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AIPPI Q274 – Rights in Data

REPORT OF THE SWISS GROUP*

Introduction

1. In recent years, the amount of data created, recorded, collected and used all around the world has exploded, and in very diverse fields (automotive, health, building, banking, marketing, etc.).

This phenomenon is due, among others, to the development (i) of technologies to record and process data (e.g. sensors, computers) and (ii) of electronic communication and platforms.

One of the major consequences of the accumulation of a huge corpus of data is the development of artificial intelligence (AI) and machine learning, because *"data is the raw material of AI and the emergence of new uses and applications depends on it.*[1]*"*

Data has become so important that it is has been considered as an infrastructure[2].

Why AIPPI considers this an important area of study

2. An increasing number of modern data applications give rise to legal questions about the protection of data, both in terms of protecting one's *own rights* and ***i****nvestments*, and in terms of *avoiding infringement* of rights of others.

For instance, *data mining processes* can be expensive and generate extremely valuable outcomes, but often rely on uses of previously existing data that may be difficult to square with existing exceptions and limitations of IP rights.

3. At the moment, there is uncertainty about rights in data, because in most jurisdictions the legislation doesn't give clear answers to two major questions: Who owns the data (mere data and database)? Who can access the data?

4. The lack of harmonisation creates legal uncertainty around the use and exploitation of data collections, which can deter investment and innovation.

Furthermore, uncertainties around ownership can be a barrier to effective trade and transfer of data.

5. Given the increasing role and value of data in all forms of innovation across industries and countries, it may be time for this to change.

6. However, this does not necessarily mean increasing the overall scope of protection. Although protection may encourage investment, there are also valid concerns about stifling competitive innovation by creating new monopolies on information.

Relevant treaty provisions

7. The TRIPs Agreement contains provisions on the protection of (i) compilations of data, and (ii) trade secrets[3].

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1 CÉDRIC VILLANI, For A Meaningful Artificial Intelligence, 21, <https://www.aiforhumanity.fr/pdfs/MissionVillani_Report_ENG-VF.pdf>..

2 OECD, 2015, Data-Driven Innovation: Big Data for Growth and Well-Being, OECD Publishing, 181: *"The economic properties of data suggest that may be considered as an infrastructure or infrastructural resource"* <https://read.oecd-ilibrary.org/science-and-technology/data-driven-innovation_9789264229358-en#page180>.

3 <https://www.wto.org/english/docs_e/legal_e/27-trips.pdf>.

First, the TRIPs Agreement contains a provision relating to the protection of compilations of data. Article 10.2 relating to "compilations of data" provides that: *"Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself".*

Under this provision, protection of compilations of data is mandatory.

But the second sentence of this Article provides that the protection of compilation of data cannot extend to the data itself. The construction of this second sentence is still open, particularly as to whether it prohibits any protection of mere data by an IP right.

Second, the TRIPs Agreement contains a provision dedicated to trade secrets that can apply to data. Article 39 (section 7: Protection of undisclosed information) provides that:

"1. In the course of ensuring effective protection against unfair competition as provided in Article 10bis of the Paris Convention (1967), Members shall protect *undisclosed information* in accordance with paragraph 2 and data submitted to governments or governmental agencies in accordance with paragraph 3.
2. Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information:
(a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
(b) has commercial value because it is secret; and
(c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.
3. Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products, which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition,
Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use".

Scope of this Study Question

8. This study question addresses the issue of rights in data, in particular IP rights in data.

9. It examines the extent to which data already enjoys protection under current IP and other laws, as well as any gaps or overlaps, such as those that may exist with regard to databases under copyright law and trade secret law.

10. It addresses whether there is a need for a new sui generis right in certain kinds of data, or whether current laws and contractual agreements are sufficient; and the potential right holder, object and scope of protection of any new right.

11. It also addresses whether such a right in data might undercut the existing system of intellectual property rights, unduly restrict the public domain and fundamental rights, distort competition, and hinder scientific research.

12. This study question does not address legal issues of privacy and personal data, i.e. information relating to an identified or identifiable natural person. Legislation and policy issues relating to personal data protection should not be be taken into consideration to answer this questionnaire.

13. This study question raises health data as one example of a data-intensive industry where the issues of rights and access to data are important. This question does not address any issues relating to procedures for obtaining legal approvals for products or procedures, such as pharmaceutical approvals and the like.

14. This study question also raises the topic of Public Sector Information (PSI) as another large source of data to which access may be desired by certain parties for commercial or other purposes.

Definitions

15. In the context of this study, the term "Data" means any mere information (individual item) of any kind, not aggregated and not arranged in a systematic or methodical way, that is recorded and stored by electronic or other means.

16. The terms “Database” and “Dataset” mean a collection of independent works, data arranged in a systematic or methodical way and individually accessible by electronic or other means[4].

Previous work of AIPPI

17. AIPPI has adopted three resolutions in the past:

– Resolution on database protection at national and international level (Q182) in 2004[5].

