Federal Ministry
of Education
and Research

dbv deutscher bibliotheks verband

Copyright in Academic Work

An Overview for Research, Teaching and Libraries

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Introduction

It is often said that Germany is a "land of poets and thinkers". Research and education certainly play an important role in Germany. The basis for any kind of research and educational activity is, however, provided by the work done by academics from all disciplines. Research papers that have been written in the past and are protected by copyright usually provide the foundation for any kind of innovation or any new approach taken in research. The transfer of knowledge that takes place in educational establishments would also be impossible were this activity not able to draw on the art, culture, and academic knowledge created by Germany's creative and intellectually active people. Research and university education therefore need to be able to use the fruits of creative labour.

By adopting the Act on Copyright in a Knowledge-based Society (Urheberrechts-Wissensgesellschafts-Gesetz), the German legislature has reformed the regulatory framework that provides statutory rules for using copyright protected works in educational establishments and for academic research. As part of this reform, sections 60a to 60h have been added to the German Copyright Act (Urheberrechtsgesetz).

The present guideline, published by the German Federal Ministry of Education and Research in cooperation with the German Library Association, provides advice on the way in which copyright protected works can be used for teaching and research in higher education, and on the conditions attached to such use. This brochure is no substitute for expert advice that may be required.

Copyright in academic work: Significance and definitions

Why is copyright important for research and education? Both education and research make use of content that is protected by copyright (i.e. works), and they both produce their own copyright protected content (i.e. works).

Definitions: Work, author and user

Examples from education: In the context of a course, copyright is affected whenever texts, images, drawings, tables, or the like are copied for use by university students, made available on learning management systems, or used as teaching materials. At the same time, university students and teachers also create their own works: they give lectures, prepare handouts, write a term paper or a bachelor's or a master's thesis, and develop written examination tasks or teaching materials. Such work normally displays the required degree of individuality, and therefore any such effort constitutes a "work" within the meaning of copyright law – which means that it also enjoys copyright protection.

A **"work"** is an author's own intellectual creation; it displays a certain degree of singularity, originality or individuality that can be perceived through the senses. Mere ideas or thoughts are therefore not protected by copyright. A work displays the required degree of singularity, originality or individuality if it sets itself apart from the bulk of everyday output, or from achievements that are only of a routine or workmanlike nature. One also says that a work needs to reach a certain "threshold of originality".

Examples from research: In carrying out research, academics often build on existing works that were created by other people. They, for example, copy, analyse or otherwise use data bases, studies or other academic writings in order to identify correlations or provide new insights. In addition, researchers normally publish their research findings, usually in the form of a "publication". Such a publication is a "literary work" within the meaning of the German Copyright Act.

Section 2 of the Copyright Act sets out a number of different **types of work** by way of example. A work can be: a literary work; a computer program; a piece of music or mime; a work of architecture or art; a cinematographic work; or an illustration of a scientific or technical nature, such as a drawing, a plan, a map, a table or a three-dimensional representation.

An **"author"** is any natural person who has created a work through their own intellectual effort. Where several persons have jointly created a work, for example where they have written a publication jointly, they are referred to as the "joint authors" of the work.

In principle, anyone wanting to use a work protected by copyright requires the author's permission to do so, unless the copyright has expired. Copyright expires 70 years after the author's death. The term of protection for anonymous and pseudonymous works expires 70 years after creation or publication of such a work. A work whose term of protection under copyright has expired is "in the public domain". Works that are in the public domain may be used by anyone.

One **"uses"** copyright protected content if, for example, one copies or disseminates the work or puts it on the internet.

Permission to use a work that is protected by copyright may be obtained in a number of ways: by concluding a licence agreement, or on the basis of an open licence or statutory authorisation.

Licence agreements

Authors may permit a third party to use their works by concluding a licence agreement with that third party. The other party to the agreement may be a natural person or an institution, for example a library. The other party to the agreement will be granted a licence (right of use) under the agreement and will thereby become a "rights holder". The rights holder will thus be entitled to use the work in the manner agreed in the licence agreement. The law does not stipulate any formal requirements for a licence agreement.

A **licence** is a right of use that has been contractually agreed. More specifically, a licence is an agreement between the user (an individual or an institution, e.g. a library) and the rights holder (the author or another third party that holds a right to the work), under which the user is permitted to use the work for one or more types of use. As a rule, the user will have to pay a "royalty" (a licence fee) for this permitted use.

Apart from governing the specific rights of use that are granted under it, the licence agreement also regulates the purpose, scope and duration of these rights and the royalties payable in this respect.

Open licences

An author may also license their work under an open (or free) licence. The author thereby permits the general public to use the work free of charge, subject to certain conditions. Strictly speaking, a licence agreement is concluded in this case as well. However, the author will not conclude a separate agreement with each user; the agreement is rather concluded "automatically" as soon as the user uses the work in question.

