The legal status of research data in the Netherlands

Annex 1 to the Knowledge Exchange report
‘The legal status of research data in the Knowledge Exchange partner countries’
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**About Knowledge Exchange**

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Executive Summary

Open access to research data in the Netherlands can be restricted by three different regimes of intellectual property protection: copyright, database right and the protection of non-original writings.

Copyright

Under Dutch law research data may be copyright-protected if they have been processed and the author had freedom of choice which he exercised in a manner of his own. As a rule of thumb, one can ask whether it is conceivable that two different authors, working separately, could have arrived at precisely the same form. If that is in fact conceivable, then the work concerned will usually not enjoy copyright protection.

Even though data may be copyright-protected, the following actions can still generally be carried out without consent:

- Incorporation of the factual data in one’s own words and in a structure of one’s own;
- making a copy (including a digital copy) and utilizing that copy for one’s own research, as long as the original data is not made available to others;
- citing from the research data;
- all acts with works produced by the authorities are not protected by copyright unless that is explicitly stipulated;
- copying a work for personal use.

Consent is therefore necessary for other uses of copyright-protected data (or collections of data). This may involve actions such as:

- The inclusion of the research data in a publication;
- sharing the research data with other people;
- including the research data in their entirety in a database of one’s own that is also shared with other people.

In such cases, one must obtain the consent of the author (or under certain circumstances of another party). The form in which consent can be arranged is basically unrestricted. When arranging consent, one must agree on exactly what use of the work is permitted.

Database right

A collection of separate items of data may constitute a protected database if those items are systematically arranged or are traceable in some other manner. It is also necessary for the creation of the database to have made a substantial investment; the investment made in researching and creating the data that is included in the database does not count towards that substantial investment.
If there is in fact a protected database, the producer’s consent is required for the following actions:

- Making copies of the entire database or essential parts thereof (reutilization);
- making the entire database or essential parts thereof available to the public (extraction);
- retrieving (i.e. copying or downloading) substantial portions of the database;
- repeatedly and systematically retrieving non-substantial portions of the database;
- reusing (i.e. publishing) substantial portions of the database.

The producer’s consent is not necessary for:

- Using a database for scientific/scholarly research if no substantial portions of the database are published (reused);
- using a government database (unless there is an explicit stipulation to the contrary).

**Protection of non-original writings**

Any “writing”, whether analogue or digital, can basically qualify for the protection of non-original writings; no detailed criteria can be given. Given the cases in which this type of protection has been assumed, it is quite conceivable that lists or collections of research data are also covered by this regime. There is a specific requirement for a non-original writing to qualify for protection, namely that it must have been published or be intended for publication. This means that the writing must have been publicly accessible, or at least this was intended. This restricts the number of cases in which research data can enjoy protection as a non-original writing.

**Personal research data**

Privacy can form an obstacle to the use and making available of personal research data, which is data containing information about living persons. Anonymized data is not covered by the Personal Data Protection Act [*Wet bescherming persoongegevens, Wbp*] and can be used or shared with other people without concerns about privacy. However, combining anonymized data with other data – which may also be anonymized – may in fact produce data that can be used to trace the identity of the person concerned.

The results of research should be published in such a way that it is absolutely impossible to trace them to the persons concerned, unless those persons give consent for that to be done. Under Dutch law making data available to fellow researchers – not only the research results but also the raw data on which those results are based – is permitted under certain conditions, even if personal data within the meaning of the Personal Data Protection Act is concerned. The most important condition is that the fellow researcher who receives the data is bound by the same rules for careful use, as described in the various codes of conduct.

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1Protection of non-original writings follows from Section 10(1)(1) of the Dutch Copyright Act.
### Fig. 1. Use of research data

<table>
<thead>
<tr>
<th>In what way do you want to use existing data?</th>
<th>What is required?</th>
</tr>
</thead>
<tbody>
<tr>
<td>To copy bare facts and put them in a personal context.</td>
<td>No consent is required: bare facts are not protected by intellectual property rights (section 2.1.2.)</td>
</tr>
<tr>
<td>To make a copy of data for your own use.</td>
<td>No consent is required for copyright-protected works due to a copyright law exception (section 2.3.5.).</td>
</tr>
<tr>
<td>To put data into a personal database/archive without sharing it with anyone else besides your own research team.</td>
<td>No consent is required for copyright-protected works due to a copyright law exception (section 2.3.5.).</td>
</tr>
<tr>
<td></td>
<td>No consent is required for substantial portions of protected databases due to a database law exception (section 3.2.5.).</td>
</tr>
<tr>
<td>To cite data.</td>
<td>No consent is required due to a copyright law exception (section 2.3.4.).</td>
</tr>
<tr>
<td>To copy or make available data made by the authorities (e.g. laws).</td>
<td>No consent is needed due to a copyright law exception unless protection is explicitly stipulated in the work concerned (section 2.3.3.).</td>
</tr>
<tr>
<td></td>
<td>No consent is required due to a database law exception unless protection is explicitly stipulated (section 3.2.6.).</td>
</tr>
<tr>
<td>To copy a non-substantial portion of a database.</td>
<td>Only allowed without consent when the portion is quantitatively and qualitatively insignificant (section 3.2.1. and 3.2.3.).</td>
</tr>
</tbody>
</table>

Continued next page
To make existing data available to persons other than your research team (including publishing).

<table>
<thead>
<tr>
<th>Check whether the data is protected by:</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Copyright:</strong> Assess whether the data have an original character of their own as well as a personal stamp or feature of the maker (\rightarrow) if this is the case copyright law applies and consent from the right holder is required for this kind of use (section 2.2.2.)</td>
</tr>
<tr>
<td><strong>Database right:</strong> Assess whether the database is systematically or methodically arranged, the pieces of data in the database are able to be individually retrieved and the creation of the database has required a substantial investment (\rightarrow) if this is the case the database right applies and consent from the database producer is required for this kind of use (section 3.2.2.)</td>
</tr>
<tr>
<td><strong>Non-original writings:</strong> Assess whether the writing – which is not protected by copyright or the database right – has been published or is intended for publication (\rightarrow) if this is the case the protection of non-original writings applies and consent from the right holder is required for making the work available in full (chapter 4.)</td>
</tr>
</tbody>
</table>

To copy data.

<table>
<thead>
<tr>
<th>Check whether data is protected (see above). Consent is required for</th>
</tr>
</thead>
<tbody>
<tr>
<td>- copying copyright-protected data (section 2.2.2.)</td>
</tr>
<tr>
<td>- copying a database right-protected database entirely or a substantial portion thereof (3.2.1.)</td>
</tr>
<tr>
<td>- copying protected non-original writing data in full (section 4.2.)</td>
</tr>
</tbody>
</table>
Consent not required
- quoting
- copying and making a work of the authorities available (unless protection is explicitly stipulated);
- copying for personal use

Copyright-protected works
- making available (includes publishing and sharing with persons other than your research team)
- copying for purposes other than those exempted by law

Databases protected by Database right
- retrieving (copying) or reusing (making available) a government database (unless protection is explicitly stipulated)
- retrieving substantial portions for personal
- publishing an edited version
- copying an edited version

Protection of non-original writings
- retrieving (copying)
- reusing (making available)
- systematic and repeated retrieving of non-substantial portions
- retrieving substantial portions for purposes other than those exempted by law
- publishing in full
- copying in full
1. Introduction and plan of discussion

This country report deals with the legal status of research data in the Netherlands.
In the following chapters the scope of several IP protection regimes in the Netherlands is outlined. We discuss the following regimes: copyright (chapter 2); the database right (chapter 3); the protection of non-original writings (chapter 4). Contractual agreements and privacy issues will be discussed briefly in the final two chapters (chapter 5 and 6).

