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Intellectual Property Aspects of Socio-Economic Research

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a project funded by the European
Commission's Information Society
Technologies (IST) Programme

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institute for
employment
studies

Published as IES Report 413, by:

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British Library Cataloguing-in-Publication Data

A catalogue record for this publication is available from the British Library

ISBN 1 85184 343 4

Printed in Great Britain

The RESPECT project is about:

RESPECT for research ethics
RESPECT for intellectual property
RESPECT for confidentiality
RESPECT for professional qualifications
RESPECT for professional standards
RESPECT for research users

The aims of the project are to:

- develop a voluntary code of practice for the conduct of socio-economic research in the information society
- contribute to the development of common European standards and benchmarks for socio-economic research
- contribute to the development of high standards in cross-national and cross-disciplinary socio-economic research
- contribute to broader ethical and professional debates within the socio-economic research community
- help reduce barriers to the mobility of socio-economic researchers within the EU and Accession States
- provide succinct information on good practice in socio-economic research for research users both inside and outside the IST community.

For full details, see the project website: www.respectproject.org

Acknowledgements

We would like to thank Benjamin Bajan, Anna Baljasnaja and Hayo Schapp (ITM junior researchers) for their help in this work.

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Executive Summary

Socio-economic research creates intellectual property and is itself based on intellectual property. The rules concerning intellectual property rights should always be kept in mind when conducting any kind of socio-economic research.

These guidelines should enable those concerned with socio-economic research to take an overview of the rights at stake, and how to take them into account. By identifying possibly protected material as the source or result of any particular research activity, a researcher should be able to determine whether or not questions of intellectual property are involved.

These principles are governed by EU and Member States legislation. A researcher who works within the limits of legislation will therefore show full respect for intellectual property. These guidelines are meant to enable researchers to respect intellectual property, and are therefore based on these regulations. It is by no means an exhaustive list of all legal aspects to be considered in a particular case.

The guidelines are particularly subject to the following limitations:

- Where possible, the guidelines are based, above all, on the EU Directive harmonising copyright,¹ but due to the incomplete implementation in the Member States and limited scope of harmonising EU-legislation it mostly had to be based on the variety of national provisions, especially regarding copyright before implementation.
- Because of this legislative delay and limited scope, disparities between Member States still govern intellectual property, especially copyright, therefore the guidelines focus on basic principles and describe key concepts and common standards; where possible, short outlines of the variety of national provisions are given. More details have been added in a Survey of national provisions in the Appendix .
- The practices of courts in all Member States have not been the subject of these guidelines. A respective survey might be a

¹ Directive 2001/29/EC, see Appendix.

useful result of a future project, once implementation of the Copyright Directive is finished.

- Only the present EU Member States are covered by the guidelines and the task of the project; nevertheless footnotes allow a side-glance regarding US legislation and a Survey of national provisions regarding the ten Accession States are included in the guideline and Appendix as well as the respective links.
- National legislation has been considered in as far as that the English versions were published and available to the project by October of 2003. More recent alterations will be taken into consideration as far as possible for the online version of these guidelines published later.
- The guidelines are focussed on the question of how socio-economic research should be carried out with regard to copyright and other intellectual property questions. Information has therefore been standardised and simplified for the benefit of practical use.

The guidelines are meant to give an outline of the rights at stake and the principles governing the variety of intellectual property relations within socio-economic research. They cannot replace the advice of legal experts in a particular case and in each Member State.

Draft Guidelines on Intellectual Property

The following questions and principles should be taken into account when conducting socio-economic research:

- Recognising that intellectual property rights are typically relevant to socio-economic research.
- Understanding the application of international and multiple national intellectual property laws in modern socio-economic research, especially regarding online activities.
- Identifying what kind of material used in socio-economic research is protected by copyright legislation (copyright, database protection, software protection).
- Examining what kinds of rights are reserved for the author and what acts are therefore restricted under copyright legislation.
- Finding out what kind of exceptions/exemptions/limitations might apply to socio-economic research.
- Realising the consequences of copyright violations.
- Keeping in mind contractual questions. Realising how to use licences and assignments of rights.
- Taking into account how employment contracts might affect intellectual property.

Basic rules to be followed by a socio-economic researcher in order to use contents in accordance with intellectual property law:

- Finding out whether questions of intellectual property rights are concerned in the particular case (identification of IP-Protection relevant for socio-economic research).
- Examining which laws apply (question of applicable laws/private international law).
- Finding out whether any created or used material is protected by copyright, database and/or software protection.
- Figuring out whether the conduct in question is generally subject to restrictions due to intellectual property rights.
- Checking whether any legal permission (especially exceptions) might apply to the conduct in question.

- If statutory permissions do not cover the research activity in question, identifying the copyright owner in order to conclude contracts (licence agreements) with the authors/right holders to obtain their authorisations for the specific use within socio-economic research.

A. Introduction

Socio-economic research, through its conduct, publication and dissemination of findings, creates intellectual property and is itself based on intellectual property, in the process of research, publication and dissemination.

For designing studies, planning a proposal, drawing up contracts, carrying out research projects, dissemination *etc.*, it is necessary to respect the rights of others (and to defend one's own).

When planning, applying for, and carrying out research, as well as disseminating the findings, the rules concerning intellectual property should always be kept in mind. Details about the consequences caused by an infringement of copyright or related rights can be found in Section D, Subsection IV.

I. The aim of these guidelines

These guidelines should enable those concerned with socio-economic research to get an outline of the rights at stake regarding socio-economic research, as well as how to make use of or to correspond with them.

The guidelines are structured as follows:

- A. General introduction
- B. Basic information on intellectual property rights in research
- C. Section on the question which national laws apply
- D. to F. Sections on copyright/database protection/software protection
- E. to G. Section on contractual questions
- F. to H. Appendix including additional links and legislation

II. How to use these guidelines

The main question will be how a socio-economic researcher should proceed in order to use a work protected by copyright.

Some basic rules can be followed in order to use content in accordance with copyright (and related right) law. One may adopt the following steps:

1. Find out **whether questions of intellectual property rights are concerned** in socio-economic research, and which kind of legislation (copyright/database protection/software protection) needs to be considered more closely in a particular situation (Section B).
2. Examine **which laws apply** (Private International Law; Section C).
3. Find out **whether any used (or created) material is protected by intellectual property legislation** (see first Subsection of Sections D-F, *ie.* D I, for copyright, E I for databases, and F I for software protection).
4. Figure out **whether the conduct in question is generally restricted** (see the following in Sections D-F, *ie.* D II for copyright, E II 2 for databases and F II for software).
5. See **whether any legal permission might apply** to the conduct of the research in question (see the third Subsection in Sections D-F, *ie.* D III for copyright, E III for databases and F III).
6. If statutory permission does not cover the research activity in question, **identify the copyright owners and find out how to conclude contracts** (licence agreements) with the authors, in order to obtain their authorisations for the specific use within the research activity (Section G).

III. What is not accomplished with these guidelines

The guidelines are meant to offer an outline of issues to researchers and research managers. Information given and also legal provisions presented for this purpose in the Appendix can by no means replace full legal sources and advice. Besides this general restriction these guidelines are subject to the following limitations:

- The first limitation is obviously that only laws of EU-Member States during the project-phase¹ are covered. As outlined in Section C, where other countries' laws (*eg* US intellectual property provisions) might have to be considered with regard to research projects, the necessary information will have to be subject to another project. Nevertheless some information, especially regarding the US-situation, is included in footnotes. Surveys of some

¹ *ie* April 2001-March 2004 including 15 States.

national provisions of Accession States¹ are included in the Appendix.

- Secondly, only English versions of national laws in force and available to the project by October 2003 could be taken into consideration for these guidelines (except for Luxembourg.²) Some of the more recent acts are unfortunately not yet translated or published in English (especially those of 2003) and could therefore not be included in the final version of these guidelines. Major changes during 2002 and 2003 have been considered as far as possible (references added in catchwords or unofficial translation), but drafts and pending acts have proven to be subject to so many changes that their presentation would be misleading for practical purposes. In addition, some Member States have not yet implemented the Directive 2001/29/EC of 22 May 2001 at all. This Directive has the purpose to harmonise certain aspects of copyright within the EU and the Member States should have brought into force the laws necessary to comply with this Directive before December 2002. As to October 2003 only Austria, Denmark, Germany, Greece, Italy and UK have done so. Therefore many changes in national copyright law could in some cases not even be considered in the final version of these guidelines according to Member States' progress in implementing the Directive. Thus, a researcher has to bear in mind that major changes concerning the national copyright legislation will soon occur, due to the implementation of the Directive. Even those Member States having implemented already might change their legislation in the near future due to the progressive development within the field of copyright protection.
- Finally, the work concentrates on the law in force, whilst Courts' practices in all the Member States have not been subject of this project. Nevertheless they are mentioned in various places where the decisions were regarded to be useful to illustrate typical questions and solutions. Wherever court decisions are mentioned the guideline-user has to bear in mind that each decision is just one example of one particular country not suitable for generalisation.

One further characteristic should, at best, not be a limitation but a benefit for the practical use of these guidelines. All information is organised around questions asked by

¹ 10 States (Estonia, Latvia, Lithuania, Poland, Hungary, Czech Republik, Slovakia, Slovenia, Cyprus, Malta) joined the EU in April 2004.

² Luxembourg had only a 1991 version of the copyright-legislation available, thus a 2001 in French was used.

practitioners in the field of socio-economic research¹ and is therefore concentrated on the question of how socio-economic research should be carried out with regard to copyright and other intellectual property questions. Briefness and comprehensibility necessitate constant simplification and thus judicial accuracy cannot be guaranteed. Where this causes misrepresentation of a Member State's legal situation relevant to activities of socio-economic research, comments on these guidelines are most welcome.

One has to emphasise that these guidelines do not aim to replace an expert's advice in individual cases. These guidelines cannot answer each specific question concerning intellectual property rights that occurs in the context of socio-economic research activities. In the case of special problems and questions, particularly concerning the national legislation of the Member States, a researcher should not hesitate to contact qualified persons or organisations in the respective countries.

¹ Interviews carried out in a first project phase with researchers and research organisers from different EU Member States.

B. Basic Information on Intellectual Property Rights

Material used as source or resulting from research will in many cases be subject to intellectual property rights. By identifying such protected material in general this section should enable the reader to determine **whether or not questions of intellectual property are concerned**.

These general concepts of intellectual property should be kept in mind when planning a project within the field of socio-economic research in order to identify upcoming legal issues. In almost any typical research work, intellectual property will be both used and created. In order to ensure respect for the intellectual property rights of others (and to make best use of one's own results), one has to determine, as a first step, to what extent the material in question in the particular research activity might be subject to intellectual property rights. One should consider whether a research activity refers to any of the following categories of intellectual property.

I. Intellectual Property

Intellectual property rights serve the **protection of different types of intellectual creations**, *eg* inventions, business names, creativity and inventiveness. They **grant** creators and producers of intellectual goods (temporary) **rights to control the use of their creations or productions**. Intellectual property rights are the rights resulting from intellectual activity in many fields, especially socio-economic research. Intellectual property aims:

- firstly, at giving statutory expression to creators' control over their works and the use thereof (see moral and economic rights in Section D)
- secondly, at initiating the creation and dissemination of new pieces of work.

Intellectual property is a broad term, comprising two main branches — **industrial property**, and **copyright** (including related rights).

1. Industrial Property

Industrial property principally deals with the **protection of inventions** (patents and utility models), **marks** (trademarks and service marks) **and industrial designs**, and the repression of unfair competition. The first three subjects mentioned have certain features in common, in as much as protection is granted for inventions, marks and industrial designs in the form of exclusive rights of exploitation.

Since these guidelines are to be applied within the field of socio-economic research, industrial property questions will only be considered where necessary. It is quite possible that the research activity in question does not concern industrial property at all. Nevertheless, one should keep these rights in mind, especially regarding dissemination. *Eg*, when disseminating research results on the Internet, the domain name used should not interfere with an existing trademark of a third party. The design used to promote one's results on paper or on the Internet cannot simply be taken from a third party, since this party might enjoy industrial property protection for the design. These questions relate to publication on the Internet rather than to socio-economic research itself. Support answers to questions on industrial property can be found, *eg*, at the EU-IPR-Helpdesk (see the Appendix for general links).

2. Copyright and related rights

More typical of socio-economic research are issues of copyright and related rights. The subject matter of copyright and related rights is traditionally described as 'literary and artistic works' that are original **creations in the fields of literature and arts**. However, the sectors covered by those rights are more diverse and include print media, arts, music, sound recordings, films, but also broadcasting, computer programs, databases and other types of multimedia works. The so-called 'information society' is having a strong impact on this sector, as most of the new products and services are protected by copyright (such as VHS, CD-audio, CD-ROM and CDI, and online services).

Almost any research activity in the field of socio-economic research will cover several areas of copyright or related rights. Thus, the main emphasis of these guidelines will be on copyright, database and software protection.

II. Copyright, database and software protection

Copyright and related rights will be the main points of concern dealing with socio-economic research. To proceed within these guidelines, one should determine whether one of the following might apply to the research activity in question.

Socio-economic research could most probably refer to:

- copyright
- database protection
- software protection.

A look at the material used or created during the research activity in question can help to find out whether these rights are concerned:

1. Copyright

Copyright **protects intellectual creations showing a certain degree of originality and which are expressed in a particular form**. This means a broad range of creations and forms. In most cases, socio-economic research will use texts of a third party as source material and thus concern copyrights.

In this regard, the following materials should be taken into special consideration as possibly being copyrighted:

- books (*eg* reference)
- articles (*eg* scientific treatises)
- photographs
- pictures
- graphics
- drawings
- illustrations
- tables
- multimedia works.

However, not all of these materials are necessarily copyrighted or in some cases their use might be allowed (*eg* via quotation right). But in any case, one should have a closer look at copyright if any of the material above is used or produced in a research activity (Section D).

Section D will also include information on related rights as far as they are relevant for socio-economic research.

Software, such as programmes used to process empirical data and databases with information relating to certain aspects of research, might also be subject to copyright or other protection, but will be covered in separate Sections (E and F) due to their immense importance within the online environment.

2. Database protection

If any of the following material is used or produced, questions of database protection arise, and should be considered carefully:

- scientific databases
- digital encyclopaedias
- collections of links.

Databases in **any form** are protected. A database is a collection of independent works, data, or other materials arranged in a systematic or methodical way and individually accessible by electronic or by other means. This definition not only covers electronic databases, but also paper databases or microfiche collections. A database can consist of simple textual items, such as names or numbers, but also of complete independent works. The protection also applies to the materials necessary for the operation or consultation of certain databases, such as thesaurus and index systems.

If these or similar materials are used in the individual research activity in question, more information can be found in Section E.

3. Software protection

Any modern research activity will include the use of a computer and therefore software. Software exists to control the operation of the computer; without it, the computer would be static.

Two separate software areas have to be distinguished in relation to intellectual property. On the one hand, there is the level perceptible for the user on the monitor, the surface representation, and on the other hand, the invisibly working software in the 'back-office' (the actual program). Software as an actual program is, in many cases, protected by copyright. Software protection is to be dealt with if *eg* the research activity in question includes:

- text-processing programs (*eg* 'Word' by Windows)
- calculating programs
- graphics programs

Software protection is a sensitive issue. If those programmes are obtained and used, licences will be necessary in most cases. If software is produced within the research (*eg* by developing a program for processing certain kinds of empirical information) then intellectual property rights might help the researcher benefit from the creation (Section F).

C. Which National Law Applies (Private International Law)

Before discussing intellectual property provisions in detail, one has to find out which national legislation relates to the particular copyright problem. Therefore, the first fundamental question is:

I. Which (national) copyright laws to take into account

While using protected material, the question of the applicable national copyright law that determines the legality of the relevant use is usually quite clear. The copyright laws of the country in which the use of the copyright-protected content takes place bind the researcher. *Eg*, a researcher conducting a study in Italy who utilises the pieces of work of other scientists for a study has to check the Italian copyright laws to determine the legality of this conduct.

This eventually applies in 'pure' national cases, with no so-called 'foreign contacts'.

Example: The researcher is an Italian national, the use takes place in Italy, and the copyrighted material used is from an Italian author and was first published in Italy. But even if the pieces of work used are produced by Spanish and German nationals and probably first published in the UK, the copyright law governing their utilisation within Italy will always be the national Italian copyright law.

Therefore the decisive factor for determining the **applicable copyright law** is basically the **place where the copyright-relevant act occurs**.¹ Accordingly, the law of the country in which the act whose copyright legality is in question occurs is applicable.

¹ This concept derives from the so-called 'principle of territoriality', according to which the territorial scope of national (copyright) laws are limited to the territory of the State which enacted the laws. French copyright law thus applies solely in France (within French borders), Greek copyright law is limited to Greek territory. Because intellectual property rights, such as copyright, are artificial monopolies granted by a state, this grant is limited to the territory of that State.

This rule applies independently of the nationality of the user or author, and irrespective of where the work was first published. All over the world, especially in the whole EU, national courts administer justice corresponding to this principle.

If one has determined that only one country's law has to be applied, the special Sections D on copyright/E on database protection/F on software protection and the special provisions of this country (see Survey of national provisions in the Appendix) should be taken into account as the benchmark.

II. What happens if different countries are concerned?

In most cases, this rule provides for a simple and clear answer to the applicable law by allowing the application of the domestic copyright law. Thus, anyone who uses copyright protected content should be familiar with the pertinent legislation of the state in which the socio-economic research is carried out.

However, this basic rule leads to more complicated results if the act of utilisation is not limited to the territory of one particular country but concerns several territories, consequently showing a cross-border character.

Example: A copyrighted art-photo is placed in an international magazine or a copyrighted song is distributed worldwide. Each of the distribution countries' laws has to be considered regarding distribution in that particular country.

In applying the general rule described, the national copyright law of each individual country governs the use of copyrighted photo's or songs in different countries. To be accurate, each country's law only governs that fraction of distribution that occurs within its borders. Therefore, the distributor needs to take into account all the different copyright laws of the countries in which distribution takes place. Likewise, a researcher publishing the results of his study including lengthy quotes from other authors, some photos and some other images from third parties in the EU, the US or Japan, needs to check whether the publication and distribution conforms with the copyright laws of all these countries.

Only the laws of countries to which copies are distributed unintentionally (*eg* some copies of the study are brought to universities in Korea or Mexico without the knowledge of the researcher — so called 'spill over effect') can be left aside. In general, one can conclude:

With respect to the use of copyrighted material that takes place in **several countries**, or has a cross-border reference, **each of those countries' copyright laws apply** to the part of the utilisation that takes place within its borders.

If it is determined that several countries' provisions have to be applied, the special Sections D on copyright/E on database protection/F on software protection, and the special provisions of all these countries (Survey of national provisions), should be taken into consideration.

III. What to consider in an online environment

The results of this rule are particularly difficult if applied to the online environment. If copyrighted material *eg* the newest scientific article or some pictures and photos on one's own website is made available on the Internet via a file swapping network (like 'Kazaa' for music), then two possible answers as to the applicable copyright law exist. The act of making available could be considered to take place either in the country where the uploading server is located, or in all countries where the material can be retrieved and looked at.

In the EU, in order to avoid access to copyright infringing content from a third country with very low or no standards of copyright protection in the EU, the EU Commission and the Member States have adopted the latter approach. One is, in general, bound by all the laws of the countries where the protected material can be viewed on screen, and therefore by all national copyright laws of the world. Some Courts in the EU and the US, however, tend to limit the number of applicable national laws. The most dominant approach is to consider only the laws of the countries to which the website is directed.

For example, what if a researcher from Italy makes his study on the influence of Italian media on politics, which is written in the Italian language and contains copyrighted pictures available on the Internet? It could be argued that even though the study can be accessed from all over the world, only Italian law applies, since the study is only directed at Italians. However, it is more difficult to determine the targeted users when someone posts a study on the Internet on the effects of globalisation, all written in English language.

According to traditional doctrines, when posting copyrighted material on the Internet, all the national copyright laws of the world bind you, since the material can be accessed from anywhere in the world. It is, however, reasonable to believe that most courts would take into account this worldwide accessibility, and therefore not apply a particular national law unless the material is directed at that particular country.

In order to limit applicable laws, one might use a disclaimer stating that the website addresses only users in country x, y, z, but it is important that the design of the website and its content does not give a distinct impression (*eg* by the use of other languages, *etc.*).

Therefore, when publishing study results on the Internet or using material from the Internet, the copyright laws of all target States have to be considered (see Sections D, E, F), such as the special provisions of all these countries (Survey of national provisions).

After identifying, as a first step, which intellectual property rights might be affected in general (Section B), and as a second step, determining the applicable law, the intellectual property rights at stake have to be checked in detail (see Sections D-F).

In the following chapters, these guidelines will explain the laws of the EU Member States (on copyright, database protection and software protection) insofar as they are relevant for using copyrighted material for socio-economic research. In several areas of copyright law, EU legislation harmonising the laws of the Member States exists. Within these areas, therefore, the national laws do not vary, and one can rely on uniform rules when using copyrighted material throughout the EU. These guidelines will indicate where such uniform rules apply, and in which areas national laws diverge.

IV. Recommendations

- Researchers should keep in mind that many acts of using copyrighted material are not limited to the territory of one particular country but concern several territories. Therefore they should examine, which different national legislation could possibly be touched by their research activities.
- In general, at least the law of the country, in which the act whose copyright legality is in question occurs, is applicable. This rule applies independently of the nationality of the user or the author, and irrespective of where the work was first published.
- The distributor needs to take into account all the different copyright laws of the countries in which distribution takes place. Only the laws of countries to which copies are distributed unintentionally can be left aside.
- In an online environment the act of making available is not considered to be the country where the uploading server is located, but in all countries where the material can be retrieved and looked at. As some Courts in the EU and the US tend to limit the number of applicable national laws by considering only the laws of the countries to which the website is directed, every researcher should use a disclaimer stating that the website addresses only users of specific countries.

