The legal status of research data in Denmark

Annex 2 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 Denmark can be restricted by three different regimes of intellectual property protection: copyright, the database right and the catalogue rule.

Copyright

Research data are seldom copyright protected in Denmark as they are considered to be facts in the public domain. This means that facts can be used freely. If they are protected, for example, as (part of) an original database, the following main actions can be carried out without consent:

- Copying and using bare facts of a work;
- Citations;
- Copying and using acts, administrative regulations, case law and preparatory legislative reports;
- Copying a work for personal use (excluding the right to make a digital copy for use outside the household or to make a digital copy of a database).

Database right

A collection of separate data elements may constitute a protected database under the Database right, if these have been arranged systematically and the elements can be traced individually. It is also a requirement for database protection, however, that there has been a “substantial investment” in the creation of the database itself. The investment made in the creation of the data (the research), however, does not count towards the substantial investment requirement.

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 (re-utilization);
- 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.

Consent is not required for the following actions¹:

- Using a government database consisting of acts, administrative regulations, case law etc. (sources with a normative binding character).²

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¹ There is no explicit exception included in Danish law on the use of a database for scientific/scholarly research if no substantial portions of the database are published (reused). However, due to the exception in the Database Directive (art 9.(b) 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) Danish law should be interpreted in such a way that this exception is in place in order to be in line with European law.

² In fact, no government database containing the case law of the courts exists in Denmark.
The Catalogue rule

The Danish Copyright Act contains neighbouring rights protection for various types of objects which are not considered to be literary or artistic works. The catalogue rule, a common Nordic rule, protects catalogues, tables and the like and databases which do not fulfill the originality requirement. The term catalogue is to be understood broadly as it offers protection to various types of systematic collections such as telephone directories, pricelists, registries etc. A collection of research data organized systematically may qualify for this protection if it contains a substantial amount of information or is the result of a substantial investment. Given the fact that the protection offered is nearly identical to database protection, the catalogue protection is relevant when research data do not meet the requirements for database protection, for example, because there has been no substantial investment in the database.

However, research data that meet the requirement for database protection, except for the requirement of a “substantial investment”, cannot be protected by the catalogue rule since the decision in the Ofir case. The catalogue rule has lost most of its relevance. Catalogues (or data collections), tables and matrixes that contain a substantial amount of information without being databases in the legal sense, for example, because they lack a system for tracing individual elements (this is unlikely) may still enjoy catalogue protection.

Personal research data

If research data contains information about living persons’ privacy, restrictions may arise. The Personal Data Act is based upon the European Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data. If research data contain personal information about living persons, they must comply with the regulation contained in the Personal Data Act.

This law applies to personal information which may directly identify a person such as a name, address or personal identification number and to information which may indirectly identify a person. If a researcher wants to obtain personal data, for example, by means of surveys or interviews, the person(s) concerned must give their explicit consent. When a research project has been completed, the personal data must be destroyed or anonymized. A researcher may only share personal data with other researchers after having obtained specific authorization from the Data Protection Agency.

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3 Danish Maritime and Commercial Court, UFR 2006.1564SH, Ofir.
4 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.
### In what way do you want to use existing data?

<table>
<thead>
<tr>
<th>What is required?</th>
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<tbody>
<tr>
<td>To copy bare facts and put them in a personal context.</td>
</tr>
<tr>
<td>To make a copy of data for your own use.</td>
</tr>
<tr>
<td>To put data into a personal database/archive without sharing it with anyone else besides your own research team.</td>
</tr>
<tr>
<td>To cite data.</td>
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<tr>
<td>To copy or make available data made by the authorities (e.g., laws).</td>
</tr>
<tr>
<td>To copy a non-substantial portion of a database or catalogue.</td>
</tr>
<tr>
<td>To make existing data available to persons other than your research team (including publishing).</td>
</tr>
<tr>
<td>To copy data.</td>
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</tbody>
</table>
Fig. 2: Use of research data protected by intellectual property rights
1. Legal status of research data

1.1 Introduction

In this chapter an overview is provided of the legal status of research data in Danish law. The chapter deals primarily with two legal regimes regulated in the Danish Copyright Act (Ophavsretsloven) that may offer intellectual property right protection for research data; the protection of original works contained in Chapter 1 of the Danish Copyright Act and the protection of certain neighbouring rights such as relating to databases, catalogues and tables contained in Chapter 5 of the Act. This chapter on Danish law incorporates some of the findings in a Danish report from 1998 on rights problems in research co-operation. New developments and relevant aspects which were not dealt with in this report have been taken into account. An interview with one of the authors, Prof. Mads Bryde Andersen, took place in Copenhagen on the 23rd of February 2011.

1.2 Definition of research data

There is no legal definition of the term research data in intellectual property law. In the SURF report on Dutch law an effort has been made to further clarify this term and it has been taken as a point of reference in the introduction to this report.

1.3 Plan of discussion

This report on Danish law is structured to serve the purpose of a comparison between the legal regulations in place in Dutch, UK, German and Danish law. This means that the structure is based upon a functional approach and structure which fits the legal structure of all jurisdictions. Consequently, the report begins with an observation on the intellectual property regime concerning original works in chapter 1 (Danish Copyright Act), followed by the legal protection of databases in chapter 2 (Copyright Act). Thereafter, the protection of neighbouring rights will be discussed, followed by other unregulated protection in chapter 3 (primarily the Danish catalogue rule contained in section 5 of the Copyright Act).

The protection of original works, on the one hand, and the protection of databases and catalogues on the other, is fundamentally different concerning the object of protection. In the first category, the object is an individual creative work of an author (a natural person) whereas the second category concerns an object created through “effort” and investment (by a natural person or legal entity).

Databases and catalogues have in common that they protect the “effort” and investment rather than the individual creative work. The Danish regulation of the protection of databases which is based upon the European Database Directive has been implemented in a simplistic (but inadequate) way into the existing provision providing for the protection of catalogues, thereby providing, principally, the same type of protection for “non-original” databases and catalogues. Nonetheless, it may be justified to deal with them individually in chapters 2 and 3 considering that the basis for database protection is the

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European Database Directive while the catalogue rule, which has a common Nordic origin, has existed for a longer period of time.\footnote{Directive 96/9 EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, hereafter referred to as EU Directive 96/9.}

Chapter 4 deals with the privacy regulation of personal data. Finally, chapter 5 contains a short conclusion.