We have chosen to discuss the regimes in the order of their respective protection range. The most extensive – i.e. the “toughest” regime – is copyright, followed by the database right, and finally the protection of non-original writings. If the range of protection is wide, the position of the author vis-à-vis third parties will be much stronger. On the other hand, these tougher regimes generally have a more restricted scope of application. If research data are not covered by copyright, they may well be protected by the database right. If the database right does not apply either, the protection of non-original writings can still be applicable. Copyright and the database right may also apply to a work simultaneously; these protection regimes are not mutually exclusive. The protection of non-original writings, however, is only relevant if copyright or the database right does not apply.

2. Copyright law

2.1 Introduction
Copyright gives the “author” (i.e. the maker or creator) of a work the exclusive right to decide on the publication and duplication of that work (or parts thereof). This means that the author’s consent is required if another person wishes to “publish” or “duplicate” the work. The author is referred to as the copyright holder.²

Copyright law provides protection for works that display a certain creativity or originality. The law does not, however, explain what works enjoy copyright protection. It is the courts that decide this on a case-by-case basis; Section 2.3 considers the criteria that they apply in doing so. In many cases, it is clear that a work enjoys copyright protection: writing a book or an article almost always involves personal creativity. In the case of research data, things are not so clear since the work often consists of bare facts. Therefore, research data will often not be protected by copyright.

Copyright is not intended to protect the researcher who discovers new data, no matter how creative or original that discovery may be. Copyright cannot be used to protect newly discovered data. It can, however, protect the form or shape in which the discoverer has embodied the facts. That form must be the result of creative choices. If that is the case, copyright protection applies and others are only

² Section 1 of the Dutch Copyright Act.
permitted to use the form if they obtain consent from the right holder.

It is not necessary for the work to bear the “copyright notice” (©), which is simply an indication that the work is copyright-protected. It is important to note that works sometimes bear the copyright notice even though they do not meet the requirements and therefore do not in fact enjoy copyright protection.

2.1.1 Owner or right holder
As stated above, bare facts do not belong to anyone; information is not subject to being owned. Someone can, however, be the right holder of the right to certain data. That is the case if the form in which the data has been put means that it qualifies for protection under the various regimes discussed in this country report. The law provides that the author of that form (or in some cases another party) enjoys certain exclusive rights to carry out certain actions. An exclusive right means that the party enjoying that right – the right holder – is the sole party that can perform any acts covered by the right; others must secure the consent of the right holder.

There is generally no obligation to share research data with others. Regardless of whether the data are protected or whether the researcher is the right holder, the researcher can always decide not to make his data available to others. Contractual agreements, for example with a client, may be relevant here. In some cases, the client stipulates that all the data should be sent to him. The contract may also contain provisions that oblige the researcher to keep the data secret. Such arrangements must be complied with, regardless of the regimes discussed here.

2.1.2 Legal framework: the content is free
In some cases, the law designates someone other than the author as the copyright holder (see section 2.5.). Under certain circumstances, Dutch law provides protection for certain intellectual products of the mind. This means that the author has the exclusive right to determine what is done with them. A third party that wishes to use the product concerned is obliged to request the author’s consent. The author can stipulate that the third party has to pay a fee to use the product.

When someone writes, for example, a book or an article, this writing will be subject to copyright, meaning that the author enjoys certain exclusive rights to the work. Only the author can decide whether and where the text may be published. If someone else wishes to republish the article or book (or parts thereof), for example in a collection or on the internet, that person will need to secure the consent of the author. Not everything that third parties do with a work is relevant; copying the work for private use or citing from the work is always permitted.

It is important to realize that the protection regimes that we are discussing never provide protection for the bare facts themselves: facts are free. There is a distinction between non-protected content (bare facts) and the form which the content takes. It is only the form that may qualify for protection under certain circumstances, meaning that third parties cannot simply adopt that form.
Example

If someone publishes a scientific/scholarly article on the basis of research that he has carried out, the article is protected by copyright. This means that a third party is basically not permitted to copy parts of or the entire article without the author’s consent. However, copyright only protects the article in its *form*. The *content* – i.e. the bare facts that it contains – is free. It belongs to the domain of knowledge which is a public good. The measurements that underlie the article also belong to the content, and are basically not protected by copyright. Third parties can write a new publication in their own words (i.e. a publication with a form of its own) on the basis of the measurements.

When determining whether research data are protected, it is important to bear this background in mind. Research data can generally be categorized as bare facts. After all, scientific/scholarly knowledge cannot be monopolized: a researcher does not have an exclusive right to utilize the data that he has discovered or collected. This means that research data as such will often be “free”.

In practice (i.e. in legal practice), however, it is not always clear where the boundary is to be drawn between content and form. The point at which bare facts become protected data is not always easy to determine. After all, even bare facts have to be set out in a certain way, i.e. in a certain form. Measurements can be presented in tables or complex formulas; data of a more qualitative nature can often only be presented in words. Data also occur in a variety of forms: they may consist not only of a few figures or words but sometimes of datasets or complete databases. This issue will be discussed in more detail in section 2.2.

The information discussed so far leads to the general conclusion that bare facts may become protected data in the following cases: the bare facts are written down in subjectively determined original wording (copyright, chapter 2); the bare facts are presented in some other way in a subjectively determined original manner (copyright, chapter 2); the bare facts have been selected from a larger set of data (copyright, chapter 2); the bare facts form a database in the legal sense (the database right, chapter 3).

In all these cases, the bare facts have been arranged in a certain form, which may qualify for legal protection. In legal parlance, we then speak of a “(protected) work”. For the precise criteria and for the extent of the legal protection provided, see the chapters referred to. In the cases not listed above, the protection of non-original writings is relevant (see chapter 4).

The distinction between form and content (bare facts) is illustrative of the way the law works. One needs to realize, however, that the distinction between form and content has no useful legal relevance. After all, it is virtually impossible to determine legally which aspects of a work belong to the content and which to the form.
2.2 When may research data be protected by copyright?

This section deals with the scope of copyright. It sets out criteria that can be used to determine whether certain research data may be protected by copyright. In doing so, it deals separately with copyright-protected databases.

2.2.1 The form of the work

In legal terms, copyright covers a “work”. This means a perceptible manifestation of a certain “mental creation”. It is important that the work is in fact perceptible: thoughts alone are not covered by copyright. It is not necessary that the work has been put down on paper or given some other physical form. Oral statements or expressions such as lectures may also be protected by copyright. Research data will generally have been put down in writing or recorded in digital form but, under the circumstances referred to below, orally presented research data may also be protected by copyright.

2.2.2 General criteria

The legislation and case law on copyright have set a number of requirements that must be met if a work is to enjoy copyright protection. As stated in the general introduction, copyright protection does not apply to the content – i.e. the bare facts – but to the form that has been given to that content. However, not every form is in fact subject to copyright protection. The form must be the result of personal, subjective choices by the author.

In the relevant case law, there are two requirements for a work to enjoy copyright protection:

- The work must have an original character of its own;
- the work must bear the personal stamp of the author.