  This resolution stated, *inter alia*:

  “*AIPPI recommends that all countries provide for the protection of databases which require substantial investment by means of the sui generis right or other proprietary right subject to the provisions set out below*” (first paragraph of the resolution).

  But the recital stated that: “*Such proprietary right should not extend to the information and data contained in the database*” (recital b).

  One aim of this new study question is to determine whether the recommendation of AIPPI to protect databases has been followed by national/regional legislations.

  Another aim is to determine whether the protection of data should now be extended to mere data.

  Other relevant prior work includes:

– AIPPI’s Resolution on “Exceptions to copyright protection and the permitted uses of copyright works in the hi-tech and digital sectors” (Q216 and Q216B) in 2010[6].

– AIPPI’s Resolution on “Copyright in artificially generated works” in 2019[7].

18. While these Resolutions address related issues, they do not directly address the broader issue of protection of data and data ownership. Thus, it is considered appropriate to continue this avenue of study with this study question on rights in data.

Discussion

19. Under national and regional legislation, *mere data* has traditionally fallen outside the scope of IP protection.

20. But in many jurisdictions, *databases* can be protected by copyright, if they fulfil the general requirements for protection under copyright, and/or trade secret or unfair competition laws.

21. Furthermore, some jurisdictions have adopted other regimes to provide some measure of protection to investments in creating, collecting and organising databases.

These regimes use different instruments to pursue different goals, with different economic rationales.

For instance, in the EU, collections of data that are the product of substantial investment have been protected by a *sui generis* database right since 1996, with little demonstrable success in incentivising investment[8].

In 2017, the European Commission floated the idea of creating an EU-wide ‘data producer’s right’ that would protect industrial data, but no follow up initiatives were advanced.

22. The aim of this Study Question is to decide whether such specific regimes providing protection of databases are desirable and sufficient, and whether mere data should also be protected in certain circumstances.

23. The process of creating and using mere data and of databases can be divided into three steps.

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[4] This definition is set out in the EU directive 96/9/EC of 11 March 1996 on the legal protection of databases, Art. 1. This definition has been adopted by the AIPPI resolution on Database Protection at National and International Level (Q 182, point 3).
[5] <https://aippi.org/wp-content/uploads/committees/182/RS182English.pdf>.
[6] <https://aippi.org/wp-content/uploads/committees/216/RS216English.pdf> and <https://aippi.org/wp-content/uploads/committees/216B/RS216BEnglish.pdf>.
[7] <https://aippi.org/wpcontent/uploads/2019/10/Resolution_Copyright_in_artificially_generated_works_English1.pdf>.
[8] The EU Commission conducted in 2017 and 2018 the evaluation of tis Directive: <https://ec.europa.eu/digital-single-market/en/news/staff-working-document-and-executive-summary-evaluation-directive-969ec-legal-protection>.

I. Creation/Production of mere data

24. Data exists when it is (i) *recorded* and (ii) *stored* in a device.

Many industries have been highlighted as big data intensive industries. This is, for instance, the case for automotive and healthcare industries.

> Example 1: the automotive industry (data generated by sensors).
>
> The automotive sector may be trending toward a situation where any device consists of two assets: the physical equipment itself and the data generated from its operation.
>
> Automotive manufacturers assemble each vehicle from many components acquired from subcontractors. These components include data sensors, recorders, and communication units.
>
> Who is the owner of the data produced during vehicle operation? The subcontractor, the automotive manufacturer, the owner of the vehicle (*e.g.* a leasor or employer), or the end user?[9]

Similar issues arise, for example, with collection of vehicular traffic data and weather data.

25. This raises the question of the *rights on mere data.*

In most of the jurisdictions, mere data seems not to be protected by copyright or another

IPR. However, the data from millions of cars, taken together, has immense value.

Control of and access to mere data are typically controlled by contract. In most cases, such data is subject to secrecy obligations, thereby preventing access to that data by competitors and the public. Particularly in industries with a small number of large players, this may result in an "information monopoly" that provides significant economic advantage.

The question then is to consider whether control, access and use of mere data should be subject to a specific legal regime, *e.g.* a new *sui generis* right, with specific prerogatives for the owner and specific exceptions and limitations to the monopoly.

II. Creation of database

26. The structuring and annotation of mere data is crucial, for instance for machine learning.

The transformation of mere data to a suitable form for training an AI modelusually requires skill and effort, and can be extremely time consuming and expensive[10].

27. This raises two issues: (i) the protection of the resulting database by IP rights, and (ii) the access to and use of the mere data to be stored in the database.

28. (i) *Database protection*

A database can be subject to IP rights if it meets the corresponding legal requirements.

Indeed, it is generally considered that a database which, by reason of the selection or arrangement of its contents, constitutes the author's own intellectual creation shall be protected as such by copyright.