The author usually lays down various conditions for the unremunerated use of the work; the author may, for example, only permit certain types of use.

A number of standard licences have been developed to make it easier for authors to use free licences for their works. The following are the most common standard licences:

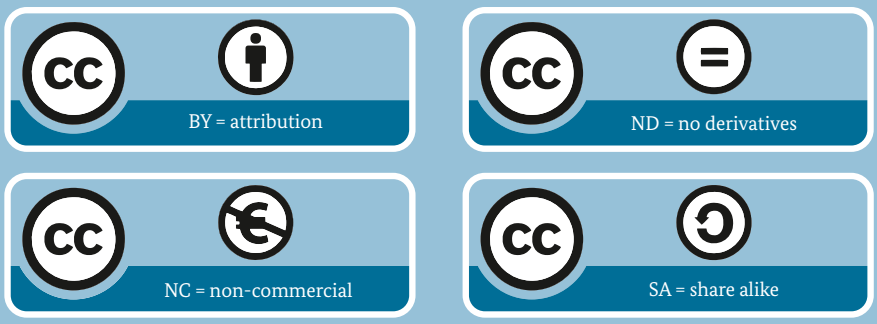
- Creative Commons licences (CC licences)
- the GNU General Public License (GPL)
- the Digital Peer Publishing Licence (DPPL)

Creative Commons licences (CC licences) are used by Wikipedia, for instance. In order to enable a user to understand the licensing system quickly and easily, Creative Commons licences employ four abbreviations to label the uses permitted by an author:

- BY = attribution
- NC = non-commercial
- ND = no derivatives
- SA = share alike

These abbreviations can be combined with each other in various ways (e.g. BY-ND-NC); they indicate to what extent and under what conditions a user may use a work. If a work has been BY-NC licensed, for example, then it may only be shared if the author's name is indicated and the work is not used commercially. The NC abbreviation is particularly often used, because it excludes any commercial use. As a consequence, NC licensed works may not be used in newspapers or school books, or on financed blogs, for example.

Since authors specifically want other people to use their work, it is usually easy to spot the CC licensing notice. Licensing notices will also often link to the specific and detailed licensing terms.



Creative Commons licensing modules

Open licences provide unrestricted access to knowledge and are used in **various fields**.

In education, so-called **open educational resources** (OER) provide educational material of all kinds that can be freely accessed over the internet and has been published under an open licence (often a Creative Commons licence). More detailed information, references, and an OER map of Germany can be found at www.open-educational-resources.de.

Open access (OA) plays an important role in the academic world. Open access is a range of practices through which authors provide the general public with academic publications that are distributed online and free of charge – for example on a website, in an online journal or via a so-called repository. "Free of charge" means that the reader is not required to pay for access to an academic work. Costs are incurred, however, in the context of producing works, e.g. for the development of a suitable data base. Particularly if the so-called "gold open access" model is used, which means that articles or contributions are made available by academic publishers, additional costs for editing and layout of the articles or contributions as well as expenditure on staff are incurred. There are various financing options available: sometimes authors finance publication themselves (supported by funding, where appropriate) or funding is provided by an institution, for example a university.

Authorisation by law

If a work is not licensed under a free licence, a potential user would normally have to conclude an individual licence agreement with the author or rights holder. In certain areas, however, German legislators have provided for the option of using works protected by copyright on the basis of "statutory authorisation" (or statutory permission).

In practice, this means that there is no need to conclude a licence agreement in cases where the use of a work is permitted by law. "Statutory authorisation" only applies to certain types of use and certain areas, however, for example education and research.

Why is there statutory authorisation for the use of works in education and academic life?
Society needs creative achievements. Creative works are an important and integral part of our culture, and they are studied in our schools and universities. Innovative efforts and research activities often use existing works as a starting point. However, it is the whole of society that ultimately benefits from any innovation that is achieved. It is therefore in society's best interests if people are allowed to use copyrighted works in education and academia. That is why the Copyright Act lays down statutory provisions authorising such use in education and academic life.

Another well-known type of use that is permitted by law is the "right to quote" (section 51 of the Copyright Act).

The right to quote

The right to quote enables authors to discuss existing works. Authors may "quote" individual passages of a copyrighted work within their own work for the purpose of carrying out an intellectual discussion of these passages. Important conditions apply, however: the source of the quotation must be indicated, and the quotation may not be altered.

Quoting means (partially) copying a work protected by copyright for the purpose of intellectually discussing this quotation (the so-called "purpose of the quotation"), while at the same time indicating its source.

The right to quote is subject to a number of conditions:

Intellectual discussion of the work (purpose of the quotation): A quotation is only a quotation if the user actually discusses the work quoted. Simply copying a work does not mean "quoting" it. A copy becomes a quotation if one uses the work quoted in order to aid one's own explanation or commentary, for example in the context of critically discussing a certain work.

Independent work: A further condition is that one's own work must be eligible for protection under copyright law. Only persons who create intellectual works themselves enjoy the right to quote.

