Data Management Plan

Legal Issues

Outline

- 1. Copyright general framework, exceptions
- 2. Sui generis database right and other related rights
- 3. Licensing
- 4. Personal data

Intellectual Property

- intangible goods (assets)
- copyright and related (neighbouring) rights
- patents
- designs
- trademarks

Copyright — sources

- international law
 - Berne Convention 1886
 - WIPO Copyright Treaty 1996
- EU law
 - Software Directive 1991, 2009
 - Database Directive 1996
 - InfoSoc Directive 2001
 - Term Directive 2006, 2011
 - Orphan Works Directive 2012
- national law

Copyright — subject matter I

- a work
- conscious human creation
 - no: pure accident
 - no: animals, nature, artificial intelligence
 - creation modification of reality (no: discovery)

Copyright — subject matter II

- form of expression
- idea / expression dichotomy
 - no: ideas, raw facts, themes, mathematical concepts, genres, methods (cf. patents)...
- common law: fixation in a tangible medium of expression
- civil law: no fixation necessary, also ephemeral works
- indifferent: merit, genre, size, purpose

Copyright — subject matter III

- originality
- original to the author = not copied
- minimal degree of creativity (very low threshold)
 - England: labour, skill and judgement
 - 'sweat of the brow'?
 - France: the author's personal imprint
 - EU: the author's own intellectual creation
 - Germany: persönliche geistige Schöpfung
- creative choice in selection and arrangement

Copyright — subject matter: wrap-up

- novel? painting? concerto?
- title / slogan?
- software?
- folk song?
- explanatory notice? dictionary? encyclopaedia?
- phone book?
- 'Complete works of Shakespeare' vs. 'Best works of Sh.'?

Copyright — exclusive rights

- copyright is a monopoly (authorisation needed)
- tangible vs. intangible property
- reproduction (art. 2 InfoSoc Directive)
 - BUT: temporary acts of reproduction
- communication to the public
 - BUT: what constitutes a public?
 - linking, framing?
- distribution (first sale doctrine)

Copyright — moral rights

- paternity
- integrity
- first publication
- droit de suite
- monist vs. dualist systems
 - monist: limited in time, can be alienated
 - dualist: perpetual, cannot be alienated

Copyright — term

- EU, US: life of the author + 70 years
- international law only requires life + 50 years...
- special rules *may* apply to:
 - joint works (death of the last author)
 - works for hire, especially movies
 - anonymous works
 - posthumous works

Copyright — ownership

- in principle copyright belongs to the author (creator)
 - physical person
 - joint authorship possible
- employees?
 - common law: 'work for hire'
 - civil law: similar solutions
 - exception: academics ('teacher exception')
- publication usually implies transfer of rights to the publisher
- no registration required

Copyright — orphan works

- orphan work copyright holder impossible to identify / contact despite diligent search
- Orphan Works Directive 2012
- who?: ... educational establishments ...
- what works?: published literary, cinematographic or audiovisual works contained in their collections;
- can do what?: digitise, make available, index, catalogue, preserve or restore;
- what if right holders reappear? end of the orphan work status

Copyright — exceptions

- exceptions to property rights...?
- three-step test (Berne convention)
 - in certain special cases
 - no conflict with a normal exploitation of the work
 - no unreasonable prejudice to the legitimate interests of the author
- principle: overridable by contracts!
- exception vs. limitation

Copyright — teaching & research exception

- art. 10.2 of the Berne convention
- art. 5.3(a) of the InfoSoc Directive
- 52a UrhG

Copyright — quotation

- art. 10.1 of the Berne Convention
- art. 5.3(d) of the InfoSoc Directive
- 51 UrhG
- Painer case

Copyright — private copy

- art. 5.2(b) of the InfoSoc Directive
- 53(1) UrhG
- private copy levy (special tax on recordable media)

Copyright — libraries

- 5.3 (n) of the InfoSoc Directive
- 52b UrhG
- Ulmer case
- also: Stichting case

Copyright — New Exceptions!

- UrhWissG (BT-Drs. 18/13014) entry into force April 2018
- 60a teaching
- 60c research
- 60d text and data mining
- 60 g non-overridability by contracts (!)
- 60f equitable remuneration of right holders

Copyright — DRM

- Digital Rights Management (Technological Protection Measures)
- art. 6 of the InfoSoc Directive
- 95a, 95b UrhG

Related rights

- originally intended to protect actors, singers etc.
- EU-wide: sui generis database right
- in Germany: scientific editions (70 UrhG)
- in Germany: non-original photographs (72 UrhG)

Sui generis database right l

- Directive 96/9/EC on the legal protection of databases
- definition of a database: art. 1(2)
 - eg. a topographical map can be a database
- a database can be protected by copyright (if original selection and arrangement) and/or by the sui generis database right (if substantial investment)
- ownership of the sui generis right: maker of the database (investor)

Sui generis database right II

- exclusive rights:
 - extraction (=reproduction) of a substantial part
 - re-utilisation (=comm. to the public) of a subst. part
- limited exceptions (art. 9)
- duration: 15 rights after investment, renewable, potentially infinite

Licensing

- a license is a 'promise not to sue'
- a lease, not a sale
- make sure you own the rights you license!
- bespoke licenses vs. public licenses

Free Software

- Richard Stallman
- Free Software Foundation 1985
- Freedom 0: to run the program for any purpose.
- Freedom 1: to study how the program works, and change it.
- Freedom 2: to redistribute and make copies.
- Freedom 3: to release your improvements to the public.