Whether a work is actually protected will need to be determined on a case-by-case basis by the courts, with both these criteria being considered. An “original character of its own” means that the work must not be borrowed from other works. This entails that parts of the work or the entire work must not be quoted verbatim, or with a mere minimum of changes, from another pre-existing work. Commonly utilized forms are in general not considered to be original. The “personal stamp” of the author means that the work must be the result of a person’s creative endeavour. In creating the work, the author must have made certain choices on the basis of personal preferences (whether or not those preferences are conscious or unconscious).

Simply presenting a series of measurements in a table, for example, will not easily meet these requirements; the person who produced the table has simply listed a number of figures one after the other, probably in such a way that any other author could arrive at a similar table. That may be different if, for example, the figures are discussed in a text. If that is the case, then it is much more

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3 Supreme Court of the Netherlands 30 May 2008, LJN: BC2153, Endstra tapes.
likely that one can speak of creative, personal endeavour which qualifies for copyright protection.

For a work to be deemed to bear the personal stamp of its author the latter must have had a certain freedom of choice when creating it; in other words, he could choose between various different forms for the work. If the author did not have that freedom, then his product will not usually enjoy copyright protection.

A question which can be used in practice to determine whether a work is likely to enjoy copyright protection (a rule of thumb) is to ask oneself whether it is conceivable that two authors might have produced exactly the same work independently. If that is in fact the case, then the product concerned will not have an original character of its own, nor will it bear the personal stamp of the author, because one can assume that its form is not based on any creativity. Rather, the form will be dictated by practical, objective considerations that would be the same for all authors. Such works are unlikely to enjoy copyright protection.

2.2.3 Copyright-protected research data
The following question now arises: do research data qualify for copyright protection on the basis of the above criteria? There are, in fact, very few examples in the case law.

In deciding whether research data are in fact protected, one needs to bear in mind the following general rules. When an author creates a work, it is based on some objective data (the bare facts) regardless of whether he himself has discovered the data. Those bare facts are not protected by copyright; after all, they are facts, and facts can be used by anyone (section 2.1.2). If the author goes on to process those bare facts, for example by writing them down in a particular manner, he can make certain choices. If those choices are based on a personal preference, they may enjoy copyright protection. This then means that someone else cannot borrow them without consent (section 2.4).

What does this mean for research data in practice? One has to determine whether the author made subjective choices when processing the research data and, if so, what those choices were. When research data is presented, there will generally be little or no question of any subjectively motivated choices. The way in which research data are recorded is often determined solely by practical considerations. Categorizing, structuring, and selecting the data, for example, will normally take place on the basis of scientific/scholarly insights or standards and considerations of a practical or scientific/scholarly nature (for example, analyzing data using software like SPSS). This means that there is only a restricted scope for the researcher’s personal preferences. If the above-mentioned rule of thumb is used, it can indeed be perfectly imaginable that two researchers would arrive independently at the same form for the data in which case there is no question of copyright protection.

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Situations are conceivable, however, in which research data are given a particular form on the basis of subjective choices, causing the work to enjoy copyright protection. According to rulings by the courts, this may be the case if the researcher makes a selection from a large number of bare facts and then processes that selection in some way, for example by placing the selection in a table or diagram. If the researcher makes subjective choices when doing so, then the selection and processing qualify for copyright protection. This may also be the case if some or all of his choices are made on the basis of scientific/scholarly or technical knowledge, insight, and experience.\(^5\)

It remains difficult to determine in particular cases whether selecting and processing the bare facts have actually involved subjectively determined choices. How, for example, should one assess the selection and processing of data with a view to statistical analysis? This will generally not involve any personal choices because both selection and processing are determined by statistical methodology. It has in any case been established in the case law that if the selection and processing concerned were necessary, no copyright protection applies since in such cases there is no real freedom of choice.\(^6\)

Protection of selection and processing was considered possible, for example, in the case of a kinetic scheme that included chemical formulae describing the production process for a particular substance. Although chemical formulae are facts, it was considered possible for the scheme to enjoy copyright protection because the author of the scheme made a selection from a very large number of formulae and then incorporated them into the scheme. Even though they were based on scientific and technical knowledge, insight, and experience, his choices in doing so were subjectively determined; a different author might well have arrived at a different selection of formulae and a different scheme.

A selection of bare facts may therefore enjoy copyright protection, meaning that consent must be obtained before someone is allowed to make a copy. If someone copies the work without obtaining consent, the copyright is infringed. There is no infringement of copyright if a person possessing a similar work can prove he arrived independently (i.e. by means of his own labour) at the same (or virtually the same) selection. In that case, the selection has not been copied.

Qualitative data – for example, descriptions, observations, etc. – that are in a form that displays an original character of its own and the personal stamp of the author may also enjoy copyright protection. That is not the case, however, if use is made only of short phrases or standard scientific terms and structures. Matters may be different if the data consist of lengthy descriptions that clearly demonstrate a creative choice on the part of the author, for example because the phrasing and vocabulary are unique.

2.2.4 Other kinds of data: photographs, maps, diagrams, etc.
So far, we have been talking about research data that have been put down in writing, i.e. in figures or

\(^{5}\) Supreme Court 24 February 2006, NJ2007, 37, Technip/Goossens.
\(^{6}\) Supreme Court 16 June 2006, AMI 2006, 161, Kecofa/Lancôme.
words. There are many kinds of data, however, which are presented in a more visual form, for example photographs, videos, maps, and diagrams.

Photographs are more likely to enjoy copyright protection than research data that have been put down in writing. After all, taking a photograph generally involves a number of choices beforehand, for example selecting the subject, the perspective, the composition, etc. But not every photograph qualifies for protection: to be protected, a photograph needs to have an original character of its own and bear the personal stamp of the photographer. In the case of a photograph that has been taken by purely mechanical means, for example, no personal choices are involved: the photograph has simply been taken automatically without human intervention. Satellite photos are an example of such photos. Processing such photos, however, may indeed involve making personal choices. Adding colours or data to the photograph, for example, may bring the photo within the remit of copyright if making the additions involves personal choices. The same applies mutatis mutandis to video recordings.

Maps form a somewhat special case. Creating a map that represents an existing geographical location does not really involve any creative choices. But actually designing the map may of course require creative choices and the map may then qualify for copyright protection. Adding research data to a map may also lead to it being protected if these actions involve making personal, creative choices.

An updated map, for example, may use different colours and may (or may not) include points of view or other interesting features for tourists; it may consequently enjoy copyright protection.

The situation regarding diagrams is similar; they may enjoy copyright protection if personal choices were involved in compiling or formatting them.

### 2.2.5 Copyright-protected databases

Certain databases may also be subject to copyright protection. The following requirements apply:

- The database must consist of a collection of works, data, or other independent materials;
- it must be possible to trace those materials by means of a method or system.

A database is only protected by copyright if the choice or arrangement of the materials that it contains complies with the criterion that it should have an original character of its own and bear the personal stamp of the author. This may also be the case if the subjective choices made in creating the database – for example, the selection of the data – were determined by scientific/scholarly or technical knowledge, insight, or experience.

### 2.2.6 How copyright protection arises

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7 For databases subject to the database right see chapter 3.
8 Supreme Court 24 February 2006, NJ2007, 37, Technip/Goossens.
Finally, it should be noted that copyright protection arises automatically if a work complies with the criteria explained above. No registration is required, and neither does the work need to bear the “copyright notice” (©). Moreover, the work does not need to have been published in some way or another or be intended for publication. This means, for example, that a set of processed research data for internal use may enjoy copyright protection.