Indication of source: The user must always indicate the source of the quotation – provided this is reasonable and technically feasible – and the quotation may not be altered. If one quotes from another author's work without attributing this quotation to the author in question, this is commonly known as "plagiarism".

Scope of a quotation: The law distinguishes between "large-scale quotations" and "small-scale quotations". In a large-scale quotation, the entire work by another author is quoted. This is quite often used in the case of images. This type of quoting is limited to use in academic works, however. In a small-scale quotation, only individual passages of a work are copied. The permissible scope of the quotation is determined by the amount of content from an author's work that one needs in order to be able to discuss it.

Research and university education: What does the law permit?

The reform of the Copyright Act that entered into force on 1 March 2018 laid down new statutory provisions authorising the use of copyrighted works in research and university education. These rules apply under any circumstance, even if, for instance, conflicting agreements have been set forth in a contract. The statutory provisions that are relevant for authorised use of works in research and university education are explained in this chapter.

University education

Section 60a of the Copyright Act governs in what way and to what extent teachers in educational establishments may use material protected by copyright without requiring permission for use.

The term **"educational establishment"** comprises early-childhood educational establishments, schools, universities, vocational schools, and any other type of training and further education institution.

Only educational establishments that operate on a non-commercial basis are entitled to the type of lawfully permitted use allowed by this statutory provision. However, the law does not define what operating "on a non-commercial basis" entails. The decisive factor here is whether payment has to be made for the individual lesson or lecture, and whether the provider strives to make a profit – not whether the university is public or private.

What uses are permitted?

Section 60a of the Copyright Act permits works to be used in a variety of ways in the context of teaching in educational establishments: works may be "reproduced", "distributed" and "made available to the public".

Reproduction mainly means "copying" a work. The term comprises both analogue and digital copies. If a graphical image is taken from the internet, for example, and is included in a PowerPoint presentation, then this is an act of reproduction.

Distribution means that a copyrighted work, or a "copy" of such a work, is made available to another person. This is usually the case if the copyright protected work in question, e.g. a book or lecture notes, is passed on to third parties or shared with them.

"Making available to the public" means that, generally speaking, works are made available to the public online, i.e. on the internet.

To whom may I make content available?

Section 60a of the Copyright Act permits copyrighted works to be reproduced, distributed or publicly made available for certain recipients; this means that the copyrighted works may only be placed at the disposal of these recipients.

The authorised recipients under this provision are those who participate in a certain course or lecture (the same teaching event) and the teachers and examiners involved in it.

A **teacher** is any person who teaches in an educational establishment. The form in which a teacher is employed is irrelevant. The term "teacher" therefore includes guest lecturers and fixed-term employees, e.g. research assistants, and professors.

Participants in the same teaching event are all persons who attend the same teaching unit (lecture, tutorial or seminar), including guest students. It is important to note that the distributed materials may not be shared with students from other courses.

An **examiner** is a person who does not belong to the educational establishment in question but conducts examinations there. This is particularly relevant in the case of final state examinations, for example the state examination in law.

Copyrighted works may also be placed at the disposal of certain third persons, for example where teaching units or learning outcomes are presented to others. A PowerPoint presentation may be hosted on the educational establishment's website, for example, or learning outcomes may be presented at an educational establishment's open day. This is meant to enable other people to gain an insight into the activities carried out by the educational establishment.

For what purpose may I use a work?

Under section 60a of the Copyright Act, works that are protected by copyright may be used to illustrate lessons or lectures at an educational establishment, to explore any subject in depth, and to provide supplementary material. The illustrating of lessons or lectures may be carried out before, during, and after lessons, lectures or examinations. The law therefore covers the use of copyright protected works by university students and teachers while they are preparing a teaching unit and following it up; this includes any preparation and follow-up done outside the university.

However, the use for purposes of entertainment is not covered by the law, e.g. if music is played in the university cafeteria, or during the university's open day, or during such events as the so-called "Long Night of the Sciences". These uses require permission to be obtained from the author or the rights holder.

How much of a work may I use?

One is allowed to use up to 15 % of a work for purposes of teaching in educational establishments without requiring permission. In order to work out the percentage used, one can base one's calculations on the total number of numbered pages of a book, including introduction, table of contents, bibliography and index (but not counting blank pages), or on the total running time of a film, or on the overall duration of a piece of music.

There are some types of work that one is allowed to use **in full**:

- out-of-commerce works,
- works in academic journals, and
- small-scale works.

Out-of-commerce works are works that are no longer available on the market as new goods. It is irrelevant whether or not they may still be bought in second-hand bookshops.

Academic journals are aimed at an expert audience and are usually much more expensive than other types of journals. In some areas of study, academic journals are also assigned a so-called "impact factor" that provides information on the relative importance of a journal.

In contrast to the rule that applies to academic journals, one may use no more than 15 % of a work published in a daily newspaper or a consumer magazine. However, if a daily newspaper or a consumer magazine is out-of-commerce, one may make full use of it.