D. Questions of Copyright

In most cases, those concerned with socio-economic research activities will have to consider **copyright and related rights as the most important field of intellectual property (IP)**. The purpose of copyright is (amongst others):

- to promote the progress of science through creation and dissemination on the one hand
- and to reward creators and thus encourage new creations on the other.

Through copyright, the author or creator of a work enjoys some rights enabling him to control the use of his research activities' results. Those dealing with socio-economic research might profit from copyright and related rights, but they will have to respect third parties' rights as well.

Section B of these guidelines (basic information on intellectual property rights) provides first rough indications on whether copyright (or any other type of intellectual property) might be relevant for particular research activities. As a second step, Section C gives information on the applicable national legislation in the particular case. Step three is now to identify protected material — followed by further steps showing under what conditions the use of protected material is legal. This section gives more details on issues researchers have to keep in mind regarding copyright¹. Deviating from general dogmatic legal principles, descriptions of database protection and software protection can be found in separate Sections, E and F.

The core question of intellectual property for socio-economic research is always:

Is (statutory/contractual) permission necessary for the intended use of material?

With the help of the following information, one can, based on a very basic introduction on copyright, determine:

¹ Having regard to related rights as far as is relevant to socio-economic research.

- which material used or created/produced by socio-economic research activities is protected by copyright or related rights (Subsection I)
- whether the conduct in question is generally restricted due to certain rights (Subsection II), and if so
- whether any exceptions might apply to the conduct in question (Subsection III).

As pointed out in Section C, many research activities are affected by several national laws. Each Member State has its own particular legislation (and the according case law). Although substantial copyright legislation has been harmonised to some extent by EU Directives, differences still exist to a degree relevant for socio-economic research. In order to keep the information workable, this section mainly offers a rough outline. In cases where some kind of common ground for all, or at least some, of the Member States could be identified, this is pointed out as an introduction to each aspect, followed by an outline of the Member States particularities. These enumeration's are not exhaustive. Whenever detailed information about Member States' legislation is necessary, it can be found in the appendices, which contain a Survey of national provisions on copyright (to the extent to which they may typically be applicable to socio-economic research), and a table of copyright acts used for the guidelines which contains links to the current Member States' legislation on copyright.

Following the Subsections on copyrighted material, and creators' rights causing restrictions in research conduct and on limitations/exceptions/exemptions, copyright questions can be resolved.

If the envisaged activity includes the use of copyrighted material of a third party without enjoying one of the exceptions or exemptions to copyright, contractual solutions (*eg* licences) should be kept in mind (see Section G). Licenses for copyrighted material will be a standard tool of socio-economic research in an online environment.

I. What kind of material used in socio-economic research is protected by copyright legislation?

Substantial copyright has been subject to harmonisation within the EU, based on the 'Directive on the harmonisation of certain aspects of copyright and related rights in the information society'¹ (see the appendices for relevant EU Directives), and harmonisation is still proceeding. Although legal experts will still identify enormous discrepancies between Member States

¹ Directive 2001/29/EC, OJ L 167/10; see Appendix H I 3.

that could not always be acknowledged in detail in these guidelines, some more or less common principles can be identified.

These principles should help practitioners in socio-economic research consider copyright questions:

1. Basic principles

Copyright protection basically has two requirements throughout the EU,¹ even though exact legal wordings and exact interpretation differ:²

- some kind of originality/certain level of creativity/personal intellectual creation
- expression in a particular form.

Expression in a particular form means existence in a physical form, such as a written text, recorded speech, song, movie or broadcast. For the online environment, it is important to know that digital storage devices like CD-ROMs and documents on a server are understood to meet this requirement. Details on how the requirement of originality is interpreted in different Member States can be found in Subsection 3.

Copyright **never protects ideas** themselves, but the expression of intellectual creations in a particular form.

Example: The idea of a survey on children's behaviour in relation to TV commercials cannot be protected by copyright, nor can any ideas for the respective questionnaire. The expression of this idea in a particular questionnaire, on the other hand, will enjoy protection in any EU Member State.

Based on the same thought principle the following are not protected under copyright law:

1 § 102 of the US Copyright law: for a work to receive copyright protection, it must reflect creative expression or originality. Copyright protects original works of authorship fixed in any tangible medium of expression now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. This includes *eg* literary, dramatic, musical, and artistic works, such as poetry, novels, movies, songs, computer software, and architecture. Copyright does not protect facts, ideas, methods, systems, processes, concepts, principles, discoveries or methods of operation, works consisting *entirely* of information that is common property and containing no original authorship.

² See for details Member States' legislation, references according to ECLIP Research Paper on Copyright by Büning/Kaestner, page 7 et seq; www.eclip.org/documentsII/research/copyright.pdf.

- information as itself
- mathematical theories and
- algorithms (*eg* in empirical studies).

Copyright (unlike patents and trademarks) is **not based on any formal requirements**. A creation of some originality expressed in a particular form is a ‘work’ protected by copyright without any formal act such as registration or copyright notices. This also applies to other signatories of the Berne Convention, such as the United States.

Grouped around the actual work and copyright are **other ‘neighbouring’ or ‘related’ rights**. These concern accomplishments which approach the creation of a work, or which are closely related to the performance of a work, *eg*, accomplishments of a performer or producer of a work. Many of them, like the rights of broadcasting organisations, will rarely be important for socio-economic research. Besides the rights referring to databases (see Section E), rights in photographs should be particularly kept in mind. More detailed information on related rights can be found in the particular Member State’s outline following. One particular aspect of related rights with importance for socio-economic research is the shorter duration of protection (ranging from 15 to 50 years) compared to the standard 70 years after the author’s death for copyright (for details on the period of protection see Subsection III 2).

In order to determine whether material used in socio-economic research is copyrighted, one should first **try to divide the material** into smaller, *copyrightable* pieces of work.

Example: A typical socio-economic survey for instance, may include scientific analyses in text-form and maybe graphs. Each of them will, in most cases, be a copyrighted work.

For each independent accomplishment, the type of work (and therefore the question of copyright) has to be determined separately. If the work in question is indivisible, its type can usually be determined with regard to the main emphasis of the achievement.

2. Protected categories in particular states

Most Member States identify **different types of pieces of work** that are subject to copyright. In general, **literary, scientific and artistic pieces of work** enjoy protection under copyright law. Writings or speeches within socio-economic research will therefore regularly be subject to copyright. Furthermore, the national copyright acts mention, amongst others, the following categories, not all of which are necessarily protected in each Member State. Some of them will only rarely be relevant for

socio-economic research. The following list (selected with regard to the wide range of socio-economic research activity) is, therefore, primarily meant to demonstrate the existing variety of protected categories and definitions within the EU and is by no means exhaustive:

Austria

works of language of any kind, including computer programs, works of scientific or didactic nature which consist of pictorial representations in two or three dimensions

Belgium

writings of any kind, or any other oral manifestation of thought such as lessons, lectures, speeches and sermons

Denmark

maps and drawings and other works of a descriptive nature executed in graphic or plastic form shall be considered as literary works, also computer programs

Finland

fictional or descriptive representation in writing or speech, also maps and other descriptive graphically or three-dimensionally executed works

France

artistic and scientific writings, plans, sketches and three-dimensional works relative to geography, architecture and science; translations, adaptations; titles of a work of the mind

Germany

photographic works including works produced by processes similar to cinematography, illustrations of a scientific or technical nature, such as [...] tables; editions which consist of non-copyrighted works or texts if they represent the result of scientific analysis and differ in a significant manner from previously known editions of the works

Greece

translations, adaptations, arrangements and other alterations of works or of expression of folklore

Ireland

typographical works/arrangements

Italy

protection of the title, headings and external appearance of works and of articles and news, prohibition of certain acts of unfair competition; derivative works such as translations,

transformations into any other literary or artistic form, modifications and additions, adaptations, arrangements, abridgements and variations

Luxembourg

all productions in the literary, scientific and artistic domain

Netherlands

music, art, architecture, cinematography and photographic works, audio-visual arts, lithography, typographical works, engravings, works of applied arts and industrial designs and models

Portugal

emblems or slogans, even if used for advertising, provided that they show originality, parodies

Spain

court pleadings, academic treatises, graphs, maps and figures relating to topography, geography and science in general

Sweden

fictional or descriptive representations in writing or speech, computer programs, musical or dramatic works, cinematography, photographic works or other works of fine art, works of architecture or applied art, works expressed in some other manner

UK

literary, dramatic, musical or artistic works, sound recordings, films, broadcasts, the typographical arrangements of published editions; a literary work means any work, other than a dramatic or musical work, which is written, spoken or sung and includes *eg* tables and compilations other than a database, computer programs, preparatory design material for computer programs and databases

Further details regarding the national law can be found in the Survey of national provisions in the Appendix.

Depending on the national legislation(s) involved, most of the material used in socio-economic research will be subject to copyright.

<p>Example: The following may be protected by copyright: books, CDs, directories, drawings, e-mails, films, graphs, letters, memoranda, multimedia works, music, photos, pictures, press articles, scientific articles, sculptures, sound recordings, <i>etc.</i></p>
--

Courts throughout Europe are generally favourable to creators, whereas legislation leaves room for interpretation.

Exception:

There is, in most cases, no copyright in laws and decrees, or in decisions and declarations of public authorities and other public bodies (see Section D III 5 for details of exceptions).

The categorisation of *copyrightable* works is similar in most Member States. If the material in question is mentioned as copyrighted in at least one of the countries above, protection in other countries relevant to a particular research activity should be double-checked in the survey of national provisions. They should also possibly be checked in the national legislation itself (see the table of copyright acts in the appendices). This is advisable anyway, since all research activities involving the Internet might have to take into account several countries' legislation due to private international law (see Section C). The Copyright Directive will not harmonise the types of works or introduce new types, leaving the distinction to the national legislator.

As mentioned before, the examples above are only illustrative. Therefore, even if the material in question is not listed above, copyright protection is still quite possible. Categories of *copyrightable* material are usually broadly interpreted; therefore new developments will often be included.

Example: In 2001, the Austrian Supreme Court¹ had to judge the question, whether the layout of a website could be protected by copyright. The result was that the graphical design of a website can be considered as a work with a certain level of creativity. The layout of a website is a complex composition which contains photos, textual and graphical elements and is therefore protected by copyright if its design expresses some kind of originality. A work cannot be protected by copyright if the layout was only a matter of routine or a product of standardised software.

'Multimedia works' such as web pages are not currently mentioned in the wordings of the Member States' copyright acts. However, such works might, besides copyright protection of their individual parts (*eg* texts, photos), enjoy copyright protection as whole works due to the broad interpretation of, for instance, 'literary works', 'artistic works', or even 'cinematographic works'.² Even if the material in question belongs to one of the categories above, it has to meet the second standard of copyright protection, which is the requirement of originality.

¹ Decision of 24.04.2001, 4 Ob 94/01.

² See section E for possible protection as database (work).

3. Requirement of originality/creativity

In all EU Member States, a work must be ‘**original**’ to be protected by copyright. Unfortunately for those involved in research activities, this term is **interpreted rather differently**¹ throughout the EU.² Although this may seem a rather theoretical question, the consequences of interpretation of ‘originality’ for research activities are immense. Depending on this question, a work might be used freely in one country while being subject to copyright protection, and therefore restricted in use, in other countries. Most Member States define a work as ‘original’ if it is the author’s own creation. Thus, in some countries, originality means that a work is marked by the personality of the author or creator.

At least a minimum of intellectual content that can be attributed to the creator has to be shown. Protection is not limited to fine arts, but intended to also include scientific works, *eg*, including those created by socio-economic researchers. Creators must have determined the work. Therefore, external factors such as technical requirements or a simple alphabetical order of items do not lead to copyright protection. In particular, the United Kingdom has a lower originality ‘threshold’, demanding only an element of skill or labour, and that the work has not been copied.

While this divergence is addressed with an EU-Directive regarding software protection, harmonisation has not been reached for general copyright protection. Therefore, material used in socio-economic research might be *copyrightable* in countries whilst being open for free use in other countries.

a) Original intellectual productions required

Austria, Belgium,³ France (‘work of mind’, creation), Germany, Greece, Ireland (original literary, dramatic, musical or artistic works and original databases), Italy (works of mind with

¹ See for details to ECLIP Research Paper on Copyright by Büning/Kaestner, page 3ff: www.eclip.org/documentsII/research/copyright.pdf.

² § 102 (a), US Copyright Law: For a work to receive copyright protection, it must reflect creative expression or originality. The Supreme Court stated in 1991 that the former doctrine of sweat of the brow –which conveys the requirement of labour — is no longer sufficient, but that the work must display a minimum of creativity, which is closer to the European standard of originality. Therefore originality is a sine qua non of copyright law, regardless of the author’s efforts in collecting and assembling facts.

³ Although the requirement of an original creation is only set down in Section 3, Special Provisions on Works of Fine Art, originality is required for all works protected by copyright.

creative character), Luxembourg, Netherlands (originality and personal stamp of the author required), Portugal, Spain (original creations), UK.

b) No *express* requirement of creativity/originality

Denmark, Finland, Sweden

4. Research practice

Research within the field of socio-economic research will, in many cases, include research papers, essays, opinions, interviews, *etc.* — from **digital** sources (Internet, CD ROM, *etc.*) as well as **analogue** sources (paper journals, *etc.*); from **public** sources (official reports, government statistics, *etc.*) as well as private sources occasionally. Most of the material used and produced within the process will be protected by copyright (see Section E for databases and F for software) in at least some Member States.

5. Related rights

As outlined in Section B, additional rights are grouped around copyrights acknowledging contributions to works. Besides the rights of performing artists (relevant, *eg*, as an object of socio-economic research) and producers of sound recordings (again rather an object than a result of socio-economic research), the rights of broadcasting organisations should be considered when using material from that source. Questions of database protection are covered in Section E).

6. Recommendations

Recommendations for research activities regarding the identification of protected material are:

- When planning or carrying out socio-economic research, one should bear in mind that **almost any activity concerns copyrightable material.**
- International research activities especially (be aware that almost all activities are international with regard to the Internet, see Section C) should be checked for **possible copyright protection in other Member States**, and how this deviates from the protection in the researcher's home country (see Survey of national provisions and the actual legislation linked in the Table of Copyright Acts used for the guideline in the appendices for details).
- If there are doubts about the necessary 'originality', to be on the safe side, **material of third parties** used within a

research activity **should be considered as possibly protected by copyright.**

- The results of one's own research activities should always contain an **indication of the copyright-holder (copyright-notice)**. Although this is neither a legal requirement nor an exact proof, it helps other researchers to respect copyright rules.

II. Restricted acts under copyright legislation — what rights are reserved for the author?

The right holder is granted certain rights that enable him to bar others from a series of acts (carried out without permission). Copyright protection for the material ('works') in question does obviously not mean that any use is prohibited. Whenever copyrighted material is needed for research activities, the next step is to determine whether the conduct in question concerns rights granted to the copyright holder that have to be respected. Thus, researchers can conform with copyright, for instance, by obeying the conditions of statutory permissions (see Subsection D III on exceptions/exemptions) or obtaining contractual permission (see Section G). This Section shows what kind of rights are in principle, reserved for authors/creators, and thus not free for others without further consideration.

1. Basic principles

Copyright grants certain rights to the creator of a work. Despite differences throughout the EU, some common principles can be identified.

a) Which rights are granted to authors?

If a work is copyrighted, the right holder (mostly the author, see Section II 1 b on the right-holder) is granted certain rights. As a consequence, a large number of acts typical of research activities might be restricted by copyright. In all EU Member States,¹ authors are granted two kinds of prerogatives:

¹ § 106 of the US Copyright Law: The owner of copyright has the exclusive right to do and to authorize others to *reproduce* the work in copies or phonorecords, to prepare *derivative works* based upon the copyrighted work; to *distribute copies or phonorecords* of the work to the public by sale or other transfer of ownership, or by rental, lease, or lending; to **perform the work publicly**, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to **display the copyrighted work publicly**, in the case of literary, musical, dramatic, and choreographic works, pantomimes, and

- economic rights
- moral rights.

1) Economic rights

Economic rights are those rights that provide creators with the possibility to gain profit from their work. They are therefore sometimes also called exploitation rights, or rights of utilisation. Important economic rights relevant to socio-economic research are:

- the right of **reproduction** (Details in Section D II 2 a), *eg*, making a copy on paper or on a CD-ROM
- the right of **distribution** (Details in Section D II 2 b), *eg*, publishing the original work
- the right of **communication to the public**.

In addition, insofar as this has not yet been enacted, all Member States will have to implement the right of '**making available to the public**' specified in the Copyright Directive (see Section D 2 b for Details on communication to the public/making available).¹

Thus, any of the following activities will in almost any case concern copyright:

- making a paper copy
- making a digital copy (on CD-ROM, disk *etc.*)
- downloading and storing material from the Internet
- uploading material on the Internet (*eg* a research draft for discussion)
- issuing copies of a piece of work to the public in any way (speech, paper, articles, *etc.*)
- showing the work (*eg* a film) to the public
- altering the work in any way (*eg* adaptation, amendments)
- translating a piece of work
- integrating the work into a web presentation
- 'framing' a third party's material on a web presentation.

pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work; and in the case of *sound recordings*, to perform the work publicly by means of a *digital audio transmission*. In addition, certain authors of works of visual art have the rights of attribution and integrity as described in <http://www.copyright.gov/title17/92chap1.html> - 106aSection 106A of the 1976 Copyright Act.

¹ Directive 2001/29/EC, OJ L 167/10; see Appendix 1, H I 3.

2) Moral rights

Moral rights concern the personal creation an author contributes to a piece of work. They include:

- the right of publication
- the right to be recognised as the author
- the right to prohibit distortion of the work.

The **right of publication** is described in most Member States¹ as the 'disclosure of the work to the public with the author's consent'. In most countries, publication usually means any form of making a work accessible: Member States name, amongst other things, putting the work on sale/on market. The right includes control of time, place and manner in which the work is made accessible to the public. The **right of recognition of authorship** is granted to the author in all Member States. It contains, in most cases, the right to be, or not to be, designated as the author. In almost all countries, this right is inalienable, while, *eg.* Finnish legislation expressly allows the author to waive the right (though under strict conditions). The **right to oppose the distortion** of the work is granted in all Member States. The scope of protection, however, varies from the right to oppose any deviation to the right to oppose those deviations that may be hazardous to the author's moral interests, such as honour and reputation (regulation in most Member States) and finally, the protection of all cultural interests after the author's death. For details, see the Survey of national provisions.

The moral rights do not expire at the same time as economic rights in all Member States. Due to their personal character, these rights cannot be transferred as such to a third party; however agreements obliging the author to refrain from exercising these rights are allowed to a certain extend (see Section G for information on contractual questions).

3) Recommendations

Recommendations for research activities concerning economic rights:

- No single one of the activities listed above (and those similar) should be carried out without statutory/contractual permission. Any of these acts carried out without authorisation is an infringement of copyright

¹ United States copyright law vindicates the economic rather than the personal rights of the authors. Therefore moral rights are generally not recognized as a part of copyright law. Only to a limited category of works of visual art moral rights have been accorded to. (§ 106A).

possibly penalised (see Subsection IV on Consequences of copyright infringements). Even the simple download of a scientific article on a personal computer should only be done where exceptions/limitations of copyright apply (see Subsection D III on limitations/ exceptions/exemptions/ limitations).

- As far as a tacit authorisation by those putting up the material on the Internet is concerned, this only applies to the inevitable RAM storage. Permanent storage (*eg* on a hard disk) needs the right holder's consent, unless a more or less explicit consent (*eg* 'click here for download') is included in the website — and even then it will not cover any other restricted acts.
- Digital conduct should be treated as carefully as traditional research activities. Acts restricted by exploitation rights in the analogue environment will, in general, also be restricted when carried out in the digital environment. Closer attention should be paid to the fact that, by online distribution, authors' rights might not become exhausted, as they do for analogue copies (see below for details on the principle of exhaustion). Authorisation should therefore be obtained before redistributing or re-communicating material purchased online.

Recommendations for research activities concerning moral rights:

- Where a third party's work is used, the author(s) need(s) to be recognised.
- An explicit authorisation should be obtained from the author before altering a work, to ensure that they will not invoke any moral rights.
- To be on the safe side, when in doubt, one should regard an act as relevant to the moral rights, and obtain the author's permission.

b) Who is the right-holder?

A central question of intellectual property is the precise identification of right holders. For the purpose of compliance with copyright, researchers might want to contact the right holders, *eg* in order to obtain a licence for the intended use of their material. Creators themselves might also have to consider this question occasionally. Today's socio-economic research is hardly ever planned, carried out and made use of by one single person. Groups of researchers in different official positions work together in teams in one institute; different institutes co-operate in elaborate research activities, more and more frequently crossing borders. Compliance with copyright requires identification of right holders. This could be either the

original right-holder or someone who obtained rights from that original right-holder.

1) Concepts of authorship

The regulation on (original) right-ownership regarding copyright follows two major concepts across Europe¹ — the ‘continental’ approach and the ‘British’ approach.² The different approaches have practical consequences, and are therefore important for socio-economic research:

Majority of continental Member States:

In most continental EU Member States,³ the creator of a piece of work is considered to be the author and copyright-holder. In most cases, that original right-holder will be an individual. Some countries like, *eg*, Finland or Germany don’t accept legal entities like universities or companies to be such original copyright-holders at all. Some countries (*eg* France, Portugal, Spain, Italy and the Netherlands) allow them to obtain copyright as such only under quite restrictive conditions. This would be the case regarding some collective works. The copyright is bound to the author of a work. Copyright as such is (except for inheritance and similar situations) in general not transferable in most countries (see the appendices for details on particular countries in the Survey of national provisions). In most cases rights can, however, be assigned to others (see Section G for details on transfer and assignment of rights). In employment situation (Section G V) the continental approach usually supposes copyright to rest in principle with the employee while certain rights have to be assigned to the employer.

UK/Ireland/Netherlands:

The creator of a work may transfer copyright as a whole to another legal or natural person. (Original) Copyright-holder can, *eg*, be the employer (instead of the creating employee).