2.3 What actions require consent?
This section explains what kind of use requires consent if copyright-protected data are concerned. If it has been established that research data qualify for copyright protection according to the criteria mentioned above, certain types of use of that data require the consent of the author (or perhaps of another party: see section 2.5). This section deals with the actions for which consent must be obtained and those for which consent is unnecessary.

2.3.1 Some components of the work are not subject to copyright
One important point to note is that copyright does not apply to all elements and aspects of a work. Only the subjectively determined elements or aspects, those determined by the personal creativity of the author, are protected. This is important when research data are concerned. If research data are protected by copyright, then it is generally only the structuring, selection, or wording of the data that are covered (section 2.2). The bare facts themselves can however be used freely by other persons as long as those facts are presented in a structure of their own and in the user’s own words, and if the use of the facts does not constitute retrieval or reuse within the meaning of database law (section 3.2). Copying a copyright-protected work in unaltered form is therefore often not permitted, while copying the content – i.e. the bare facts – and presenting them in one’s own words or form is generally allowed.

For example: a collection of research data in the form of figures is protected by copyright because the collection is structured in a special and original way that displays personal creativity on the part of the author. In this case only the structuring of the figures is protected by copyright. This means that a person other than the author cannot copy that structure or publish it elsewhere without the author’s consent. The bare facts contained in the structure are not protected, however, even if they were discovered by the maker. Another person may therefore copy the figures and use them for his own research freely, as long as the copyright-protected structure in which the figures are included is not copied. The same applies, mutatis mutandis, to research data used in the form of a text which is protected.

The copyright protection afforded to a scientific/scholarly publication (i.e. a book or article) is wide-ranging because the whole structuring and wording derive from personal choices made by the author. Nevertheless, such publications also contain objective aspects that fall outside the scope of copyright. Examples of this are such things as common (and therefore not original) phrases or expressions, but
also the scientific or scholarly theory defended in the article. The theory can be considered to be an objective, factual given, even if it has been conceived by the author personally; it is only the wording and the manner of treatment that have been chosen for the article – and which are therefore subjective – that are protected by copyright. Another person may, however, describe the theory in his own words and in a structure of his own without seeking the author’s consent.

2.3.2 What use is subject to copyright?
If someone wishes to use not only the bare facts but also the copyright-protected form, it is necessary to determine whether the proposed use is such that the author’s consent is required. The law applies two broad terms to indicate what is covered by the author’s exclusive right. The author is the only person who can decide on the publication and duplication of a copyright-protected work. In so far as is relevant, duplication here means the production of physical or digital copies of the work (or parts thereof). This therefore involves making a copy or a print-out of a written work, scanning it, or downloading a digital copy. Duplication also includes adapting, translating, or imitating the work (or parts thereof). In the latter case, we are dealing with non-literal copies that are nevertheless taken from the work so that the protected subjective elements are largely preserved.

Publication means making the work available to the public in some way or another. This may involve circulating prints of the work but also making it available digitally on the internet, displaying it publicly, or reading it out in public.

Example
Let us assume that we are dealing with a copyright-protected set of research data because the data consist of observations expressed in a personal and original wording. Someone other than the author wishes to write a new article on the basis of those data. That is permitted. The objective data from the observations can be used without the original author’s consent if this is done in the other author’s own words. However, if the other author intends to incorporate the entire protected set of data into his article as an appendix, he must obtain consent from the original author. This is because the verbatim inclusion of the protected data counts as publication and making the data available to the public; it also involves making copies (duplication).

When using protected data, it is always necessary to determine whether the proposed action constitutes duplication and/or publication.

Note that even if the author has made the protected data available to others (for example, by placing the data on the internet) the work can still not be used by third parties (i.e. published or duplicated) in the manner described above. Doing so still requires the consent of the right holder.

2.3.3 Exception: works produced by the authorities

Sections 1 and 13 of the Dutch Copyright Act.
No consent is required to use works produced by the authorities. Acts of Parliament, regulations, and court rulings are never subject to copyright. Other types of works published by the authorities are also basically not subject to copyright unless that it is explicitly stipulated in the work concerned. This applies, for example, to reports (including research reports), policy documents, data etc. published by a government body. This rule does not require the authorities to be the maker of the publication: a government body may well publish a work (for instance a report) produced by a private research company. Such works are also not protected by copyright unless explicitly stipulated.

Research data, for example statistics, published by the authorities can thus generally be reused without consent, as long as the work does not include a stipulation to the contrary (for example “All rights reserved”). It is not always clear whether research data are in fact derived from the authorities since there is no clarity as to the government bodies concerned. Local and national authorities and departments of state are certainly included in the term “authorities”. Publications by other government bodies are also subject to these rules. In cases of uncertainty, the work should be inspected for a copyright statement (i.e. “All rights reserved”, the © sign, etc.) or the publishing body should be consulted.

Statistics Netherlands [CBS] is an example of a government body; it is therefore covered by this system of rules. Data from the Statline database can therefore be freely used by others (even if the database itself is subject to copyright). According to the information given on its website, Statistics Netherlands does not reserve copyright but it does require that it should be designated as the source when using its data. The Statline database is probably also subject to protection by the database right, meaning that that is also relevant (chapter 3).

2.3.4 Exception: citations

In a scientific/scholarly publication, one does not need consent to cite from a work. This also applies to protected research data. A number of rules do need to be borne in mind, however; the most relevant of these are:

- As far as possible, the name of the author and the source of the citation must be given.
- The size of the passage cited must be in a reasonable relationship to the purpose. To take the example given in Section 2.4.2: one cannot simply “cite” a whole set of protected data as an appendix; nor can one cite a whole work.
- Data which is cited must have been lawfully published. This means that the author himself must have decided that the data could be made available to the public. The data are likely to have been published lawfully if they have been uploaded to the internet by the author (or with the author’s consent). That may be different if the data were only shared within a highly restricted network. If

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9 Section 15b of the Dutch Copyright Act.
11 Section 15a of the Dutch Copyright Act.
the data have been made known only personally to another person (for example, if the author has sent the data on request), there is no lawful publication. The data may therefore not be cited.

- The citation must also be justified in the context in which it is made. This means that there must be a substantive connection between what is cited and the context, for example the accompanying text. There will be such a connection if, for example, the protected data that are cited are discussed in the text.

2.3.5 Exception: private copy
It is always permitted to duplicate a copyright-protected work for private use or study if this is done without any commercial intention.\(^\text{13}\) This may, for example, involve making a physical copy or copying out or downloading the work. One cannot provide such copies to others, however, or publish the complete work in some other manner, whether or not as an appendix or as part of one’s own publication. In the context of research, copyright-protected works can therefore be used by downloading them and placing them in one’s own database, for example, but they may not be published in any way.

2.4 Who is the right holder?
This section deals with the question of whose consent needs to be sought and what arrangements should be made if certain research data seem to qualify for copyright protection; it is important to determine who holds the right in respect of the work. That is, after all, the person who has the exclusive right of publication and duplication and whose consent is therefore required for use by third parties. So far, we have referred to the author as the right holder. That is in fact usually the case: as a rule it is the author (i.e., the person who created the work) who is the right holder. The copyright may, however, belong to someone else.

