The legal status of research data in the United Kingdom

Annex 4 to the Knowledge Exchange report
‘The legal status of research data in the Knowledge Exchange partner countries’

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About Knowledge Exchange

Knowledge Exchange is a cooperative effort between four European organisations that support the use and development of Information and Communications Technologies infrastructure for higher education and research. The four partners are Denmark's Electronic Research Library (DEFF), the German Research Foundation (DFG), the Joint Information Systems Committee (JISC) in the UK and the SURFfoundation in the Netherlands. Based on the four national strategies the joint vision of the initiative is to make a layer of scientific and scholarly content openly available and re-usable on the internet.

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Executive Summary

In UK law open access to research data may be restricted by copyright law and the database right.

Copyright

Copyright may apply to various categories of works such as; literary and artistic works. Literary works are works using letters, numbers or symbols. A literary work does not need to have any literary merit. It may also include, if it is deemed to be original, items such as tables, matrixes, reports, accounts, computer programmes, databases, timetables and research data. Artistic works may include various types of graphic works such as, for example, drawings and photographs. Copyright protection only applies to literary or artistic works that are “original”. A work is considered to be original if its creation required sufficient “skill, judgment and labour”. This requirement varies with the category of work but may generally be described as modest.

In a research context, copyright could apply to research data that have been recorded in a creative way with a minimum amount of effort (as opposed to a pure registration of facts – facts and information are not copyright protected). Databases that meet the requirement of skill, judgment and labour in their selection or structure may also be protected by copyright.

When a work is protected by copyright, the following use of the work can take place without the consent of the author:

• Copying of the bare facts of a work and putting them in an personal structure or choice of words;
• Insubstantial taking or substantial taking with respect to a fair dealing exception in relation to: private and non-commercial research purposes, educational purposes or criticism and news reporting.

Consent is required from the author(s) of the work for reproduction, distribution and publication. The author(s) is/are generally the creator(s) of the work. If the work has been created in the course of an employment, the employer will normally hold the copyright. Copyrights may also be transferred to a third party.

Database right

Under the UK’s implementation of the European Database directive, databases may enjoy database right protection. For database right protection to arise a database (consisting of independent works, data or other materials) has to be:

• Systematically or methodically arranged;
• accessible by electronic or other means;
• the result of a substantial investment in obtaining, verifying and presenting the contents of the database (in the creation of the database rather than in the creation of the data).

The person or entity which has made the substantial investment qualifies as the database producer and enjoys the exclusive database rights.

Using a non-substantial portion of the database is allowed without consent. The lawful user may further extract a substantial part of the contents of a database for illustration for teaching and non-commercial research (such as academic research).

Consent from the producer is required for:

• Copying the entire database or essential parts thereof (retrieving);
• making the entire database or essential parts thereof available to the public (reusing);
• repeatedly and systematically retrieving non-substantial portions of the database.

**Privacy**

The UK Data Protection Act 1998 ensures that personal data held on living identifiable individuals (data subjects) in automatic equipment or another filing system are not disclosed, contrary to the principles contained in the Act. The Act transposes two European Directives.¹ The Act protects personal data relating to an identifiable living individual if that individual can be identified from that data or from that data and other information in the possession of the data controller. Specific regulation exists for sensitive personal data concerning the subject's race, ethnicity, politics, religion, trade union status, health, sex life or criminal record.

A researcher who uses personal data has two options: to comply with the principles of the Data Protection Act, for example, to obtain consent from the data subject or to use anonymized data whereby the Data Protection Act does not apply. It is preferable to work with anonymized data. If this is not possible, an important exemption applies to data which are used exclusively for research purposes, provided that certain conditions are fulfilled. If the data have been obtained from a third person (the reuse of data), it is not necessary to inform the data subjects of the intended use. The researcher must still comply with the remainder of the data protection principles, e.g. not collecting