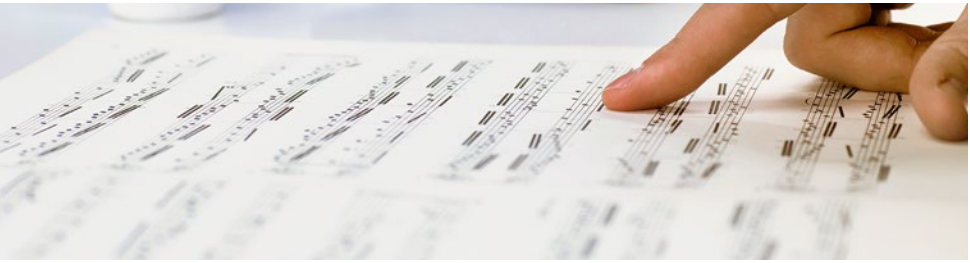
Small-scale works are very short works. They can likewise be used in full, because restricting use to 15 % of their length would not make sense. The following types of work meet the definition of a small-scale work, for example:

- a printed work of no more than 25 pages,
- a film of no more than 5 minutes' length, or
- a piece of music of no more than 5 minutes' length.

However, some works **may not be used without permission** at all. As a matter of principle, the statutory permission to use a work does not apply to the following works:

- **Sheet music:** It is not lawful to copy sheet music. The reason is that sheet music is often produced in a very small number of copies and at a high cost.

- **Recordings of live events:** Film, concert or theatre performances may not be recorded.



Practical questions

Are written-examination tasks protected by copyright?

Yes, they are. As a rule, written-examination tasks (including multiple-choice tasks) are protected by copyright. The creative work that is part of preparing multiple-choice tasks often lies in drafting factually incorrect alternative answers.

May journal articles or textbooks be copied for the purpose of studying at university or preparing lessons or lectures?

Yes. Pursuant to subsections (1) and (2) of section 60a of the Copyright Act, university students (including guest students), teachers and examiners may use up to 15 % of any copyright protected work, for example a textbook, monograph, daily newspaper, consumer magazine, etc.

In addition to that, they are allowed to make full use of out-of-commerce works, articles from academic journals and small-scale works.

However, sheet music and live recordings, for example of concerts or films, may not be used at all on this basis. These types of work always require authorisation from the author or the rights holder.

May university students and teachers include copyrighted images, photographs and drawings in their term papers or teaching materials?
The provisions that apply to texts also cover images, because both types of work are "copyright protected works". Section 60a of the Copyright Act allows the use of copyright protected works "for the purpose of illustration in teaching in educational establishments". This means that visual contents may be used in teaching lessons or giving lectures and for preparing and following them up, e.g. by including visual contents in a PowerPoint presentation.

In contrast to what applies to texts, any picture, photograph or graphical image is a small-scale work and may therefore be used in full for teaching and research.

As mentioned above, the use of such contents is permitted under the terms of section 60a of the Copyright Act. However, the right to quote (section 51 of the Copyright Act) also allows one to use such contents without permission, particularly in the context of preparing a term paper or a bachelor's or master's thesis. Unlike permission to use works under section 60a of the Copyright Act, the use of a work is not restricted to teaching in educational establishments if its use is based on the right to quote. In addition, no restriction applies to the type of person who may base their use of a work on the right to quote. There are many different ways of quoting a work: quotations can, for example, take the form of quoting from a text, reusing an (unaltered) image, or quoting a film scene or sections from a musical composition.

Who owns the copyrights to a term paper, a bachelor's or master's thesis or an essay?
A term paper, bachelor's or master's thesis or an essay is usually an intellectual creation, i.e. a "work" within the meaning of copyright law. The copyrights to such a work are always owned by its creator, in this case the university student who created it. The same also applies in cases where academic staff suggest the subject of a paper or assign a certain task. It is the university student who ultimately produced the paper, and the student therefore is the creator within the meaning of copyright law.

This means that such papers may not be used by others, including the university, without the student's permission.

If several students author a paper jointly, they are referred to as "joint authors". All persons involved in the creation of the work count as authors, and they therefore hold any rights jointly. As a result, they may also only exercise their rights jointly.

Who owns the rights to papers or contributory work produced by professors, research assistants, doctoral students or student assistants?
In certain instances, such works may be covered by so-called "employment copyright" which is provided for in section 43 of the Copyright Act.

"Employment copyright" grants employers a statutory right to use any work that has been created in the fulfilment of obligations resulting from an employment or service relationship. Nevertheless, the employee still remains the author of the work.

The provisions on employment copyright only have very limited application to higher education, however. With regard to university teachers who are also civil servants, the constitutionally guaranteed freedom of the arts and sciences, which is provided for in paragraph (3) of Article 5 of the German Basic Law (Grundgesetz), further limits application of the rules on employment copyright. According to this provision, research and teaching are free. All research results and creative work produced by a university teacher in the context of teaching count as being created independently by the teacher and are not covered by employment copyright.