2.4.1 Shared copyright or the involvement of a superior
If a copyright-protected work has been created by more than one person, it may not be clear who is considered to be the author and therefore the right holder. With research data, that situation may well arise, for example if the data have been assembled by a group of people. If all those people have had an equal creative influence on the creation and production of the work so that distinguishing their individual contributions is no longer possible, they are all considered to be the authors. They consequently share the copyright and must jointly decide on the exercise of that right. If, however, a group of persons produces a work under the direction of a person who has come up with the idea of the work and who instructs them accordingly, then that superior holds the copyright.\(^\text{14}\)

When a research group processes data in such a way that a copyright-protected work is produced, it will be necessary to consider which situation is most applicable. If the study was set up by a superior who instructed a number of co-workers about how the data should be collected and processed, then

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\(^{13}\) Section 16b of the Dutch Copyright Act.

\(^{14}\) Section 6 of the Dutch Copyright Act.
that superior holds the copyright. One cannot then say that the co-workers themselves had a creative influence on the work. If, however, one is dealing with a group of equal researchers who came up with the concept jointly and implemented it jointly, then the copyright is likely to be vested in all of them.

2.4.2 Cases in which the law allocates copyright
There are also a number of situations in which the law provides that the copyright is not vested in the actual author of a work. Two of those situations are relevant here. Firstly, the copyright may be vested in an employer if the author of the work concerned was working for that employer on the basis of a contract of employment. The work must then have been created as part of the employee’s employment.15 A researcher employed by a research firm will not therefore hold the rights to the research data that he collects and processes in the context of his work. The same also applies at universities, although there has been a great deal of discussion on this matter. Secondly, a legal entity – which includes business companies, foundations, and universities – may be deemed to be the right holder. That is the case if a work has been published with only the legal entity being referred to, without any mention of the actual author (i.e. a natural person).

2.4.3 Cases in which contractual provisions may be relevant
Finally, there are a number of situations in which contractual provisions may be relevant when deciding who is the right holder. A client who commissions certain research, for example, may stipulate in the contract that the copyright will be transferred to it. In that case, the client becomes the right holder and it is the client’s consent that will be required for the work to be used by other parties. The contract may also stipulate that the researchers will retain the copyright but that they already give consent for the client to use the work (this is then referred to as a licence). The arrangement may also mean that the client is the sole party that is permitted to use the work (this is then an exclusive licence). In that case, the right holder is not permitted to grant consent for other parties to use the work (at least not without the consent of the client).

For the sake of clarity it should be noted that the author of research data that are not subject to copyright protection is not obliged to make his data available to third parties. He is at liberty not to share the data with third parties and thus to prevent them from using the data.

An author may in fact grant consent in advance for certain types of use by any potential user. The author may attach a statement to that effect to the work. One popular way of doing this is by means of a Creative Commons licence (chapter 5).

2.5 Reuse of protected data: sometimes there is double copyright
Before someone can copy a whole set of copyright-protected data or include them in a slightly altered form in his own collection of research data, he needs to obtain the consent of the right holder. The question may then arise as to the status of the new collection, which now contains the initial

15 Section 7 of the Dutch Copyright Act.
researcher’s protected data. Who is the right holder as regards the new collection?

That situation is rather complicated because the author of the original data retains his rights even if his data are now contained in a new and larger collection of data. If the portion of the collection that has been included is utilized in a manner that requires consent to be given (section 2.4), the user will need to obtain the consent of the original author. The same applies if the user is the author of the new collection of data.

Example
Researcher A puts together a collection of data (c). In it, he includes a table of data (t) produced by researcher B. Table t is protected by copyright, so A asks B for consent to include it. A then wishes to upload collection c to the internet. In order to do so, he will need to obtain consent from B because collection c now includes the copyright-protected table t. Uploading c to the internet in fact also involves uploading t, and that requires the consent of t's author.
If researcher C then downloads collection c from the internet and wishes to use table t from it and include that table in a publication, he will need to secure the consent of researcher B because B is the right holder in respect of table t.

The new collection itself may also be subject to copyright protection. That right is then vested in the author of the new collection. The whole collection is then subject to two copyrights: one vested in the new author of the whole collection and one vested in the initial author in respect of that part of the data that has been copied. If someone wishes to use the new collection in a manner that requires consent to be given, he will need to secure the consent of both the author of the new collection and the author of the copied data.

If researcher C therefore wishes to copy and publish collection x in its entirety, he will need to secure the consent of both A and B. After all, the collection as a whole has been created by A, meaning that A is the right holder, but collection x now also includes table t, of which B holds the copyright.

2.6 Summary
Under Dutch law research data may be copyright-protected if they have been processed and the author had freedom of choice which he exercised in a manner of his own. As a rule of thumb, one can ask whether it is conceivable that two different authors, working separately, could have arrived at precisely the same form. If that is in fact conceivable, then the work concerned will usually not enjoy copyright protection.

Even though data may be copyright-protected, the following actions can still generally be carried out without consent:
- Incorporation of the factual data in one’s own words and in a structure of one’s own;
- making a copy (including a digital copy) and utilizing that copy for one’s own research, as long
as the original data are not made available to others;
citing from the research data;
works produced by the authorities are not protected by copyright unless that is explicitly stipulated.

Consent is therefore necessary for other types of use of copyright-protected data (or data collections). This may involve such things as:

- The inclusion of the research data in a publication;
- sharing the research data with other people;
- including the whole of the research data in a database of one’s own that is also shared with other people.

In such cases, one must obtain consent from the author (or under certain circumstances from another party). The form in which consent can be arranged is basically unrestricted, but it is a good idea to put it in writing. Consent can also be arranged by e-mail. When arranging consent, one must agree on exactly what use of the work is permitted.

### 3. Database right

A collection of data may also be subject to protection by the database right.\(^{16}\) The database right is an entirely different matter to copyright. The question of an “original character of its own” and the "personal stamp of the author” are not relevant here. Quite the contrary: where the protection of databases is concerned, it is not the creativity or originality of the database or its contents that counts but the protection of the investment made in order to assemble the collection of data. It follows that the database right is specifically intended to ensure that someone who has invested in the database can recoup his investment by exploiting the database; the database right protects the investor against third parties that wish to take over large portions of the database or to use it without consent or without paying. The database right applies just as much to non-commercial databases as long as the requirements explained below have been complied with.

The database right may therefore be relevant to collections of research data. If a collection of research data is deemed to be a protected database, then third parties must request consent before they can retrieve or reuse substantial portions of the database. Consent is also required for systematically retrieving non-substantial portions of the database (section 3.2).

### 3.1 When is research data protected by the database right?

The law assigns a different meaning to the term “database” than in normal parlance: not every collection of data is a database in the legal sense. The legal definition of a database specifies when

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\(^{16}\) The database right is laid down in the Dutch Database (Legal Protection) Act. This act is based on EU Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.
the database right applies. It will therefore be necessary to determine whether the collection of data concerned is in fact a database within the meaning of the law.

Dutch law defines a database as follows:

‘A collection of works, data, or other independent items arranged in a systematic or methodical way and individually accessible by electronic or other means and for which the obtaining, verification or presentation of the contents, evaluated qualitatively or quantitatively, bears witness to a substantial investment.’

This definition comprises three essential elements:

- The database must consist of independent items;
- the database must be searchable or systematically arranged so that the individual items can be traced;
- there must have been a substantial investment in the database.

From the legal perspective, a collection of data is only considered to be a database if it meets these three requirements. A searchable collection of data is therefore only a database in the legal sense if there has been a substantial investment.

3.1.1 Collection

A database in the legal sense must in the first place be a collection containing works, data, or other independent items. That definition is a broad one, and it certainly includes research data (both bare facts and copyright-protected data). This may involve data such as figures, codes, words, or descriptions, but also photographs etc. The materials in the collection do need to be independent, however; in other words, it must be possible to separate them without them losing their substantive value or meaning.