## 2. Copyright law

Copyright provides the author, i.e., the creator or maker of a “work” (værk), with the exclusive right to control that work. This means that the author’s consent is required if another person wishes to use the work in a way that requires consent. The author is referred to as the “copyright holder” (ophavsmanden).\footnote{The law sometimes designates copyright to a work to somebody other than the author; see section 2.4.}

Copyright protection only applies to literary or artistic works including certain composite works and translations/adaptations that fulfil the originality requirement. This will be further elaborated in section 2.2.2. In a research context, copyright is likely to apply to books, articles and presentations based upon research data. However, the research data themselves (the bare facts, measurements or other types of information) are not likely to be protected by copyright no matter how new, original or even creative they are.\footnote{Guide UBVA, p. 9, interview with Mads Bryde Andersen 23.02.2011.}

If copyright does apply, it is not necessary for the work to bear the “copyright notice” (©). The copyright notice only indicates that the work is copyright protected. It is important to note that works sometimes bear the copyright notice even though they do not fulfil the requirements for copyright protection.

### 2.1 Owner or right holder?

The leading question in this report is “who owns the data”. It should, however, be noted that the relevant question in intellectual property law is the following: who is the “right holder” of certain types of protected work or data, rather than who is the “owner”? Nonetheless, the ownership of the physical medium as opposed to the protected rights in a work may be relevant in a research context. It is possible to claim “ownership” or rather the right to dispose of the physical medium where the data is collected or stored, for example, the research protocol, cd-rom or other medium by the person/institution that has collected and stored the material. The question is then whether the physical ownership may be used to prevent others from gaining access to this material. This is not an aspect of intellectual property law.

Illustrative is a decision concerning “ownership” or the right to dispose of a collection of frozen human tissue samples. A former senior consultant who had worked at a pathological institute as a visiting professor/researcher had removed a large amount of these samples from the institute. The samples were stored at the institute and there were digital records as well as a security copy kept by the
manager of the laboratory. The senior consultant considered the samples to be research material which he himself had collected and decided to store during his employment for research purposes. The question was whether removing those samples was lawful or whether it amounted to a criminal offense. The court found that the samples which largely had been collected by the consultant during his employment and which had been stored at the institute (and at the cost of the institute) continued to be a patient-related and sensitive material. As such, the samples were the responsibility of the institute and they had the right to dispose of the samples. The court further found that there was a public scientific interest in keeping the samples available in a public system for scientific purposes. The consultant was neither the “owner” of the samples nor did he have the right to dispose of the samples and he was therefore criminally convicted for the removal of the samples.  

It is generally acknowledged in administrative case law and guiding statements that a researcher who happens to physically possess a collection of (unprotected) data cannot use this possession to exercise “indirect ownership” over this collection to the detriment of the other researchers involved. This may qualify as a breach of contract. It is also generally acknowledged that a researcher who leaves the research project has a right to receive the (unprotected) data which he/she was meant to work with subject to the contractual and other regulations applicable to the research project.  

There is no obligation to publish or share research data in intellectual property law. If, however, the research has been funded (wholly or partly) by public means, there is an obligation for the researcher(s) to make use of and to publish research results when the research has been completed. There are no exact time limits given, but in the context of research results where a patent is possible, a two-month period is considered acceptable. The protection of intellectual property rights plays a role with respect to what is considered to be an acceptable time limit.  

2.2 When may research data be protected by copyright?  

2.2.1 The form of the work  

In order for copyright to apply to a work, the work must be deemed to be a literary or artistic work whether it appears in written form or is expressed in speech as a fictional or a descriptive representation, or whether it is a musical or dramatic work, cinematographic or photographic work, or a work of fine art, architecture, applied art, or expressed in some other manner. Copyright protection is thus not limited to particular forms; the work must, however, be deemed to be a literary or artistic work.  

The common feature of literary works is that they are constructed by letters and characters. For artistic works there are, in principle, also no limits to the types that may be protected as long as they represent an original artistic expression.  

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12 Act on universities, Bekendtgørelse af lov om universiteter, Consolidated Act No. 754 of 17.06.2010, Art. 2(3). Regulation for Copenhagen University, No. 50.09, Regelsamling for Københavns Universitet, Retningslinier for universitets samarbejde med private virksomheder, Section 5. Guides to good scientific practices, Vejledninger i god videnskabelig praksis, The Danish Committees for scientific Dishonesty (UVVU), 2009, Chapter 5.8.  
13 Art. 1(1), Compilated Copyright Act, Bekendtgørelse af lov om ophavsret, LBK No. 202 of 27.02.2010, hereafter referred to as Copyright Act.  
The work must be “expressed” and it is the expressed form that enjoys protection. This means that mere thoughts which have not been expressed cannot be protected. Research data will generally have been written down or recorded digitally but also research data expressed orally can, in principle, be protected by copyright.

### 2.2.2 General criteria

If a work is to enjoy copyright protection it must be deemed to be a literary or artistic work and express a certain independent and creative activity on the part of the author. One generally speaks of an originality requirement although this cannot be deduced directly from the wording of the Copyright Act but may be considered to be inherent in the term “work”. The originality requirement is not easy to define. In fact, many definitions are available. Further, it may vary with the type of work involved and it is consequently up to the courts to develop this concept on a case to case basis. Generally, it is presumed to entail that the work must have been created by the author’s personal creative effort.\(^{15}\)

The fact that the work must be created by the author means that information in the public domain is excluded from copyright protection. Unprocessed facts and information cannot be protected by copyright. It further means that there must be an author who is a human being – “the person” in the wording of the Copyright Act. Works created by a machine cannot be protected by copyright. A certain amount of creativity indicated by personal choice/freedom is required.\(^{16}\) Pure craftsmanship cannot be protected by copyright. Further, it must not be purely reconstructive but have a “new” character. This means that exact copies cannot be protected by copyright. That it must be “new” is subjective to the author/creator, meaning that he/she must believe that it is a new creation. If two or more authors/creators create the same work independently of each other, the works may be subject to copyright irrespective of the time of publication.\(^{17}\)

The originality requirement may generally be considered to be a mild one, for example, with respect to traditional literary works, such as books, articles etc. It may, however, become stricter with respect to certain works where society has an acknowledgeable interest in not providing the author with an exclusive right. This may, for example, play a role in the strict application of the originality requirement with respect to legal contract forms. Appropriate legal forms should not be subject to exclusive rights.\(^{18}\)

To determine if a work fulfills the originality requirement one may use the “double creation criterion” (dobbeltskabelseskriteriet) as a guideline. If it is inconceivable that two persons could create the same work, then the work is more likely to be original. On the other hand, a work is not likely to be original if it is conceivable that two persons independent of each other could create the same work.\(^{19}\)