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more material than is necessary, complying with security provisions, etc. Keeping personal data which are used exclusively for the purpose of research is not restricted to a certain period of time.
<table>
<thead>
<tr>
<th>In what way do you want to use existing data?</th>
<th>What is required?</th>
</tr>
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<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.</td>
</tr>
<tr>
<td>To make a copy of data for you own use.</td>
<td>Consent is required for copyright-protected works; under the fair dealing exception in relation to private study, it may be acceptable to make a single photocopy but not a digital copy.</td>
</tr>
<tr>
<td></td>
<td>Consent is required for protected databases; the fair dealing exception does not include a photocopy of all elements of the database or a digital copy.</td>
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<td>To put data into a personal database/archive without sharing it with anyone else besides your own research team.</td>
<td>Consent is required for copyright-protected works; the fair dealing exception in relation to non-commercial research may apply but does not include a digital copy.</td>
</tr>
<tr>
<td></td>
<td>Consent is required for substantial portions of protected databases.</td>
</tr>
<tr>
<td>To cite data.</td>
<td>No consent is required in relation to insubstantial taking and/or due to the copyright law exception of fair dealing (private and non-commercial research purposes).</td>
</tr>
<tr>
<td>To copy or make available data made by the authorities (e.g., laws).</td>
<td>Consent is generally required since some official documents enjoy specific copyright protection (crown and parliamentary copyright) or may be protected by copyright as works. Copyright on judgments is generally not asserted. Reporting from such works and copying facts is allowed. The documents may also be encompassed by an “open government licence” whereby copying, publishing and distribution are allowed (with proper acknowledgement).</td>
</tr>
<tr>
<td>To use a database in teaching.</td>
<td>No consent is required due to a database law exception.</td>
</tr>
<tr>
<td>To copy a non-substantial portion of a database.</td>
<td>Only allowed without consent if the portion is quantitatively and qualitatively insignificant.</td>
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<tr>
<td>To make existing data available to persons other than your research team (including publishing).</td>
<td>Check whether the data are protected by:</td>
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<tr>
<td></td>
<td><strong>Copyright:</strong></td>
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<td></td>
<td>Assess whether the data have an original character (skill, judgment and labour) if this is the case copyright law applies and consent from the right holder is required for this kind of use.</td>
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<td><strong>Database right:</strong></td>
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<td></td>
<td>Assess whether the database is systematically or methodically arranged, the pieces of data in the database are individually accessible and the creation of the database has required a substantial investment if this is the case, the database right applies and consent from the database producer is required for this kind of use.</td>
</tr>
<tr>
<td>To copy data.</td>
<td>Check whether data are protected (see above).</td>
</tr>
<tr>
<td></td>
<td>Consent is required for copying copyright-protected data (more than a single photocopy when a fair dealing exception applies) and for copying a database right-protected database entirely or a substantial portion thereof.</td>
</tr>
</tbody>
</table>

Fig 1. Use of research data
Fig. 2. Use of research data protected by intellectual property rights

- Copyright-protected works
  - reproduction
  - distribution
  - publication

- Databases protected by Database right
  - copying the entire database or essential parts thereof (retrieving)
  - making the entire database or essential parts thereof available to the public (reusing)
  - repeatedly and systematically retrieving non-substantial portions of the database

- Consent not required
  - Insubstantial taking or substantial taking under a specific fair dealing exception for the purpose of:
    - Private and non-commercial research
    - education
    - criticism and news reporting
    - use by libraries and storage in archives
  - Using a non-substantial portion of the database
  - extracting a substantial part of the contents of a database for illustration in teaching and non-commercial research (such as academic research)

- Consent required
  - using a non-substantial portion of the database
  - extracting a substantial part of the contents of a database for illustration in teaching and non-commercial research (such as academic research)
1. The legal status of research data

1.1 Introduction
This chapter provides an overview of the legal status of research data in UK law. UK law covers the following jurisdictions: Scotland, England and Wales and Northern Ireland. The chapter deals with the relevant legal regimes contained in the UK Copyright, Designs and Patents Act 1988 with amendments: primarily the protection of copyright-protected literary and artistic works including the specific copyright to certain official publications, the copyright protection of databases and database protection. Copyright protection (related rights protection) for computer-generated works and for the publisher of a typographical arrangement will not be further discussed since this is of limited relevance in the context of research data. It should be noted that there are several transitional regimes in UK copyright law due to changes in the copyright legislation. These transitional regimes will generally not be discussed in this chapter.

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.2

1.3 Plan of discussion
This chapter on UK law is structured to serve the purpose of comparison between the legal regulation in place in Dutch, 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, this report first deals with the intellectual property regime concerning original works in chapter 2, then the legal protection of databases in chapter 3. Finally, chapter 4 deals with the protection of personal data.

2 Copyright law
Copyright is a property right that might arise in specifically listed categories of works in the Copyright, Designs and patents Act 1988, amongst others, in literary and artistic works, including compilations and in official documents covered by crown or parliamentary copyright. Copyright assigned to computer-generated works and to the publisher of a typographical arrangement are not discussed here since they are of limited relevance to research data.