A collection of measurements, for example, will often consist of independent items, each having its own substantive meaning which is not lost if that particular item of data is viewed separately from other data in the collection, because the value of that item of data remains unchanged or just as significant. This may be different, for example, in the case of a set of cohesive data (for example, a series of figures) that only have a substantive meaning when viewed as a whole and whose components cannot be viewed separately without them losing their substantive meaning. In that case, there is no question of a protected database.

The law does not impose any requirements regarding the size of the collection. This means that a small collection can also be a database as long as it complies with all the components of the definition.

A database does not have to be in electronic form. It does, however, have to be recorded on a data

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17Section 1(1) of the Dutch Database (Legal Protection) Act.
medium, but this can be a paper medium as well as a digital one. The database may be distributed between a number of different media; in other words, it does not need to consist of only a single computer file or a single book.

3.1.2 Searchability
A database must also comprise a method or system that makes it possible to access each of the items in the database individually. Such a system can consist of an arrangement or indexation that allows each item to be traced. If the database is not arranged in that way, then a search program can ensure that each item can be traced. In the case of research data, however, it is more likely that each item of data can be traced because the data are arranged in the form of tables or matrices.

3.1.3 Substantial investment
Finally, a substantial investment must have been involved in obtaining, verifying, or presenting the data in the database if it is to qualify for protection by the database right. Not every investment qualifies for protection: it must be a substantial investment. Consideration here needs to be given to the time, effort, and money that went into compiling the database.

The law does not give any detailed indications of when an investment should be considered to be substantial. The investment concerned must in any case be both qualitatively and quantitatively substantial. It involves investment in:

- **Obtaining** the contents of the database;
- **presenting** the contents;
- **verifying** the contents.

Obtaining means collecting the contents of the database. Verifying means checking the correctness of the data; it can take place either as the database is being assembled or at a later stage when it already exists. Presentation means setting up the database, organizing it, etc.

A database comprising research data does not necessarily involve a substantial investment within the meaning of database law. Although the data will often have been collected in the course of lengthy and expensive research, protection under database law requires a substantial investment in the database itself. From a legal point of view, a distinction needs to be made between creating the data, on the one hand, and obtaining, presenting, or verifying it on the other.\(^\text{18}\) Creating means producing or discovering the data that go into the database. It is important to note that from a legal point of view creating is not the same as obtaining; the latter refers mainly to collecting existing data and not to “discovering” new data.

Investment in the creation of data is of no importance when deciding whether there has been a substantial investment in the database. That fact is important as regards databases comprising

\(^{18}\) Section 1 (1) (a) and (b) of the Dutch Database (Legal Protection) Act.
research data. With such databases, the main investment will have been in the research itself and thus in “creating” the data; that investment is of no importance, however, when deciding whether there has been a substantial investment in the database as such. The same applies to investments in verifying the data: that investment takes place in the context of research and not for the sake of the database.\(^\text{19}\)

Deciding whether there has been a substantial investment in the database is based solely on whether – regardless of the time, money, and effort that went into the research that produced the data – there has been a substantial investment in obtaining, presenting, and verifying the data. This means that a collection of research data will not always be deemed to be a protected database, although that is not impossible. If there has been a substantial investment in the database itself – in addition to the investment in the research – then the database will indeed qualify for legal protection. The investment may, for example, involve systematically or methodically arranging the research data for the database.

**Example**

Let us assume that a qualitative field study has led to the storage of measurements taken in a large matrix, with a large number of variables being filled in for each case investigated. The variables themselves are simple, consisting only of a single word or a simple code. The structure of the database is also straightforward. There is therefore no question of any originality or a personal stamp, meaning that neither the database as a whole (because of its structure) nor the materials as such (the measurements) are protected by copyright. However, the database may be deemed to be a protected database. There is, after all, a collection of separate data: each item has its own meaning. Moreover, the matrix has been structured systematically: the data have been arranged so that each item of data can be accessed separately. The crucial point, however, is whether there has been a substantial investment in obtaining, presenting, or verifying the contents of the database. That does not appear to be the case here. It is true that a great deal of time, money, and effort have been invested in the research and in “creating” the data, but collecting the data in the database was merely a by-product of that research. There has been no investment in obtaining the data because the data had already been obtained in the course of the research. Nor has there been any investment in verifying the data; that took place in the course of the research. All that therefore remains is the presentation of the database. This may have involved a substantial investment if, for example, a lot of time, money, and effort went into formatting and programming the database; in this particular case, there is no question of that.

Sometimes, a database comprising research data may well have involved a substantial investment in obtaining (i.e. collecting) the contents. This may be the case, for example, if someone has gone to a great deal of trouble to compile a database comprising an overview of all existing research data. In such a case, a great deal of time, money, and effort may have gone into collecting and perhaps verifying the data, with that investment being solely in creating the database. The database does therefore qualify for protection and can therefore be covered by the database right.

\(^{19}\) European Court of Justice 9 November 2004, case C-203/02, British Horseracing Board/William Hill.
3.2 What actions require consent?

If the database meets the criteria explained in the previous subsection, its producer enjoys an exclusive right. The producer is then the sole person who can grant consent for retrieving a substantial portion of the database, repeatedly and systematically retrieving non-substantial portions, or reusing a substantial portion. A person who wishes to perform these actions therefore requires consent or the use of the database will infringe the right held by the producer of the database.

3.2.1 Retrieving material

Retrieving material involves appropriating or transferring some or all of the content of a database. This may, for example, involve making a copy – either written or digital – or (temporarily) downloading material from the database. However, borrowing data from the database also counts as retrieval, for example when the data are copied out or typed into another database. That is also the case if the data (or a large part thereof) are copied by hand after a critical selection has been made. Taking data from a protected database for one’s own research purposes, for example, also counts as retrieving material. It is irrelevant whether the research data are then used to create a new database. Consent is only required in two types of cases:

- a substantial portion of the database is retrieved (section 3.2.3);
- non-substantial portions of the database are retrieved systematically and repeatedly.

3.2.2 Reuse

The term “reuse” as applied in Dutch law does not mean the same as in normal parlance. By reuse, the law means any action whereby the database is made available to the public. This therefore means providing access to the database. It may involve an intermediary who makes other parties’ databases available to third parties via the internet. This is also not permitted without the consent of the producer of the database.

Reuse will not always be relevant, of course, as regards the use of databases containing research data. In actual practice, consulting the data from a database containing research data will be the main action involved, something that is not covered by the legal use of the term “retrieval”. Reuse is relevant, however, if other persons are given access to a database containing research data. This may be the case, for example, if that database is included in a new one. In such a case, one is dealing, first of all, with data being retrieved but if the new database is made available to other persons, then reuse is also being made of the original database. In all cases, substantial portions of the database must be involved (section 3.2.3).

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20 Section 2(1) of the Dutch Database (Legal Protection) Act.
21 ECJ 9 October 2008, case C-304/07, Directmedia/Albert-Ludwigs-Universität Freiburg.
22 Section 2(1)(b) of the Dutch Database (Legal Protection) Act.
3.2.3 Substantial portion
The law specifies the term “substantial portion”. The portion concerned may be substantial both qualitatively and quantitatively. The qualitative aspect refers to the economic or technical value of the portion that is retrieved or reused. From the quantitative point of view, it is probably necessary to consider the size of the retrieved or reused portion in relation to the size of the database as a whole. It can sometimes be difficult to determine what is to be viewed as the whole database; a large database may, after all, consist of component databases. A component database is also deemed to exist if a small portion of the database also complies independently with the requirements explained above. In that case, the component database is also deemed to be an “independent unit”.