¹ § 201 US Copyright Law: Copyright in a work vests initially in the author or the authors of the work. The authors of a joint work are co-owner of copyright in the work. In the case of works made for hire, the employer and not the employee is considered to be the author unless the parties have expressly agreed otherwise in a written instrument signed by them. Therefore the employer normally owns all of the rights comprised in the copyright.

² See for details ECLIP Research Paper on copyright by Büning/Kaestner, p.19ff:
www.eclip.org/documentsII/research/copyright.pdf.

³ Netherlands being an exception due to similarities with the anglo-american approach to copyright.

These differences will not be abolished in the course of the implementation of the Copyright Directive, and need to be taken into account, especially in the strategic planning of research activities.

Example: Concerning a research project of, or with, a research institute, in most of the continental European Member States contractual agreements (explicit or at least implied, *eg*, in the employment contract) are necessary to assure all rights required for full exploitation of future research results for the institute in charge. Otherwise, negotiations with each particular researcher might hamper scientific and economic success.

Creation within employment situations often constitutes an exception to these principles. Most Member States¹ provide for the transfer of copyright (where possible), or at least the right to utilise the creations (see for details Section G and the Appendix on contractual questions). Nevertheless these contractual transfers do not apply to the author's moral rights.

2) Creations with several contributors

A further aspect particularly relevant to practical research is the question of right-ownership in cases where several individuals contribute to the research results, and participate in the creation of a work. In legal terms, this can lead (varying in exact wording and consequences) to:

- joint authorship/works created by collaboration
- composite works
- works on commission
- collective works
- compound works.

This issue deals with the question of authorship and the exercise of rights in cases of more than one person participating in the creation of rights.

¹ § 201 (d), 204 US Copyright Law: The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession. Any transfer of statutory copyright ownership must be in writing and signed by the owner of the rights.

Example: The Beckingham/Hodgens case of 2002¹ provides for an example of the problems that may arise when creators fail to close a contractual agreement on the question of who owns the copyright of a created work. The claimant, who is professionally known as Bobby Valentino, was hired as a session musician in 1984 when the band 'Bluebells' first recorded their version of 'Young at Heart'. In 1993 the song was re-recorded successfully and Mr Valentino then claimed that he wrote the famous violin riff for the song. As this part of the song was a significant and original contribution to the work he was therefore joint author and joint owner of 'Young at Heart' and was entitled to a share of the copyright proceeds of the recording re-release. This was disputed by Robert Hodgens who claimed that he in fact composed 'Young at Heart', including the violin part, himself and that Mr Valentino's contribution to the song was as a performer and not as a composer. Alternatively, he claimed that even if Mr. Valentino did more than that, his composition was neither original nor substantial enough to attract a share of the copyright. Hodgens claimed that joint authorship requires a joint intention to create a joint work.

After stressing the difficulty in resolving what happened in a recording studio some 18 years ago without any documents, the London's High Court decided that after hearing the song and expert evidence, Mr Valentino's contribution is considered to be significant and original. As a result Mr Valentino is a joint author of the copyright in the song. The Court found that the three requirements for joint authorship were satisfied. There must be collaboration in the creation of a new work, there must be a significant and original contribution from each joint author and the contributions from each author must not be separate. The concept of authorship does not require a joint intention but is a question of fact.

As far as contractual questions (*eg* employment contracts) are concerned, see Section G as well. The issue of participation in the creation of a work is regulated differently throughout Europe. However, there are certain principles that are common to most jurisdictions.

Joint authorship

All Member States (see Survey of Member States) have somehow enacted the principle of joint authorship, sometimes also called collaboration (*eg* in France). Sometimes, this principle is not expressly provided, but its existence is stipulated in the relevant act.² It applies, in general, where two or more persons have jointly created a work in such a manner that the individual parts of the creators cannot be divided any more, and the result forms an indivisible whole. Many research teams will thus create works in joint ownership/collaboration. In such a case, the copyright belongs jointly to all the authors.

¹ Beckingham vs. Hodgens (2002), EWHC 2143, EIPR 2003, 25 (5), N76-77.

² Netherlands

This will usually be the case with articles written by more than one person (*eg* for a scientific journal).

Thus, any alteration or exploitation of the work requires the consent of all the authors. If consent is unreasonably refused, courts are entitled to order the demanded consent. Only proceedings for infringement of copyright can be instituted separately. It shall be noted that there are some differences throughout the concept of joint authorship (see the Survey of Member States legislation for details).

Composite works

Another principle is the principle of composite works (with some legal alteration in detail these are also called collective works). It is common to some legislation, that where several works are combined to create a new work, that the person combining it is the author of the new work and is the owner of that copyright, subject to the rights of the authors of the pre-existing works.¹ Research activities with distinct work packages carried out by different researchers, which are then integrated at a later stage, will, in many cases, be composite works.

Works on commission

Some Member States, like Belgium, provide for a distinct principle for works on commission in their legislation. Where works are created by an author on commission, the economic rights may be assigned to the person commissioning the work on the condition that the activity is in a non-cultural field or in advertising and that the work is intended for such activity. A similar principle also exists in Portugal where ownership of copyright is determined in accordance with the relevant agreement if the work is carried out on commission.

Collective Works

Similar to the latter principle is the French principle of collective work. According to this, the copyright is assigned to the person under whose name the work has been disclosed, as long as the work was created at the initiative of that person and the contributions of the various authors who participated are merged in the overall work. This principle also applies in Greece, Portugal, Spain and Italy, in a slightly different form.

The Netherlands has a similar principle — if a literary, scientific or artistic work consists of separate works by different persons, the person who has guided supervised or compiled the work is deemed to be the author of that work, subject to the copyright in the derivative works. Moreover, if a work has

¹ *Eg* Austria, France, Portugal, Spain, Sweden.

been made according to the draft and under the guidance and supervision of another person, that person is deemed to be the author.

Compound works

Another relevant principle is the German principle of compound works. This applies where pieces of work are combined for exploitation in common. In this case, each author may require consent from the others for the exploitation or alteration of the work, if it is deemed reasonable.

These alternatives of participation in the creation of a work show that permission of several persons might be necessary before using a third party's material. This might even apply to a work created by one person. In accordance with the scope of possible rights concerned in copyright (see Section D II on granted rights) there might be moral rights staying with the original author, while economic rights/licences are transferred/granted to others.

Recommendations

Recommendations for research activities regarding right-ownership:

- **Right-ownership should be indicated** on all documents when publishing research results — better even whenever material is shared with others (*eg* on an internal database)
- Where necessary, according to national legislation(s) (see Survey of national provisions), **right-ownership** of the researchers and other persons involved **should be clearly denominated in contracts** (*ie.* work and labour/employment/consortium agreements). The transfer of rights or, as the case may be, licences (see Section G) should be kept in mind
- Right-ownership regarding all material ('works') created by third parties should be identified, and the respective rights considered, before any acts relevant for copyright (*eg* downloads) are carried out.

2. Details on creators' rights/restricted acts

a) Right of reproduction

Reproduction (see also Section D II a I above for a general description of economic rights) concerns typical acts carried out in research, *ie.* different manners of making a copy of a work. Copies, or reproductions, could either be analogue (*eg* paper copy) or digital (*eg* CD-ROM storage). Whether or not short-

time storage of a copy in the RAM-storage is such a copy or not has been disputed among legal experts. With regard to the fact that the Copyright Directive will probably be implemented in all Member States¹ soon, its provisions should be considered in all Member States for socio-economic research. According to Article 2 of this Copyright Directive ² Member States are required to provide for authors' (and other right-holders', *eg* film producers') exclusive right to decide about reproductions like *eg* copies on paper or a digital device. Member States' understanding of what a reproduction especially in an online environment is still varies, especially since implementation is not yet completed.

In those countries where the term of reproduction is defined by law, it includes at least a fixation of the work on a medium in a way that the work can be perceived from this medium.

Differences exist in relation to the temporal extent of reproduction, as well as the kind of fixation:

Austria

Art. 15 gives the author the exclusive right of reproduction without defining the term exactly. Included is any kind of process, quantity and period of time (temporary/permanent reproduction) as well as the fixation of recitations and performances of works on audio and video recording devices. Not protected is casual/incidental reproduction under the strict provisions of Art. 41a.

¹ § 106 of the US Copyright Law: The owner of copyright has the exclusive right to do and to authorize others to reproduce the work in copies or phonorecords.

² 'Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

(a) for authors, of their works

(b) for performers, of fixations of their performances

(c) for phonogram producers, of their phonograms

(d) for the producers of the first fixations of films, in respect of the original and copies of their films

(e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.

Belgium

According to Art. 1, the author of a literary or artistic work alone has the right to reproduce his work or to have it reproduced in any manner or form whatsoever. This right comprises the exclusive right to authorise adaptation or translation of the work. It further comprises the exclusive right to authorise rental or lending of the work.

Denmark

According to sec. 2 (1), the right of making copies, while any direct or indirect, temporary or permanent reproduction, in whole or in part, by any means and in any form shall be considered as reproduction as well as the recording of works on devices which can reproduce it (Sec. 2 (2)). There is further an explicit provision on temporary reproduction in Sec. 11a, which is generally permitted. This, however, does not apply to computer programmes and databases.

Finland

Art. 2 provides for the right of making copies including recording on devices which can reproduce the work. It is not important which device is used and how long is the existence of the copy.¹

France

According to Art. L. 122-1, -3 reproduction shall consist in the physical fixation of a work by any process permitting it to be communicated to the public in an indirect way. It may be carried out, in particular, by printing, drawing, engraving, photography, casting and all processes of the graphical and plastic arts, mechanical, cinematographic or magnetic recording.

Germany

Exclusive right of reproduction by any method or quantity and including fixation on audio or video recording mediums and not depending on whether copies are made temporarily or permanently (Sec. 16). Reproduction is the production of one or several fixations that can directly or indirectly enable a perception of the work by human senses.² If the work has been included into a periodically appearing collection with the author's consent the publisher is deemed to have acquired reproduction and distribution rights (Sec. 38).

¹ Rosén, GRUR 2002, 195, 196.

² Fromm/Nordemann, § 16, 1.

There are furthermore special provisions in Sec. 44a concerning temporary acts of reproduction made incidentally without a separate commercial purpose as well as in Sec. 57 for incidentally made insignificant works.

Reproduction of works at exhibitions and similar premises as well as at publicly accessible places is paid attention to in Sec. 58 and Sec. 59.

Greece

An exclusive right of fixation and direct, indirect, temporary or permanent reproduction by any means and in any form, in whole or in part is provided for in sec. 3 (1) (a). Not included are specific transient or incidental acts of reproduction (par. 28B). No one except the author may reproduce electronic databases even for private purposes (par. 3 (4)).

Ireland

The right of reproduction includes the right to copy a work and to authorise others to do so (Sec. 39 (2)). Copying is, above all, storing on any medium, reprographic copying of typographical arrangements as well as incidental and transient copying.

Italy

Reproduction includes multiplication of copies of a work by any means such as copying by hand, printing, lithography, engraving, photography, phonography, and cinematography as well as any other process of reproduction (Art. 13).

Luxembourg

Art. 3: Right of reproduction without a precise definition of the term.

Netherlands

According to Art. 13 reproduction of a literary, scientific or artistic work includes the translation, arrangement of music, cinematographic adaptation or dramatisation and generally any partial or total adaptation or imitation in a modified form, which cannot be regarded as a new, original work. Art. 14 then covers by the term of reproduction of a literary, scientific or artistic work the fixation of the whole or part of the work on an object which is intended to play a work or to show it.

Portugal

Art. 68: No exact definition of the reproduction term; printing is mentioned as a means of graphic reproduction.

Spain

Art. 18: Reproduction means the incorporation of the work in a medium that enables it to be communicated and copies of all or part of it to be made.

Sweden

Art. 2: No precise definition; included is also the recording of works on devices which can reproduce them. As in Finland, it is not important which device is used and how long the copy exists.¹

UK

Sec. 17: Copying in relation to a literary, dramatic, musical or artistic work means reproducing the work in any material form. This includes storing the work on any medium by electronic means.

b) Right of communication to the public/Making available

Art. 3 of the Copyright Directive, concerning the communication to the public of the works right and the making available to the public right (see Section D II 1 a (1) for general information), requires harmonisation of national provisions with regard to the following principles:

- Member States have to provide for authors' exclusive rights to decide about any kind of communication to the public of their works and the making available to the public. Communication to the public includes transmission and distribution of copyright works other than in physical form.²
- Member States have to provide for these rights so as not to exhaust by an act of communication to the public or making available.³ In consequence even a document already made

¹ Rosén, GRUR 2002, 195, 196.

² '1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.' Art. 5(2) contains special provisions for performers, phono — and film producers and broadcasting organisations. There are legal discussions regarding the question, whether 'communication to the public' includes execution of a work in front of a present audience.

³ Art. 5 (3).

available on a website is still subject to the making available right and can therefore not be uploaded on another website without the right-holder's authorisation.

Again, the Directive has not yet been implemented in some countries.¹ According to Member States' legislation available in English, they provide for communication to the public in varying provisions.

As the wording and content of national provisions have not yet been harmonised, certain actions in socio-economic research might be restricted in one Member State, while not being relevant to copyright in another State. This applies especially to online environment acts. National legislation mentions among others:

- broadcasting of the work (*eg* by television, radio)
- right of (public) recitation
- exhibition (in public)
- performance (in public; *eg* lectures, addresses, speeches, visual or acoustic)
- presentation of works
- public recitation
- public projection
- offering (of copies) for sale/rental/lending or other distribution
- transmission in a public place of a tele-diffused work.

See Subsection III 5 b and Surveys of Member States' provisions for details.

c) Rights of distribution — and the principle of exhaustion

One of the major rights of authors is the distribution right. The most typical act of distribution is to sell a work or a copy of it. The Copyright Directive provides for the right of distribution in Art. 4 (1).² Accordingly all Member States³ have to ensure

¹ Austria, Denmark, Italy, Germany, Greece and UK have implemented as for October 2003.

² '1. Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.'

³ § 106 of the US Copyright Law: The owner of copyright has the exclusive right to (...) to distribute copies (...) of the work to the

that all authors have the exclusive right to decide about selling their work (or copies of it).

As this is now also required by the Directive, most of the Member States have included 'rental' and 'lending' (*eg* offering CD-ROMS with scientific facts for short-term use) in the term distribution, as well as 'other forms' of distribution. There are, however, exceptions from this rule, *eg* the Netherlands, and also differences as to exact definitions. Particular provisions regarding distribution include:

- offering copies for sale/renting/lending/leasing (sale, rental and loan, also often covered by the term 'circulation')
- putting them into circulation, resulting in public availability
- issuing of works/copies of it to the public
- authorising others to issue works/copies of it to the public
- the exclusive right to make the work available to the public by:
 - posting
 - printing
 - hanging
 - exhibiting
- or similarly using copies thereof
- importing of copies in a Member State/the EU.

See Surveys of Member States' provisions or Member States provisions for details.

However, the distribution rights listed above and in the appendices are subject to a special limitation, the **principle of exhaustion**. According to this principle, distribution is no longer restricted once the right holder has sold a work or a copy of it.

Example: In preparation for a study, a scientist buys, amongst others, a quite expensive book which turns out not to match their subject exactly, thus he wants to resell it. If distribution rights were not restricted, this resale would be a restricted act under copyright legislation. Nevertheless, this resale of a copy of a work does not need authorisation, because the author's rights are exhausted with the first sale or with the consent of the right holder, as can be supposed when buying a book in a bookstore.

Here too, the Member States' legislation varies, and is supposed to be harmonised by the implementation of Art. 4 (2)

public by sale or other transfer of ownership, or by rental, lease, or lending; to perform the work publicly (...).

of the Copyright Directive¹ demanding the distribution right to exhaust with the first legally sold (or otherwise transferred) original or copy.

Most Member States have already included the principle of exhaustion — at least where the first distribution has occurred within the EU.²

Application of the principle of exhaustion on activities in the online environment is still in discussion, and is handled differently in the Member States. *Eg*, the resale of content purchased on the Internet might still be restricted under copyright. Before distributing third parties' material, Member States legislation (see Survey of Member States' legislation) (and jurisdiction) should be checked with regard to exhaustion. Once the EU Directive is implemented correctly in all Member States, any offer of copyrighted material on the Internet will be subject to the 'right of making available works to the public'. Therefore forming part of the right of communication to the public (see above) which is not exhausted like the distribution right. This harmonised approach means *eg* that even though material is already made available on the Internet, the distribution right is not exhausted and the author's permission is still necessary for any act of distribution, like offering this content on a website.

d) Adaptation

Any alteration of a work within research activities might constitute a restricted act under copyright legislation, an adaptation and the creation of new work at the same time.

- An adaptation might be:
- taking a piece out of a work (*eg* a paragraph from a text)
- changing the dimensions of presentation (*eg* adjusting the size of a graph to one's own purposes)
- integrating a work with other elements on a website
- translation.

¹ 'The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the right holder or with their consent.'

² Büning/Kaestner: ECLIP Research paper on Copyright, p.43; Denmark, Finland and Sweden refer to distribution in EEA-countries, for databases and computer programs even to global distribution; for details see Rosén, GRUR, 2002, 195, 197.

There is no exact definition of the term of adaptation, or especially, translation in Member States' legislation. There are, however, two main points worth mentioning about the scope of the right: In all States, adaptations are protected as separate works by copyright, however, **only insofar as they do not prejudice any rights in the original work**. Furthermore, protection as a separate work in some of the countries requires the adaptation to be a **creative** work of mind. In almost all Member States, official translations are expressly not protected by copyright. Variations among Member States include:

Austria

Translations and other adaptations are protected under Art. 5 (1) as original works. However, the author of a translation or adaptation himself violates the copyright of the author of the original work if he translates or adopts the work without the original author's consent. The author of a translation or an adaptation has all the economic rights if the author of the original work has transferred to him an exclusive right of translation or adaptation or has authorised him to translate or to adopt the work (adaptation- or translation right) (Art. 14 (2)).

Belgium

Under Art 1 (1) the right of translation or adaptation is contained in the right of reproduction of the work and therefore originally belongs to the author of the original work.

Denmark

Sec. 2 includes the exclusive right to make the work available to the public, inter alia, in amended form, translation or adaptation. The person amending or translating the work gains the copyright in the new form of work subject to the copyright in original work (Sec. 4).

Finland

According to Art. 2 the authors' rights to 'control the work' (regarding publication, distribution *etc.*) includes control of altered forms.

France

Under Art L. 112-3 the authors of translations, adaptations, transformations or arrangements of works of the mind shall enjoy the protection afforded by this Code, without prejudice to the rights of the author of the original work. Adaptation and transformation is only lawful with the consent of the author of the original work (Art. L. 122-4).

Germany

Translations and other adaptations of a work which constitute personal intellectual creations of the adapter shall enjoy protection as independent works without prejudice to copyright in the work that has been adapted. Insignificant adaptations of a non-protected musical work shall not enjoy protection as independent works (Sec. 3).

Greece

Translations, adaptations and other alterations of works are protected as works provided the new arrangement is original. This shall not prejudice the rights in the original works used for the alteration (para 2 (2)).

Ireland

Under Sec. 37 (1) adaptation of the original work as well as copying and making available of the adaptation is one of the exclusive rights of the author. The adaptation contains under Sec. 43, inter alia, translation of the work. Adaptation is further referred to in Sec. 109 which codifies the right to prohibit distortion of the work with the consequence that the latter mentioned right is also applicable to an adaptation of the work.

Italy

Art. 4.: Without prejudice to the rights subsisting in the original work, works of a creative character derived from any such work, such as translations into another language, transformations into any other literary or artistic form, modifications and additions constituting a substantial remodelling of the original work, adaptations, arrangements, abridgements and variations which do not constitute an original work, shall also be protected.

Art. 18: The exclusive right of translation concerns all forms of modification, adaptation and transformation of a work as referred to in Art. 4.

Luxembourg

Under Art. 3 translations, adaptation, arrangements of music and other transformations of a literary or artistic work shall be protected as original works without prejudice to the rights of the author of the original work. The right to make translations, arrangements or other alterations, however, is originally vested to the copyright owner.

Netherlands

Art. 10 (2): Reproductions of a literary, scientific or artistic work in a modified form, such as translations, arrangements of music, cinematography and other adaptations and collections of different works shall be protected as separate works, without prejudice to the copyright in the original work.

According to Art. 13 the reproduction of a literary, scientific or artistic work includes the translation, arrangement of music, cinematographic adaptation or dramatisation and generally any partial or total adaptation or imitation in a modified form, which cannot be regarded as a new, original work.

Portugal

Under Art. 3 (1) (b): Translations, arrangements and other transformations of a work are deemed to be original and are protected without prejudice to the rights of the original work. The translation, adaptation, arrangement or any other transformation of the work belong according to Art. 68 to the exclusive rights of the author.

Spain

Translations and adaptations are under Art. 11 item 1 without prejudice to the right in the original work subject of intellectual property.

Sweden

Translations and adaptations are protected as separate works, however, they are subject to the copyright in the original work (Art. 4). Originally, the right to make translations *etc...* is vested to the owner of copyright in original work (Art. 2).

UK

Under Sec. 21 the adaptation of a work can infringe the copyright of the author of the original work. Adaptation includes, inter alia, the translation of the work.

III. What kind of exceptions/exemptions/limitations might apply to socio-economic research?

Copyright is not granted without limitations. Even if material envisaged for use within socio-economic research is protected (see Subsection I), and the particular act of research conduct is restricted in principle by Copyright (see Subsection II), the utilisation might still be allowed because of copyright limitations, exceptions and exemptions.

1. Basic principles

Not every form of utilisation relevant to copyright requires the authorisation of a right holder. Copyright is subject to diverse restrictions in order to establish a balance between creators' and societies' legitimate interests in the use of creations (see also Section B for fundamental principles of intellectual property). Legislation in all Member States¹ provides for a wide choice of limitations. The exact legal significance of those restrictions varies between Member States, and not all of them are genuine exceptions (especially with regard to dogmatic questions). The basic principle is always that certain **utilisation** of copyrighted material is **allowed** (though possibly forming a restricted act) **without authorisation by the right holder** within the limits and keeping **the conditions of those concessions**. Only a few of each Member States' list of limitations will be relevant for socio-economic research and therefore named here. Amongst them are:

- educational use/teaching
- scientific use
- library and archive use
- private use
- quotation.