It should finally be noted that it is not a requirement that the work has a high quality.\(^{20}\)

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16 Schovsbo and Rosenmeier, 2011, p. 64.
17 Guide UBVA, p. 11.
18 Schovsbo and Rosenmeier, 2011, p. 65.
19 Supra, p. 65-66. The criterion was used by the Supreme Court in a decision concerning a computer program for betting, UFR 1993.17H.
20 Schovsbo and Rosenmeier, 2011, p. 66.
2.2.3 Copyright-protected research data

The question whether research data are protected by copyright must be based upon the criteria discussed above, meaning that they must be original (personal creative effort) and be deemed to be a literary or artistic work. There is no case law on the matter. The reason for this may be that conflicts between researchers, employers and others are likely to be solved outside the courts, for example, by bringing these conflicts before the Danish Committee on Scientific Dishonesty (UVVU) for a guiding statement by the Committee for the Protection of Academic Work (an academic labour organization). There are also not many administrative decisions or guiding statements on this matter. Generally, it seems prudent to say that copyright protection will only rarely arise with respect to “raw” research data since they are considered to be facts in the public domain. Copyright may, however, arise with respect to certain elements (maps, diagrams and photographs discussed in section 2.2.4 below). Further, it would seem to be possible that research data could consist of original elements such as qualitative interviews processed with a certain creativity on the part of the author or that they concern originally adapted texts of historical material such as a transcript (the rewriting of an old Gothic handwritten text) which the UBVA (the Committee for the Protection of Academic Work) considered to be a copyright-protected adaption. A table consisting of numbers will not qualify as a literary work. A table is specifically mentioned in the catalogue rule (neighbouring rights protection, see section 4.1).

Research data consisting of collections qualifying as composite works and databases are perhaps more likely to be copyright protected. This is dealt with below in section 2.2.5.

2.2.4 Other kinds of data: photographs, maps, diagrams, etc.

Data presented in a visual form such as photographs, maps and diagrams may also be covered by copyright if they fulfill the originality requirement. Photographs (also including x-rays) which do not fulfill the originality requirement enjoy a neighbouring right protection as photographic pictures pursuant to Chapter 5 in the Copyright Act. This protection includes all photographic pictures; from private holiday pictures to medical x-rays and also pictures produced by a surveillance camera. It does not protect pictures produced through photocopying, microphotographing and computer fabricated pictures. The main difference between the two types of protection is the length of the protection: photographic works are protected for seventy years and photographic pictures for fifty years. It is not easy to draw a clear distinction between the two types of protection.

If photographs are to be copyright protected as works they should be the result of an independent creative effort (lighting, angle, choice of motive etc.). This is often not the case with photographic research material, for example, x-rays, when it is often diagnostic purposes that dictate how the x-ray

22 Supra p. 10-11. The guiding statement concerning a transcript is elaborated in further detail in Section 2.4.2 below.
23 Art. 1(1), (photographs – artistic works) and 1(2) (maps and diagrams – literary works), Copyright Act.
24 Art. 70, Copyright Act.
is made. It is probably the main practical rule that x-rays are considered to be photographic pictures and not works.²⁶

2.2.5 Copyright-protected composite works and databases
The protection of composite works and databases are closely connected considering that the copyright-protected composite works will often correspond with the legal definition of a database in the European Database Directive. Consequently, composite works will normally be databases in the sense provided by the EU Directive.²⁷ It should be noted that the Danish rules on copyright protection for composite works and databases have not been amended in connection with the implementation of the EU Directive. This leads to some consistency questions concerning the relevant criteria for the copyright protection of composite works and databases.²⁸

Composite works (of copyright-protected literary or artistic works) are protected according to the Danish Copyright Act if the originality requirement is met.²⁹ A composite work consisting of unoriginal elements may also enjoy protection as a work.³⁰

Originality in a composite work may be present by the way the individual elements have been grouped and systemized or in the selection of individual elements. The grouping of individual elements numerically, chronologically or alphabetically will not meet the originality requirement. A complete collection of works (for example, all the author’s works) will not constitute an original selection. Databases may enjoy copyright protection.³¹ The Danish Copyright Act does not provide specific criteria for the copyright protection of databases other than those discussed above in respect of composite works.

From the European Database Directive it follows that databases which, by reason of the selection or arrangement of their contents, constitute an author’s own intellectual creation shall be protected as such by copyright. The European Database Directive also states that no other criteria shall be applied to determine eligibility for that protection.³² It is not entirely clear if this provision has extended or changed the scope of copyright protection for databases.³³

In a research context, it should be noted that research data collections are likely to be stored in a way which meets the legal definition of a database in the European Database Directive (a collection of individual data arranged in a systematic or methodical way and individually accessible by electronic or other means). The question then is whether there has been a “selection or arrangement of contents” so that it constitutes the author’s own intellectual creation. This will generally not be the case if the collection contains all “raw” research data. If, however, there has been a selection based upon the researcher’s own choices or the data have been structured in an original way, it is conceivable that copyright protection could arise. There is, as yet, no relevant published case law.

²⁶ Guide UBVA, p. 10.
²⁷ Schovsbo and Rosenmeier, 2011, p.93. Art. 1(2), EU Directive 96/9 defines databases as: A collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means.
²⁹ Art. 5, Copyright Act.
³⁰ Art. 1, Copyright Act. see further: Schovsbo and Rosenmeier, 2011, p. 92.
³¹ Art. 71(3), Copyright Act.
³² Art. 3(1), EU Directive 96/9.
2.2.6 How copyright protection arises
It is not necessary to carry out specific actions for copyright to arise. The protection comes into place automatically when an original literary or artistic work has been expressed.\textsuperscript{34}

2.3 What actions require consent?
If research data should qualify for copyright protection (and this is not likely as explained above), the question is which actions then require the consent of the author. This section deals with the actions requiring consent and the main exceptions.

2.3.1 Some elements of the work are not subject to copyright
Not all elements of a work are subject to protection. Protection only applies to the text itself (of literary works), the arrangement or the structure. The expressed ideas, theories and opinions as well as data in the public domain are not protected.

2.3.2 What use is subject to copyright?
Copyright confers upon the author(s) the exclusive right to control the work by reproducing it and by making it available to the public, whether in the original or in an amended form, in translation, adaptation into another literary or artistic form or into another technique.\textsuperscript{35} Consequently, two exclusive rights exist:
- Reproduction;
- making available to the public.

