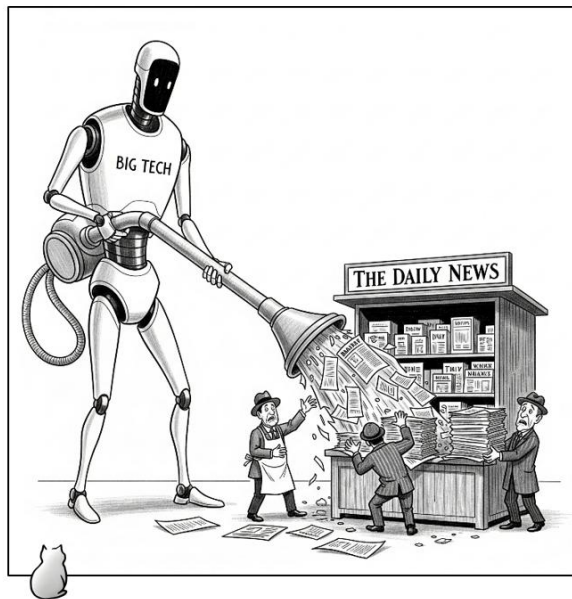
Motion Gössi (24.4596): Droht ein faktisches Verbot für generative KI in der Schweiz?

6. August 2025, Rechtsanwalt Martin Steiger

"Could there be a de facto ban on generative AI in Switzerland?"

Amend Swiss Copyright Law To Protect Against "AI Misuse"?

How supporters see it



How some others see it



Counterreactions
to the Gössi
motion

Possible solutions | 1

- **Practical solutions**
 - Robots.txt, paywalls, filtering: Limited practical effect
 - Legally protect such measures? Did not work out last time ...
 - License deals and cooperations with AI companies!
- **Expand scope of copyright protection as such**
 - E.g., declare use of works for AI training to be a relevant usage
- **Limit existing statutory copyright exceptions**
 - E.g., scientific exception not to apply in case of an opt-out by a rights-holder (as under the EU TDM exception)
 - How to record the opt-out? Does also not solve problem no. 2
 - Rights-holders must "opt-out" to be able to cut own license deals

Possible solutions | 2

- **Compensation for reliance on statutory exceptions**
 - Criteria to be used for determining the tariff? Does a negligible contribution to training also result in negligible remuneration?
 - Administration likely burdensome, eligible right-holders may have to be limited, and it may not solve problem no. 2
- **Collective licensing schemes**
 - Mechanisms exist, some even with opt-out for rights-holders
 - Similar issues as for collective compensation schemes; collective licensing only works if copyright prohibits a particular use of AI
- **Other concepts**
 - Turnover-based levy on providers or on users? Grant media houses own rights to control AI usage of to their content?

A political balancing act ...

- **Copyright is only one possible instrument to regulate** – neither "friend" nor "foe" to AI; its purpose is a fair balance
- **The core decision is political** – the focus is not abuse; it is whether we shall protect certain established industries (which have value for us) or let innovation and competition disrupt established markets or both
- **Protect both innovation and creativity** – should Switzerland follow the rest of Europe or develop own, innovative approaches to deal with the challenges?
- **Prevent a "zero-sum-game"** – even though there will be compensation, the devil remains in the detail of implementation
- **Our experience shows:** We will adapt and learn to live with it

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Thank you for your attention!

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Detailed background report:



<https://vischerlnk.com/3KZG2Wf>

More on this topic:
vischer.com/ki