Much to the regret of those, using third party material within research, but for the profit of those creating new material, there is no blanket exception for research as such. Even where research can be labelled for 'scientific use', not any conduct will be allowed. Instead of general reference to that limitation, special legal requirements have to be met to enjoy protection.

¹ §§ 107 — 122 of US Copyright Law: Limitations on exclusive rights of the author are established. One major limitation is the doctrine of 'fair use' what is defined as 'a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent'. § 107 codifies the fair use doctrine. It is no infringement of copyright to use a work for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research if the purpose and character of the use is fair use. A fair use exception is most likely to be granted if the use is for non-commercial purposes, the original work was inexpensive to produce and/or distribute, a relatively small amount of the original work is used, the portion used is transformed, not merely copied and/or the economic impact is insignificant. The criteria of 'fair use' have to be evaluated in each individual case. There are no statutory categories of 'fair use'. In other instances, the limitation takes the form of a 'compulsory license' under which certain limited uses of copyrighted works are permitted upon payment of specified royalties and compliance with statutory conditions.

Further restrictions regarding copyright exceptions are caused by **copy-protection**. More and more of today's digital documents are provided with technical devices controlling access and use, especially reproduction of these documents. A legitimate use according to copyright exceptions does not necessarily include measures taken with regard to such anti-copying-devices (see Subsection III 5 a for Details).

Example: A researcher carrying out communication studies wants to analyse public relations material of several enterprises for a comparative study. Although he is allowed to make reproductions for this purpose based on the particular Member State's exception for research he is stopped by a copying device preventing any copying activity. 'Cracking' that copying-device — even though meant for a legitimate use — would make the researcher subject to prosecution.

In addition, Member States' particularities have to be considered, even when the Copyright Directive will be implemented in all Member States, since exceptions have rarely been harmonised (see Subsection 5 for details).

2. Term of protection

Copyright only exists for a limited period of time, called the 'term of protection'. Before considering a special exception for the intended use of material, one should always consider whether or not the material is still protected under copyright law. For practical purposes of socio-economic research, term of protection might serve the same purpose as exceptions, since works where the copyright protection has expired can be used freely (as long as all related rights have expired as well).

The term of protection has been substantially harmonised by the Directive on copyright duration ('term of protection')¹ (see EU — and international legislation).

Pursuant to the Directive, all Member States² have to provide as follows:

¹ Council Directive 93/98/EEC harmonising the term of protection of copyright and certain related rights, OJ L 290, 24/11/93.

² §§ 302 ff. of US Copyright Law: There are different terms of protection which depend on the date, the work was originally created. For works created after 1977, a copyright lasts for the length of the author's life plus 70 years. In the case of 'a joint work prepared by two or more authors who did not work for hire,' the term lasts for 70 years after the last surviving author's death. For works made for hire, and for anonymous and pseudonymous works the duration of copyright will be 95 years from publication or 120 years from creation, whichever is shorter. If the author is

- With regard to economic rights, copyright protection expires, in principle, **70 years after the author's death** in all Member States, Art. 1 (1), while the term for moral rights is not yet harmonised, Art. 9, therefore in some Member States (*eg*, in France) moral rights are perpetual, while in others, moral rights expire at the same time as economic rights).
- The term runs irrespective of the date when the work is lawfully made available to the public.
- In cases of joint authorship, Collective Works or Works on Commission the term is, in principle, calculated from the death of the last surviving author, Art. 1 (2) + (4).
- Related rights expire on shorter terms:
 - 50 years for performers after the date of the performance, Art. (1), of phonogram and film producers after fixation, Art. 3 (2) + (3), for broadcasting organisations after first transmission, Art. 3 (4)
 - 30 years maximum, at Member States' choice, for protection of critical and scientific publications of works that have come into the public domain.
 - 25 years for previously unpublished works, Art. 4.

If a copyright (or related right) seems to have expired according to the rough list above, the precise respective national legislation should be consulted for national peculiarities (see Survey of national provisions), with special regard to enduring moral rights. In addition, implementation of the Directive is, in some Member States, still quite recent, thus longer terms that were granted before implementation of the Directive might still exist.¹ However, all Member States are obliged to confer a 70-year term to all new works.

3. Recommendations

Recommendations for research activities regarding exceptions:

- Before carrying out restricted acts with copyrighted material, one should consider whether an exception to copyright applies
- Expiration of rights (term of protection) may be considered in addition to exceptions

not a person (such as in a work for hire situation) the term is the shorter of 95 years from publication or 120 years from creation of the work.

¹ See Art. 10 of the Directive for Application in time.

- If an exception seems to broadly meet the purpose, exact conditions of the particular exception should be checked — if necessary for all relevant countries (see Section C)
- Where doubts arise, to be on the safe side, one should consider an act as not benefiting from the particular exception
- Where envisaged conduct does not exactly meet the conditions of statutory permissions, authorisation by the right holder should be obtained
- Material protected by technical copy-protection devices should only be used if such means as are necessary to benefit from an exception are approved by the right-holder, such as decryption keys.

4. Excursus: How to deal with quotations in scientific work

It is an essential method of scientific research to consider existing results of other researchers in the relevant field of work. Therefore, it is necessary for every kind of scientific work to include quotations of those parts of third parties' work, which were referred to by the researcher. Thus, the quality of a scientific work results, among other criteria, from the personal contribution of the researcher just as from the analysis of third parties' results. However, copying of third parties' works literally or textually and without stating the source and the name of the author of the work, has to be regarded as plagiarism. To avoid such legal conflicts, every researcher is required to make sure that the act of quotation does not conflict with the interests of the copyright-holder.

- Unfortunately, the requirements for the quotation right are not identical in every Member State, but most states apply a similar regime, which means that the following principles can be regarded as essential elements of quoting legally:
- A work can only be quoted after it has lawfully been published
- A permissible quotation has to be made for a certain legitimate purpose (*eg* criticism or review)
- The permissible extent of a quotation is mostly ascertained by the purpose. In most states, the permissibility of a quotation is limited in the way that it has to be in accordance with fair practice, proper usage or fair dealing. In consequence, a quotation may not go beyond what is necessary for the new scientific work in question.

It is required that the source of the work and the name of the author of the quoted work have to be mentioned. In some

states it is additionally specified that the publisher,¹ the title,² or the translator³ of the work has to be mentioned. Therefore it is advisable always to mention all these elements. However, this does not apply if it is impossible to do so, *eg* if the work was published anonymously.

Example: Pro Sieben is a German television company. In August 1996, Pro Sieben featured an interview with Ms Mandy Allwood who had received fertility treatment and, as a consequence, was pregnant with eight live embryos. Pro Sieben had paid Ms Allwood for the opportunity to interview her and to broadcast the interview. Carlton UK Television Limited produced a television programme for the purpose of criticism of works of chequebook journalism in general, and in particular the treatment by the media of Ms Allwood's multiple pregnancy. Carlton UK therefore included a thirty-second extract from the Pro Sieben interview with Ms Allwood. Pro Sieben sued for infringement of its copyright interest in the television programme. Carlton UK claimed that its use of the copyright broadcast constituted fair dealing for the purpose of criticism or review and/or fair dealing for the purpose of reporting current events. Furthermore there had been a 'sufficient acknowledgement' of the television programme's author. While the extract from the interview had been shown the name of the programme and the name of Pro Sieben appeared on the screen. The Court of Appeal considered that the programme was indeed made for the purpose of criticising and reviewing the Pro Sieben report. The Court of Appeal concluded that the use of the extract constituted 'fair dealing'. The thirty-second extract was 'quite short' and the programme of Carlton TV was not produced in the course of unfair competition with Pro Sieben. Sufficient acknowledgement of authorship had been given (Pro Sieben Media AG v. Carlton UK Television Ltd, among others).⁴

For details regarding quotation in Member States see the following sections.

5. Details on exceptions/exemptions

Detailed information on exceptions and exemptions to copyright can be found in the EU Directive on Copyright in the Information Society⁵ (see EU — and international legislation), and in Member States' particular provisions. Originally, the Directive was meant to harmonise copyright limitations. Due to abundant compromises within the legislation process, it failed to do so, since there is now a long list of mostly optional

¹ *Eg* Portugal, Italy, Greece.

² *Eg* Portugal, Italy.

³ *Eg* Italy.

⁴ Civil Decision December 17, 1998, Nottingham Law Journal, 1999, p.54 — 59.

⁵ Directive 2001/29/EC, OJ L 167/10; see Appendix 1.

exceptions. Nevertheless, it sets a framework of provisions that might be found in particular Member States, once they have implemented the Directive in the near future.

a) Exceptions according to the Directive

The only mandatory exception to copyright provided for in the Directive, Art. 5 (1) refers to temporary acts of reproduction necessarily occurring in the online environment,¹ RAM-copies made on the home computer of a user and proxy caching are typical acts covered by this exemption. Member States, which have not yet expressly stated so in their legislation, will in most cases, come to the same solution by jurisdiction.

All further exceptions and limitations are only optional, and in some cases will therefore only exist in one particular state. In some cases, exceptions and exemptions are linked to fair compensation. For details, see the following Section and the Directive itself (EU — and international legislation).

Exceptions to the right of reproduction include, according to Art. 5 (2):

- analogue reproductions effected by photographic techniques or similar, provided for fair compensation (*eg* paper copies)
- reproductions by a natural person for private use and no commercial end
- specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives without commercial advantage
- ephemeral recordings by broadcasting organisations by their own facilities
- reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition of fair compensation.

Exceptions to the communication/making available to the public and the rights of distribution are provided for in Art. 5 and include, among others:

¹ ‘Temporary acts of reproduction referred to in Article 2 [direct and indirect, by any means and in any form, in whole/in part] which are transient or incidental (and) an integral and essential part of a technological process and whose sole purpose is to enable (a) a transmission I a network between third parties by an intermediary, or (b) a lawful us of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.’

- use for the sole purpose of illustration for teaching or scientific research (with an indication of the source)
- uses for the benefit of people with a disability under certain conditions
- 'reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics, or of broadcast works or other subject matter of the same character, in cases where such the use is not expressly reserved' (including an indication of the source)
- 'quotations for purposes such as criticism or review, provided that they relate to a work or other subject matter which has already been lawfully made available to the public' (including an indication of the source) in accordance with fair practice, and to the extent required by the specific purpose
- use of political speeches as well as extracts of public lectures or similar works or subject matter, to the extent justified by the informatory purpose (including source indication)
- use of works made to be located permanently in public places (*eg* sculptures)
- incidental inclusion of a work in other material
- use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals under certain conditions.

This selection of exceptions with regard to possible use within socio-economic research cannot be applied directly, but needs implementation in national legislation by the respective Member State(s). Since most of the limitations are optional, it is quite probable that exceptions might stay the same as listed below for present legislation.

'Quotation' (see above Section D III 4 for a general information on quotations) is a good example of how the varying concept of exceptions to copyright is applied on the European as well as on the national level. Whether a particular quotation conflicts with the copyright is question of the copyright law actually being in force in the relevant country. In general, it is up to the national legislator to include an exception or limitation to the copyright of the author for the purpose of quotation or not. However, EU Member States are obliged to meet the requirements set up by Article 5 (3) (d) of the EU Copyright Directive.¹ This regulation allows them to provide for

¹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of certain aspects of copyright and related rights in the information society.

exceptions or limitations to copyright in the case of quotations, for purposes such as criticism or review, provided that:

- they relate to a work or other subject matter which has already been lawfully made available to the public and
- the source, including the author's name, is indicated (unless this turns out to be impossible), and
- their use is in accordance with fair practice, and
- to the extent required by the specific purpose.

Even those Member States which have not yet brought the Directive into force, provide for exceptions or limitations to copyright in the field of quotations.

Copy-protection systems (see Subsection III 1 for basic information) and other types of technological measures protecting digital documents can create a relevant drawback to the use of copyright exceptions. According to the Directive (Art. 6) Member States are obliged to protect anti-copying devices and to outlaw circumventing acts (*ie.* 'cracking' those devices or related acts). This protection of technological measures is in principle also applied to beneficiaries of copyright exceptions or limitations, such as researchers for research purposes and/or quotations.

Member States have to take measures to ensure that right-holders make available to those beneficiaries the means of benefiting from certain exceptions¹ (*ie.* any tool enabling the legitimate use). Nevertheless it is questionable whether the implementation of this provision will offer appropriate access for researchers. One reason is that the obligation to enable use of protected material only covers a few exceptions,² furthermore the kind of measures taken by each Member State to ensure legitimate use of copy-protected material are not harmonised. Therefore Member States can refer legitimate users to courts in order to obtain means to benefit from an exception regarding copy-protected material,³ if the right-holder does not voluntarily handover the necessary tools.

A material meant to be an object of legitimate research activities might therefore be inaccessible for researchers for all the time a court's decision might take.

¹ Directive 2001/29/EC Art. 6 (4).

² Among others, for libraries and archives as in Art. 5 (2) (c), for scientific research as in Art. 5 (3) (a).

³ *Eg* Germany chose that option.

b) Exceptions in Member States' legislation

Exceptions of copyright listed below are not categorised by their name within a particular country or their broad spectrum of application, but by their use within socio-economic research. See Survey of national provisions and the national legislation linked in the table of copyright acts in the Appendix for more details regarding particular Member States.

1) Educational/Scientific use

Austria

Reproduction by schools for own use; exempted are works that are intended for teaching or training; Art. 42 (6) as well as reproduction of whole of books or periodicals or sheets of music or copies thereof (Art. 42 (8)). Works of literature and elucidating works of pictorial representations of scientific or didactic nature may be reproduced, distributed and made available to the public in collections of works intended for school use if this is done after the publication of the works for non-profit purposes and to the extent justified by the purpose (Art. 45 (2)); under certain circumstances school broadcasting of published works of literature (Art. 45 (3)).

Use of school books for commercial purposes provided the user has obtained the rights required for this from the responsible collecting society (Art. 59c). Use of individual oral presentations or individual performances for scientific and educational purposes as far as justified by a non-commercial purpose and the source is indicated (Art. 71a (4)).

Belgium

Reproduction in part or in whole of articles or works of fine art or reproduction of short fragments of other works fixed on a graphic or similar medium where reproduction is intended for a strictly private or didactic purpose (Article 22 (1) 4.) The same applies to reproductions in part or in whole of articles or works of fine art or reproduction of short fragments of other works fixed on any medium where such reproduction is intended illustration of education or scientific research to the extent justified by the education or research purpose (Article 22 (1) 4bis and 4ter).

Making of an anthology for education (after the death of the authors, their work can be used without right-holder's authorisation, but with a remuneration).

Reproductions and communications to the public used for examinations.

Denmark

Quotation rights in accordance with proper usage; for the purpose of educational activities, copies of published works may be made, provided that the requirements regarding extended collective licences have been met; short literary works or minor portions of them may be reproduced in composite works for educational activities (exempted are works intended for use in educational activities as well as any use for commercial purposes: 'school textbook clause'); non-commercial recording of work performances as part of educational activities.

Finland

Parts of literary works may be used in exams or comparable tests; minor parts of a literary work may be used in a compilation intended for use in education; only non-profit educational activities are covered.

France

Analyses and short quotations justified by the educational or scientific nature of the work in which they are incorporated.

(broader exceptions for education and scientific research will probably be integrated in the law when implementing the copyright directive. The exact scope of such exceptions is still being discussed)

Germany

According to Sec. 46 reproduction, distribution and making available of parts of published works in certain types of collections comprising works of a number of authors are allowed if meant for certain educational purposes. Sec. 47 contains exceptions for school broadcasts. The new Sec. 52 a provides for making available small parts of a work, small works and single contributions from newspapers and periodicals for the purpose of illustration instructions in non-commercial education, restricted to a limited circle of people and to the extent necessary for the purpose.

This provision concerns namely making available of material for *eg* a research group in an intranet (not Internet). If however a work is designed for teaching, the right-holder has to be asked for permission.

Reproduction for personal scientific use and for inclusion into a private archive is covered by Sec. 53 (2)). Sec. 52 (3) provides for reproduction of small parts of published works for school and non-commercial education as well as state examinations.

Greece

'School textbook clause' for use in primary and secondary education. However, only applicable to reproduction by means of printing; reproduction for teaching purposes or examinations in accordance with fair practice and not in conflict with the normal exploitation of the work or other protected subject-matter and without prejudicing the legitimate interests of the right-holder.

Ireland

Fair dealing with a literary work or a non-electronic original database for the purposes of research or private study does not infringe copyright; fair dealing requires that the work has already been lawfully made available to the public and that the purpose of the copy does not unreasonably prejudice the interests of the copyright owner; also no copyright infringement by inclusion in an incidental manner into another work; special provision concerning copies of abstracts of scientific articles published in periodicals (copying and making available is permissible); 'school textbook clause'; educational establishment covers schools, universities and other establishments prescribed in a decree by the Ministry (not available yet); reprographic copies by educational establishments are allowed for the educational purposes of that establishment but limited to an amount of up to 5 % of any work any calendar year; licensing schemes may be granted to educational establishments but may not restrict the exceptions above.

Italy

School anthologies are allowed but restricted to the extent specified in regulations that also lay down the manner for determining the equitable remuneration for such reproduction. Reproduction of photographs in anthologies for school use and in scientific or didactic works is lawful subject to the payment of equitable remuneration determined in the regulations.

Luxembourg

No infringement by the use of literary works by way of illustration in publications for teaching, to the extent justified by the purpose.

Netherlands

Taking over of parts of literary or scientific works in publications for teaching purposes is permissible under those circumstances, with the additional requirement of equitable remuneration; exception for limited amounts of copies made of literary or scientific works for the sole purpose of private study of the person who makes or orders the copies (remuneration is

owed for this reproduction); also allowed: reproduction of scientific works including individual articles, reports or other texts, or short passages of books or other writings, on behalf of an enterprise, organisation or other establishment provided that the number of copies is limited to the number reasonably needed by the organisation.

Portugal

Right of partial or even total reproduction by photography or by an analogous process carried out by a library, a non-commercial documentation *centre* or a scientific institution, limited to the requirements of such institutions' activities; this privileged scientific use, however, requires equitable remuneration to be paid to the author and to the publisher; the same right applies to educational establishments if the reproduction and the number of copies are made exclusively for educational purposes and their use is not profit-making; in this case, there is no requirement of equitable remuneration; 'school textbook clause'; special provision concerning one single copy of works not commercially available or impossible to obtain for purposes of exclusively scientific interest and restricted to the period necessary for the use; in those cases, there seems to be no requirement for equitable remuneration either.

Spain

Privilege of reproductions of works made 'without gainful intent by museums, libraries, record libraries, film libraries, newspaper libraries or archives which are in public ownership or form part of institutions of cultural or scientific character, and where the reproduction is effected solely for research purposes', Art. 37 (1) — this exception shall privilege researchers making copies in the mentioned institutions; exceptions may not be interpreted in a manner capable of unreasonably prejudicing the legitimate interests of the author or adversely affecting the normal exploitation of the works (Art. 40bis); exceptions from database protection exist for purposes of illustration in teaching or scientific research, provided that the use is made to the extent justified by the non-commercial purpose pursued and that the source is mentioned (Art. 34 (2) (b)).

Sweden

Privilege for copies of published works prepared by means of reprographic reproduction for educational activities where an extended collective licence applies; those copies may only be used in such educational activities which are covered by the agreement forming the basis for the extended collective licence; 'school textbook clause'; archives and libraries have a right to make copies for purposes of research; restricted to public archival authorities, those scientific and research libraries that

are run by public authorities and public libraries; the same right may be granted by the government to other certain archives and libraries.

UK

Fair dealing with a literary work for the purpose of research for a non-commercial purpose does not infringe any copyright in the work; copying by a person other than the researcher or student is not fair dealing in case of multiple copies (Section 29). Also the purpose of private study constitutes fair dealing (Section 29). According to Section 32 copyright is not infringed if copying is done for the purpose of instruction or examination under certain conditions. Also the inclusion of a short passage from a published literary or dramatic work in a collection does not infringe copyright, provided it is intended for use in educational establishments and fulfils other criteria (See Section 33 for details, 'school textbook clause'). Also Section 34, 35, 36 and 36 provide exceptions in regard to educational establishments.

Material from Member States shows that an exception such as this should not be used broadly by its mere label, but in consideration of the precise understanding in a Member State.¹ This can be illustrated by some explanations offered in a British copyright guideline, taken from the TLTP (UK Teaching and Learning Technology Programme) copyright guidelines (see [Links to other copyright guidelines](#)):

'In all cases, the term 'fair' means 'not unduly prejudicial to the copyright owners' interests', especially financial interests. In deciding whether or not to use material without permission by relying on the fair dealing provisions, you must make a judgement whether or not, if you were the copyright owner, you would think it 'fair'. Fair dealing is not a right, but a defence against an infringement action. If sued for infringement, you must be prepared to demonstrate not only that the copying was done for one of the approved purposes, but also that it was indeed 'fair' to the copyright owner. Our advice is that this provision is unlikely to be much help in the present context, as multiple copying or subsequent publications are almost certainly unfair.'

'Apart from fair dealing, the previous concessions, are not specifically designed to help education, although they can be utilised for that purpose. However, there are some limited concessions aimed specifically to help the teacher and learner.'

Reprography

Literary, dramatic and musical works (not artistic) and published editions may be photocopied by or on behalf of an educational establishment for the purposes of instruction. There are, however,

¹ In general the fair use doctrine of the USA also provides an exception for non profit educational purposes (§ 107).