Reproduction entails making physical copies, which makes it possible to use the work such as producing books and articles, CDs, DVDs, magnetic tapes and digital media.
The exclusive right to make a work available to the public includes the right to spread the work to the public (sale, lease or loan), to public display (of physical copies) and to public transmission (also including file sharing and deep linking).

2.3.3 Exception: works produced by the authorities
Consent is not required to use certain works produced by the authorities. This applies to Acts of Parliament, administrative regulations, court rulings, administrative decisions and similar public documents such as preparatory legislative reports. These are not subject to copyright.\textsuperscript{36} Independent contributions to legislative reports such as preparatory reports which have been implemented in the final report may be subject to copyright. Nonetheless, these may be reproduced together with the unprotected documents.\textsuperscript{37}

\textsuperscript{34} Art. 1, Copyright Act and Art. 5(2), Berne Convention.
\textsuperscript{35} Article 2(1), Copyright Act.
\textsuperscript{36} Article 9, Copyright Act.
\textsuperscript{37} Article 9(2), Copyright Act.
The main criterion determining whether public documents are protected or not is whether the
documents create legal rights or duties (not protected) or not (may be protected); in other words, the
exception applies to documents which have a certain normative binding character.  

Public statistics will not fall under the exception as they do not create rights or duties. Statistics
Denmark, a public body, generally stipulates that the information is protected by the Copyright Act.
This will generally mean that the information is protected as a database or catalogue/table since the
statistics themselves are not likely to qualify as an original literary work. Publications containing
processed statistics are likely to be copyright protected as a literary work.

It should be noted that an Act was passed in 2000 on the reuse of public sector information (Lov om
videreanvendelse af den offentlige sektors informationer). 39 This Act is based upon the European
Directive on the reuse of public sector information. 40 The Act establishes common minimum rules for
the reuse of public data for commercial and non-commercial purposes. Data produced by public
authorities with a commercial purpose are not covered by the Act. Further data covered by the
intellectual property right of a third person are excluded.
The general principle is that a researcher can make a request to a public authority for the use of public
data. The use of public data may be contingent upon the payment of a fee. Such a fee cannot,
however, exceed the cost of making the data available. The public authorities that have data available
are registered on www.digitaliser.dk. They include the statistics (statistikbanken) of Statistics
Denmark.
There is a general prohibition on the granting of an exclusive right with respect to available public
sector information. Such may, however, be granted in specific situations where it is necessary for the
delivery of a service in the public interest.

2.3.4 Exception: citations
A person may cite from a work which has been made public in accordance with proper usage and to
the extent required for the purpose. 41 Citation means to take over a small part of a work to include it in
a new work. It is only a citation if the citation concerns something which in itself fulfills the originality
requirement. 42 This means that one may freely use unprotected data (also if these data have been
incorporated into a copyright-protected work). 43 Citation should be separated from the concept of
covering a work and the possibility to use certain descriptive works (maps and drawings) in critical and
scientific presentations. 44

A researcher wishing to cite from data should keep the following in mind:
- Are the data copyright protected? If not, one is free to use data that have been made public. It is
  not a citation;

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38 Western High Court, UFR 1995.782V.
39 Act No. 596 of 24.06.2005 with later amendments.
  information.
41 Art. 22, Copyright Act.
42 Schovsbo and Rosenmeier, 2011, p.188.
44 Art. 23(1), Copyright Act.
• copyright-protected data should have been made public. One should not cite from works that have been communicated only to a small circle, for example, to receive comments before final publication;

• if the data are copyright protected, the author must be named and the source of the citation must be given;

• the citation must not go beyond what is considered normal in that research field. Normally, one should only cite a modest part of the protected work and this part should also be a modest part of the new work;

• covering the work (without too many details) is not a citation and consequently is not subject to the citation rules (the author and source must be named, however);

• certain descriptive works such as maps and drawings may be used in non-commercial critical or scientific presentations without the consent of the right holder (the author and source must be named, however).

2.3.5 Exception: private copy
A natural person is entitled to make a paper copy of a copyright-protected work for private use if this is not done for commercial purposes. This also applies to researchers making a paper copy for themselves or a close colleague. A digital copy is also allowed, although this is restricted to the goal of personal use and use within one’s household (eliminating the possibility of a researcher making a digital copy for himself or for a close colleague). A copyright-protected database is not covered by this rule. It is not allowed to make a digital copy if the copy is made on the basis of a reproduction of the database in digital form.

2.3.6 Exception: extended collective licence
In a number of situations, the consent otherwise required for the use of a work is not required because of the use concerned, for example, reproduction has been regulated through an extended collective licence. This may be the case, for example, within educational activities and within business enterprises which may comprise both private and public institutions, organizations and business enterprises. A university or other research facility is likely to be covered by an extended collective licence with respect to different types of works.

The use which can be made is stipulated in the relevant provision of the Copyright Act and further regulated in the extended collective agreement. For use in a public or private research facility (a business enterprise) this means, for example, that internal use for the purpose of their business activities includes: photocopying, making or having copies made of descriptive articles in newspapers, magazines and collections, of brief excerpts of other published works of a descriptive nature, of

45 Art. 12, Copyright Act.
47 Art. 12(2), No. 5, Copyright Act.
48 Art. 12(2), No. 4, Copyright Act; Karnov Legal Commentary to the Copyright Act, Karnovs Lovsamling, Comment 75, (March 2011).
49 Arts 13 (educational activities) and 14 (business enterprises) in connection with Art. 50(1) Copyright Act.
musical works and of illustrations reproduced in association with the text if such are covered by the agreement.\textsuperscript{50}

2.4 Who is the right holder?
If research data or parts of research data qualify for copyright protection, it is relevant to determine who holds the rights to the work as this person has the exclusive right to determine whether the work may be reproduced or made available to the public. The right holder of copyright is generally the author/creator of a work and consequently the person who may consent to its use by third parties. The rights of the author may, however, belong to someone else.

2.4.1 Shared copyright or the involvement of a superior
If the copyright-protected work has been created by more than one person, it may not be clear who is considered to be the author and thereby the right holder. Research data are often collected by a group of researchers and this situation is therefore likely to arise. If the individual contribution of the researchers cannot be separated into individual works, they hold the rights together. It is then a "joint work" (fællesværk).\textsuperscript{51} This means that they can only exploit the work together.
If the work, on the other hand, was created under the direction of a superior whose ideas and directions were followed and the effort of the employee(s) was secondary and unoriginal then the superior may be deemed to be the author of that work.