Databases can be protected by others means. For instance, in the EU, a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of its contents can be protected by a *sui generis* right. The data producer can prevent extraction and/or reutilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database[11].

A database can also be protected as trade secret or by unfair competition law if it fulfils the corresponding legal requirements.

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[9] J. RITTER/A. MAYER, Regulating Data as Property: A New Construct for Moving Forward, Duke Law & Technology Review, vol. 16, n° 1, 221 s. <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1320&context=dltr>.

[10] Machine learning is not the only expression of AI, but it is currently the most developed and efficient one. Machine learning is based on the use of a data set to train an AI model. Consequently, the availability of appropriate training data is critical.

[11] Article 7.1 of the Directive 96/9 of 11 March 1996 on the legal protection of databases.

The issue is to determine whether the current regimes are satisfactory or if some modifications and harmonization are desirable in light of the rapid developments in this field.

29. (ii) Access to mere data.

Mere data used by the database producer to create the database may have been produced by *third parties*.

> Example 2: Works generated by AI (machine learning)
>
> Existing works (e.g. paintings) are selected to be integrated in a database.
>
> This database is used by an AI system to create an artificially generated work[12].
>
> Source works can be protected by IP right, *e.g.* copyright. Indeed, when a literary, audio-visual or musical work is integrated in a database, for instance to create AI training data, its copyright protection may extend to such use.

> Example 3: Applications based on social media
>
> Many applications are based on statistical studies of information available on social media.
>
> An AI system may be used to examine, for example, the huge number of messages (texts, photos, etc.) posted every day on social media and detect certain relationships or trends in order to provide statistics in very diverse domains (health, marketing, etc.).

In these examples, the crucial issue is the lawful access to data.

Is there a need for clarification regarding the use of mere data available on internet? Should specific exceptions to IP rights be implemented, for instance for data mining? [13]

30. In other circumstances, third parties may wish to obtain access to existing databases as a whole.

> Example 4: Health data (access to a database)
>
> Research in the area of health, and valuation of new medical products and processes, may be greatly facilitated by access to existing databases containing health-relating information. However, such data are confidential and highly valuable information. They may be protected by an IP right (copyright, *sui generis* right) or by trade secret. A researcher may wish to obtain access to such databases for furtherance of health-related studies or initiatives.

The potential desire of third parties to access existing databases is far from limited to this one example. Other examples include browsing and shopping histories, location data, music and video preferences, etc.

III. Creations made using a database

31. When a database is used, for instance by an AI system, the result (invention, work, etc.) may be protected by an IP right (patent, copyright, related right, etc.).

The issue is to determine whether or not the owner of the mere data and/or the database could claim any right on the result of the AI process.

For instance, the resolution on Copyright in artificially generated works (2019) states that:

"AI generated works should only be eligible for protection by Copyright if there is human intervention in the creation of the work and provided that the other conditions for protection are met. AI generated works should not be protected by Copyright without human intervention.
This principle is considered to apply to the Working Example as follows: (...)

[12] See the resolution and study guidelines on Artificially generated works (2019). <https://aippi.org/wp-content/uploads/2019/02/Study-Guidelines_Copyright_Copyright-in-artificially-generated-works_22January2019_NEW.docx.pdf>.
[13] For instance, the EU Directive 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market, provides an exception to copyright for text and data mining for the purposes of scientific research (Article 3 and 4).

"the AI generated work should be eligible for Copyright protection where there are human data selection criteria for the input into the AI".

If the "human data selection criteria" confers originality to the final AI generated works, the selector could possibly claim copyright on the final work.

Questions

I. Current law and practice

A. Protection of mere data

1. Can mere data (in general or some specific mere data) be subject to a property right / IP right? If yes, please answer the following sub-questions:

No.

Under Swiss law, mere data is not subject to any intellectual or other property right that awards exclusivity or comparable rights. Such intellectual or other property rights only exist with respect to the content embodied in or represented by data.

Hence, whether or not data benefits from protection under intellectual or other property rights depends upon the type of content of the data at issue. By way of illustration, data may represent a copyrightable work (e.g., if the data represents a literary work or a computer program with individual character). If so, the work is protected under copyright law, and the copyright owner is awarded exclusivity as provided for by copyright law. However, it has to be highlighted that these rights do not protect the mere data as such, but a specific type of content embodied in and represented by such data.

a) What type of property right/ IP right would this be?

Not applicable, as there is no intellectual or other property right that protects mere data as such.

b) What are the requirements for such protection?

Not applicable, as there is no intellectual or other property right that protects mere data as such.

c) Who is the owner of this property right?

Not applicable, as there is no intellectual or other property right that protects mere data as such.

d) What acts are prohibited for third parties to avoid infringement?

Not applicable, as there is no intellectual or other property right that protects mere data as such.

e) Is this right marketable? If so, are specific rules in contract law applicable?

Not applicable, as there is no intellectual or other property right that protects mere data as such.

f) Does your legislation/case law contain specific exceptions to this protection (e.g. access right for data mining, scientific research, etc.)?