*severe limitations; only 'passages' (not defined) may be copied and only 1% of any work may be copied in any calendar quarter. Note that it is 1% of the work, so a short story in a collection would be a distinct work and 1% would apply to it and not to the collection as a whole. On the other hand, any number of copies may be made. Against this, computer programs are excluded and, in any event, the resulting copies may not be sold, hired or offered for sale. Before using this rather limited concession, a check should be made as to whether or not you are covered by a licence issued by the Copyright Licensing Agency (CLA) since the concession lapses if and to the extent that licensing schemes are on offer. The CLA might be able to offer a licence for reproduction for use in programmes for exploitation.'*¹

2) Quotation

All Member States have integrated the concept of legitimate quotations in their legal system somehow. See general introduction to quotations in research above for an example. Some Member States provide for quotation as such, others refer to quotations of certain material or certain purposes. Some, like the UK, rely on a general concept of fair use.

Austria

Reproduction and distribution as well as oral public presentation, radio broadcast and making available to the public are permissible where individual parts of an published work of language are inserted or where individual works of language or works of a scientific or didactic nature, after they have been published in the quantity justified by the purpose, are included in a work of an essentially scientific nature whereas a work of a scientific or didactic nature may be included only for the purpose of elucidating the contents (Art. 46).

Belgium

According to Article 21 short quotations taken from a lawfully published work for the purpose of criticism, polemic or teaching or in scientific works in accordance with the fair practice of the profession and to the extent justified by the purpose are allowed.

Denmark

Quotations in accordance with proper usage and to the extent required for the purpose from a work which has been made public are *permissible* (Sec. 22).

¹ JISC/TLP Copyright Guidelines, see Appendix.

Finland

A disseminated work may be quoted, in accordance with proper usage, to the extent necessary for the purpose (Art 22).

France

Pursuant to Article L122-5 Nr. 3 a) analyses and short quotations justified by the critical, polemic, educational, scientific or informatory nature of the work in which they are incorporated are permissible on the condition that the name of the author and the source are clearly stated.

Germany

German copyright law distinguishes between the inclusion of individual works and the quotation of passages from a work. According to Sec. 51 Nr. 1 the inclusion of a work in another work is, to the extent justified by the purpose, permissible where the individual works are included after their publication in an independent scientific work to illustrate its content. The quotation of passages from a work in an independent work of language is permissible according to Sec. 51 Nr. 2.

Greece

Pursuant to Article 19 the quotation of short extracts of a lawfully published work by an author for the purpose of providing support for a case advanced by the person making the quotation or a critique of the position of the author is permissible, provided that the quotation is compatible with fair practice and that the extent of the extracts does not exceed that justified by the purpose.

Ireland

According to Sec. 51 (1) fair dealing with a work for the purposes of criticism or review of that or another work or of a performance of a work does not infringe any copyright in the work where the criticism or review is accompanied by a sufficient acknowledgement

Italy

Quotation and reproduction of fragments or parts of a work is permissible for instructional purposes within the limits justified for such purposes provided that such acts do not conflict with the commercial exploitation of the work (Article 70).

Luxembourg

Quotation right to the extent justified by the purpose provided that the quotations are compatible with fair practice (Art. 10).

Netherlands

Quotations in an announcement, criticism, polemic or scientific treatise are permissible if the work has lawfully been communicated to the public, the quotation is in conformity with social customs, the extent of the quotation is justified by the purpose and the moral rights of the author are not infringed (Sec. 15).

Portugal

Quotation right in support of one's own opinions or for purposes of criticism, discussion or teaching unless the quotation is so extensive that it prejudices the interests in the work (Art. 75 (f)).

Spain

According to Section 32 it is lawful to include in one's own work fragments of the works of others, whether of written, sound or audiovisual character, and also to include isolated works of three-dimensional, photographic, figurative or comparable art character, provided that the works concerned have already been disclosed and that they are included by way of quotation or for analysis, comment or critical assessment. Such use may only be made for teaching or research purposes and to the extent justified by the purpose of the inclusion and the source and the name of the author of the work have to be stated.

Sweden

Quotation right in accordance with proper usage and to the extent justified by the purpose (Art. 22).

UK

Section 30 (1) allows fair dealing with one work in order to criticise or review another work provided that it is accompanied by a sufficient acknowledgement and provided that the work has been made available to the public. Criticism can be scathing and can involve a substantial part of another work and yet still be fair dealing.¹

Whether a usage of a work is fair dealing, depends especially on the motive behind the use of the author's works.²

¹ Bainbridge, *Intellectual Property 2002*, p.171; *Pro Sieben Media AG v Carlton UK TV Ltd 1999*.

² Bainbridge, *Intellectual Property 2002*, p.171; *Hubbard v Voster, 1972, 2 QB 84*.

As you have seen, besides some clear and definite legal provisions, there are many less definite general legal terms applicable to the quotation right. How far these general terms may influence the right of quotation in the individual case is a question of their interpretation by the national judiciary. To make sure the relevant quotation does not conflict with the copyright of the author it is therefore, in case of doubt, recommendable to consult the national organisation responsible for questions of copyright law and its interpretation.

3) Libraries and archives

Austria

Single copies of works in their possession or works which have been sold out; generally no reproduction of whole books/periodicals (except copied by hand).

Belgium

Exceptions only concerning cinematographic works in favour of the 'Cinémathèque Royale de Belgique' (Film Archive. The exception might be broadened as to include all archives and museums when implementing the Copyright Directive).

Denmark

For copies in digital form making available outside the libraries, archives or museums is not allowed according to Sec. 16 (1). Works which have been made public may only be made available for personal viewing or studying on the spot. Further there are rules for making single copies by libraries, archives and museums laid down in the *Order of the Right of Archives, Libraries and Museums to Make Copies of Literary and Artistic Works, etc. No. 876 of November 28, 1997*. The rights stated there are primarily granted to public authorities, libraries and archives (the institutions) for the purpose of the institution's activities. The rights include under Sec. 6, *eg*, the right to make single copies for use in research; for handing out copies of single articles or short book sections to other users and for lending copies. Only one copy may be made available to the individual user (Sec. 6). Not allowed is making copies of computer programs in machine-readable form. The copies made under the Order may only be used by individuals for personal consultation or study. Copies can, however, be in paper form handed out to individuals under the provisions of Sec. 6. Acts of 'Making available' of works are excepted from the rules laid down under Section 1.

Finland

Decree regulating the right of archives and libraries to make copies of a work for the purpose of their activities under conditions specified in the decree; proposed amendments during the implementation of the Copyright Directive

France

No explicit reference in the Intellectual Property Code

Germany

Reproduction for collections of (parts of) works for religious, school and instructional use (Sec. 46 (1)) and recordings of documentary nature placed in official archives (Sec. 55 (2)) are exempted.

Greece

Reproduction of one additional copy made from a work already in the permanent collection is permissible in non-profit libraries or archives only if an additional copy cannot be obtained in the market promptly and on reasonable terms. The additional provision introduced by the Law 3057/2002 amending the Copyright Act is under para 28 C that the use permitted under the limitation does not conflict with a normal exploitation of the work or other protected subject-matter and does not unreasonably prejudice the legitimate interests of the right-holder.

Ireland

Above all, regulations may be made by the Minister that include the following matters: the conditions under which librarians can make copies for the library's permanent collection or for persons requesting a copy. Further, Sec. 60 and the following provide that one copyshell, *eg*, be supplied to a requesting person if he declares that he requires it for research or private study; copies also may be supplied from library to library if the work in question has already been lawfully made available to the public without infringing on any copyrights.

Included are further limitations on multiple copying and regulations on culturally important works and others.

Italy

The photocopying of works available in libraries for personal use or for the services of the libraries is permitted; the reproduction of intellectual works for personal use, when done by photocopying, xerocopying or a comparable medium, is permitted up to a limit of 15% of each volume or issue of a

periodical, excluding pages of advertising; the distribution of those copies and any use that infringes the exploitation rights of the author is prohibited; loans from libraries and record libraries belonging to the State or to public authorities, made exclusively for purposes of cultural promotion and personal study without authorisation of the right-holder concerning printed copies of works, except for music scores, further concerning certain phonograms and videograms; reproduction of single copies of the phonograms and videograms containing cinematographic or audiovisual works or sequences of moving images, with or without sound by departments of libraries and record libraries belonging to the State.

Luxembourg

Public lending may not be prohibited by the author; he is, however, entitled to remuneration for such lending on conditions laid down in a Grand-Ducal regulation specifying the circumstances (regulation not available).

Netherlands

Exceptions from lending remuneration for educational establishments, research institutes and the libraries attached to them; no express exceptions concerning reproduction.

Portugal

Right of partial or even total reproduction by photography or by an analogous process carried out by a library, a non-commercial documentation centre or a scientific institution, limited to the requirements of such institutions' activities. This privileged use, however, requires equitable remuneration to be paid to the author and to the publisher.

Spain

Art. 37 (1): privilege of reproductions of works made without gainful intent by museums, libraries, or archives which are in public ownership or form part of institutions of cultural or scientific character, and where the reproduction is effected solely for research purposes. Where this is the case, no authorisation and no payment or remuneration is required for the loans that these institutions make.¹

Sweden

Archives and libraries have a right to make copies for purposes of preservation, completion or research, or of single articles or short extracts which for reasons of security must not be given away in the original; restricted to public archival authorities,

¹ Apparently this exception is applicable for archiving in research.

those scientific and research libraries that are run by public authorities and public libraries; the same right may be granted by the government to other certain archives and libraries (decree not available).

UK

Libraries and archives are defined in regulations made by the Secretary of State (regulations not available) which specify the provisions for different types of libraries and archives for different purposes; librarians in the sense of the copyright act are allowed to make copies for persons satisfying the librarian that they require the copies for purposes of research for a non-commercial or private study only; this right is restricted to single copies of articles in periodicals and parts of literary works and conditioned by the requirement that the persons to whom the copies are supplied are required to pay a sum not less than the cost attributable to the production of the copies, including a contribution to the general expenses of the library.

Even the United States have — in addition to their fair use practice — an explicit limitation of copyright regarding libraries and archives.¹

4) Private use

Almost all national laws contain an explicit exception concerning copies made for private use of some kind. Where not explicit provision applies, the common-law concept of 'fair use' best known from United Kingdom (and the United States) might be applicable. Irrespective of the dogmatic solution, the private use-exceptions should be handled with care. Whether or not *eg* the exceptions might be applied to digital copies or not varies between Member States and is not always explicitly provided for. The number of copies covered by the exception varies between Member States and is often only decided by judges. Researchers should prefer to refer to the more specific exceptions for research purposes/scientific use as described above.

¹ § 108 of US Copyright Law: It is not an infringement of copyright for a library or archives to reproduce no more than one copy or phonorecord of a work, (there are some exceptions where the right to reproduction applies to three copies for the purpose of preservation or replacement of damaged works) or to distribute such copy or phonorecord, if the reproduction or distribution is made without any purpose of direct or indirect commercial advantage; the collections of the library or archives are open to the public, or available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; the reproduction or distribution of the work includes a notice of copyright that appears on the copy or phonorecord.

Austria

Art. 42 contains a reproduction right for one's own use in general for analogue copies (1) and for all types of copies for own research (2) and at the same time a limitations of this right (Art. 42 (5)). That means, that copies reproduced for one's own use must not be used for the purpose of making the work accessible to the public.

Belgium

Regarding a lawfully published work an author may according to Sec. 22 (1) Nr. 4 not prohibit reproduction of articles or works of fine art or reproduction of short fragments of other works fixed on a graphic or similar medium where such reproduction is intended for a strictly private or didactic purpose and does not prejudice the publication of the original work.

Denmark

According to Art. 12 (1), private non-commercial copying is in principle allowed, but Subsection 2 contains a list of exceptions to this permission, among those provisions regarding certain forms of material in digital form, databases, computer programs.

Finland

According to Sec. 12 private copies of disseminated works are allowed with a number of exceptions including musical works, cinematographic works, useful articles or sculptures, or the copying of any other work of art by artistic reproduction, databases, computer programs.

France

According to Article L122-5 Copies of a disclosed work are allowed for strictly private use, except for works of art to be used for purposes identical with those for which the original work was created and except for computer programs (unless for a necessary backup) and databases.

Germany

Private copies for personal use from a not obviously illegal source and non-commercial purposes are allowed according to Sec. 53 (1), another person may only be asked to make analogue (paper) copies. In addition for own research purposes both types (analogue and digital) are allowed even when made by a third person.

Greece

Private Copies of a lawfully published work are in principle allowed according to Sec. 18, unless this is in conflict with normal exploitation of a work or the author's legitimate interests. All copies concerning somehow 'technical means' are subject to restrictions and a remuneration scheme.

Ireland

No specific reference to private use, but copyright subject to 'fair use' concept (see Sec. 50)

Italy

Reproduction of single works or of portions of works for the personal use of the reader, when made by hand or by a means of reproduction unsuitable for marketing or disseminating the work in public. Photocopying of works available in libraries for personal use when done by photocopying, xerocopying or a comparable medium up to a limit of 15% of each volume or issue of a periodical, excluding pages of advertising; however, no distribution of copies as mentioned before in public and, in general, no use of them that infringes the exploitation rights of the author. Allowed are further Loans from libraries and record libraries belonging to the State or to public authorities, made exclusively for purposes of cultural promotion and personal study and exclusively concerning printed copies of the works, except for music scores and certain phonograms and videograms.

Luxembourg

According to Art. 10 an author may not prohibit a copy 'effectuée à titre gratuit par le copiste' and for strictly private purposes.

Netherlands

According to Sec. 16 b a limited number of copies made for private practice or study

Portugal

According to Art. 81, copies for exclusive private use allowed, provided that it does not harm normal exploitation of the work nor cause unjustified prejudice to the author's legitimate interests

Spain

With certain conditions stated in that section, reproductions of already disclosed works are allowed according to Art. 31 (1) for the private use of the copier, provided that the copy is not put

to either collective or profit-making use; subject to a remuneration scheme (Sec. 25).

Sweden

Single copies for private use of works, which have already been made available, are allowed according to Art. 12, but digital copies are among the exceptions to this right.

UK

No specific provision for private use, but copyright subject to 'fair use' concept 'fair dealing' is possible with the works regarding private study *eg* a single copy of an extract of a work or other very limited use within the scope of the term 'private study'.

All the exceptions mentioned above have to be handled with regard to the particular provisions, see the Survey of national provisions in the Appendix, and the national legislation (Table of Copyright Acts).

5) Source Indication

All Member States impose an obligation to acknowledge the source of a copy. In most Member States, there are specific provisions stipulating that the source and the name of the author have to be mentioned in the case of copies that are covered by an exception to copyright protection, especially concerning the right of quotation.

In addition, there is the general moral right of recognition of authorship that applies in those jurisdictions which do not explicitly refer to the copier's duty to mention the author's name in case of copyright exceptions. Concerning the necessary information that has to be provided, some national copyright laws explicitly require mention of the source and the name of the author (or even the publisher of the copied work, *eg* Italy), while other Member States refer to 'proper usage' and 'sufficient acknowledgement'.

Austria

source indication obligatory for specified uses

Belgium

quotations require mentioning the source and the name of the author

Denmark

source shall be indicated in accordance with proper use

Finland

necessary because of general requirement of acknowledgement of source, no special provision concerning exceptions

France

required for quotation

Germany

clear acknowledgement required

Greece

required

Ireland

sufficient acknowledgement of the work and the author required

Italy

acknowledgement of title, name of the author, publisher, translator required

Luxembourg

mention of the source and of the name of the author

Netherlands

required

Portugal

mention, where possible, of the name of author and publisher, title and other elements enabling the work to be identified

Spain

Source and name of author have to be stated in case of quotations and concerning exceptions from database protection; generally necessary because the legitimate interests of the author may not be unreasonably prejudiced, and one of those interests is the moral right of recognition of authorship.

Sweden

Source and name of the author shall be stated to the extent and in the manner required by proper usage

UK

In general sufficient acknowledgement is necessary; except in cases where this would be impossible for reasons of practicality or otherwise or in certain other cases. In addition, there is the general right to be identified as author (Sec. 77, exceptions Sec. 79).

IV. Consequences of copyright infringements

Any act relevant to copyright as described above (*eg* publishing, copying, altering *etc.*, see Section D II regarding restricted acts for details) carried out without legislative or contractual permission will typically constitute an infringement of copyright in a legal sense besides the ethical problems. An infringement of copyrights and other related rights has various civil and criminal consequences. Unfortunately, these **legal sanctions are not harmonised throughout the European Union.**¹ The measures of protection, and also the level of protection, differ from country to country. These disparities are hampering the proper functioning of the internal market, and make it difficult to combat counterfeiting and piracy effectively, and lead to the 'race to the bottom' phenomenon.² Furthermore, the conditions for fair and equal competition are weakened by differing national rules on enforcing intellectual property rights,³ in research as well as other relevant markets.

Moreover, it makes it difficult for entities that are working throughout the European Union to overlook the different systems of sanctions, and hampers their opportunity to react adequately to copyright and related rights infringements.

Up until now, there is only a proposal for a Directive on measures and procedures to ensure the enforcement of intellectual property rights⁴ see Appendix for EU-legislation. Until the enactment of this directive and its proper implementation into the national laws, each Member State will keep its particularities. This causes difficulties in providing a

¹ See §§ 501 - 513 of US Copyright Law for details of copyright infringement and remedies.

² Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights, 2003, p.3.

³ Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights, 2003, p.6.

⁴ Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights, 2003, http://europa.eu.int/comm/internal_market/en/indprop/piracy/.

general outline of the system of sanctions and gives reason to seek professional assistance in cases of copyright infringement. As a first instance, it is advisable to contact one of the organisations that are dealing with socio-economic research, if you think that an infringement of copyright or a related right has occurred or will occur. A comprehensive list of these organisations, compiled by FORBA¹ is available on the RESPECT homepage.²

Nevertheless, it might be useful to give a general outline of the system of sanctions in order to give an idea of the consequences of an infringement of copyright or a related right.³ See Survey of national provisions and links to national legislation in the Table of Copyright Acts in the Appendix for more details on particular Member States' provisions.

1. Civil consequences

Most of the EU Member States have enacted their own system of sanctions concerning the infringements of copyrights and related rights.

Only a few legal systems⁴ have not provided their own system of sanctions for these infringements. In these countries, this issue is dealt with by the general civil law. However, there are often certain rules modifying the general rules, particularly in the aspect of procedural law.

Nevertheless, there are some general principles, which are common to most legal systems. In general, obligations of an infringing party comprise remuneration, surrender of profits, damages and duties regarding the infringing material.

a) Appropriate remuneration

In most legal systems,⁵ the infringing party has to pay at least appropriate remuneration to the right holder if a work has been used unlawfully, regardless of whether the infringement was committed intentionally or with negligence. Mostly, the amount of remuneration depends on the sum that would have been paid if the violating party had acquired a proper licence. With varying dogmatic approaches some Member States

¹ Forschungs- und Beratungsstelle Arbeitswelt, Vienna.

² www.respectproject.org

³ For a more detailed overview of the different regulations, see the table in Appendix 1.

⁴ *Eg* Belgium, France, Portugal.

⁵ *Eg* Austria, Denmark, Finland, Sweden.

require infringers to pay a multiple of this sum. It should be kept in mind that pursuant national legislation remuneration might even have to be paid where the use of protected material itself enjoys an exception/ exemption/limitation.

b) Surrender of profits

According to some of the national legislations,¹ an injured party is entitled to request the surrender of the profits derived from the acts of infringement under certain conditions (intention, negligence).

c) Damages

It is a common principle to all national legislations that the infringing party is obliged to pay damages to the injured party, proved that the inflicting act has been intentional or with negligence. However, the amount of damages awarded does differ. In some legal systems the infringing party is obliged to pay an even higher amount of indemnification than the extent of the de facto caused damage.² In some cases,³ the amount of indemnification is at least twice as high as the amount of reasonable remuneration. The treatment of the infringement of moral rights sometimes differs;⁴ and non-economic loss is recoverable. In some legal systems,⁵ damages even have to be paid if the infringement is committed in good faith, but only up to the profit gained.

Whether or not different consequences as named above are applied at the same time differs between Member States.⁶

d) Infringing material

In most legal systems,⁷ a right-holder can demand either the destruction or the rendering useless of illegal copies and

¹ *Eg* Austria; Germany, Greece.

² *Eg* in the Republic of Ireland aggravated and exemplary damages are permissible, and in the UK, additional damages.

³ *Eg* Austria, Greece.

⁴ *Eg* Austria, Germany.

⁵ *Eg* Denmark.

⁶ In some legal systems, *eg* Austria, besides remuneration and surrender of profits, indemnification will only be granted to that amount which exceeds the amount of remuneration and the surrendered profit. According to other legislation like *eg* Greece or Netherlands, a right-holder has to choose between the surrender of profits, or damages.

⁷ Austria, Germany, Finland, Sweden.

material that is intended¹ for the unlawful manufacture of copies. In some jurisdictions,² this right is only given if the destruction is not disproportionate. Sometimes,³ these rights are also extended to protection-defeating devices. Mostly, the delivering of the conflicting material to the injured party is also permissible, sometimes only in return for equitable remuneration.⁴ In some legal systems this right does not extend to works of architecture,⁵ to copies that were acquired in good faith⁶ or, in the case of good faith; these measures can be averted by the payment of a reasonable indemnification in money.⁷ In some cases,⁸ the seizure of goods is permissible if there is reason to believe that these goods are to be marketed.

e) Injunctive relief

In general infringing parties will be obliged to refrain from any further infringing acts, called injunctive relief. All jurisdictions grant injunctive relief of some kind to cease copyright and related right infringements. Only the requirements for an order of injunctive relief differ.

2. Criminal consequences

Most jurisdictions have criminalised certain infringements of copyrights and related rights. The sanctions vary from fines to imprisonment. Mostly, the criminal regulations are enacted in the Copyright Acts. However, sometimes they are part of a general penal code.

See the Survey of national provisions and the table of copyright acts with links in the Appendix for details on Member States' provisions.

3. Recommendations

Recommendations for research activities regarding infringements:

¹ Sometimes exceptionally intended, *eg* Austria.

² *Eg* Austria, Germany.