Consent is also required for repeatedly and systematically retrieving non-substantial portions. The thinking here is that constantly retrieving (in the sense of borrowing) small portions of the database can ultimately lead to the reconstruction of the whole database or a substantial part thereof; this is also harmful for the producer.

3.2.4 Derivation
If someone compiles a database that is wholly or to a substantial extent identical to an existing database, he does not automatically infringe the relevant database right. He only does so if the new database is entirely or to a large extent derived from the original database. What this means is that the author of the new database has taken the data from the existing one; this requires consent. If, however, someone compiles a database by means of his own efforts that is wholly or to a large extent the same as an existing database, there is no infringement of the relevant database right. It has to be demonstrated, however, that the new database is not derived from the existing one. If someone compiles a new database by examining materials in an existing database one by one and making a selection therefrom for the new database, this will qualify as derivation.

3.2.5 Exceptions: scientific/scholarly research
The law provides that retrieving substantial portions of a database for the purpose of scientific/scholarly research does not require consent. This exception is restricted, however, to retrieval. This covers actions such as inspecting the database, downloading it, and making printouts. Copying the database into one’s own database also constitutes retrieval.

One cannot, however, reuse substantial retrieved portions of a database within the framework of scientific/scholarly research without obtaining consent. Reuse basically means any action whereby the data are made available to persons other than the research team. The retrieved data cannot therefore be shared with persons other than one’s own team of researchers. One is also not permitted to include the substantial portions of the database that one has retrieved in a publication. If such portions are placed in a researcher’s own database, he must not share that database with others because it will

24 Section 5(b) of the Dutch Database(Legal Protection) Act.
then contain a substantial portion of the original database, and that portion may not be shared. All of these actions do require consent.

3.2.6 Exception: government databases
Government databases have a special position. Databases comprising legislation, regulations, and court rulings are not subject to the database right.25 The same applies to other types of databases produced by the authorities, unless there is an explicit provision to the contrary. In general, therefore, no consent is required to reuse or retrieve material from a government database. It is necessary, however, to determine whether the database right in the particular database concerned has been reserved. A government database is one that has been produced by a government body (section 2.4.3). Important: it is also possible that a different producer (i.e. a commercial organization) compiles a database containing solely government material; in that case, this exception does not apply.

3.2.7 Consent, consultation, and contractual arrangements
Where the consent requirement is concerned, it is irrelevant whether the database is already available (including generally available) to third parties. Even if the database can be consulted by other people, consent is in principle still required to retrieve (i.e. borrow) substantial portions of the database or to reuse them (i.e. make them accessible). It is also irrelevant whether such retrieval or reuse serves a commercial purpose: the producer’s consent must also be acquired for non-commercial use (see section 3.2.4 regarding the exception that applies to scientific/scholarly research).

Consent is not necessary to inspect a database, nor for borrowing small quantities of information from it. It is important to remember, however, that this rule does not prevent the producer of the database from making different arrangements. The producer of the database may, for example, stipulate in the relevant contract that access to the database depends on payment being made. However, someone who has secured legitimate access to the database can always retrieve and reuse non-substantial portions thereof without the consent of the producer; that right cannot be excluded contractually.26 In this regard, one should consult the user agreement concluded with the producer of the database. If no other arrangements have been made, then basically the database right regime that we have discussed will apply.

Finally, it should be noted that some commercially available databases are programmed in such a way that certain actions are technically impossible. It may not be possible, for example, to print out or download the database. The law provides that such “technical protection measures” must not be circumvented, even if the regime provides that making copies or downloads is in fact permitted.

3.2.8 Borrowing from another database containing research data
Where assembling research data for scientific/scholarly research is concerned, it is important to know

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25 Section 8(1) of the Dutch Database (Legal Protection) Act.
whether one can borrow data from a protected database containing research data (or borrow the whole database) without securing the consent of the producer of that database. As we have already seen, bare facts are free; the bare facts contained in a database can therefore be used for new research. However, one must always remember that substantial portions of the database may not be copied. If substantial portions are retrieved in the context of scientific/scholarly research the exception dealt with in section 3.2.4. will often apply.

Things are more problematical when it comes to borrowing and publishing an existing database (or a large part thereof) in a new database in a new research publication. In that case, one is retrieving and reusing a substantial portion of the existing database. That is also the case if a large part of the data in the pre-existing database is copied out by hand after a critical selection has been made. This also requires the consent of the producer of the database concerned. Important: this only applies to databases for which a substantial investment has been made in obtaining, arranging, and verifying the data, something that is by no means always the case with databases containing research information. In the case of government databases, borrowing data only requires consent if the database right has been explicitly reserved.

3.3 Who is the right holder?
We have already noted that the producer is deemed to be the right holder of the database right; he is the party that can grant consent for other people to retrieve and reuse substantial portions or to repeatedly and systematically retrieve non-substantial portions. The relevant question here is who is considered to be the producer of the database; this is by no means always the actual author (i.e. the “maker” of the database). According to the law, the producer of the database is the party that bears the risk of the investment in the database etc. This may be the actual author, but it may also be the party that instructed that the database be created. Who bears the risk in this relationship must be determined on the basis of the contractual arrangements that apply between them. It is advisable to reach agreement on this matter. In many cases, the right holder may therefore be a legal entity.

3.4 Relationship to copyright
In conclusion, we will give a brief explanation of the relationship between copyright and the database right. These are two separate areas of the law which by no means exclude one another. If it is sufficiently original, a database itself can therefore also be a copyright-protected work (section 2.3.4). The various materials in a database can also themselves be a copyright-protected work. In that case, borrowing those materials requires the consent of the copyright holder in accordance with the way the copyright has been arranged (chapter 2).

3.5 Summary
A collection of separate items of data may constitute a protected database if those items are

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27ECJ 9 October 2008, case C-304/07, Directmedia/Albert-Ludwigs-Universität Freiburg.
systematically arranged or are traceable in some other manner. It is also necessary for the creation of the database to have required a substantial investment; the investment made in researching and creating the data that are included in the database does not count towards that substantial investment.

If there is in fact a protected database, the producer’s consent is required for the following actions:
- Retrieving (i.e. copying or downloading) substantial portions of the database;
- repeatedly and systematically retrieving non-substantial portions of the database;
- reusing (i.e. publishing) substantial portions of the database.

The producer’s consent is not necessary for:
- Using a database for scientific/scholarly research if no substantial portions of the database are published (reused);
- using a government database (unless there is an explicit stipulation to the contrary).

4 Protection of non-original writings

If neither copyright nor the database right applies, then the “protection of non-original writings” [onpersoonlijke geschrevenbescherming] may be relevant. This involves a very “narrow” type of protection for works that do not meet the criteria for copyright protection. The requirements that a work has an original character of its own and bears the personal stamp of the author are irrelevant where this type of protection is concerned. The protection of non-original writings may also apply to collections of data for which no substantial investment has been made and that are consequently not subject to protection under the database right.

Important: the protection of non-original writings only applies if neither copyright (chapter 2) nor the database right (chapter 3) applies.

4.1 When does the protection of non-original writings apply?

Any “writing”, whether analogue or digital, can basically qualify for the protection of non-original writings; no detailed criteria can be given. Given the cases in which this type of protection has been assumed, it is quite conceivable that lists or collections of research data are also covered by this regime.