As mentioned above, there is no intellectual or other property right that protects mere data as such.

However, it may be worth noting that with respect to content that is embodied in or represented by data that constitutes a copyrightable work, Swiss copyright law provides for an exception with respect to text and data mining for research purposes (cf. Article 24d of the Swiss Copyright Act, CopA). Under this exception, it is permissible to reproduce a work for the purposes of scientific research if the copying is due to the use of a technical process and if the work to be copied is lawfully accessed. In this context, it does not matter whether the research is for academic or commercial purposes.

2. Is mere data protected by provisions other than a property right/IP right? If yes, please answer the following sub-questions:

No.

The situation outside the field of intellectual property or other property rights is comparable to the one within that field (cf. answer to question 1 above): There are no other Swiss laws outside that field of intellectual property or other property rights that offer protection to mere data as such and such other rights only exist with respect to the content embodied in or represented by data.

For instance, the Swiss Federal Unfair Competition Act (UCA) prohibits the exploitation of a work result that has been entrusted to a person if such exploitation violates a duty of loyalty or trust (article 5(a) and (b) *UCA).* It further constitutes an act of unlawful competition under the UCA to take over and exploit as such the market-ready work result of a third party without reasonable own effort by means of technical reproduction processes (article 5(c) UCA). The UCA also prohibits the exploitation of trade secrets that have been unlawfully obtained (article 6 UCA). The unlawful disclosure or exploitation of a trade secret may further constitute a criminal offense (article 162 of the Swiss Penal Code, *SPC).* Hence, protection under the UCA and the SPC is available with respect to the unlawful disclosure and/or exploitation of certain work results and trade secrets. To the extent that trade secrets or other data is protected by contractual obligations, such as confidentiality or non-use obligations, protection may also be available under the contract law. In addition, there are a number of sector specific laws that award protection to certain information, such as with respect to data contained in applications for approval of pharmaceutical products (article 12 of the Federal Act on Medicinal Products and Medical Devices, TPA) and agrochemical products (article 52 of the Ordinance on the Placing on the Market of Plant Protection Products).

In each case, however, the relevant provisions of Swiss law do not protect mere data as such, nor do they grant exclusivity or similar rights. They merely offer limited protection against specific, often narrowly defined unlawful uses of the content embodied in the data at issue, provided that the applicable prerequisites are fulfilled.

a) What type of protection is available?

Not applicable; as mentioned above, there is no other right that protects mere data as such.

b) What are the requirements for such protection?

Not applicable; as mentioned above, there is no other right that protects mere data as such.

c) Who is the person entitled ?

Not applicable; as mentioned above, there is no other right that protects mere data as such.

d) What acts are prohibited for third parties to avoid infringement?

Not applicable; as mentioned above, there is no other right that protects mere data as such.

e) Are mere data marketable? If so, are specific rules in contract law applicable?

Yes, as a matter of principle, data is marketable under Swiss law. There are no Swiss law provisions that would limit or restrict the marketability of mere data as such under Swiss law. Any such limitations would only arise with respect to specific content embodied in such data (e.g., under data protection laws).

However, for lack of legal protection by way of an intellectual or other property right, there is no exclusivity or similar right in mere data. Hence, mere data may merely be marketed by way of restricting access and use of such data by imposing contractual obligations, such as confidentiality obligations, on the recipient.

f) Does your legislation/case law contain specific exceptions to this protection (e.g. access right for data mining, scientist research, etc.)?

Not applicable. As mentioned above, there is no other right that protects mere data as such; hence, there are neither any specific exceptions.

B. Protection of databases

3. Can a database be subject to a property right/IP right? If yes, please answer the following sub-questions:

Yes.

While there is no sui generis or specific legal protection for databases under Swiss law, a database may qualify as a collected work and thus be subject to copyright protection insofar as it is an intellectual creation with individual character with regard to its selection and arrangement (article 4 CopA). In addition, a database may potentially be copyrightable as a linguistic or scientific work (article 2(2)(a) CopA; e.g., an encyclopedia) or as a derivative work (article 3(1) CopA), in each case, provided that it is an intellectual creation with individual character.

It should be noted that copyright protection of databases as collected work or as any other type of copyrightable work does not protect the mere data as such that is contained in the database. Hence, even if the database may, subject to having individual character, constitute a copyrightable work, the mere data that builds the database as such is not protected by copyright. In other words, the protection of a database as a collected work is a purely structural protection (cf. Decision of the Swiss Federal Court 4A_482/2013 E. 3.2.3).

a) What type of property right/ IP right would this be?

Protection may be awarded under copyright law, provided that the database has individual character and constitutes a copyrightable work.

b) What are the requirements for such protection?

To benefit from copyright protection, the database has to qualify as copyrightable work. This requires that it is a literary or artistic intellectual creation with individual character.

