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“From sainted to tainted” Third Party Rights to AI Training Data

reWIPS⁵ - 5th annual Workshop on Intellectual Property Rights, 19.-20. April 2021, Szeged (online)

What is the problem anyway?

- Trained with more than 15.000 images as training data
- What are the risks of introducing an AI system in which the training data was tainted with third party rights?
- In other words: What happens, if only 1 out of the 15.000 used images is tainted?
 - This may raise the question of proportionality...



Picture from <https://obvious-art.com/portfolio/edmond-de-belamy/>; Edmond De Belamy; Medium: GANs Algorithm, Inkjet printed on Canvas.

Some technical aspects first:



Picture from pixabay: <https://pixabay.com/photos/machine-learning-typewriter-5290464/>; picture: Machine Learning Typewriter Artificial Intelligence; Author: viarami, free for commercial use /no attribution required

- Supervised Learning
- Unsupervised Learning
- Reinforcement Learning

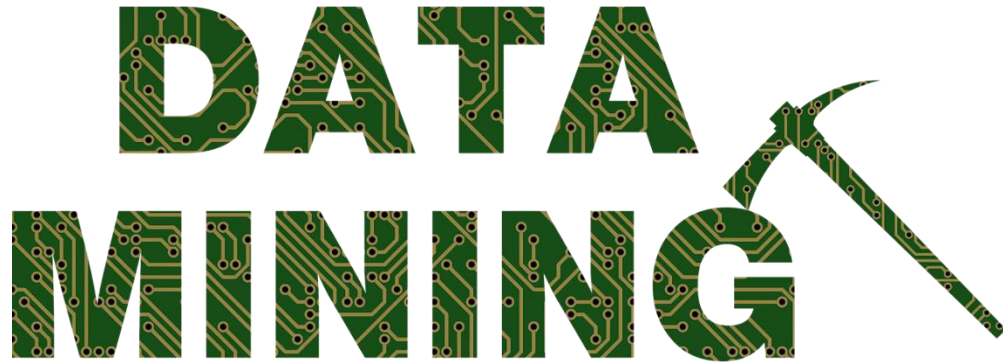
Black Box



Picture from pixabay:
<https://pixabay.com/photos/hard-drive-storage-medium-1523751/>;
picture: Hard drive Storage medium Digital Data Disk; Author: PIRO4D, free for commercial use /no attribution required

- Lack of knowledge at two points:
 - *ex ante*, since a predictability of a certain behavior is not possible or only possible to a limited extent
 - *ex post*, since clarifications can no longer be guaranteed

Text- and Data Mining as a tailor made solution...



Picture from pixabay: <https://pixabay.com/vectors/a-i-ai-anatomy-2729773/>;
picture: A I AI Anatomy Artificial Intelligence Chip; Author: GDJ, free for commercial use /no attribution required

Art. 2 No. 2 DSM-RL with its definition of "text and data mining" states:

"Text and data mining' means any automated analytical technique aimed at analysing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations."

but...

- Only applies if there is lawful access to the data
- Art. 3 DSM-Directive privileges TDM for the purpose of scientific research for research institutions and cultural heritage institutions
- Is *"generating information"* the same as *"training"* an AI?

Proportionality test for injunctive relief in patent law:



Picture from pixabay:
<https://pixabay.com/illustrations/decision-question-response-1013751/>; picture:
Decision Question
Response Horizontal
Problem; Author:
Peggy_Marco, free for
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attribution required

- the plaintiff has suffered irreparable harm
- statutory remedies are inadequate to compensate for that harm
- a remedy at law is equitably justified in light of the balance of hardships between the plaintiff and the defendant and
- the public interest will not be harmed by a permanent injunction

Fruit of the Poisonous Tree Doctrine:



Picture from pixabay:
<https://pixabay.com/illustrations/adam-and-eve-old-1957-1649339/>; picture: Adam and Eve
Old 1957 Tree of Knowledge
Death; Author: darksouls1, free
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attribution required

- Value added to society by the modified product
- fault in the infringement
- the effectiveness of direct remedies in providing compensation when enforcement is difficult or unprofitable

Lemley, The Fruit of the Poisonous Tree in IP Law, Iowa Law Review 2017, 245 et. seq.

Thank you for your attention and stay healthy!

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