³ *Eg* Republic of Ireland.

⁴ *Eg* Austria, Denmark, Finland.

⁵ *Eg* Austria, Germany, Finland, Ireland.

⁶ *Eg* Denmark, Finland, Ireland, Italy, United Kingdom.

⁷ *Eg* Germany.

⁸ *Eg* Ireland, United Kingdom.

- Avoid infringements, thus before carrying out an act relevant to copyright (such as copying, making available, down- and uploading, altering *etc...*) make sure that the act does not constitute an infringement, *eg*:
 - make sure that the respective exception (for research, quotations or the alike) really covers the intended use
 - make sure that the permission obtained from the right-holder covers the intended use
 - make sure that rights really rest with the party in question
 - consider online-activities the same way analogue (paper) activities would be considered
 - regard that copyright legislation varies between EU Member States
 - consider copyright questions in all contracts (employment, research groups, networks *etc.*).
- However, if notified that a third party considers a certain use to be an infringement, stop that use immediately and tell the notifying party; if the third party indicates legal consequences seek legal advice immediately
- When realising that a third party is infringing your copyright ask that party to refrain immediately (without waiving further claims)
- If an infringing party does not react properly to your request, inform the respective research bodies (see FORBA's list of relevant bodies on the RESPECT homepage¹) and seek legal advice.

¹ www.respectproject.org

E. Questions of Database Protection

Databases, like compilations of empirical data, are used frequently within socio-economic research, and will increasingly be a fundamental basis of research in a digital environment. The making of databases requires the investment of considerable human, technical and financial resources therefore databases are protected in all EU Member States. In March 1996 a European Directive concerning the legal protection of databases¹ was passed with the aim to establish a sufficient protection of databases in all Member States and to harmonise the existing different attributes of the protection. From that date on, Member States were required to protect databases. Currently, every EU Member has adopted the Directive in its national legislation.

Therefore databases, even if they might be as simple as a link-list made by a third party, should be handled with care, since databases enjoy strong protection. Policy known from copyright in general (see Section D) cannot be automatically applied to databases.

Researchers should check before using a database:

- whether it is protected by one of the two database regimes in Europe (by copyright, see below and Section E I 1 and by the special 'sui generis' right, see below and Section E I 2)
- whether or not the intended use is subject to restrictions under database legislation, and if so
- whether or not any of the special exceptions/limitations might be applied to the conduct in question.

I. What is protected?

According to the Directive collections, sometimes also called 'compilations' of work, data or other materials that are arranged, stored and accessed by means which include electronic, electromagnetic, electro-optical or analogous

¹ 96/9/EC of 11 March 1996

processes are protected in all EU Member States.¹ In case of using third parties' data or compilations of data a researcher has to check, if the relevant data may be qualified as such a database.

The Directive protects '**databases in any form**' (Art. 1 D). This definition not only covers electronic databases, but also paper databases such as telephone books, or microfilm collections. The term 'database' should be understood to include literary, artistic, musical or other collections of works or collections of other materials, such as texts, sound, images, numbers, facts and data.

Protection is provided for databases defined as:

- collections of independent works, data or other material
- which are systematically or methodically arranged
- and can be individually accessed
- by electronic or other means.

Example: The items in the database can be simple textual items, but can also be complete independent works (copyrighted or not). Thus, an encyclopaedia with different entries qualifies as a database. An electronic photo book is also protected, even if the database creator does not have the copyright to the photos in the photo book. Of course, making this database available requires the permission of the copyright holders of the individual photos.

¹ The US Copyright Act does not expressly mention databases. Two bills concerning databases are currently pending in the House of Representatives that would introduce database rights comparable to the European Union's Database Directive providing protection for 'collections of information': <http://www.techlawjournal.com/cong106/database/hr354ih.htm> and <http://www.techlawjournal.com/cong106/database/hr1858ih.htm> HR 354 is orientated towards database producers and prohibits uses which could harm the primary or related market of the database. HR 354 contains definitions for the terms: 'collection of information', 'Information', 'potential market' and 'commerce' (Art. 1401). Among others, permitted acts, exclusions, civil remedies and criminal penalties are written down. HR 1858 introduced is more oriented toward database users and allows all uses of databases, except commercial uses meant to compete directly with the original database. In the USA, databases can only be protected by copyright as compilations. § 101 of the US Copyright Act defines a compilation as 'a collection and assembling of pre-existing materials or of data that are selected in such a way that the resulting work as a whole constitutes an original work of authorship.' It is required that the selection involves some creative expression. If there is no original/creative selection involved, the database is not protected. There is no 'sweat of the brow' protection.

To be protected by copyright, a database has to be the author's own intellectual creation, otherwise it cannot be protected by copyright because some Member States therefore require certain creativity. In many cases considerable financial investments are made to create a database, which does not fulfil the criteria of an intellectual creation itself (*eg* in the structure of a telephone book there is rarely no scope for creativity). For this reason the Directive introduces two separate ways through which a database can be protected, deviating from the requirement for copyright protection.

- First, it confirms the existing practice in several Member States that a database can be **protected by copyright**, if there is an intellectual creation involved in the selection and arrangement of materials (see Section I 1)
- Second, it introduces a new, independent right, if there is no creativity but a qualitatively and/or quantitatively substantial investment in the obtaining, verification or presentation of the contents of a database. This right is called '**sui generis**' right (see Section I 2).

By the time of this document's edition, all Member States have implemented this two tier approach of database protection.

The following subjects are explicitly excluded from the extent of the protection as a database:

- computer programs used in the making or operation of a database (see Section F)
- the works and material contained in the database (the works themselves might be protected by copyright law if they fulfil the requirements for protection, see Section D)
- recording or an audio-visual, cinematographic, literary or musical work as such does not fall within the scope of this Directive
- the rental and the lending of databases in the field of copyright and related rights are governed exclusively by Council Directive 92/100 EEC of 19.11.1992,¹
- the moral rights of the natural person who created the database remain outside the scope of the protection.

The following Sections describe which databases are protected by copyright (I 1), which are protected by the 'sui generis'

¹ The exclusion of the public lending from the scope of the restricted acts has been expressly implemented by the majority of the Member States; in other States it can either be concluded from the special provisions or by way of interpretation in accordance with the Directive.

rights (I 2), which rights are in principle reserved to the right-holder (II) and significant exceptions to the protection (III).

1. Database protection by copyright

The Directive stipulates that databases which, by way of the selection or arrangement of their contents constitute the author's own intellectual creation, shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection, which means that Member States¹ may not introduce other, additional requirements to limit the copyright protection of databases. The scope of the protection by copyright is the intellectual creation.

Example: In July 2001 the Austrian Supreme Court² decided that a website containing information on holiday houses with links to independent websites is protected by copyright. The court held that the information had been systematically arranged. Having found that the website constituted a 'database', the court also awarded copyright protection because of the creativity comprised in it.

2. 'Sui generis' protection of databases

Even with the harmonised rules on copyright protection for databases, many databases are left unprotected because they lack creative content. To overcome this problem, the Database Directive also introduces a so-called 'sui generis' protection regime. The scope of protection by 'sui generis' right is the investment in modern information storage. According to the Directive (Article 7, 'Object of protection'), Member States³ shall provide for a **right for the maker of a database** which shows that there has been:

- qualitatively and/or quantitatively a substantial investment
- in either the obtaining, verification or presentation of the contents
- to prevent extraction and/or re-utilisation of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.

¹ In the USA, databases can only be protected by copyright as compilations (§ 101 US Copyright Act). It is required that the selection involves some creative expression. If there is no original/creative selection involved, the database is not protected.

² 0.07.2001, 4 Ob155/01.

³ To date different pieces of legislation have been brought before the United States' Congress for its consideration with regards to the creation of a sui generis right in relation to databases. Yet there is no sui generis protection.

The substantial investment can be found, *eg*, in the work or the money required to obtain the individual elements. *Eg*, the collection of people's birth dates by visiting all church archives and other public records could qualify. The design of a user interface, or the digitalisation of existing paper records could also be seen as a substantial investment. Compiling music tracks on a compact disc or other carrier does not qualify, because this shall not be seen as a substantial investment.¹

Example: The online database Berlin Online,² which contained classified ads from the Berliner Zeitung newspaper, was systematically searched by a 'meta-search engine', that automatically e-mailed search results to users. The Berlin Court ruled that the conversion into digital form and the selecting, updating and verifying of the ads constituted a substantial investment under §87a (1) (1) of the German Copyright Act. The use of the search engine was held to amount to repeated and systematic extraction of insubstantial parts of the database that unreasonably damaged the lawful interests of the owner of the database rights. The website owner was deemed to have suffered damages because the search engine systematically bypassed the advertisements on the Berlin Online site.

In all EU Member States 'sui generis' database protection exists and the definition provided by the Directive has, in the main, been adopted by them. According to the Directive,³ the **maker of a database** is the person who takes the initiative and the investment risk. Though only some Member States have expressly implemented that the maker of a database is the person who takes the initiative and the investment risk, all national courts of the EU Member States will have to identify the maker in accordance with the Directive even in absence of an explicit implementation in their national legislation.

II. Which rights are reserved?

The following chapter contains information about the implementation of the economic/exploitation rights granted by the Database Directive; the moral rights are provided for in the Copyright Directive which has been examined in Section D II 1 a) (2).

¹ According to recital 19 of the Database Directive.

² Landgericht Berlin, 08.10.1998, Bernt Hugenholtz, The New Database Right: Early Case Law from Europe, April 2001.

³ Recital 41.

1. Rights provided for by copyright protection of databases

According to the Directive (Art. 5, Restricted Acts) in respect of the expression of a database which is protectable by copyright, the author of a database should have the exclusive right to carry out or to authorise:

- temporary or permanent **reproduction** by any means and in any form, in whole or in part
- translation, adaptation, arrangement and any other **alteration**
- any form of **distribution** to the public of the database or of copies thereof; the first sale in the Community of a copy of the database by the right holder or with their consent shall exhaust the right to control resale of that copy within the Community;
- any communication, display or performance to the public
- any reproduction, distribution, communication, display or performance to the public of the results translation, adaptation, arrangement and any other alteration.

The legitimate user of a database may perform all these acts without the authorisation of the author of the database that are necessary for the purpose of access to the contents of the database and normal use of these contents. This user may retrieve and re-use, without authorisation and for commercial purpose, non-essential parts of the contents of a database. They may not perform acts which unreasonably prejudice the legitimate interests of the maker of the database or of a person providing the works or services contained in the database.

2. Rights provided for by 'sui generis' protection of databases

The protection as database reserves certain rights for the right-holder of a database. According to the Database Directive¹ (see Appendix for EU-legislation) the maker of a database, which is protected by the 'sui generis' right, shall be prevented from **extraction** and/or **re-utilisation** of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of his database.

- '**Extraction**' shall mean the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form.

¹ Art. 7, Object of Protection.

- **'re-utilisation'** shall mean any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by online or other forms of transmission. The first sale of a copy of a database within the Community by the right holder or with their consent shall exhaust the right to control resale of that copy within the Community; Public lending is not an act of extraction or re-utilisation.
- The repeated and systematic **extraction** and/or re-utilisation of **insubstantial parts** of the contents of the database implying acts which conflict with a normal exploitation of that database or which unreasonably prejudice the legitimate interests of the maker of the database shall not be permitted.

'Sui generis' rights form pecuniary rights and as such can be transferred, assigned or granted under contractual licence.

III. Exceptions to database protection

Legal protection of databases does not necessarily mean that they cannot be used at all. Even an individual permission is not necessary, if a statutory permission (exception) can be applied. Exceptions exist regarding copyright as well as 'sui generis' protection of databases.

1. Exceptions to copyright protection of databases

The general structure of exceptions is reflected by Art. 6 of the Database Directive, which contains, in addition to the regulations for the lawful user of a database, Art. 6 (1), the options for the EU Member States¹ to provide limitations on the authors' rights.

Limitations can be set in the following cases:

- in the case of reproduction for private purposes of a non-electronic database
- where there is use for the sole purpose of illustration for teaching or scientific *research*, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved

¹ As mentioned before the US Copyright Act does not yet contain explicit protection for databases. The Bills HR 354 and HR 1858 propose certain exceptions, *eg* by excluding government-produced data from protection, or by offering certain fair use exceptions like with the Copyright act, but both of them are not accepted by the Congress.

- where there is use for the purposes of public security or for the purposes of an administrative or judicial procedure
- where other exceptions to copyright which are traditionally authorised under national law are involved, without prejudice to points mentioned before.

a) Scientific research and education

Most of the general copyright exceptions for teaching illustrations and scientific research apply to database protection in the same way as they apply to all other protected works. These exceptions to copyright for scientific use have therefore already been explained in Section D III 5 b) (1) of these guidelines. In the most cases there is additionally a special protection for scientific databases. For details concerning this topic in the national legislation please see Appendix (Survey of national provisions, Table of copyright acts).

b) Archives and libraries

There are no special provisions for the use of databases by libraries and archives. Therefore, where databases are protected by copyright, the common exemptions for libraries and archives as stated in Section D III 5 b) (3) could apply. These would probably fall under Art. 6 (2) (d) of the Database Directive as exceptions traditionally authorised under national law without prejudice to the provisions of Art. 6 (2) (a), (b), (c). The researcher should, however, take care in cases where those general exemptions could circumvent the exclusive provisions on teaching and research.

c) Quotations

The same applies to the exceptions for quotations where they are not covered by the scientific research exception. As shown above, those exceptions which do not fall under the scientific research exception of Article 6 (2) (b) are covered by Article 6 (2) (d) as traditionally authorised national exceptions.

2. Exceptions to 'sui generis' protection

According to the Database Directive (see EU-Directives in the Appendix, Article 9, 'Exceptions to the 'sui generis' right') Member States may stipulate that lawful users of a database which is made available to the public in whatever manner may, without the authorisation of its maker, extract or re-utilise a **substantial part** of its contents. The exemptions stipulated might be relevant for socio-economic research:

- in the case of extraction for private purposes of the contents of a non-electronic database
- in the case of extraction for the purposes of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved

a) Teaching and research

For the purposes of the RESPECT project, the most relevant exemption is that of Article 9 (b) for teaching and scientific research. Therefore, you will find the details of the different regulations in the Member States concerning this important topic in the Survey of the national provisions and in the national legislation linked in the table of copyright acts (Appendix).

b) Exemptions for libraries, archives etc.

Although the Database Directive does not provide for an exemption to the 'sui generis' protection for archives, libraries and similar institutions, some Member States have included such an exemption in their national laws. The Copyright Acts of Denmark, Finland and Sweden contain an explicit provision concerning such an exemption.

IV. Term of protection

The right to prevent the unauthorised retrieval of the contents of a database extends for a period of 15 years with effect from the date on which the creation of the base was terminated.

To qualify for protection under those rights, a database must meet certain requirements; a database can qualify for both rights at the same time.

V. Recommendations

- Realise that work with databases will in almost any case constitute a restricted act under database restriction; when in doubt consider the material as protected.
- If a database is found to be protected by (any) one of the provisions mentioned above, it should not be used for research without (statutory or contractual) permission, if the intended use constitutes a restricted act.
- Any research activity that contains a restricted act of database use listed above (in at least one of the Member States) should not be carried out unless one of the exceptions can be applied or permission obtained.

- Unless there is a unquestionable implied permission (see for implied licence Section G II 3 on formal requirements), explicit permission for any use should be obtained from the right holder.
- A researcher using any material, *eg* establishing a website, should check carefully whether he has obtained the necessary rights for all the third party material that could be subject to database protection. The fact that material is 'freely available', *eg* on the Internet, does not mean that there are no third party rights attached to it. A researcher should — as a general rule — assume that most of the material described above will be protected by intellectual property laws, and therefore refrain from using any of this material without explicit permission.
- If the researcher uses his own material which meets the criteria for protection, *eg*, establishing a website, it should include a short **copyright notice**¹ on the webpage or connected to the copyrightable content (*eg* at the beginning or the end of a text, or under a picture). In case such notice appears on the copy, in a copyright infringement suit in some countries a defence cannot be based on the assertion that an innocent infringement occurred. Also, in most European countries it is presumed that the person mentioned as the author on the work is in fact the creator of the achievement. Finally, the removal or alteration of such a copyright notice can serve as an extra ground to pursue claims against a person who has taken material from one's own website.

¹ Such as '© 2003 by ... All rights reserved. This work may be copied in its entirety, without modification and with this statement attached. Redistribution in part, or modifications, may infringe moral rights and are not permitted without the advance agreement of the copyright owner. The content of this web page is protected by international copyright laws. Any unauthorised utilisation of this content infringes applicable copyright laws and will not be tolerated'

F. Questions of Software Protection

Any modern socio-economic research activity will include the use of software, at least, *eg*, the use of a word processor. Most of the software used in a professional working environment will not be free, but subject to rights which should be respected. Even for the special purposes of research statutory or contractual permission is necessary in most cases. The fact that a software-version has been bought once officially does not necessarily contain all the rights obligatory for later research activities (*eg* an adaptation of the software might not be permitted; licences usually only permit the installation on one single computer). Statutory protection for software in copyright laws has become increasingly important because more software is mass-marketed through traditional channels from a website without a signed licence agreement.

Copyright protection of software is first of all determined by the Directive 91/250/EEC (see Appendix for EU-Directives) on the legal protection of computer programs. The aim of this Directive is to establish that Member States should accord protection to computer programs under copyright law as literary work. To establish who and what should be protected, the exclusive rights on which protected persons should be able to rely in order to authorise or prohibit certain acts, and for how long the protection should apply. To date, all Member States have adopted the Directive on the legal protection of computer programs, mostly not by separate acts on computer software protection (with the exception of Belgium) but by amendments to the existing copyright acts.

Nevertheless all researchers should be aware that software is not only protected by copyright, but, in some cases not normally relevant in socio-economic research, also be protected by way of a patent (see Section B I 1 on industrial property).

I. What is protected by copyright?

Software exists to control a computer's operation. Without software the computer would be static. Software instructs the computer's hardware to carry out functions in discrete steps and for this reason, software is sometimes called 'instructions'.

While the term 'computer program' is not defined in the Directive 91/250/EEC,¹ it includes:

- programs in any form, including those which are incorporated into hardware
- preparatory design work leading to the development of a computer program, provided that the nature of the preparatory design work is such that a computer program can result from it at a later stage.

In the area of software protection, the conditions for protection are the same or very similar in the EU Member States. The necessary level of originality that is required for copyright protection of computer software is defined as the 'author's own intellectual creation', thereby harmonising this aspect throughout the EU². This requires:

- the creation of the software by a human being
- that the material has to be the result of that person's own intellectual creation.

Sufficient is the showing of a minimum of individuality or creativity. Only totally trivial material, which does not even contain a spark of individuality or creativity, is ineligible for protection. Whereas, in respect of the criteria to be applied in determining whether or not a computer program is an original work, no test as to the qualitative or aesthetic merits of the program should be applied. Some Member States, such as Germany, had to lower the threshold for protection. Although not all Member States have implemented the exclusion of other *criteria expressis verbis*, the Software Directive has nevertheless led to a harmonised level of originality concerning copyright protection of software.

II. Restricted acts regarding software protection

If there are no exceptions to those restricted acts as mentioned below, the following exclusive rights belong to the right-holder:

- reproduction — which includes permanent or temporary reproduction of a computer program by any means and in any form, in whole or in part. This does also include the

¹ According to § 101 of the Us Copyright Act A 'computer program' is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.

² In the USA a Computer code is copyrighted as a 'literary work'. A minimum of creativity is required, not the ideas but only their expressions are protectable. Labour and skill is not protected.

loading, displaying, running, transmission or storage of the computer program

- translation
- adaptation
- arrangement
- or any other alteration of a program
- as well as any form of distribution to the public, including software rental.

III. Exceptions to those restricted acts

There are certain permissible exceptions to the exclusive rights¹ listed above.

1. Activities by 'lawful acquirers'

Generally speaking, normal activities by 'lawful acquirers' of the program are allowed. Acts do not require authorisation by the author of the program whenever a:

- reproduction, translation or any other restricted act is necessary
- for the use of the program

¹ According to § 117 of the US Copyright Act Limitations on exclusive rights for Computer programs exist: (a) Making of Additional Copy or Adaptation by Owner of Copy.—Notwithstanding the provisions of section 106, it is not an infringement for the Subject Matter and Scope of Copyright owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided: (1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or (2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful. (...) (c) Machine Maintenance or Repair.—Notwithstanding the provisions of section 106, it is not an infringement for the owner or lessee of a machine to make or authorize the making of a copy of a computer program if such copy is made solely by virtue of the activation of a machine that lawfully contains an authorized copy of the computer program, for purposes only of maintenance or repair of that machine, if— (1) such new copy is used in no other manner and is destroyed immediately after the maintenance or repair is completed; and (2) with respect to any computer program or part thereof that is not necessary for that machine to be activated, such program or part thereof is not accessed or used other than to make such new copy by virtue of the activation of the machine.

- by the lawful acquirer
- in accordance with its intended purpose.

2. Reverse engineering techniques

This is especially true for certain reverse engineering techniques. The person having a right to use a copy of a computer program shall be entitled, without the authorisation of the right-holder:

- to observe, study or test the functioning of the program
- in order to determine the ideas and principles underlying any element of the program
- so long as this does not result in an infringing copy, as the ideas and principles themselves are not covered by copyright.

3. Right to make a back-up copy

There is also an explicit right to make one back-up copy which is necessary for the use of the program by the lawful acquirer. Such rights of the rightful possessor cannot even be overridden by a contract. This right is restricted to one copy and is only applicable if the right-holder himself did not hand out a back-up copy to the lawful acquirer.

4. Decompilation

A very important exception is the possibility of decompiling a program to make it interoperable with other programs. Such decompilation is only allowed if:

- it is indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs
- such decompilation is performed by the person having a right to use a copy of a program,
- the information has not previously been readily available to this person (*eg* because it has been made available by the author)
- the decompilation is confined to the parts of the original program which are necessary to achieve interoperability
- the information obtained by the decompilation is not used for other goals than to achieve the desired interoperability. It may especially not be given away to others, or used for copyright infringing purposes such as the development of substantially similar computer programs.