To constitute an *intellectual creation*, the work has to be a creation of a human mind and based on the human will. In other words, a work must be an expression of a statement of thoughts (Decision of the Swiss Federal Court 130 III 168, c. 4.5). If a database were to be created by a machine alone (e.g., by artificial intelligence), without there being any sufficient involvement of a human in the process of its creation, it would not be protected under copyright. *Individuality* differs from banality or routine work; it results from the variety of decisions taken by the author, from surprising and unusual combinations, so that it seems impossible that a third party faced with the same task could have created an identical work (Decision of the Swiss Federal Court 136 III 225, c. 4.2).

With regard to the protection of a database as a collected work in particular, it is required that the database as such amounts to a new work, i.e., to an intellectual creation with individual character, and is not merely the mechanical addition or sequencing of data. By way of example, the sequencing of temperature values from different locations that are measured on an ongoing basis every sixty seconds in a database would not be sufficient for the database to constitute a copyrightable work. Similarly, an alphabetical telephone directory would not qualify as a copyrighted work. Instead, the individual character must result from the selection and arrangement of the data that is in the database. This also means that the data as such does not benefit from copyright protection, even if it is included in a copyrightable database.

c) Who is the owner of this property right?

As a matter of principle, copyright vests in the author, who is the natural person who has created the work (article 6 CopA). If two or more persons contribute as authors to the creation of the work, they jointly own the copyright (article 7(1) CopA). Hence, the initial owners of the copyright in a database will be the author(s) who created such database. They may assign the copyright to a third party upon its creation or thereafter. For instance, employees may assign the copyright in works they create to their employer.

d) What acts are prohibited for third parties to avoid infringement?

The prohibited acts with respect to databases that are protected as copyrighted works are the same as for any other copyrighted work.

Copyright confers upon the author the exclusive right to his/her work (article 9(1) CopA) so that the author may decide whether, when and how the work is used (article 10(1) 1 CopA). In particular, the author has the exclusive right to reproduce copies of the work and to recite, perform or present the work (article 10(2) CopA). Further, the author has the right to decide whether, when and how the work may be altered, and whether, when and how the work may be used to create a derivative work or may be included in a collected work (article 11(1) CopA).

As mentioned above, the protection of a database as a collected work only concerns the collection as such, but not the mere data included in the collection. If only a part of the collected work is copied, the copyright is infringed only if the copied part as such is protected under copyright in itself, either because it still represents an individual, copyrightable selection, or because it adopts the individual arrangement of the original collection (cf. Cour de justice Geneva, SMI 1994, 183). In contrast, the unauthorized reproduction of the mere data does not infringe upon the copyright in the collection.

e) Does your legislation/case law contain specific exceptions to this protection (e.g. access right for data mining, scientist research, etc.)?

Yes, there are a number of exceptions to copyright protection.

For instance, there are exceptions for private use, for creating archive and backup copies, for creating temporary copies, for quotations, etc. As already mentioned above, Swiss copyright law further provides for an exception with respect to text and data mining for research purposes (article 24d CopA). Under this exception, it is permissible to reproduce a work for the purposes of scientific research if the copying is due to the use of a technical process (e.g., data mining) and if the work to be copied is lawfully accessed. In this context, it does not matter whether the research is for academic or commercial purposes.

4. Are databases protected by any provision other than a property right / IP right? If yes, please answer the following sub-questions:

There is no sui generis or similar specific legal protection for databases under Swiss law. However, the owner of a database may under certain circumstances benefit from protection awarded against unlawful third party use of such database under unfair competition law or trade secret law. It is important to note that the relevant provisions of Swiss law do not protect the database as such, nor do they grant any exclusivity or similar rights. They merely offer limited protection against specific, narrowly defined unlawful uses of certain content, provided that the applicable prerequisites are fulfilled.

a) What type of protection is available?

Protection may be available under unfair competition law and under trade secret law. In addition, protection may be available under certain sector-specific laws.

The UCA prohibits the exploitation of a work result that has been entrusted to a person if such exploitation violates a duty of loyalty or trust (article 5(a) and (b) UCA). It further constitutes an act of unlawful competition under the UCA to take over and exploit as such the market-ready work result of a third party without adequate own effort by means of a technical reproduction process (article 5(c) UCA). A database may potentially qualify as work result. It is important to note, however, that article 5 UCA does not protect work results as such, but is only intended to prevent specific unlawful conduct with respect to such work results, such as to avoid free-riding.

The UCA also prohibits the exploitation of trade secrets that have been unlawfully obtained (article 6 UCA). The unlawful disclosure or exploitation of a trade secret may further constitute a criminal offense under Swiss criminal law (article 162 of the Swiss Penal Code, SPC). Thus, if and to the extent that a database is a trade secret that is unlawfully disclosed or exploited, protection may be available under the UCA and/or the SPC.