2.4.2 Cases in which the law allocates copyright
The Danish Copyright Act does not contain a general provision concerning the allocation of the employees’ copyright or a part thereof to the employer.\textsuperscript{52} Only with respect to computer programs does the Copyright Act stipulate that the copyright is transferred to the employer.\textsuperscript{53}
In other situations, a general principle derived from case law and legal theory applies. This principle entails that:
Unless otherwise agreed, the employer will only be allocated with the elements of the employees’ copyright which are necessary for the employer’s normal business activities at the time when the employee created the work.
Accordingly, the employer is not allocated with the copyright of the employee but only with “necessary elements” depending upon the normal business activities of the employer. The work must have been created as part of the employer’s working assignments for this principle to apply. University researchers will generally retain the copyright to books and articles (and presumably to research data if they are protected by copyright) considering that the publication thereof is not considered to be the “normal business activity” of the universities. Copyright with respect to examinations and e-learning will normally be allocated to the university as this belongs to its “normal business activity”.\textsuperscript{54}

\textsuperscript{50} Art. 14(1), Copyright Act.
\textsuperscript{51} Art. 6, Copyright Act.
\textsuperscript{52} The introduction of such a general provision has been discussed most recently in a legislative preparatory report from 2006. The majority of the Danish Parliament decided in favour of the present situation, Commission report 1480/2006 and legislative proposal LS8 2007/2008.
\textsuperscript{53} Article 59, Copyright Act.
\textsuperscript{54} See further, Schøvsbo and Rosenmeier, 2011, p. 112-119.
In a guiding statement of the UBVA (the Committee for the Protection of Academic Work), the right holder to a transcription material (the rewriting of an old Gothic handwritten text) was considered to be the employee and not the university centre. The project had been planned by the employee together with a colleague. There were no specific agreements concerning the employment but the employee had presumed that he had the freedom to arrange his work and chose his methodology. The UBVA found that the employment contract in the present situation should be evaluated according to the rules which are applicable to scientific employees employed at universities and other higher learning institutions. For such employees, the legal understanding is that copyright to works and elements of works which originate from the employment belongs to the employee. The fact that the employee’s salary was paid by public funding (a job creation scheme) was to be considered as funding by a foundation. The UBVA found that the transcription was comparable to a translation or adaptation protected by copyright and that the completed text could also be subject to protection as a catalogue (neighbouring right). The employee, consequently, could not be obliged to hand over the unfinished product.

2.4.3 Cases in which contractual provisions may be relevant
There are a number of situations in which contractual provisions are relevant when deciding who the copyright holder is. In the first place, it should be noted that the (economic) exclusive rights of the right holder are transferable (as opposed to the droit moral rights whose transferability is limited). The author(s) of a work may have transferred the exclusive rights in whole or in part to another person or legal entity. This can be done in advance or after the work has been completed.

2.5 Reusing protected data: sometimes there is double copyright
If a researcher includes copyright-protected data (data considered to be a copyright-protected literary or artistic work) in his/her own collection of research data, this person must secure the consent of the right holder. The question is then: what is the status of the new collection? The new collection may be deemed to be a composite work which also includes databases (of copyright-protected works). In order to achieve copyright protection the new collection must be original (for example, by the way it has been grouped, systemized or through selection) and the elements belong to the protected categories of literary or artistic works. If this is the case, the situation arises where a new user/researcher may need double consent in order to include the new collection in his/her own research data.

55 Art. 4(1) and 71, Copyright Act.
56 Guide UBVA, p. 11.
57 Art. 3, Copyright Act.
59 Art. 5, Copyright Act.
60 Schovsbo and Rosenmeier, 2011, p. 92-93.
Example
Researcher A puts together a collection of data (c). He includes an original text (t) produced by researcher B. This text is protected by copyright. A needs to secure the consent of B if he intends to use B’s text in a manner that requires consent, for example, publication on the internet. If researcher C then wishes to include the text (t) produced by researcher B in a publication he will need to obtain consent from B. However, if C wishes to use the entire collection of data (c) in a manner that requires consent, for example, to include the whole collection in his own data collection and to make this public on the internet, he will need to seek the consent of both researchers A and B. A has the copyright to the collection (c) – the way in which it has been grouped, systemized or the selection – as well as copyright to his/her own original elements while B has the copyright to his individual element (t).

2.6 Summary
Research data are seldom copyright protected as they are considered to be facts in the public domain. This means that the facts can be used freely. If they are protected, for example, as an original database or parts of a database, the following main actions can be carried out without consent:

- Copying and using bare facts of a work;
- citations;
- covering the work;
- copying and using acts, administrative regulations, case law and preparatory legislative reports;
- copying a work for personal use (excluding the right to make a digital copy for use outside the household or to make a digital copy of a database).

3 Database right
A collection of data may be subject to protection as a database by the database right. In Danish copyright law database protection belongs to the legal category of “neighbouring rights” (naboretten) regulated in section 5 of the Copyright Act.⁶¹ The protection of databases which is based upon the European Database Directive was incorporated into the existing “catalogue rule”.⁶² Consequently, Article 71 affords protection to catalogues, tables, databases and the like where a substantial amount of information is collected or is the result of a substantial investment.

The criterion “substantial amount of information” stems from the wording of the original catalogue rule whereas the criterion “substantial investment” is taken from the implemented European Database Directive. The implementation of the EU regulation on databases in the existing catalogue rule has given rise to many legal questions concerning the scope of the provision.

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⁶¹ Art. 71, Copyright Act.
In the first place, the question is whether Danish law also offers a more widespread protection for databases, for example, because they contain a “substantial amount of information” without being the result of a substantial investment. This question must be answered in the negative considering that the European Database Directive intended to harmonize database protection in the EU. The Danish regulation must consequently be interpreted in accordance with the European Database Directive and EU case law. This means that the wording “substantial amount of information” can be considered to be unwritten with respect to databases.\textsuperscript{63} The second question is how the implemented database protection influences the protection of catalogues (this issue will be addressed in section 4.1).

A database in the legal sense must be defined as a collection of independent items, arranged in a systematic or methodological way and individually accessible by electronic or other means which is the result of a substantial investment.\textsuperscript{64} This definition consists of three essential elements:
- The database must consist of independent elements;
- the database must be searchable or systematically arranged so that individual elements are traceable;
- there must have been a substantial investment in the database.

All three elements must be present if a collection of data is to be considered a database in the legal sense. It is possible that a collection of data that does not meet these requirements qualifies for protection as a catalogue or table pursuant to the catalogue rule (see section 4.1).