The interpretation of the decompilation¹ exception differs from country to country.²

5. Other exceptions

As computer programs are protected as a special form of literary work both under the Directive and under the national law of the Member States, one might think that any exceptions applicable to those works may just as well be applied to computer programs. Such a transfer of exceptions would, however, undermine the exclusive list of copyright exceptions concerning the protection of computer software. Member States are not allowed to provide any additional exceptions. While the specific exceptions addressed above limit copyright protection of computer programs under certain circumstances, the Community legislator has at the same time, excluded the applicability of other copyright privileges, as they are not mentioned in the exclusive numeration of Art. 5 and 6 of the Directive.³

- Private copying of computer programs was excluded from the scope of permissible exceptions from restricted acts, although some Member states do not state that explicitly in their national legislation.
- Exceptions for scientific research cannot be applied to computer programs although not all national laws do say so explicitly.

¹ In the USA Decompilation is in general regarded to be fair use. (see *Sega vs. Accolade*; *Atari Games vs. Nintendo*).

² Concerning the decompilation exception, almost all Member States have fully and sometimes verbatim implemented the Directive into national law except the reference to the Berne Convention mentioned in Art. 6 (3) of the http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31991L0250&model=guichett, which is missing in a number of Member States (*eg* in Austria, Denmark, Finland and the Netherlands).

³ However the application of traditional exceptions is still unclear in some Member States, *eg* some UK Courts have already applied Sec. 29 ('fair dealing') to software without considering the conformity with the Directive. Although there is no express exclusion of computer programs from the general copyright exceptions for non-commercial research and private study in Sec. 29, it is, however, not fair dealing to convert a computer program or to copy it, if those acts are not in accordance with the exceptions of the Directive. It is not clear by now whether Sec. 29 complies with the Software Directive.

IV. What is protected by patent law?

Software is not only protected by copyright, but might in some cases also be protected by way of a patent. A patent is an exclusive right for a new invention, normally in the technical field. It is granted by patent offices to give the applicant the right, for a limited period of time, to prevent others from (re-)producing, offering, using or selling the invention without his permission. The legal position on the patentability of computer programs is very ambiguous and this issue is dealt with inconsistently throughout the European Union. Article 52-2c of the European Patent Convention states that computer programs are not to be considered as inventions and cannot be protected as such by way of a patent.

However, courts and the patent offices have made several decisions in the past, where after computer programs are patentable under certain conditions:

- The guidelines for examination in the European Patent office state that a computer program, itself or as a record on a carrier, is patentable in principle if ‘the program has the potential to bring about, when running on a computer, a further technical effect which goes beyond the normal physical interactions between the program and the computer’.
- Furthermore a computer program has to meet — as any invention — the criteria of novelty, inventive step and industrial application.

Examples: A computer program controlling x-ray equipment¹; a program controlling the co-ordination and control of the internal communication between programs and data files² or a method for entering a rotation angle value into an interactive draw graphic system were held to be patentable.

Thus, such a program might be protected by way of a patent and any use without the permission of the patent holder would be prohibited. In February 2002 the European Commission drafted a Proposal for a Directive on the patentability of computer programs. Since the European Parliament

¹ <http://legal.european-patent-office.org/dg3/bib/t860026.htm> (OJ 1988, 19).

² <http://legal.european-patent-office.org/dg3/bib/t830006.htm> (OJ 1990, 5).

rejected this draft in September 2003, the future development of the patentability remains uncertain.¹

V. Recommendations

Recommendations for research activities regarding software:

- Recommendations given in connection with copyright (see Section D) and database protection (see Section E) are of course valid in this context. Using any material, you should check carefully whether you have obtained the necessary rights for all the third party material that could be subject to software protection.
- You are explicitly permitted to make a single back-up copy of the software for bona fide reasons if a back-up version wasn't handed out by the right-holder. If this back-up copy fails, you can then make another back-up copy. You may not make multiple copies unless you get a licence permitting this.
- You may reverse engineer, that is, take portions of some software code to ensure that software you are developing is fully compatible with it.
- The situation regarding rental and lending of software is particularly complex. Rental (*ie.* lending for a charge) of a third parties' computer software is an infringement if done without permission. There is no obligation upon the copyright owner to give such permission (except in the case of public libraries). Free loan of software is never an infringement as long as the software has been lawfully obtained.

¹ For more information on the topic see the working paper on the patentability of computer programs commissioned by the European Parliament. www.ivir.nl/publications/other/softwarepatent.pdf or the IPR-Helpdesk www.iprhelpdesk.org/docs/docs.EN/patentabilityComputerPrograms.html

G. How to Treat IP-Questions in Contractual Agreements

Questions of intellectual property rights arising in socio-economic research are often treated in contracts. These guidelines are mainly designed to enable researchers and the respective management to do their work in compliance with the intellectual property rights of others. Thus the most important contract issue for researchers may be agreements necessary to use works created by a third party within the research activity. This might necessitate a contract granting (utilisation) rights to use material in a certain way.¹

Licensing contracts and contractual relations concerning copyright and related rights have not been subject to overall harmonisation within the Community.² Therefore the variety of relevant national provisions within the Member States makes it difficult to elaborate general principles of the transfer of rights. In some cases the contract law concerning intellectual property right is ruled by civil law, in other cases the EU Member States created specific national provisions for the contractual agreements concerning the transfer of intellectual property rights. Many Member States have also implemented a number of specific measures designed to protect authors in their contractual relations with third parties.³ Nevertheless, some aspects relevant in most or all Member States are presented in Subsection I — IV.

Another typical scope of contracts regarding intellectual property in socio-economic research are the **employment contracts** of researchers, whose working results are in many cases meant to be exploited by their employers. Their influence on intellectual property rights are covered by Subsection V.

¹ The legal differences between assignment of rights and licensing are only mentioned where essential for researcher to decide on their IP-related conduct.

² Commission of the European communities, Communication from the Commission to the Council and the European Parliament on European contract Law, Brussels 11 July 2001, COM (2001) 398 final, Annex 1, p.38.

³ *Eg* in most of the Member States the publisher cannot assign the acquired rights to a third party without the author's consent.

I. Basic principles of transfer of rights

In many cases, the first contact of a socio-economic researcher with intellectual property contracts will concern a transfer of rights to grant a third party certain rights concerning the use of protected material (see, *eg*, Section D I for material protected by copyright). Without some form of transfer of rights or permission to perform certain acts with respect to the protected subject matter, the exploiter would be committing an infringement of the creator's right. Contractual agreements enable the undertaking of a restricted act.

A researcher will need any form of transfer of rights whenever he wants to use a work created by a third party if:

- the usage constitutes an act relevant to intellectual property (see, *eg*, D II for restricted acts in copyright), *ie.* using rights granted in principle to the author, and
- the usage is not covered by statutory exceptions or the like (see, *eg*, D III for limitations of copyright).

If no exception applies, the use of copyrighted material requires the right holder's consent.

Example: Supposing a researcher is using some kind of software (no freeware) for his work (*eg* a word processor, a program to process empirical data) he does not 'own' the software unless he has written the software himself without being in an employment situation. The extent of the legal usage depends on his licence for the protected software.

Within the Member States different legal constructions exist to transfer intellectual property rights. The term 'transfer' is to be understood in its broadest sense and includes all possible forms of alienation of rights. A brief overview of the most common forms of transfer of rights and their main characteristics is given which enables researchers to choose the form that will fit best their needs. The restrictions regarding the transferability of rights apply to copyright. All rights concerning the 'sui generis' protection of databases can be transferred.

1. Assignment of rights

An assignment is generally understood as the complete transfer of the rights in the protected subject matter from the initial author to another party.¹ It can be limited to apply to one or

¹ See Guibault/Hugenholtz: Study on the Conditions applicable to Contracts relating to Intellectual Property in the European Union. May 2002: <http://www.ivir.nl/publications/other/final-report2002.pdf>, p.29.

more acts that the right owner has the exclusive right to perform. It can also be limited to the time period and to certain forms of exploitation. Once a right is assigned the initial owner loses all his claims on the assigned right. In most Member states copyrights may be subject to an assignment.

2. Licence

A licence is defined as the permission to do an act, which without that permission would be an infringement of copyright or related right.¹ A licence may cover all of the acts of the right-holder, it may also be limited to one or more or to certain forms of exploitation, a time period or a geographical territory, and it may be exclusive or non-exclusive. In general the author's rights may be divided with respect to the modes of exploitation.²

In practice, an exclusive licence and an assignment of rights have similar economic consequences for the author and the exploiter since an exclusive licence excludes all other persons, including the grantor of the licence, from exploiting the work.³ The essential difference between the licence and the assignment lies in the fact that, contrary to the assignment, the licensee cannot be considered the owner of the right. The licence gives authors the possibility to transfer their rights if an assignment is not possible because of the unalienable rights of the authors.⁴

3. Waiver

Copyright protection consists of the protection of economic and of moral rights. Moral rights are generally considered to be inalienable. As a consequence, a global waiver of an author's moral rights is generally not valid. However in some Member States moral rights are subject to Copyright and Related Rights Acts which allow the authors under certain circumstances to waive certain attributes of their moral rights which makes it easier for the contracting party to use the protected work.⁵ Nevertheless national legislation varies significantly on the

¹ Visser 1999, p.118.

² *Eg* the transfer may be limited to the right of reproduction.

³ See Guibault/Hugenholtz: Study on the Conditions applicable to Contracts relating to Intellectual Property in the European Union. May 2002 <http://www.ivir.nl/publications/other/final-report2002.pdf>, p.29.

⁴ *Eg* in Germany and Austria copyright is considered to be a unitary right of the author, and therefore it is not possible to dissociate the economic element of the right from the personality element of the right. A transfer of ownership is not permitted.

⁵ *Eg* they get some degree of freedom to alter a work.

question of the renunciation to some of the creator's moral rights.¹ Therefore it's important to recognise the differences between the legal approaches towards moral rights within the Member States.

4. Collective licence

Rights can be transferred by single licences or collective licence agreements. For the latter, the right holder transfers (mostly all of) his rights to a collective society which then offers licences to third parties, returning a certain sum to the original right holder for each licence granted. Collective licensing might above all be important for research related to music, which is in most cases exploited by collecting societies. A special kind of licence provided for in some of the Member States are compulsory licences administered by collecting societies as well.

II. Basic principles of contractual agreements

In application of the principle of freedom of contract, parties are free to conclude any agreement that they perceive to be in their best interest. Nevertheless they have to obey some general principles concerning contractual agreements which are not only valid for IP questions but for every kind of civil law contract. At the moment the level of regulation on intellectual property contracts still varies to an extent, hampering activities related to intellectual property contracts. Some provisions regard the form of contracts (see the following Subsection), others the content. Some Member States require specific information on the geographical scope,² the duration,³ the forms of exploitation⁴ and the amount of remuneration.⁵

To overcome this problem of different contract law regulations the Principles of European Contract Law⁶ were created which aim to harmonise this field. They are intended to be applied as general rules of contract law in the European Union when the parties have agreed to incorporate them into their contract or that their contract is to be governed by them. Nevertheless

¹ See Guibault/Hugenholtz: Study on the Conditions applicable to Contracts relating to Intellectual Property in the European Union. May 2002
<http://www.ivir.nl/publications/other/final-report2002.pdf>, p.42.

² *Eg* Belgium, Greece.

³ *Eg* Spain, Portugal.

⁴ *Eg* France, Greece.

⁵ *Eg* Belgium, Italy.

⁶ www.cbs.dk/departments/law/staff/ol/commission_on_ecl/

these principles contain no specific rules for the transfer of intellectual property rights.

1. Good faith

In all Member States the principle of good faith exists. While some Member States have transposed this provision literally in their copyright acts,¹ other States did not implement it because the principle of good faith is a fundamental concept of their legal system.² Good faith means that the obligor and the obligee shall behave according to the rules of fairness. This principle reflects the general recognition that parties have an obligation of loyalty and a duty on each party of the agreement to take one another's interest into account. It is also recognised as allowing courts to bring correctives to the application of legal norms and contractual agreements.

Example: A young researcher wrote a book and entered into an exclusive 10-year-agreement with a publisher. The publisher assigned the copyright for the whole world for every research activity being published by the researcher during this period. The publisher had no obligation to exploit any work of the researcher, could terminate the agreement at any time and could assign the benefit of it. Vice versa no such right was given to the researcher.

Such an agreement is neither fair nor reasonable and infringes upon the principle of good faith.

2. Standard form contracts

In the field of copyright, agreements often take the form of standard form contracts. The question therefore arises whether such a transfer of rights could be invalidated on the basis of its unfairness towards the author. To protect authors in their contractual relations most of the Member States stated, *eg* that in doubt about the scope of a transfer, the contract must be interpreted in favour of the author and therefore against the user. In general a party who accepts another party's standard terms is bound by those terms irrespective of whether or not the contracting party actually has knowledge of the content of the contract. But where circumstances indicate that one party could not comprehend the contractual agreements or in cases of unfair standard regulations some Member States³ have adopted legal provisions to declare specific contractual

¹ *Eg* Dutch Copyright Act, Art. 26 b.

² The civil codes of Belgium, France and Luxemburg provide for the rule, that contracts must be performed in good faith, Italy, Spain, Portugal and Greece oblige the parties to behave in accordance with the requirements of good faith.

³ *Eg* Germany, Netherlands.

agreements to be unfair and therefore invalid. In other Member States¹ the protection against the use of abusive clauses is lower.

3. Formal requirements

Formal requirements for licence agreements vary throughout Member States. Oral agreements according to explicit legislation are sufficient in some countries (Austria and Nordic countries), while most Member States demand agreements to be in written form (see Survey of national provisions for details; mostly just conditions for full proof, not making other agreements invalid). To be on the safe side, licence agreements should be made in written form, since several Member States legislation might be applicable on an international research activity, and will be applicable when publishing on the Internet (see Section C). Since there are no further special requirements, a licence might be asked for and granted with informal letters exchanged containing the necessary information.

Provided that an agreement is only linked to a country not requiring written form, a licence can be implied.

Example: Suppose someone places a study on a webpage, combined with a button 'click here for download'. It can be assumed that the right holder authorises the necessary restricted acts to do so. Nevertheless, this authorisation cannot be assumed to cover further acts relevant to copyright such as, for instance, distribution to others.

4. Unknown means of utilisation

In many Member States there are restrictions referring to unknown means of utilisation. If a certain usage is not known at the time the contract is concluded, any contractual obligation cannot refer to those new means in the respective countries.²

Suppose a contract signed in the late 1980s contains a licence covering all aspects of reproduction, distribution and communication to the public relating to a certain text. If the licensee now wants to publish this text on the Internet, he has to seek for a new licence, since according to the principle of

¹ The European Directive 93/13/EEC on unfair terms in consumer contracts was adopted in 1993 but the provisions of the Directive only apply to 'consumer' contracts and are therefore in general not applicable to contractual agreements of IP questions.

² An explicit prohibition imposes the Copyright Acts of Belgium, Germany, Greece, Italy and Spain.

unknown means the parties could not possibly have agreed on this aspect back then, because it wasn't known at all.¹

Example: In the year 2000, eight French journalists sued the Gestion du Figaro for publishing their newspaper articles in an electronic edition of the last two years' Figaro-archive. They claimed that reproducing and distributing the newspaper articles in a digital form was considered to be an infringement of their copyrights. According to the judgement of the Cour d'appel de Paris² the creator of a work is granted the economic and the moral rights. In cases of new technological ways of distribution there is no tacit authorisation for the assignment and exploitation of these rights. An additional agreement with the right-holder has to precede the distribution via new technologies.

5. Works created in the future

Like in the case of the transfer of rights, in future forms of exploitation the national legislations within the Member States vary quite a lot with respect to the possibility to transfer rights on future works.

- The Copyright Acts of some Member States allow the transfer of rights in future works at the moment the contract is concluded under certain conditions, mostly under the condition of limitation in time³
- in other countries the Copyright Acts strictly prohibits the transfer of rights in works to be created in the future⁴
- the Copyright Acts of Ireland and the United Kingdom allows the transfer of rights in future forms of exploitation without any restriction
- finally, a number of Copyright Acts lay down no references to the transfer rights in future works.⁵ With respect to the principle of 'freedom of contract' the transfer of rights in future works might be allowed in these Member States.

¹ Which exact point in time has to be referred to has been discussed controversially, see Büning/Kaestner: ECLIP Research paper Copyright, p.56.

² SA Gestion du Figaro ./ . SNJ Syndicat national des journalistes, Cour d'appel de Paris, 10.05.2000.

³ See Guibault/Hugenholtz: Study on the Conditions applicable to Contracts relating to Intellectual: Property in the European Union. May 2002:
<http://www.ivir.nl/publications/other/final-report2002.pdf>, p.32.

⁴ *Eg* in France and Spain.

⁵ *Eg* in Austria.

In addition, the national courts have to point out under which conditions the transfer of rights in future forms of exploitation are invalid on the basis of the general rules of copyright law (see the Survey of national provisions in the appendices for details).

6. Special conditions of the online environment

The terms and conditions mentioned above are, in principle, applied to contracts in the online environment as well. Some aspects are of special importance to this field. Still problematic is the electronic transfer of intellectual property rights.¹ As mentioned above, some Member States require contracts to be in written form. Generally, this cannot be accomplished online.²

On the other hand, acquiring digital material via the Internet will become more and more standard within socio-economic research. The most common example today is the download of software or scientific articles. These agreements are often referred to as click-wrap-agreements. The term refers to the agreement reached by two parties, sometimes including general business conditions, by clicking the respective button of a webpage or online dialogue. According to the E-Commerce-Directive,³ Member States have to ensure possibilities for digital contracts, but so far, the usage of a certified electronic signature often necessary to replace a signature written on paper is not yet popular. In cases where the written form is not necessary, access to information will be given with a mere click which will simultaneously indicate consent to a licensing contract with little or no negotiating clout to the contractual conditions.

Another aspect of online work is the scope of rights affected. If material is *eg*, supposed to be put on the Internet, the necessary digitisation is a restricted act of reproduction. In many cases this material has to be altered to fit into the online scheme. These alterations might be relevant even to moral rights, as might be the case with drawings losing their intended effect due to format changes. Combinations with other material

¹ See Dusollier/Poullet/Buydens: A study prepared for the Third UNESCO Congress on Ethical, Legal and Societal Challenges of Cyberspace Infoethics 2000: Copyright and Access to Information in the Digital Environment. July 2000, p.18.

² With the exception of the not yet prevalent technology of digital signatures.

³ Directive 2001/31/EC on certain legal aspects of information society services, in particular electronic commerce, see: http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_178/l_17820000717en00010016.pdf.

might change the implications of a work and again constitute an act restricted by copyright legislation.

7. Remuneration

The majority of copyright acts do not provide measures for the amount of remuneration to be paid to the author.¹ There are numerous ways to calculate the amount of remuneration to be paid to the author for the use of his work. The most popular payment forms are proportional, equitable or lump sum. It depends on each situation and the form of exploitation which payment fits best. Therefore the question of the amount of remuneration should be part of the contractual agreement.

8. Effect of the transfer of rights to a third party

After having reached a contractual agreement on the transfer of a required right a researcher might have the necessity to re-transfer the acquired right to a third party. Therefore it is important to know if the transferee obtains the right for further transfers under the law.

The answer to these questions does not depend solely on the nature of the transfer, whether assignment or licence, but depends also on the law of each Member State. In almost all European Member States, the transferee is entitled to transfer the rights he acquired to a third party, provided that the author has given his consent to the transfer.²

The question of whether the exploiter has standing to sue for copyright infringement is regulated only in a minority of Member States. In general, the assignee and the holder of the right of an exclusive exploitation right are permitted to sue in his own name for copyright infringement. By contrast, the holder of a non-exclusive licence is not entitled to institute proceedings in his own name.³ As national laws differ very much from each other and often reserve the power to the sole author to enforce his rights, legal expert should be contacted if

¹ Belgium, France, Greece, Germany, Italy, Portugal and Spain provide measures in this respect.

² One exception is the transfer of rights that occurs as part of the sale of the whole or part of the exploiter's business. In this case, the prior consent of the author or performing artist is usually not required.

³ See Guibault/Hugenholtz: Study on the Conditions applicable to Contracts relating to Intellectual Property in the European Union. May 2002 <http://www.ivir.nl/publications/other/final-report2002.pdf>, p.35.

a transfer to a third party is intended or if someone has to be sued for a copyright infringement.

III. Details on copyright related agreements in Member States

The following list only contains a choice of Member States' provisions that are meant to give an idea of the national approaches on copyright agreement matters. The fact that a certain subject is not mentioned here does not allow the conclusion that the particular Member State has not regulated the aspect. Even if a respective provision cannot be found in the more extensive Survey in the Appendix or in the national copyright acts, general civil law might have to be applied in a particular state.

The given overview is just a short résumé of a study on the conditions applicable to contracts relating to intellectual property in the European Union, which was commissioned by the European Commission in May 2002.¹

Austria

Copyright is subject to inheritance, but is otherwise inalienable. There is only the opportunity to authorise others to exploit the work by some or all possible methods of exploitation or to grant other persons the exclusive right to exploit the work. Such an exclusive right is subject to inheritance and alienable. Even if an exclusive exploitation right was granted, there remain still some exploitation rights to the author (*eg* to include his work in a compilation of his works after a period of twenty years have elapsed from the date of publication of the work).