Finally, there are certain sector specific laws that award protection to specific information. For instance, data relating to the marketing authorization for pharmaceuticals (article 12 TPA) and agrochemical products (article 52 of the Ordinance on the Placing on the Market of Plant Protection Products) are protected from exploitation by third parties under certain circumstances.

b) What are the requirements for such protection?

The requirements depend upon the type of protection that is sought.

To fall within the scope of article 5 UCA, a database has to constitute a work result, i.e., a tangible result of a minimal investment in the creation of the work result. Further, such work result must be exploited in the specific manner sanctioned by article 5 UCA in order to constitute unfair competition. For instance, article 5(c) UCA is triggered only if the market-ready work result is taken over and exploited as such by means of a technical reproduction process without adequate own effort.

To benefit from protection as a trade secret, the database has to be kept secret and the owner needs to intend to keep, and to have a reasonable interest in keeping, it secret. Further, protection under trade secret laws is only granted if the trade secret is disclosed or exploited by a person who is not authorized to do so, which typically requires that such person is bound to confidentiality and breaches such obligation, or knowingly abuses such breach by a third party.

c) Who is the person or entity entitled to this protection?

This depends upon the type of protection that is sought. It may be the person who has created or who is entitled to use the work result as its own, or the person whose trade secrets are at issue.

d) What acts are prohibited for third parties to avoid infringement?

This depends upon the type of protection that is sought. Typically, the rights mentioned above prohibit the unlawful exploitation and/or disclosure of the work results resp. trade secrets at issue.

e) Does your legislation/case law contain specific exceptions to this protection (e.g. access right for data mining, scientist research, etc.)?

No.

C. Public Sector Information (PSI)

5. Does your legislation contain regulation/case law regarding PSI? if YES, please explain.

Yes.

The Federal Act on Freedom of Information in the Administration (FoIA) that applies to the Swiss federal administration and to certain public and private bodies outside the federal administration stipulates the general principle that any person has the right to inspect official documents and to obtain information about the content of official documents, subject to certain exceptions. Thus, the right to access official documents is intended to be the rule, whereas secrecy shall be the exception.

In addition, the Swiss Federal Council adopted on November 30, 2018 an “Open government data strategy in Switzerland for the period 2019 to 2023”. Its aim is to grant public access to all open data of the federal administration on the portal “opendata.swiss”, and to develop legislation to provide for such access.

6. Is there a right to access such PSI?

Yes.

Insofar as the FoIA applies and provides for access to public documents, there is such right. In order to implement an open government data strategy, further amendments to the existing law and regulation may be required.

D. Health data

7. Does your legislation contain regulation/case law regarding health data? If YES, please explain.

Yes, health data is governed by several statutes.

For instance, health data is protected under the Swiss Federal Data Protection Act (DPA), which qualifies health data that relates to an identified or identifiable person as sensitive personal data. The processing of such sensitive personal data is subject to certain additional limitations compared to “normal” personal data, such as specific information duties and the need to justify disclosures to third parties.

Furthermore, health data may be protected by way of professional secrecy obligations applicable to doctors and other health practitioners (article 321 SPC) and to persons involved in human research pursuant to the Federal Human Research Act (article 322 SPC), both of which require the relevant professionals to maintain certain information, which often includes health data, secret.

The Human Research Act *(HRA)* further governs the collection and processing of health-related data in the context of research concerning human diseases and concerning the structure and function of the human body. In particular, the HRA requires the data subjects to be informed about the processing of their health data and the measures taken to protect such data. Furthermore, the HRA stipulates a need to obtain consent for certain processing activities in respect of health-related personal data.

Health data is further addressed in the Swiss Federal Act on the Electronic Patient File. This law essentially requires that such electronic patient file can only be established with the informed consent of the patient, which can be withdrawn by the patient at any time. There is a controversial discussion ongoing as to whether the electronic patient file should be made mandatory and whether and under which circumstances third parties should have an access right to the information stored in the file.

The federal government also looks into whether and how it can improve the sharing of health-related personal data between research institutes and universities to foster personalized medicine. So far, no specific measures have been implemented to that end.

8. Is there a right to access such information?

There is no general right of third parties to have access to health data; quite to the contrary, as a matter of principle, health-related personal data must not be disclosed to third parties, except with the consent of the data subject, or if there is a specific other justification applicable. The data subject his- or herself has certain access rights under the DPA.

II. Policy considerations and proposals for improvements of your Group's current law

9. Could any of the following aspects of your Group's current law or practice relating to rights in data be improved? If YES, please explain and answer each of the sub-questions.

We believe that there is no imperative need to improve the current law and practice relating to rights in data.

Even if mere data as such is not protected and even if there exists no sui generis protection for databases under Swiss law, Swiss law offers reasonable protection against specific unlawful use (most importantly, under unfair competition and trade secret law) and we believe that the limited protection granted to databases under copyright law is appropriate. In particular, we believe that there is no need to introduce a new sui generis protection for mere data or for databases and we neither believe that the threshold for a work to be considered a copyrighted work should be eased in order to facilitate copyright protection of databases or even of mere data.