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When a work is copyright protected, the owner, who may be another person or body corporate than the author of that work, has an exclusive right to control the work economically. The author in person has certain moral rights such as the right to be named. In a research context, copyright normally arises in books, articles etc. based upon the use of research data. The raw data themselves will normally not attract copyright protection. This may be different if the data have been presented or processed in a way which meets the originality requirement. The criteria for copyright protection will be further discussed below in section 2.1 (the application to research data particularly in section 2.1.3.). If copyright should 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 fulfill the requirements for copyright protection.3

2.1 When may research data be protected by copyright?

2.1.1 The form of the work

Literary works are works using letters, numbers or symbols. A literary work does not need to have a literary merit; it may, if it is deemed to be original, also include items such as tables, matrixes, reports, accounts, computer programs, databases, timetables and research data.

Artistic works may be two-dimensional such as maps, drawings, paintings and photographs or three-dimensional such as a sculpture.

Although there are no formalities required to ensure copyright protection, it is nonetheless an assumption in UK copyright legislation that all subject-matter needs to exist in some permanent form before it can enjoy copyright protection. The term often used to describe this requirement is the term “fixation”. It is possible to view this requirement as a corollary of the principle that protection only applies to the particular expression of ideas, or to view it primarily as a matter of evidence as to the existence of a copyright-protected literary work.4

Artistic works (maps, drawings, photographs etc.) can only be subject to copyright protection if the particular (idea of the) work is expressed, i.e. has taken a physical form. The idea is transmuted into expression; the act of creation and the “fixation” of the work are indivisible.5

For literary works, creativity may appear at several stages. A speech may, for example, be conceived in the mind and a literary work may subsist in several draft versions before becoming final. When the speech is delivered, it is deemed to have been expressed (but not necessarily fixed if it is delivered ex tempore) and also a draft version of a literary work will be deemed to have been expressed, whereby fixation has occurred.6

2.1.2 General criteria
Copyright only applies to literary or artistic works that are “original”. Behind this lies the requirement of sufficient “skill, judgment and labour”, “selection, judgment and experience” or “labour, skill and capital”, whereby the wording of the criteria depends upon the individual case and the type of work involved. The last-mentioned criteria (labour, skill and capital) may, for example, be relevant in situations where facts have been collected through economic effort (“sweat of the brow”) rather than through intellectual creativity.

An original work thus requires a certain amount of creative intellectual activity and a minimum amount of effort. This requirement may be described as relatively modest; it does not require high literary quality or style. It must, however, originate from the author and not be copied from another work.

Corresponding with the above-mentioned criteria, copyright has been found to exist in, for example, compilations of information such as a timetable index, trade catalogues, examination papers, street directories, football fixture lists and the listing of programmes to be broadcast. It should, however, be noted that the relevant criteria in relation to compilations are likely to become stricter (a stronger originality requirement) due to the influence of the originality requirement of the European Database Directive. This aspect is further observed in section 2.1.5.

2.1.3 Copyright-protected research data
The question whether research data are protected by copyright must be based upon the general criteria discussed above, meaning that they must be original, i.e., requiring a certain amount of creative intellectual activity and a minimum amount of effort (sufficient skill, judgment and labour).

In a research context, copyright could consequently apply to research data that have been recorded with a certain degree of creativity and with a minimum amount of effort (these are relatively modest criteria) as opposed to a pure registration of facts or a registration which requires only slight efforts. While there seems to be no guiding case law dealing specifically with research data, there are also no indications that such data would not enjoy the same copyright protection offered to other data collections (telephone directories etc.). Protected objects could be compilations of works or data which are specifically dealt with in section 2.1.5 below and other secondary works on existing sources such as translations, editorial work involving amendment, critical annotation or explanation, selection and abridgement. They could take the form of texts, tables, matrixes, reports or accounts.

2.1.4 Other kinds of data: photographs, maps, diagrams, etc.
Data presented in a visual form such as photographs and maps, drawings and diagrams (graphic works) may also be covered by copyright as artistic works if they fulfill the originality requirement.

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7 Copyright, Designs and Patents Act 1988, section 1 (1).
10 Cornish and Llewelyn, 2007, p. 423.
11 See, for example, the research example mentioned by the High Court (Lord Justice Floyd) in the Dataco case, Football Dataco Limited and others v. Yahoo and others, High Court, 23.04.2010, [2010] 3 CMLR 25, [2010] EWHC 841 (Ch), [2010] RPC 17.
12 Cornish and Llewelyn, 2007, p. 422.
13 Copyright, Designs and Patents Act 1988, sections 4 and 1(1).
While photographs and other graphic works must principally fulfil the originality requirement, this only ensures that they will not be copied and that the threshold of sufficient labour, skill and judgment is present. Artistic quality is not required. The result is that photographs and graphic works that are not mere copies will generally be covered by copyright.