Open Access

- unrestricted online access to peer-reviewed scholarly publications
- gratis and libre Open Access
- golden route: publishing in OA journals
- green route: self-archiving

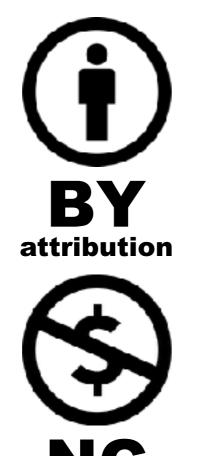
Open Data

- by the Open Knowledge Foundation
- "Open means anyone can freely access, use, modify, and share for any purpose (subject, at most, to requirements that preserve provenance and openness)."

Creative Commons

- foundation established in 2001 by Lawrence Lessig
- public license suite + CC0 waiver + PD mark
- versions: 1.0, 2.0, 2.5, 3.0, 4.0 (launched Nov 2013)
- v. 4.0 can license not only copyright, but also database right
- three layers: machine-readable, lawyer-readable, human-readable
- no ported versions for CC4.0

CC building blocks



non-commercial



BY — Attribution

- You must: identify the creator(s) of the Licensed Material (...); retain a copyright notice; retain a notice that refers to this Public License (and) to the disclaimer of warranties; retain a URI or hyperlink to the Licensed Material if reasonably practicable; indicate if You have modified the Licensed Material (...)
- You may satisfy the conditions in above in any reasonable manner(...) If requested by the Licensor, You must remove any of the information required (...)

ND — no derivatives

- prohibition to create Adapted Material
- Adapted Material means material (...) that is derived from or based upon the Licensed Material and in which the Licensed Material is translated, altered, arranged, transformed, or otherwise modified (...)

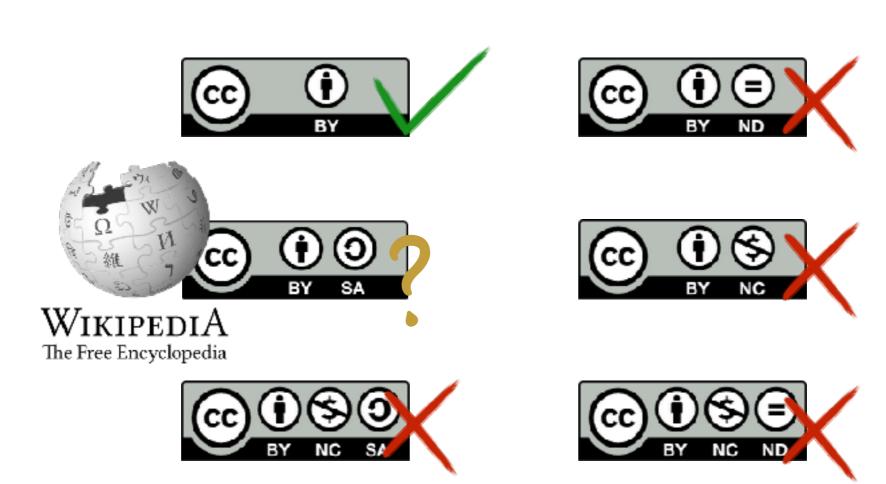
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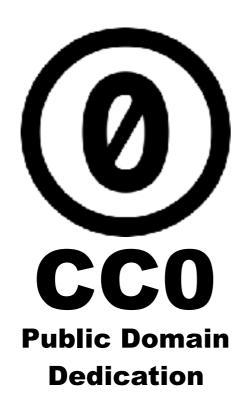
SA — share-alike

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Other CC instruments





Personal Data

- Personal Data Directive 95/46/EC
- General Data Protection Regulation (GDPR) (EU)
 2016/679 will enter into force in mid-2018
- national laws
- in Germany: BDSG (federal) and LDSGs (in each Land)

Personal Data — definitions

- art. 4 of the GDPR
- personal data any information relating to an identified or identifiable natural person ('data subject')
 - anonymised data —does not relate to an identifiable person (by any means reasonably likely to be used)
- processing any operation (...) performed on personal data
- data controller person (...) or other body which (...)
 determines the purposes and means of the processing

Principles of data processing

- art. 5 GDPR:
 - lawfulness (art. 6; in principle: consent of the data subject art. 7)
 - purpose limitation (but: extension possible for research)
 - data minimisation
 - accuracy (data quality)
 - storage limitation
 - integrity and confidentiality
 - accountability

Rights of the data subject

- information and access
- rectification and erasure (right to be forgotten)
- data portability
- right to object

Obligations of the controller

- data protection by design and by default
- security of processing
- communication of security breaches
- impact assessment

New research exception?

- art. 83 of the General Data Protection Regulation
- to be seen how it works in detail
- processing for research purposes allowed with 'appropriate safeguards', such as pseudomyisation
- derogations from certain rights of the data subjects possible (to be seen in the future).