3.1.1 Collection

In a legal sense, a database must contain a collection of independent elements; in other words, elements which are separable without losing their substantive value or meaning. This may encompass works covered by copyright and data such as figures, code words, descriptions and photographs. There are no requirements as to the size of the database as long as the other requirements are met. Further, a database does not have to be in an electronic form. The database can be recorded on a data medium which can be a paper medium as well as a digital medium or distributed between different media; in other words, it does not need to consist of only a single computer file or book.

3.1.2 Searchability

The elements of a database must be arranged in a systematic or methodological way and be individually accessible. This means that the elements must be traceable requiring a method for accessing them, such as a search function or indexation.

3.1.3 Substantial investment

In determining whether there has been a substantial investment, it is important to distinguish between an investment concerning the database itself (obtaining, presenting and verifying the contents) and the

\textsuperscript{63} Schovsbo and Rosenmeier, 2011, p. 101.
\textsuperscript{64} Art. 1(1), EU Directive 96/9.
creation of these data themselves. If the investment mainly concerns the creation of data, the database is not protected.\textsuperscript{65}

The investment in a database containing research data will often not meet the requirement of a substantial investment because the main investment will concern the creation of data rather than obtaining, presenting or verifying existing data and will consequently not be a protected database. If, however, existing data are used and there is a substantial investment in the obtaining, presenting or verifying thereof, then the database is protected.

It should be noted that a database can still be protected even if the database contains one’s own research data, if there has been an independent substantial investment in the obtaining, presenting and verifying of the data (independent from the creation thereof).\textsuperscript{66}

### 3.2 What actions require consent?

The exclusive rights of the database producer defined in the Danish catalogue rule have been implemented with a different terminology as defined in the European Database Directive. The Danish regulation of databases is succinct with many references to Danish copyright legislation, for example, with respect to the understanding of terms such as “making available to the public” or “making copies”. The Danish regulation must, however, be understood in light of the directive’s terminology and the guiding case law of the European Court of Justice.\textsuperscript{67}

#### 3.2.1 Extraction and re-utilization

If a database meets the legal criteria explained in the previous section, then the person or legal entity that produced it has the exclusive right to control the product as a whole or an essential part thereof by making copies of it or by making it available to the public.\textsuperscript{68}

This also applies to a reproduction, or making available to the public, of insubstantial parts of the contents of a database which is made repeatedly and systematically, if this use conflicts with the normal exploitation of the database or which unreasonably prejudices the legitimate interests of the producer.\textsuperscript{69}

Consequently, consent is required if one wants to:

- Make copies of the entire database or essential parts thereof (re-utilization);
- make the entire database or essential parts thereof available to the public (extraction);

\textsuperscript{65} European Court of Justice, 09.11.2004, C-46/02, C338/02, C444/02 (Fixtures), C-203/02 (British Horseracing Board). The results of these four cases have been followed by the Danish Maritime and Commercial Court (a specialized High Court) in a case concerning the database of a real estate agent containing information about properties for sale. The court found that the database was not protected, the reason being that the database was to be regarded as essentially derived from the main activities of the real estate agent (the sale of properties, advertising and presentation) and thus not a database in the legal sense consisting of collected already existing material, UFR 2006.1564SH (Ofir), Schovsbo and Rosenmeier, 2011, p. 100. The result is discussed by Rognstad in O. Rognstad, “Kommentar til Sø- og Handelsrettes dom av 24.02.2006 Ofir) II. Falder boligdatabaser utenfor databasevernet, og kan vernet suppleres af Markedsferingsloven?”, NIR, 2007, p. 411-417.

\textsuperscript{66} Schovsbo and Rosenmeier, 2011, p. 100.

\textsuperscript{67} Schovsbo and Rosenmeier, 2011, p. 145-146.

\textsuperscript{68} Art. 71(1), Copyright Act.

\textsuperscript{69} Art. 71(2), Copyright Act.
• make copies of, and/or make available to the public, insubstantial parts of the contents of the database when the use is made repeatedly and systematically (repeated and systematic acts of re-utilization and extraction).  

A researcher can consequently make a copy of non-substantial parts of the content of the database and use these parts in a publication without consent unless this is done repeatedly and systematically. In principle, it is not allowed to make a digital copy of the entire database for private use.  

The lawful user, for example, the researcher working in an institution where the use is covered by an extended collective licence, may, however, perform such actions which are necessary for the person to obtain access to the contents of the database and make normal use thereof. This may include making copies and making the content available to the public; however, only in so far as is necessary for accessing the content and making normal use thereof.  

3.2.2 Substantial part

According to the European Database Directive the determination whether an extraction or re-utilization concerned is a “substantial part” of a work must be evaluated either quantitatively or qualitatively. A part will be quantitatively substantial if it concerns a large part of the entire database and qualitatively substantial if the part itself represents a substantial investment.

3.2.3 Exception: government databases

Government databases containing Acts, administrative regulations and similar public documents such as preparatory legislative reports which are not subject to copyright (see section 2.4.3) are also not protected databases.

3.2.4 Consent, consultation and contractual arrangements

When consent is required for the re-utilization or extraction of a protected database, it is irrelevant if the database is generally available or, for example, is available as the result of an extended collective licence. Consent must be sought for the actions described above in section 3.2.1. While consent is not necessary for the inspection of a database or the borrowing of small quantities of information, it should be noted that this rule does not prevent the producer of a database from determining other contractual conditions. The producer may, for example, require payment for access to the database. Once a user has secured legitimate access to the database he/she can always re-use and extract non-substantial portions without further consent as this right cannot be contractually excluded.

71 Art. 71(1) in connection with Art. 12(2), No. 4, Copyright Act.
72 Art. 36(3) in connection with Art. 14 and Art. 50, Copyright Act.
73 Karnov Legal Commentary to the Copyright Act, Karnovs Lovsamling, Comment 251 to Art. 36(3), consulted 04.03.2011. See for the concept of an extended collective licence Section 2.3.6.
74 Schovsbo and Rosenmeier, 2011, p. 145.
75 Art. 71(5) in connection with Art. 9, Copyright Act.
76 Art. 36(2) and (3), Copyright Act.
If the database has been programmed to prevent certain actions such as printing or downloading data, the user is not allowed to circumvent such technical measures, even if such actions would normally be allowed.77

3.2.5 New databases and borrowing
While consent is required for the re-utilization and extraction of substantial parts of a database (and for repeated and systematic use of insubstantial parts), the creation of a similar or almost identical database based upon the same data is not necessarily an infringement of the protected database. After all, data are facts in the public domain. If, however, the data have been derived from the protected database in whatever manner has been used, for example, by writing down all the information/data or a substantial selection, then it will be an infringement. The new database should be created through the new “maker’s” own effort.

