

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 I

- 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



BY
attribution



ND
no derivatives



NC
non-commercial



SA
share-alike

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 (...)

NC — non-commercial

- NonCommercial means not primarily intended for or directed towards commercial advantage or monetary compensation. For purposes of this Public License, the exchange of the Licensed Material for other material subject to Copyright and Similar Rights by digital file-sharing or similar means is NonCommercial provided there is no payment of monetary compensation in connection with the exchange.

SA — share-alike

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Other CC instruments



CC0

**Public Domain
Dedication**



PDM

**Public Domain
Mark**

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).