Overall, we believe that Swiss law reasonably strikes the balance between the different conflicting interests at stake, such as the interest in the protection of proprietary information, copyrightable works and work results, the interest in preventing the monopolization of ideas and concepts, the interest in enabling access to data and information for public benefit, and the interest in reasonable protection of personal data.

What is more, we believe that Swiss law has proven to be sufficiently flexible and technology-neutral to enable it to deal with new developments, such as the increased importance of data as a commercial value. Where case law is partially criticized as too restrictive (e.g., in the context of adjudicating alleged unlawful uses of work results under article 5(c) UCA, that is often perceived as being very much in favor of the person allegedly copying such work result), the letter of the existing law allows reasonable room for courts to take such criticism into account, if needed.

10. Protection of mere data?

We do not believe that a specific intellectual or other property right or any other right to protect mere data should be introduced into Swiss law.

11. Protection of databases?

We do not believe that a specific intellectual or other property right or any other right to specifically protect databases should be introduced into Swiss law.

12. Rules on contract law, *e.g.*, prohibition of contractual override, etc.?

We do not believe that there is a need to amend rules on contract law with a view to protecting mere data or databases.

13. Are there any other policy considerations and/or proposals for improvement to your Group's current law falling within the scope of this Study Question?

If any amendments with respect to the protection of mere data or of databases were to be contemplated, they should focus on solving practical issues, such as the segregation of and access to data held by a company for a third party in the company's bankruptcy (e.g., in case of data stored and processed by an outsourcing provider for a third party client, such third party client should have the right to receive its data from the bankruptcy estate).

III. Proposals for harmonisation

14. In your opinion, should the protection of mere data and/or database be harmonized? For what reasons?

Yes, if rights to protect mere data or databases were to be introduced into Swiss law (which we believe is not needed), such rights should be harmonized. Due to its omnipresent nature and global replicability, we believe it would be inappropriate for each jurisdiction to have a different rule set with respect to rights protecting mere data and databases.

IV. Protection of mere data

15. Should mere data be subject to a specific protection, *e.g.* an IP right or other type of right?

We do not believe that mere data should be subject to a specific protection. In particular, we do not think that there should be an intellectual property right in mere data.

What may be considered is the harmonized implementation of protection of data created or collected by an individual or a legal entity against specific, narrowly defined unauthorized uses by third parties (e.g., cases of unlawful misappropriation, unlawful access and exploitation of such data). In our view, unfair competition and trade secret laws would be appropriate to deal with such issues, given that they typically do not award absolute protection and exclusivity as intellectual property rights do (which might, in case of mere data, allow the monopolization of mere data, for which we believe there is no justification), but they prevent specific unlawful conduct by third parties.

16. If yes, what should be the requirements for such protection?

Any such right should be clearly defined, offering protection against narrowly defined unlawful uses only. We believe that article 5(c) UCA could serve as a model for a concept that offers limited protection against the unauthorized reproduction of a work result by means of a technical reproduction by a third party without adequate own investment. Any such law should carefully balance the interests at stake, including, without limitation, the economic value of the work result, its confidentiality, and the public interest in enabling imitation of third party work results that are not protected by intellectual property rights. We believe it should not matter whether the data was generated by humans or by a machine.

17. Who should be the owner of this right/IP right?

The person benefitting from such right should be the individual or legal entity who has created or collected the data or invested in its use or commercial exploitation.

18. What acts should be prohibited to third parties to avoid infringement?

Prohibitions should be narrowly defined, to cover specific unlawful uses and specific acts that violate the principle of good faith, contractual or other obligations. We do not think that exclusivity rights as they are granted under intellectual property rights should be replicated for mere data. In particular, we believe

that any such prohibition should not hinder the independent generation of the same data by a third party, even if it results in the exact same result.

19. Which exceptions, if any, should apply to this protection *(e.g.* access right for data mining, etc.)?

Exceptions may be considered, but they should be carefully balanced and take into account all relevant interests at stake, including, without limitation, the interest of the person benefitting from the right in being awarded the relevant protection, and the public interest in preventing the monopolization of mere data. For instance, exceptions for private use, access to personal data and use for research purposes may be considered.

20. What role should contract law play (e.g., prohibition of contractual override)?

Given that we believe that there should not be an intellectual property right in mere data, there is no need for a prohibition of contractual override. Contracts should be a means of enabling third parties to use the data and defining the permitted use; the right should grant remedies against the breach of such obligations by the counterparty.

V. Protection of databases

21. Should databases be subject to a specific protection, *e.g.* an IP right or other type of right?

We do not believe that databases should be subject to a specific protection. In particular, we do not think that there should be an intellectual property right in mere data. We believe that the same considerations as with respect to mere data should apply (cf. our answers to questions 14 to 19).

22. If yes, what should be the requirements for such protection?

Cf. our answer to question 15.