It may be relevant for a researcher to know to what extent he/she can borrow data from an existing database. While data are facts in the public domain and consequently are free to be used, this only applies to non-substantial parts of a protected database. A researcher is consequently not allowed to make a copy of the entire protected database whether the purpose is to include this in his/her own database or a new publication or for strictly private purposes.

It should be noted, however, that most databases containing research data will not meet the requirement of a “substantial investment” concerning the collection of data (and the investment concerning the creation of data is not relevant in this respect). Therefore most (published) research data will be in the public domain, free to use for any new research.

3.3 Who is the right holder?
The right holder in respect of a database is the natural person or legal entity who is responsible for the collection of the data (not necessarily the actual maker(s)) and who bears the risk of the investment in the database.78

3.4 Relationship to copyright
Database protection does not exclude copyright protection. An original collection of data may be copyright protected and a collection may contain copyright-protected works. If this is the case, the author must grant consent in order for the data to be used.

3.5 Summary
A collection of separate data elements may constitute a protected database, if these have been arranged systematically and the elements can be traced individually. It is, however, also a requirement for database protection that there has been a “substantial investment” in the creation of the database itself. The investment made in the creation of the data (the research) is not relevant for the substantial investment criterion.

If there is a protected database, consent is required for the following actions:

77 Art. 75c, Copyright Act.
78 Karnov Legal Commentary to the Copyright Act, Karnovs Lovsamling, Comment 394 to Art. 71(1), consulted 04.03.2011.
• Making copies of the entire database or essential parts thereof (re-utilization);
• making the entire database or essential parts thereof available to the public (extraction);
• making copies of, and/or making available to the public, non-substantial parts of the contents of the database when the use is made repeatedly and systematically (repeated and systematic acts of re-utilization and extraction).

Consent is not required for the use of a government database consisting of Acts, administrative regulations, case law etc. (sources with a normative binding character).\(^{79}\)

## 4 Neighbouring rights and other protection

The Danish Copyright Act contains neighbouring rights protection for various types of things which are not considered to be literary or artistic works, for example, performing artists, producers of sound recordings, photographic pictures or catalogues, tables and databases. This chapter deals with the catalogue rule. It also deals with the possibility of unregulated protection.

### 4.1. The catalogue rule

#### 4.1.1 General criteria

In cases where copyright does not apply to a collection of research data or only partially applies to certain works and the research data collection does not qualify as a protected database in the legal sense, for example because it does not involve a substantial investment, it must be considered whether the data are protected as a catalogue or table.\(^{80}\)

The catalogue rule, a common Nordic rule, protects catalogues, tables and the like (and databases, see section 3) which do not fulfill the originality requirement. A combination of copyright protection and catalogue protection is also possible.\(^{81}\) The term catalogue is to be understood broadly as it offers protection to various types of systematic collections such as telephone directories, pricelists, registries etc. There is no relevant case law with respect to research data.\(^{82}\) A collection of research data organized systematically may qualify for this protection if it contains a substantial amount of information or is the result of a substantial investment.

Given the fact that the protection offered is nearly identical to the database protection, the catalogue protection is relevant if research data do not meet the requirements for database protection, for example, because there has been no substantial investment in the database (see section 3.1.3) or perhaps, more unlikely, because the elements are not individually traceable (see section 3.1.2). Research data such as individual tables and matrixes could also be protected. The requirement is then that they contain “a substantial amount of information”.

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\(^{79}\) In fact, no government database containing case law exists.

\(^{80}\) Article 71, Copyright Act.

\(^{81}\) Art. 71(3), Copyright Act.

\(^{82}\) See the guiding statement of the UBVA concerning a transcript (the rewriting of an old Gothic handwritten text) which was considered to be a copyright-protected adaptation and where the collection upon completion could be considered to be a catalogue; Section 2.2.4.
It is important to note, however, that research data that meet the requirement for database protection, except for the requirement of a “substantial investment”, cannot be protected by the catalogue rule since the decision of the Danish Maritime and Commercial Court in the Ofir case in 2006. This case concerned the protection of a real estate agent’s database containing information about properties for sale. The court found that the database was not protected as a database because it was to be regarded as essentially derived from the main activities of the real estate agent (the sale of properties, advertising and presentation) and thus not a database in the legal sense consisting of collected already existing material. The database could also not be protected by the catalogue rule according to the criterion of a “substantial amount of information” because the European Database Directive implies a total harmonization of the protection of collections that are databases in the sense of the directive. The catalogue rule has consequently lost most of its relevance. Catalogues (or data collections), tables and matrices that contain a substantial amount of information without being databases in the legal sense, because, for instance, they lack a system for tracing individual elements may still enjoy catalogue protection.

4.1.2 Which actions require consent?

The actions that require consent are identical to those applying to databases. This means that the maker of a catalogue or a table has the exclusive right to control the product as a whole or an essential part thereof by making copies of it or by making it available to the public. This also applies to a reproduction of, or making available to the public, insubstantial parts of the contents of a catalogue or a table, which is made repeatedly and systematically, if this conflicts with the normal exploitation of the product or if it unreasonably prejudices the legitimate interests of the producer.

Consequently, consent is required if one wants to:

- Make copies of the entire catalogue/table or essential parts thereof;
- make the entire catalogue/table or essential parts thereof available to the public;
- make copies of, and/or or make available to the public, non-substantial parts of the contents of the catalogue/table when the use is made repeatedly and systematically.

A researcher can consequently make a copy of non-substantial parts of the content of the catalogue/table and use these in a publication without consent unless this is done repeatedly and systematically. It is allowed to make a digital copy of the entire catalogue/table for private use.