As a general rule, freedom of the arts and sciences also covers research assistants. The rules on employment copyright may apply in certain cases, however, e.g. where research assistants do not work independently and where creating certain works is an integral part of the performance of their duties. This issue needs to be clarified on a case by case basis.

Student assistants, however, do not work independently, so they are normally covered by the rules on employment copyright.

If I am a teacher, may I place works protected by copyright on a university learning management system or in an electronic course reserve collection?
Yes, you may. Up to 15 % of any work may be placed on a university learning management system or in an electronic course reserve collection; this scope does not apply to a work that is out-of-commerce, small-scale or an academic journal article, because such works may be uploaded in full.

However, under section 60a of the Copyright Act, statutory authorisation to use a work is only granted to certain groups of users:

- teachers,
- participants in the same teaching event (including guest students),
- examiners and
- third persons in cases where the teaching carried out in an educational establishment is to be demonstrated to these third persons, e.g. during an open day.

It is therefore important that only these groups of users have access to the material. In a digital environment, this means that other types of users must be prevented by technical means from gaining access to the material, e.g. by requiring the user to enter a password.

May material protected by copyright be used for written examinations and other types of examination?
Yes, it may. Section 60a of the Copyright Act allows the use of copyright protected works "for the purpose of illustration in teaching in educational establishments". Examinations are part of the teaching carried out in educational establishments. This also applies to courses where examinations are conducted by external examiners, for example in the case of state final examinations of degree courses in the fields of law, school teaching, or medicine.

Under the terms of number (1) of subsection (1) of section 60a, teachers may assist each other in preparing their lessons or lectures, and they may place material at each other's disposal for this purpose. The upper threshold of 15 % applies to the scope of permitted use of a work in this case as well, unless the work is out-of-commerce, small-scale or an academic journal article.

What can I do if a work is protected by copy protection?
Where a work may be used under statutory authorisation but is protected by a technical scheme (e.g. copy protection), the rights holder, e.g. a publisher, is obliged to remove this protection to the extent that a user has lawful access to the work, so as to enable the work to be used for the purposes of teaching. The Copyright Act stipulates that a lawful user may assert a claim against the rights holder, obliging the rights holder to enable the user to use the work (section 95b of the Copyright Act). Lawful users may not, however, remove any copy protection themselves.

Research

The core business of academics is the conducting of research, and the main feature of research is a systematic striving for new knowledge.

From the perspective of copyright law, two aspects have an impact on research: on the one hand, academics use existing copyrighted works for their research. On the other, they themselves produce works protected by copyright based on their own research findings.

There are, therefore, two main issues of importance to academics. First, how and to what extent may they use other persons' copyrighted works in the context of their own research? Second, how are their own research findings protected by copyright?

Which works by other authors may I use?

Section 60c of the Copyright Act governs the extent to which material protected by copyright may be used in the course of research without requiring any permission for use. The law distinguishes between two types of use: where one uses the material for one's own research (subsection (2) of section 60c of the Copyright Act), and where one makes the material available to others (subsection (1)).

Subsection (2) of section 60c of the Copyright Act permits up to 75 % of a work to be reproduced **for one's own personal academic research**. It is important to note, however, that the law only allows works to be reproduced, meaning you are only allowed to produce an analogue or digital copy.

Up to 15 % of a work may be reproduced, distributed and publicly made available online for use by other persons (other recipients), as is the case with teaching in educational establishments. Such a group of recipients may only consist of a clearly defined circle of persons, however, who in turn are only allowed to use the material for their own personal research. One of the major examples for the application of this provision is research carried out by a research association. In addition, up to 15 % of a copyrighted work may be made available to individual third persons if this contributes to monitoring the quality of academic research. This provision particularly covers monitoring conducted in the framework of a peer review procedure.

In order to work out the percentage threshold with regard to a specific work, one can base one's calculations on the total number of numbered pages of a book, including introduction, table of contents, bibliography and index (but not counting blank pages), or on the total running time of a film, or on the overall duration of a piece of music.

As with teaching in educational establishments, one is additionally allowed to make full use of out-of-commerce works, academic journal articles or small-scale works.

What do I have to consider with regard to text and data mining?

Text and data mining is a digital research method that is often used in the context of big data. The German Act on Copyright in a Knowledge-based Society (Urheberrechts-Wissensgesellschafts-Gesetz), which entered into force on 1 March 2018 and amended the Copyright Act, was the first copyright-related law to provide for regulation of text and data mining for academic research (section 60d of the Copyright Act).

Text und data mining is a method of research by which very large amounts of data (e.g. texts, images, or sound recordings) are analysed by automated processes.