23. Who should be the owner of this right/IP right?

Cf. our answer to question 16. With respect to databases specifically, the owner of the right should be the person or legal entity who created the database; in this context, the creation of the database may encompass any step undertaken it its creation, from the definition of the idea (goal, duration, extent, etc.), the type of data, its collection, compilation and evaluation.

24. What acts should be prohibited to third parties to avoid infringement?

Cf. our answer to question 17.

25. Which exception should apply to this protection *(e.g.* access right for data mining, etc.)?

Cf. our answer to question 18.

26. What role should contract law play *(e.g.* prohibition of contractual override)?

Cf. our answer to question 19.

VI. Specific regimes

27. Should Public Sector Information (PSI) be subject to a specific regime, *e.g.* regarding the control and access to such data/databases? If YES, please explain the desirable regime.

We believe that the implementation of open data strategies by governments and public research organizations are desirable, provided, however, that the rights of commercial enterprises remain unaffected by such strategies. In other words, the implementation of open data strategies by governments should not impair the right of commercial enterprises to maintain their trade secrets.

28. Should health data be subject to a specific regime, *e.g.* regarding the control and access to such data/databases? If YES, please explain the desirable regime.

With a view to the rights discussed above (cf. our answers to questions 15 to 25), we do not believe that there is a need for a specific regime. In any case, health-related personal data will have to be protected appropriately.

VII. General

29. Please comment on any additional issues concerning any additional aspect of Rights in Data you consider relevant to this Study Question.

30. Please indicate which industry sector views provided by in-house counsel are included in your Group's answers to Part III.

Our answers include views of in-house counsels working in the field of life sciences, public health and industrial applications.

Summary

In Switzerland, mere data is not subject to any intellectual property or similar right that awards exclusivity or comparable rights. Such rights only exist with respect to the content embodied in or represented by data. Hence, whether or not data benefits from protection under intellectual property or similar rights depends upon the content of the data at issue. Unlike in other jurisdictions, there is no sui generis protection for databases under Swiss law. Limited protection may however be awarded under copyright law and under unfair competition law, if the relevant prerequisites are met. The authors of this paper believe that there is currently no imperative need to amend the laws and practice in Switzerland to expand the scope of protection awarded to mere data or to databases. In the authors' view, Swiss law offers reasonable protection against specific unlawful use of data and databases and strikes a reasonable balance between the various conflicting interests at stake.

Zusammenfassung

Blosse Daten als solche sind in der Schweiz weder durch Immaterialgüterrechte noch durch ähnliche Rechte geschützt, die Exklusivität oder vergleichbare Ansprüche gewähren. Solche Rechte bestehen nur in Bezug auf die in den Daten verkörperten oder durch sie repräsentierten Inhalte. Ob Daten als solche durch Immaterialgüterrechte oder ähnliche Rechte geschützt sind oder nicht, hängt daher vom Inhalt der Daten ab. Anders als in anderen Rechtsordnungen gibt es unter Schweizer Recht keinen sui generis Schutz für Datenbanken. Ein beschränkter Schutz kann jedoch unter dem Urheberrecht sowie unter dem Lauterkeitsrecht gewährt werden, wenn die entsprechenden Voraussetzungen erfüllt sind. Die Autoren dieses Papiers sind der Ansicht, dass derzeit keine zwingende Notwendigkeit besteht, die Gesetze und die Praxis in der Schweiz dahingehend zu ändern, dass der Umfang des Schutzes, der Daten als solchen oder Datenbanken gewährt wird, erweitert wird. Nach Ansicht der Autoren bietet das schweizerische Recht einen angemessenen Schutz gegen spezifisch umschriebene unrechtmässige Nutzungen von Daten und Datenbanken und sorgt so für einen angemessenen Ausgleich zwischen den verschiedenen gegensätzlichen Interessen, die auf dem Spiel stehen.

Résumé

En Suisse, les données en tant que telles ne font l'objet d'aucun droit de propriété intellectuelle ou d'un droit similaire accordant une exclusivité ou des droits comparables. De tels droits n'existent qu'en ce qui concerne le contenu incorporé dans les données ou représenté par celles-ci. Par conséquent, le fait que les données bénéficient ou non d'une protection au titre de la propriété intellectuelle ou de droits similaires dépend du contenu des données en question. Contrairement à d'autres juridictions, il n'existe pas de protection sui generis pour les bases de données en droit suisse. Une protection limitée peut toutefois être accordée en vertu du droit d'auteur et du droit de la concurrence déloyale, si les conditions préalables sont remplies. Les auteurs de cet article estiment qu'il n'y a actuellement aucun

besoin impératif de modifier la législation et la pratique en Suisse pour étendre la portée de la protection accordée aux données en tant que telles ou aux bases de données. Selon les auteurs, le droit suisse offre une protection raisonnable contre l'utilisation illicite spécifique de données et de bases de données et assure un équilibre raisonnable entre les différents intérêts en jeu.