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83 UFR 2006.1564SH, Ofir
84 Schovsbo and Rosenmeier, 2011, p. 99-102. This result is subject to discussion, because it “eliminated” a common Nordic well-functioning regulation. It may be criticized that the European Court of Justice was not asked for a preliminary ruling. See further; J. Schovsbo, "Kommentar til Sø- og Handelsrettens dom af 24.02.2006, Ofir. Er de nordiske katalogregler I strid med databasedirektivet?", NIR, 2007, p. 405-410.
85 Section 3.2.1.
86 Art. 71(1), Copyright Act.
87 Art. 71(2), Copyright Act.
88 Art. 71(1) in connection with Art. 12(2), No. 4, Copyright Act.
4.1.3 Who is the right holder?
The right holder in respect of a catalogue or table is the natural person or legal entity who is responsible for the collection of the data (not necessarily the actual maker(s)) and who bears the risk in respect of the investment put into the work. 89

4.2 Unregulated protection of research results
There are no specific rules regarding the protection of (unpublished) research results. The provision in the Trades Description Act protecting confidential trade secrets in principle only applies to confidential information which is created and used by business enterprises. 90 Protection based upon this principle has, nonetheless, been applied outside this scope in a case concerning the name of a private school. 91
It is perhaps not inconceivable that the acts of a researcher who reveals research results thereby breaching a contractual obligation to keep these results confidential may be punishable as this is analogous to the relevant provision of the Trade Description Act. There is, however, no relevant case law. 92
Although intellectual property rights protection is based upon the principle that protection requires a legislative basis, there may be a few cases where exclusive rights exist without a direct legislative basis. In some cases the courts have based protection upon the “real considerations (natuur des choses)” source/concept of law because this has been considered to be correct on the basis of a weighing of the interests involved. The Danish Supreme Court, for example, has offered protection to information on football matches while they were being played in order to protect the finances of the clubs concerned (because this could be important for the attendance figures) based upon general principles of law. 93
There is no relevant case law on this type of protection for research results. Contractual obligations to keep research results confidential must be considered to be more relevant in a research context.

89 Karnov Legal Commentary to the Copyright Act, Karnovs Lovsamling, Comment 394 to Art. 71(1), (March 2011).
90 Art. 19, Compiled Trades Protection Act, Bekendtgørelse af Lov om Markedsføring, No.839 of 31.08.2009.
91 UFR 1997.664Ø (Eastern High Court) and Guide UBVA, p. 16.
92 Guide UBVA, p. 16.
93 Supreme Court, UFR 1982.179H; Guide UBVA, p.17.
5 Privacy

5.1 Personal data
If research data contain information about living persons’ privacy, problems may arise. The regulation of privacy is a complex matter since it is regulated in various fields of law; human rights law, criminal law, data laws etc. and interacts with matters of administrative law.

In this section, the main features of the Processing of Personal Data Act (Lov om Behandling af Personoplysninger), hereafter referred to as the Personal Data Act, in relation to research data will be deliberated. The Act is based upon the European Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data. The act applies to data processed by public authorities as well as businesses and private persons. There are, however, many special acts regulating specific data, for example, with respect to one’s public identification number (cpr) and other public registers.

5.1.1 Directly and indirectly identifying data
If research data contain personal information about living persons, they must comply with the regulation contained in the Personal Data Act. This applies to personal information which may directly identify a person such as a name, address or personal identification number and to information which may indirectly identify a person such as information that the person in question has “a cousin who is a priest in South Jutland”.

5.1.2 Anonymized data
If data relating to living persons have been anonymized, they are not covered by the Personal Information Act. Data are only anonymized if there is no information which can be used to trace the person in question. Such information may consist of directly identifying information but also of information which may be used indirectly to identify a person. If anonymized information is to fall outside the scope of the Personal Information Act it must be practically impossible to identify the person, without using extreme resources (unreasonable use).

5.1.3 Special personal data
Certain personal information is considered to be specifically sensitive and consequently subject to a stricter regime than other personal information. This applies to information concerning race and ethnic background, political, religious or philosophical affiliation, membership of labour associations, health and sexual orientation.

If a researcher intends to gather such sensitive information, a specific authorization listing the relevant requirements is required from the Data Protection Agency (Datatilsynet).

94 Act No. 429 of 31.05.2000 with later amendments.
95 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.
96 M. Bryde Andersen, IT-retten, Copenhagen: Gjellerup, 2005, p. 603.
97 Art. 3(1),1, Personal Data Act and M. Bryde Andersen, IT-retten, Copenhagen: Gjellerup, 2005, p. 603.
98 Art. 7, Personal Data Act.
5.2. Obtaining, storage, use and sharing of personal data

If a researcher wants to obtain personal data, for example, by means of surveys or interviews, the person(s) concerned must give their explicit consent.\textsuperscript{99}

When the research project has been completed, the personal data must be destroyed or anonymized.\textsuperscript{100}

Generally, all personal data must be processed in accordance with good practices for the processing of data. The data must be collected for specified, explicit and legitimate purposes and further processing must not be incompatible with these purposes. The further processing of data which takes place exclusively for historical, statistical or scientific purposes shall not be considered incompatible with the purposes for which the data were collected.\textsuperscript{101}

A researcher may only share personal data with other researchers with specific authorization from the Data Protection Agency.\textsuperscript{102}

6 Conclusion and overview

The purpose of this report has been to identify legal flaws in and hindrances to accessing research data and to single out any preconditions for openly available data in view of the current discussions concerning open access to research data, especially those originating from publicly-funded research. This part has dealt with the intellectual property right protection for research data in Danish law, namely the intellectual property regime concerning original works in chapter 1 and the intellectual property protection of other “unoriginal” collections of data in chapter 2 (databases) and chapter 3 (catalogues etc.). Moreover, there has been a deliberation of the relevant privacy regulation in relation to personal data in chapter 4.

It must be generally concluded that the Danish intellectual property regimes do not form a serious hindrance to accessing research data because most research data will fail to meet the criteria for protection.

Research data are not likely to be considered as “works” and thereby to be copyright protected because they mainly concern facts in the public domain. For collections/copyright-protected databases containing works or independent elements, protection is perhaps more likely, but they do require an original arrangement or selection by the author. Such an arrangement or selection is not likely to have taken place in respect of collections of research data, since they are likely to be complete in the sense that they contain all relevant data (measurements, samples, information etc.).

While most research collections will meet the definition of a database, they are unlikely to qualify for database protection because there must be a “substantial investment” in the database itself (rather than in the creation of the data).

\textsuperscript{99} Art, 6(1),1, Personal Data Act.
\textsuperscript{100} Guide issued by the Data Protection Agency concerning Research, www.datatilsynet.dk/borger/forskningsprojekter/ (March 2011).
\textsuperscript{101} Art. 5, Personal Data Act.
\textsuperscript{102} Art. 6(1),1, Personal Data Act.
The Danish catalogue rule which, according to the wording of the provision, could provide protection to collections of research data that do not fulfill the criteria for database protection, for example, because there was no “substantial investment” in the database itself, cannot provide protection if the collection meets the definition of a database (which most collections will). The catalogue rule has therefore lost most of its relevance in this context. It might still provide protection for tables containing a substantial amount of information.

Consequently, it must be concluded that the main hindrances to accessing research data in Danish law do not come from the intellectual property right regulation. The regulation of personal data may form a more serious hindrance to the open access to research data unless anonymized data are used.