In conducting an analysis via text und data mining, it is sometimes necessary to reproduce, structure and harmonise the source material. Any material to which users have lawful access, e.g. licensed material, but also material that is freely accessible on the internet, can form part of the source material. The process of reproducing and harmonising the material usually interferes with copyright. However, only by using a corpus that is created by this type of process will researchers be able to carry out their computer-assisted analysis, i.e. the actual text und data mining.

Section 60d of the Copyright Act therefore now permits automatic and systematic reproduction of the source material in order to create a corpus that can be analysed. The same also applies to source material that is protected by technical means (e.g. by copy protection). Academics are entitled to require the rights holder to remove any protection in order to enable the material to be used on the basis of the limitations and exceptions to copyright (section 95b of the Copyright Act).

It is important to note, however, that the corpus must be deleted or stored by a recognized archival institution once the project or the research work has been completed. Recognized archival institutions are, for example, libraries, museums, archives and educational establishments. The completion of a research project can only be pinpointed in time on a case by case basis. As a rule, it will have been completed once the results of the research have been published.

Section 60d of the Copyright Act solely regulates text and data mining for academic research. The European Union Directive on Copyright in the Digital Single Market, which entered into force in 2019, regulates text and data mining for commercial purposes. The German Copyright Act will regulate this area once the directive has been transposed into German law.

Are my research data and research findings protected by copyright?

Research findings are normally protected by copyright, because they possess the required singularity, originality or individuality, and are therefore works within the meaning of section 2 of the Copyright Act. Academics are the authors of their research findings, so they also generally hold any copyrights to these findings.

Ideas and facts

It is important to note, however, that mere facts, thoughts and ideas are not protected by copyright. Protection under copyright solely covers a specific research result that can be perceived through the senses. For academic work, this means that protection under copyright only applies once an intellectual insight has been turned into a work, e.g. once it takes the form of a publication.

There are, incidentally, no further requirements that authors need to fulfil in order to own the copyright to their own works. Copyright neither needs to be applied for, nor does it need to be registered. That is why the so-called copyright notice (a C in a circle: ©) has no legal significance in Germany, even though it is commonly used.

Data

Academics often create contents that can be classified among one of the more familiar types of works, e.g. a literary or a musical work, but research is to a large extent also based on data. New findings are often based on research data, and insights in the arts and sciences are often derived from research data. Research data are therefore of particular importance to researchers.

Research data can be understood to mean "any digital information that is created, compiled, transformed or analysed, either quantitatively or qualitatively, in the context of a research process"[1]. Research data can be measurement data, but also texts, images or archive material.

As a general rule, data pertaining to measurements, e.g. laboratory values, do not enjoy copyright protection. Data are only protected by copyright if a great quantity of data is pooled to form a "collection" (subsection (1) of section 4 of the Copyright Act) or a "database work" (subsection (2) of section 4).

[1] Lauber-Rönsberg/Krahn/Baumann, Rechtliche Rahmenbedingungen des Forschungsdatenmanagements – Kurzfassung, page 1, available at: https://tu-dresden.de/gsw/jura/igetem/jfbimd13/ressourcen/dateien/publikationen/DataJus_Zusammenfassung_Gutachten_12-07-18.pdf?lang=de (last retrieved on 13 March 2019).

A **collection** (subsection (1) of section 4 of the Copyright Act) is defined as the result of the pooling of a number of data or other elements, provided the selection or arrangement of the data displays an individuality that makes it eligible for copyright.

Protection under copyright only applies to the collection as a whole, not, however, to the contents of the collection, i.e. to the individual data or elements. This means that protection under the Copyright Act will only apply if selected data are pooled and are then arranged in a specific manner.

A **database work** is a special type of collection. As in the case of a generic collection, the essential characteristics of a database work are the creative selection and arrangement of its elements. But a further essential characteristic applies: a work is deemed to be a "database work" if the individual elements are additionally arranged in a systematic and methodical manner and are accessible either by electronic or non-electronic means.

In contrast, a work is merely deemed a "collection" if its elements are not arranged systematically or methodically – i.e. the work does not possess a structure according to which it is organised – or its individual elements are not accessible individually. Database works can be online encyclopaedias or databases of medical or law journals, for example. As with a collection, it is not the individual elements of a database work that are protected by copyright, but rather the structure of the database itself.

What must I consider if I want to publish my research findings?

The results of research activities are normally published once the actual research work has been completed. There are various ways of publishing research results.

Open access publishing

A first option is to publish research findings via open access publishing; the results will then be accessible to everybody.

Open access is a range of practices through which the general public is provided with academic publications that are distributed online and free of charge – for example on a website, in an online journal or via a so-called repository.

Works that are published via open access publishing are often more visible to interested persons, because they can be accessed on the internet and free of charge by anyone in the world, without any restriction on access. Open access publishing enables users to access works anywhere in the world without paying for access. This type of publishing therefore simplifies the use of digital research methods like text and data mining.