The way and the means of use are determined by contract. There are no special requirements of form for such a contract under Austrian copyright law. Moreover, there is also no explicit rule restricting the transfer of rights in future forms of exploitation. However, the courts have held that transfers of rights in future forms of exploitation are invalid on the basis of the general rules of copyright law. Dispositions concerning works yet to be created are valid. However, contracts, which transfer the exclusive rights of all works of an author to be created during his lifetime or during a time period exceeding five years, are subject to cancellation after a time period of five years. Under Austrian copyright law, the parties are free to agree whatever remuneration they please to. If an exclusive

¹ Guibault/Hugenholtz: Study on the Conditions applicable to Contracts relating to Intellectual Property in the European Union. May 2002:

<http://www.ivir.nl/publications/other/final-report2002.pdf>

right is not used properly, the contract is subject to cancellation after an appropriate deadline. A waiver of this right is void, if it exceeds a time period of three years. Contracts are in general to be construed narrowly and in favour of the author. A waiver of moral rights is in general invalid (except for professionally produced audiovisual works and computer programs).

Belgium

Copyright is inalienable, only the economic rights are movable, assignable and transferable. In particular, they may be the subject of alienation or of an ordinary or exclusive licence. Contracts between authors and assignees or licensees are required to be in written form. Contractual provisions relating to copyright and to its modes of exploitation are to be interpreted restrictively. The author's remuneration, the geographical scope and duration of the assignment shall be set out explicitly for each mode of exploitation. The assignee is required to exploit the work in accordance with the fair practice of the profession. It is controversial whether this rule entitles the author to terminate the contract in case the user does not exploit the work. However, the author has a right of termination if the work is not used properly within a stipulated time limit. In general, the assignment of rights in respect of as yet unknown forms of exploitation is null and void, unless provided otherwise. The assignment of economic rights relating to future works is valid only for a limited period of time and only if the types of works to which the assignment applies are specified.

Contracts related to copyrights between other persons than the original author, *eg* between a publisher and a user, do not have to comply with all those requirements. A waiver of moral rights is in general null and void.

Denmark

Copyright is alienable wholly or partially subject to the limitations following from the author's moral rights. There are no formal requirements to be met for a contract assigning copyright but the contracts are to be construed restrictively. Moreover, there are also no rules regarding future works and future forms of regulations. At its best, such agreements are void under general contract law. The assignee is under an obligation to exploit the work. The author may cancel the agreement if the assignee has not exploited the work within a reasonable time or at the latest five years after the time where the agreement has been fulfilled on the part of the author. Where the agreement does not expressly specify individual forms of exploitation comprised by the assignment the author may subject to a reasonable notice terminate the assignment of the rights in the unspecified forms of exploitation which have

not been implemented by the assignee within three years from the time when the agreement has been fulfilled on the part of the author. Assignment of the copyright does not give the assignee any right to reassign the copyright unless the reassignment is usual or obviously presumed. The assignor remains liable for the performance of the agreement with the author. Moral rights cannot be waived except in respect of a use of the work which is limited in nature and extent.

Finland

Copyright may be transferred in its entirety or in part, subject to the limitations provided by moral rights. Moral rights may be waived with binding effect only in relation to use that is limited in character and extent. Copyright is subject to inheritance. In general, an acquired right is not assignable to third parties unless provided otherwise. Under Finnish copyright law there are no formal requirements and no restrictions regarding future forms of exploitations and future works. There are special provisions for public performance contracts, publishing contracts, film contracts.

France

Only the right of performance and the right of reproduction (economic rights) may be transferred. The total transfer of future works is null and void. Most contracts concerning copyrights have to be in written form. In the event of a transfer, each of the assigned rights has to be mentioned separately. Moreover, the scope and purpose, place and duration of the exploitation has to be defined. The assignee has the obligation to exploit the assigned right in accordance with trade practice. There are also special provisions for publishing and performance contracts. The assignment of rights comprises a proportional participation by the author in the revenue from exploitation of the work; in certain cases the author's remuneration may be calculated as a lump sum. If the assigned remuneration is a burden for the author, he may demand review of the price conditions. A waiver of moral rights is in general not permissible.

Germany

The transfer of copyright is only possible by inheritance and the alike. Under German copyright law, there is a further the opportunity to grant exploitation rights, to meet obligatory agreements on exploitation rights as well as to close agreements on alterations. An exploitation right can be granted for special or all manners of use; it can be granted as exclusive/non-exclusive right and be possibly limited in respect of place, time or purpose. An exclusive exploitation right includes, above all, the granting of exploitation rights to other persons while the author may reserve a right of use to

himself. Even if the author has granted an exclusive exploitation right, the author keeps certain rights such as the translation of the work. In any case, he has the right to use his work in a compilation twenty years after the work was published. The granting of exploitation rights for as yet unknown types of use and the alike has no legal affect. The granting of licences for the exploitation of future works is possible. However, as an exception, these contracts have to be in writing to be binding. Such contracts are revocable after a time of five years. Where not specified exactly, the scope of exploitation right is determined in accordance with the purpose envisaged in making the grant. The same applies to the question whether an exploitation right has been granted, whether it is an exclusive right and concerning the extent of the right. In a case of doubt, the contract is interpreted in favour of the author. The author is entitled to fair compensation, the remuneration to be paid is specified. A waiver of moral rights is in general not permissible,¹ however there is the possibility to agree on specific alterations.

Greece

Economic rights may be transferred or inherited. Moral rights are not transferable, but inheritable. The Greek system differs between exploitation contracts, by which economic rights are transferred and exploitation licences, by which an author authorises another person to exercise certain rights. These contracts and licences can be exclusive or non- exclusive. In the events of doubts, it is presumed that the contract or licence is non- exclusive. In an exploitation contract, the other party has the obligation to exercise the assigned rights. However, the contract or licence may in no circumstances confer any total right over the future works of the author, and will never be deemed to refer also to forms of exploitation which were unknown on the date of the contract. The aforementioned rights are not transferable to third parties without the consent of the author.

Contracts have to be in writing. There are also some provisions governing the contract. The scope and duration, the geographical application and the extent or the means of exploitation can be restricted by contract. If the duration is unspecified, its duration is deemed to be limited to five years, provided conventional mores do not indicate otherwise. If the geographical application is unspecified, it is deemed that it applies to the country in which they were concluded. If the extent and the means of exploitation is unspecified, it is deemed that it refers to the extent and the means that are necessary for the fulfilment of the purpose of the contract or licence. In all cases, the person who acquires the right or the

¹ Fromm/Nordemann, Vor § 12, Rn. 5.

licence is obliged that within a reasonable period of time, the work is accessible to the public via an appropriate form of exploitation. In general the fee payable to the author is obligatorily determined as a percentage, only in exceptional cases the fee may be agreed as a lump sum. However, this does not apply to employment contracts, computer programs and advertisement in any form. A waiver or transfer of moral rights is not permissible. However, consent given for a certain action is binding upon the author.

Ireland

The copyright in a work is transmissible in whole or in part by assignment as personal or movable property. In addition, the granting of an exclusive or non-exclusive licence is possible. Contracts assigning the copyright in a work and also exclusive licences have to be in writing. In general, there are no restrictions to the scope of a transfer of copyright, to future forms of exploitation or to the transfer of future works. However, an assignment of future works can be not enforceable according to the doctrine of restraint of trade. Also the amount of remuneration to be paid is up to the discretion of the parties. Copyright contracts are construed according to the normal rules of interpretation and not subject to special rules of revocation. Although a transfer of moral rights is not admissible. A waiver of moral rights will be valid, provided it is in writing, even in regards to future works.

Italy

Only the economic rights of copyrights are assignable to others. The moral rights of copyright remain always at the author. Furthermore the Italian law differs between exclusive and non-exclusive licences. The transfer of an exploitation right has to be in writing. The duration of a publishing contract may not exceed twenty years. An assignment does not include the exploitation by future means of exploitation. Regulations are set up regarding future works. In principle, the transfer of rights in future works is admissible, if the time does not exceed ten years. However, if such an agreement comprises all works of a certain category for an unlimited time, the contract is deemed to be void. A waiver of moral rights is in general not permissible. However a given consent for certain actions is binding.

Luxembourg

The moral rights and the rights of exploitation may be assigned or transferred wholly or in part. Also the granting of exclusive or simple licences is admissible. Those agreements have to in writing to be enforceable against the author. Publishing contracts and certain other contracts must provide a time limit. A transfer of rights on unknown forms of exploitation is only

valid if it is specially paid. A transfer of rights in relation to not yet created works is possible under Luxembourg law. There are no special provisions governing the remuneration to be paid. A contract must be interpreted in favour of the author. The waiver or transfer of moral rights is permissible as long as the honour or reputation of the author is not affected.

Netherlands

The Dutch copyright law does not contain a specific part on contracts. Economic rights may be alienated or granted under simple or exclusive licence. The assignment of such a right has to be in writing, the granting of a licence has in general no special formal requirements. The Dutch Act does not mention future forms of exploitation or the assignment of rights in future works. Therefore it is controversial in legal literature whether those assignments are valid. Several rules demand the payment of equitable remuneration for the use of the work. An assignment is to be interpreted restrictively, in favour of the author. Certain moral rights may be waived.

Portugal

The copyright owner may authorise use of the work/ transfer or assign all or part of the economic content; simple authorisation for disclosure, publishing, use or exploitation does not imply transfer of copyright in the work. The authorisation shall only be granted in writing and should contain specific details (form of disclosure, publication and use; relevant conditions governing duration, place, remuneration). However this requirement is not substantial for a valid agreement. The assignment of a right has to be in writing to be valid. Powers granted for the guardianship of moral rights may not be subject to transfer or assignments. It is required that the duration, place of exercise and, where payment is involved, the amount of remuneration, is to be laid down in writing. If no duration is agreed, the duration of the assignment is considered to be twenty-five years in general and ten years in the case of works of photography or applied art. Moreover, the use and exploitation of a work can take place by any means presently known or later developed. A contract for the assignment of rights in future works must provide a time limit (maximum period is 10 years) to constitute a valid contract. There are detailed provisions on remuneration. Moral rights are not subject to waiver.

Spain

Exploitation rights may be transferred limited to the rights transferred, to the means of exploitation expressly provided for and the time and territorial scope specified. The failure to mention the time limits the transfer to five years. A global transfer of exploitation rights regarding all future works is null

and void. A more rigid rule applies to publishing contracts. Future works may not be the object of a publishing contract. Moreover, an assignment does not apply to forms of future exploitation and the author has the right to terminate an agreement if it is not evidenced in writing. The author can also grant exclusive or non-exclusive licences. An agreement which grants an exclusive license is also revocable by the author if it is not evidenced in writing. The general rule of interpretation is that the transfer shall be limited to such exploitation as is necessarily deduced from the contract itself and is essential to the fulfilment of the purpose of the contract. The author has a right to terminate the contract under certain conditions. Remuneration is governed in the Copyright Act. Moral rights are unrenounceable and inalienable.

Sweden

Subject to the limitations following from moral rights, copyright may be transferred entirely or partially. If not agreed otherwise, the transferred copyright may not be transferred to others, only the transfer of copyright within a whole business transfer is admissible. There are no rules concerning future forms of exploitation or future works. Such agreements are only subject to the general law of unfair contract terms. Moreover the Swedish Copyright Act does not contain special provisions on the interpretation of copyright contracts but it does contain special provisions on publishing contracts. Moral rights may be waived in relation to uses which are limited as to their character and scope.

United Kingdom

Copyright in a work is transmissible by assignment, by whole or in part, as personal or movable property. A contract assigning the copyright in a work has to be in writing and signed to be valid. The owner can also grant licences. An exclusive licence has to be in writing to be binding. In general, there are no restrictions to the scope of a transfer of copyright to future forms of exploitation or to the transfer of future works. However, an assignment of future works can be not enforceable according to the doctrine of restraint of trade. Also the amount of remuneration to be paid is up to the discretion of the parties. Copyright contracts are construed according to the normal rules of interpretation and are not subject to special rules of revocation. Moral rights are not assignable, but can be waived.

IV. Recommendations

A transfer of rights is needed if a researcher uses a work created by a third party, the usage constitutes an act relevant to intellectual property and the usage is not covered by statutory

exceptions or the like. The review of the international instruments reveals that the main treaties and directives in the field of copyright and related rights offer little or no protection to authors and performing artists regarding the conclusion of exploitation contracts, nor do they contain any rule regarding the formation, execution, and interpretation of exploitation contracts. They merely imply, without more, that the economic rights of authors and performing artists may be freely transferred to third parties.¹ For this reason, an agreement concerning the transfer of rights has to be set up carefully. To reach a licence agreement the following steps should be undertaken:

1. Identification of the right-holder

The natural author who creates a work is far from being always considered as the initial owner of the copyright on a work. Therefore, first of all the **right-holder** (see Section D II 1 b on right-holders in general) has to be identified, keeping in mind that some rights (*eg* moral rights) might have stayed with the creator/author, while (some of the) economic rights have been transferred to a third party. In such a case, a double authorisation is necessary. Copyright indications on the material itself (copyright notices) are a first indication on whom to address in order to acquire the necessary rights. Those rights necessary for the intended use have to be identified as well (see Sections on restricted acts D II, E II, F II) as exactly as possible, in order to make sure agreements cover neither less nor more than needed.

Example: The use of a graph containing empirical data within a website includes the reproduction right and the right of communication to the public/making available right.

Some Copyright Acts require that the contract should set out explicitly, for each mode of exploitation the author's remuneration, the geographical scope and the duration of the transfer.

¹ Guibault/Hugenholtz: Study on the Conditions applicable to Contracts relating to Intellectual Property in the European Union. May 2002:
<http://www.ivir.nl/publications/other/final-report2002.pdf>, p.20.

2. Scope of transfer

The researcher has to decide what kind of rights the parties want to agree upon. An agreement can (and in some Member States has to)¹ refer to:

- the transfer (assignment or licence) of rights where possible²
- an exclusive or non-exclusive licence
- a limited or unlimited period of time (within the terms of intellectual property protection as, *eg*, 70 years after the authors death for copyright)
- geographical limits (*eg* reproduction and distribution only within the EU)
- exploitation rights (reproduction/communication to the public/distribution rights (see D II 2 on details of restricted acts)
- moral rights (not to be renounced generally in any of the Member States but may be waived to some extent in most of the Member States)
- remuneration in all possible forms
- amount of remuneration
- mode and term of payment
- to be on the safe side, licence agreements should be made in written form.

3. Necessary contents of contractual agreements

- preamble (parties, subject matter, purpose = intended use)
- rights (assignment of rights, non-exclusive or exclusive licences)
- description of the material (format, quality)
- extent of use (economically)
- description of (technical) necessary acts, *eg* digitisation
- possible alterations (*eg* size, format to meet online needs)

¹ See Guibault/Hugenholtz: Study on the Conditions applicable to Contracts relating to Intellectual Property in the European Union. May 2002:
<http://www.ivir.nl/publications/other/final-report2002.pdf>, p.149.

² Only where rights as whole are transferable a contract can fully assign rights (assignment), otherwise a licence is necessary.

- possible combination with other material
- possible future changes
- duration of contract/period of licence (*eg* notice of (extraordinary) cancellation)
- place of exercise/possible geographical restrictions (less probable for Internet use)
- updates
- moral rights clause
- warranty clause (licensor guarantees to be the author of the respective material and is lawfully entitled to fulfil the contractual obligations)
- indemnification (licensor will have to pay for any damage caused by the fact that the material agreed upon infringes the rights of a third party)
- waiver of liability (*eg* for intention)
- choice of law
- jurisdiction
- amount of remuneration (*eg* lump sum, equitable, proportional)
- in an online situation the content of a contractual agreement should be checked carefully because of the danger of precipitation

4. Further requirements

- The principle of good faith has to be regarded for all contractual agreements.
- Concluding a contract the Principles of European Contract Law¹ may be incorporated.
- It should be checked if there are only provisions in the civil law or if specific provisions for contractual agreements exist.

V. How employment contracts affect intellectual property

If an employee has created a work, the problem of ownership of copyright and the ownership of economic and moral rights arises. Up to now, this issue has not been harmonised by the European Union. Only two Directives have dealt with this

¹ www.cbs.dk/departments/law/staff/ol/commission_on_ecl/.

issue. Art 2 (3) of Directive 91/250/ CEE¹ (see the Appendix for relevant EU directives) provides that an employer is entitled to exercise all economic rights of a computer program if this computer program is created by an employee in the execution of his duties, unless it is provided otherwise by contract. Directive 96/9 /CEE² leaves it to the discretion of the Member States whether to apply this regulation also to the creation of databases or not. Thus, there are several principles recognisable within the European Union regarding employment and copyright.

1. Basic principles

Most Member States provide for exceptions to the basic rule that authorship implies ownership, the so called ‘creator doctrine’. One of these cases is work made under an employment situation. Where works are created within an employment situation, copyright stays in principle with the employee. The Copyright and Related Rights Acts of most Member States contain no provision regulating the ownership of works created under employment, with the exception of the provision concerning the creation of a computer program or a database in the course of employment. Nevertheless, employment contracts play an important role; many of them will transfer or assign rights to the employer — as far as possible with regard to moral rights. Most Member States provide at least for an assumption regarding this rights transfer. In some of the Member States the courts have read in the employment contract an implicit transfer of rights in favour of the employer. Even in countries where the creator doctrine is strictly applied, courts have accepted that the employer has at least the right to exercise certain powers over the work created under his employment.³

Since the situation for employed researchers varies from Member State to Member State (see the following Subsections), including an explicit transfer/assignment of rights is the best solution to be on the safe side. It should be done in writing (as most Member States require written form) and can be included in the employment contract.

¹ Council Directive 91/250/CEE on the legal protection of computer programs.

² Council Directive 96/9/EC of on the legal protection of databases.

³ Guibault/Hugenholtz: Study on the Conditions applicable to Contracts relating to Intellectual: Property in the European Union. May 2002:
<http://www.ivir.nl/publications/other/final-report2002.pdf>, p.26.

2. Details on Member States' provisions

Austria

There is no rule under Austrian copyright law, which asserts the copyright to the employer. A legal person is never deemed to be the owner of copyright. If a computer program is created by an employee in the performance of his employment duties, the employer enjoys an unlimited right of utilisation in the work unless he has agreed otherwise with the author of the program. In such cases, the employer is entitled to exercise the rights; the author's right to claim authorship for himself remains unaffected. Thus, the employer will never be the initial copyright owner, he will only get an unrestricted licence to use the work. The same applies to databases.

Belgium

In Belgium, the copyright of a work remains at the employee. The economic rights may be assigned to the employer on condition that assignment is explicitly laid down that the creation of the work falls within the scope of the contract, that the work was created on commission and that the employer's activity is in a non- cultural field or in advertising. An agreement between employer and employee transferring future works has to be express and must foresee the employee's participation in the profits. In respect to the creation of computer programs, the employee is deemed to be the assignee of the economic rights in the work. The same rule is valid in respect to databases.

Denmark

Under Danish Copyright law no general rule governing the issue of employment exists. Only in respect to the creation of computer programs there is the rule that an employer is the owner of copyright if the computer program is created by an employee in the execution of his duties.

Finland

Also under Finnish Copyright law there is no general rule. However, the employer is the owner of copyright of a computer program and a database if the work was created by an employee in the course of his duties.

France

Under French copyright law, the existence of a contract for hire or of service does not derogate the author's copyright protection. The general rule is that the author of a work enjoys copyright protection. However, the way French courts have interpreted employment contracts, there is an implicit transfer

in favour of the employer of the rights in the works that the employee creates in the course of his employment, to the extent needed to conduct the employer's business.¹ The principle of collective work can apply, according to which all rights can vest in the employer. The economic rights are transferable by contract to the employer. Moral rights are not transferable. The employer is the owner of the economic rights in a computer program if it was created by an employee in execution of his duties.

Germany

In Germany, the economic rights remain with the employee, except if the terms or nature of the contract of employment provide something else. A different regulation is provided on the authorship in computer program. Unless otherwise agreed, the employer is entitled to exercise the economic rights where the employee has created the program in the execution of his duties or following the employer's instructions.

Greece

In Greece, economic rights, which are necessary for the fulfilment of the purpose of the contract, are transferred exclusively to the employer, unless provided otherwise by contract. The copyright as such remains with the author. The economic right in a computer program created by an employee in the execution of the employment contract is transferred to the employer unless provided otherwise by contract.

Ireland

Unless there is any agreement to the contrary, the first ownership of copyright in a literary, dramatic, musical or artistic work (including a computer program) created by an employee in the course of his employment stays with the employer.

Italy

In general, the whole copyright remains with the author. The economic rights of computer programs, database and photographs created under employment, and computer programs and databases created in the execution of the employees duties or following the instruction given by the employer, stays generally with the employer.

Luxembourg

The initial ownership of rights on computer programs created by employees in the execution of their duties or following the instruction given by their employer stays with the employer.

¹ Cass. Civ. 1ère, 24 March 1993 (*Société Aréo*), *RIDA* 1993/158, p.200; Cass. Civ. 1ère, 28 March 1995 (*Société Termopac*), *RIDA*

Other provisions concerning works created under employment do not exist. The economic rights are transferable by contract to the employer.

Netherlands

Where labour, carried out by an employee, consists in making of certain literary, scientific or artistic works, the employer shall be deemed the author thereof, unless otherwise agreed between the parties. If a work has been made according to the draft and under the guidance and supervision of another person, that person shall be deemed the author of the work.

Portugal

The ownership of copyright is determined in accordance with the relevant agreement. If there is no agreement, the copyright belongs to the intellectual creator (employee), unless the name of the creator is not mentioned. In the latter case, the copyright belongs to the employer. The moral rights remain under this regime with the creator. However all rights in a computer program belong to the employer, unless there is a stipulation to the contrary or unless the nature and object of the contract dictate otherwise. The same rule applies to databases created under employment.

Sweden

There is no general provision regulating the issue of employment in Swedish copyright law. Only copyright in a computer program created by an employee as a part of his tasks is transferred to the employer unless otherwise agreed by contract.

Spain

Unless the parties have agreed otherwise in a written contract, the economic rights are presumed to be transferred to the employer, to the extent necessary for the exercise of the customary activity of the employer. Unless otherwise agreed, the exploitation rights in a computer program belong exclusively to the employer if the computer program was created by an employee in the course of his duties.

UK

Unless there is any agreement to the contrary, the first ownership of copyright in a literary, dramatic, musical or artistic work (including a computer program) created by an employee in the course of his employment stays with the employer.