There is in fact one specific requirement for a non-original writing to qualify for protection, namely that it must have been published or be intended for publication. This means that it must have been provided for inspection by the public, or at least that must be the intention. This restricts the number of cases in which research data are protected as being a non-original writing. It is not uncommon, after

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28 Protection of non-original writings follows from Section 10(1)(1) of the Dutch Copyright Act.
all, for unprocessed data to be only intended for a researcher’s own use, as the basis for a publication. When the raw data are distributed within a research community, for example on the internet, then we are in fact dealing with a published piece of writing.

One example of data that qualify for protection as non-original writings but not for copyright protection are metadata. Metadata are data that describe the characteristic features of certain information; they are insufficiently original to qualify for copyright protection. Important: metadata only qualify for protection as non-original writings if they have been brought to the attention of the public or if the intention is that that should be done. One can argue that this is not the case when we are dealing with metadata that have been recorded solely in machine-readable form. That may be different if it is a simple matter to make the metadata visible, as in the case of the source code for web pages.

Moreover, it is a collection of independent metadata that is systematically arranged and in which the obtaining, verifying, or presentation of the materials has involved a substantial investment that qualifies for protection under the database right and not the single set of metadata for a particular document.

4.2 What actions require consent?
The protection of non-original writings covers a broad scope in the sense that it applies to many different types of works, but the protection that it affords is much narrower than in the case of copyright or the database right. Here, too, the individual items of data that have been brought together in a non-original piece of writing are not each individually protected. Moreover, consent is only required for copying the piece of writing verbatim or with limited changes. That is therefore a significantly narrower type of protection than that afforded by copyright, because the latter also requires that a work must also not be adapted without the consent of the right holder.

4.3 Whose consent must be obtained?
The person who can grant consent is the same as in the case of copyright. In the first place, that means the author or authors of the material concerned, i.e. the person/persons who put down the data in writing. Depending on the circumstances, a superior, employer, or a legal entity may also be the right holder and thus the party that can grant consent. Contractual arrangements may also be relevant. (For all these matters, see section 2.5.)

5. Contractual arrangements

When sharing data with others, the author can make arrangements about the use that they can make thereof. He may stipulate, for example, that others can only inspect the data but not use them in any other way, or that they may not publish those data. Such arrangements can also be made for research data that are not protected by copyright or the database right, nor protected by the non-original writings regime.
We also need to refer to the exchange of research data via a third party that acts as an intermediary. The Netherlands, for example, now has “DANS” (Data Archiving and Networked Services). This organization has a website where researchers can upload data so that other researchers can then download the data. Certain arrangements can be made when supplying research data to the intermediary, for example that the intermediary may make the data available to third parties regardless of whether they are subject to copyright or the database right. It can also be stipulated that the data must not be made available to third parties, or only on certain conditions. These, however, are arrangements that apply between the supplier of the data and the intermediary; basically, they do not apply to third parties.

Anyone who receives data from such an intermediary must observe the rules applying to copyright or the database right. The fact that the data are made available via an intermediary does not therefore mean that the author is also waiving the copyright or database right that may apply to the data. If consent is required for the data to be used, it will be necessary to contact the author. This is only different if the author has already given consent in advance for certain actions, for example by including a Creative Commons licence. In some cases, the author of a protected work indicates in advance that he already grants consent for certain actions. He may do this by attaching a statement to that effect to the work, indicating that he already issues a licence to any potential user to use the work in a certain way. The Creative Commons licences are one popular standard. Authors can choose from a number of different licences that comprise particular conditions. Other people can then see at a glance what use they are permitted to make of the work and no longer need to contact the author to negotiate about consent.

Creative Commons licences allow authors to make all kinds of works available – texts, photos, music, films, etc. – on licence conditions that they determine independently to suit their particular situation. The licences are available in a number of different versions and allow copyright-protected works to be made available subject to various different conditions: attribution required and/or no commercial use and/or no adaptations permitted (“share-a-like”) or adaptations permitted but with further distribution subject to the same conditions. In addition, the author can require payment to be made for the commercial use of his work. The licence conditions can be easily drawn up using the licence tool provided by the Creative Commons organization; this was adapted in 2010 to bring it into line with Dutch law. A wide range of different licences are available on the websites www.creativecommons.org and www.creativecommons.nl.29

SURF has expressed an emphatic preference for the most liberal of the Creative Commons licences, namely “Creative Commons Attribution 3.0 Netherlands Licence”. Using this licence creates the fewest possible obstacles to the future use of repositories. The Creative Commons Attribution 3.0

Netherlands Licence allows users to copy a work, distribute it and pass it on, and produce derivative works and distribute them on condition that the work is attributed to its author.\textsuperscript{30}

\section*{6. Privacy}

Privacy problems may arise if the research data concerned contain information about living persons. Personal data must be dealt with carefully because they give information about the person to whom they relate.

Information regarding living persons may be anonymized since it takes a disproportionate effort to trace the person to whom the information refers. Anonymized data is not covered by the Personal Data Protection Act \textit{[Wet bescherming persoonsgegevens, Wbp]} and can be used or shared with other people without concerns about privacy. Combining anonymized data with other data – which may also be anonymized – may in fact produce data from which the identity of the person concerned can be deduced. This means that anonymized data can become indirectly identifying data.

Indirectly identifying data are data that cannot be traced to someone directly but that enable – without a disproportionate amount of time and effort – the determination of the identity of the person to whom the information relates (as in the case of the combination of an uncommon occupation and the place where someone lives). The criterion of “without disproportionate time and effort” must be interpreted broadly: if it is possible to connect data with an individual by means of the tools available to a researcher, then the data concerned count as indirectly identifying data. Practically speaking, the data may still appear to be “anonymized” for the researcher but processing the data must be done in accordance with the provisions of the Personal Data Protection Act. From the privacy perspective, the most sensitive data is directly identifying data, i.e. collections of data which immediately reveal the identity of the person to whom they relate. This may occur if, for example, a person’s name and address are given, a telephone number, a bank account number, etc. Both directly and indirectly identifying data are regarded as personal data and are subject to the provisions of the Personal Data Protection Act.\textsuperscript{31}

It is important that the results of the research are published in such a way that it is absolutely impossible to trace them to the persons concerned, unless those persons give consent for that to be done. Under Dutch law making data available to fellow researchers – not only the research results but also the raw data on which those results are based – is permitted under certain conditions, even if personal data within the meaning of the Personal Data Protection Act are concerned. The most important condition is that the fellow researcher who receives the data is bound by the same rules for careful use, as described in the various codes of conduct.


\textsuperscript{31} Section 16 of the Dutch Personal Data Protection Act.
Providing data to fellow researchers outside the European Union is more problematic: it is only permitted if the country concerned guarantees an appropriate level of protection. The United States, for instance, does not have legislation regarding the protection of personal data. The European Commission has stipulated that an appropriate level of protection can only be deemed to exist in the case of organizations that have undertaken to comply with the “Safe Harbour Principles”. These principles are intended to guarantee that organizations in the United States and in the European Union that process personal data do not act contrary to the guarantees set forth in the EU directive on the protection of personal data (Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data). Data may, however, be provided if the person concerned has granted unambiguous consent for this to be done. It is therefore advisable when collecting personal data for scientific/scholarly purposes to immediately request consent for sharing the data with colleagues, including perhaps colleagues abroad.

32 Section 76 of the Dutch Personal Data Protection Act.