A publishing contract

Another option is to publish one's findings with a publishing company. In this case one concludes a publishing contract with a publisher, under which the publishing company is granted the rights of use it requires for publication. The Copyright Act distinguishes between two types of rights of use: non-exclusive rights of use and exclusive rights of use.

If an **exclusive right of use** is granted, the other party to the contract (the so-called licensee) is entitled to assert their right of use in relation to anyone; this includes the author as well. If an author grants a publishing company an exclusive licence to print and sell a book, for example, no one, except the publisher, is allowed to print and sell the book from that date onwards - even the author is no longer permitted to do so.

If only a **non-exclusive right of use** is granted, other persons are still permitted to use the work. This means that a non-exclusive right of use may be granted to several parties.

Publishing contracts often contain a provision according to which the author transfers comprehensive rights of use.

Here is an example: "The author herewith grants the publisher all exclusive rights of use for the work in respect of any known and unknown types of use, without limitation as to space and content and for the duration of statutory copyright."

Authors should think carefully before granting an exclusive right of use, because if they grant an exclusive right of use, they will also be giving up their own rights for the period of time stipulated in the contract (often "for an unlimited period").

No matter what is agreed, the author is still entitled to an equitable remuneration (section 32a of the Copyright Act). The purpose of this statutory provision is to ensure that the author participates in the economic benefits of his work in an equitable manner. Whether the amount of remuneration in a certain case is equitable or not is often difficult to say. This issue always needs to be determined on a case by case basis. The decision on whether an amount is equitable or not depends, for example, on whether a non-exclusive rather than an exclusive right of use was granted. As a rule of thumb, one can say that the amount of remuneration should be higher the more rights have been granted.

In exceptional cases it may even be equitable to pay no remuneration at all. A well-known example from academic life is the publication of a doctoral thesis. The doctoral degree regulations of German universities prescribe that doctoral theses have to be published. Printing a doctoral thesis poses an economic risk to the publisher, however, because normally only a small or very specialised audience is interested in a thesis. In order to be able to meet their obligation to publish, authors therefore often have to pay a printing-cost subsidy towards the printing of their work.

Secondary publication right

Irrespective of the rights granted, authors also have a secondary publication right under the terms of subsection (1) of section 38 of the Copyright Act, provided their work was published in a collection which is published periodically.

The **secondary publication right** allows a publication to be made available to the public a second time (the so-called "secondary publication") once a waiting period of twelve months has expired.

However, the type of secondary publication right to which every author is entitled "under all circumstances" may be excluded by contract.

In contrast, subsection (4) of section 38 of the Copyright Act regulates a secondary publication right that only applies to academic activities. An academic secondary-publication right cannot be effectively excluded by contract; this means that one can always assert one's right to secondary publication, even if a contractual provision in the publishing contract would normally stand in the way of this.

The following conditions apply to the academic right to secondary publication:

- The right only applies if the contribution was published in a collection which is published periodically at least twice a year, e.g. in a professional journal.
- The contribution must result from research activities, at least half of which were financed by public funds.

A publication is always deemed the result of activities **at least half of which were financed by public funds** if the publication was produced in the framework of a publicly funded project or at an institution that is institutionally funded. According to the prevailing view, this definition covers any research carried out at a university.

- The author is not permitted to receive any financial gain from a secondary publication.
- The author is only permitted to publish his work in the manuscript version that was accepted by the publishing company.

The **accepted manuscript version** is the version that was submitted to the publishing company and was reviewed by it, e.g. in the context of a so-called peer review procedure. Publication of the printed version actually prepared by the publishing company, i.e. the galley proof, is not permissible.

- The source of the original publication must always be indicated.
- Publication of an article or contribution as a "secondary publication" is not permitted until twelve months have passed from the time of its "first publication".

With regard to the form of usage, it is important to note, however, that the secondary publication right as discussed here is limited to making an article or contribution available to the public, i.e. to publishing it online.

Practical questions

May I make my research findings available on the internet if they have been published as a published work by a publishing company?

This usually depends on the contract one has concluded with the publisher. If the publishing company has been granted all exclusive rights of use – something that is often done – the author is no longer permitted to exploit this work themselves.

It may, however, be possible to take recourse to the statutory right to secondary publication. Authors from the academic world even have an inalienable secondary publication right which – provided the requirements for secondary publication have been met – permits a work to be published online a second time, once a twelve-month period has expired. According to these requirements, a published work must have appeared in a collection which is published periodically at least twice a year, and the work must be the result of research activity, at least half of which was financed by public funds. If these requirements are met, the manuscript version that was accepted by the publisher and used for any review procedure may be published twelve months after first publication of the work. It is important to note, however, that it is not permissible for a secondary publication to generate any revenue.

May I use copyrighted material for my own research?
Yes, you may. According to subsection (2) of section 60c of the Copyright Act, academics may reproduce up to 75 % of a copyrighted work for their own research, i.e. they may create a digital or analogue copy. These copies may not be shared, or forwarded to other people, however.

May copyrighted works be disseminated to other academics?
Yes, but only to a limited extent. Up to 15 % of a copyrighted work may be disseminated to a specifically limited circle of persons, and to third persons if such persons carry out monitoring of the quality of academic research (peer review). "Disseminating" in this case means reproducing, distributing and making available to the public.

May works be reproduced in full for text and data mining, or does a percentage threshold apply in this case as well?
For text and data mining, whole works may be reproduced, structured and harmonised for the purpose of creating the corpus. The law does not provide for a limitation as to quantity.

For text and data mining, how may the corpus be stored after work has been completed?
After an academic has finished using the corpus, it must either be deleted or handed over to an institution recognized by law (e.g. a library, museum, archive or educational establishment) for long-term archiving. Academics may not retain the corpus themselves.

May libraries and universities permit users to store works on USB flash drives?
Subsection (4) of section 60e of the Copyright Act allows libraries to make works from their holdings available to their users in digital form (irrespective of any licence agreement to this effect) at terminals specifically installed for this purpose on their premises (previously called "electronic reading desks"). It is irrelevant in this case how many copies of a work the library has in its holdings. From the works that were made available to them in this manner, library users are allowed to make digital or analogue copies for their own personal research or private studies. Storing a work on a USB flash drive means making a digital copy of the work.

The library is obliged by law, however, to limit the extent of copying. Per session, it may permit users to make a digital or analogue reproduction of up to 10 % of a work. In addition, individual illustrations and isolated articles from the same professional or academic journal, other small-scale works and out-of-commerce works may be printed out or stored in full.

As a library user, may I order copies from individual works for my research?
Under subsection (5) of section 60e of the Copyright Act, libraries may produce copies for their users for non-commercial purposes and may send users analogue copies by post or electronic copies by e-mail. As a general rule, up to 10 % of a work may be copied and forwarded. Isolated articles which have appeared in professional or academic journals may even be copied and forwarded in full.

German Copyright Act (Urheberrechtsgesetz) (extract)

Section 60a Teaching in educational establishments

(1) For the purpose of illustration in teaching in educational establishments, up to 15% of a published work may be reproduced, distributed, made available to the public or otherwise communicated to the public on a non-commercial basis.

1. for teachers and participants at the respective event,

2. for teachers and examiners at the same educational establishment and

3. for third persons insofar as this serves to present lessons or lectures or the results of tuition or training or learning outcomes at the educational establishment.

(2) In derogation from subsection (1), full use may be made of illustrations, isolated articles from the same professional or scientific journal, other small-scale works and out-of-commerce works.

(3) Subsections (1) and (2) do not authorise the following uses:

1. reproduction of a work by means of recording onto video or audio recording mediums or communication to the public of a work while it is being publicly recited, performed or presented,

2. reproduction, distribution and communication to the public of a work in schools which is exclusively suitable, intended and labelled for teaching in schools, and

3. reproduction of graphic recordings of musical works to the extent that such reproduction is not required for making content available to the public in accordance with subsections (1) or (2).

(4) Educational establishments are early childhood educational establishments, schools, universities, vocational schools, and other training and further education institutions.

Section 60c Scientific research

(1) Up to 15 % of a work may be reproduced, distributed and made available to the public for the purpose of non-commercial scientific research

1. for a specifically limited circle of persons for their personal scientific research and

2. for individual third persons insofar as this serves the monitoring of the quality of scientific research.

(2) Up to 75 % of a work may be reproduced for personal scientific research.

(3) In derogation from subsections (1) and (2), full use may be made of illustrations, isolated articles from the same professional or scientific journal, other small-scale works and out-of-commerce works.

(4) Subsections (1) to (3) do not authorise the recording of the public recitation, performance or presentation of a work onto a video or audio recording medium and the subsequent making available to the public of that recording.

Section 60d Text and data mining

(1) In order to enable the automatic analysis of large numbers of works (source material) for scientific research, it shall be permissible

1. to reproduce the source material, including automatically and systematically, in order to create, particularly by means of normalisation, structuring and categorisation, a corpus which can be analysed and

2. to make the corpus available to the public for a specifically limited circle of persons for their joint scientific research, as well as to individual third persons for the purpose of monitoring the quality of scientific research.

In such cases, the user may only pursue non-commercial purposes.

(2) If database works are used pursuant to subsection (1), this shall constitute customary use in accordance with section 55a, first sentence. If insubstantial parts of databases are used pursuant to subsection (1), this shall be deemed consistent with the normal utilisation of the database and with the legitimate interests of the producer of the database within the meaning of section 87b (1), second sentence, and section 87e.

(3) Once the research work has been completed, the corpus and the reproductions of the source material shall be deleted; they may no longer be made available to the public. It shall, however, be permissible to transmit the corpus and the reproductions of the source material to the institutions referred to in sections 60e and 60f for the purpose of long-term storage.

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