A photograph is defined as a recording of light or other radiation on any medium on which an image is produced or from which an image may be produced by any means and which is not part of a film (which is subject to another protection scheme). This includes X-rays and negatives. While a photocopy is a photograph within the meaning of the Act, it is not an original photograph.

2.1.5 Copyright-protected compilations and databases

Traditionally, the modest originality requirement for compilations of works or facts/data would result in copyright protection for most compilations (at least for compilations that have required a certain amount of creative activity and a minimum amount of effort). The pertinent question, however, is whether this position is changing given the fact that most compilations of data/works will fall within the definition of a legal database in the sense of the European Database Directive, thereby possibly increasing the originality requirement.

A legal database in the sense of the European Database Directive is defined 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.”

Such a database will only be copyright protected as an original work if:

“by reason of the selection or arrangement of the contents of the database the database constitutes the author’s own intellectual creation.”

The question of originality with respect to factual compilations/databases may be illustrated by the recent case involving Football Dataco Limited. This case concerned football fixture lists. Traditionally, copyright protection applies to such compilations. The judge at first instance held that there was database copyright by virtue of the considerable selection and arrangement involved, with judgment and discretion being required at many stages in order to produce the lists (there was no database right since there was no substantial investment in the database, see section 3.1.3). The case was appealed and the Court of Appeal decided to bring the matter before the European Court of Justice for

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a preliminary ruling on the understanding of the originality requirement in relation to a copyright-protected database. The questions asked were the following:

“In article 3(1) of the Database Directive, what is meant by “databases which, by reason of the selection or arrangement of their contents, constitute the author’s own intellectual creation” and in particular:

- Should the intellectual effort and skill of creating data be excluded?
- Does “selection or arrangement” include adding important significance to a pre-existing item of data (as in fixing the date of a football match)?
- Does “author’s own intellectual creation” require more than significant labour and skill from the author, and if so what?"21

The answers to these questions will clarify the UK’s position on the originality requirement for copyright-protected databases. The questions raised are particularly relevant for the copyright protection of research data because “effort and skill” often relate more to the creation of data than to “selection and arrangement”.

For compilations that do not fall within the definition of a legal database in the sense of the European Database Directive, it is worth noting that the UK courts over time have used two different originality standards corresponding to what applies generally “skill, judgement and labour” versus labour, skill and capital (“sweat off the brow”) in respect of compilations.22 While the first and foremost standard may be described as pertaining to the quality of the labour, the second more controversial standard relates to the quantity of labour. The lastmentioned standard has only been used to confer originality on the resulting work in a limited number of situations such as pertaining to tables and compilations of things such as maps, guidebooks, streetdictionaries, dictionaries, authors works and selections of poems. As yet, it is too early to say whether this lastmentioned standard concerning quantity will come under pressure from the development described above in respect of databases.23

2.1.6 How copyright protection arises

It is not necessary to perform specific actions for copyright to arise. The protection arises automatically when an original literary or artistic work has attained a permanent form (fixation) such as described above in section 2.1.1.24

2.2 What actions require consent?

If research data should qualify for copyright protection, the question is which actions require the consent of the copyright owner. This section deals with actions that require consent and the main exceptions which are relevant in the context of research data.

It is important to note that there is a general requirement of using a substantial part of a work (“substantial taking”) which prevents the owner of a copyright from objecting to minor borrowing. This

22 Section 2.1.2, above.
concept is to be separated from the legislative exceptions concerning fair dealing listed below. If the use (copying) is insubstantial, a researcher does not need to depend upon the legislative exceptions.  

2.2.1 Some elements of the work may not be subject to copyright

Not all elements of a work are subject to protection. The protection generally applies to the textual (literary) expression, the arrangement or structure rather than to the general ideas, theories or facts themselves. Caution is required, however. When it comes to original compilations (research data may be protected as a compilation of data), originality normally resides either in the labour expended in assembling the facts or in the skill, judgment or knowledge involved in the selection of facts. The traditional view is that copyright in such a work may be infringed by using an undue amount of the material, although the language employed is different or the order of the material is altered. The principle is that: “No man is entitled to avail himself of the previous labours of another for the purpose of conveying to the public the same information”.  

There is, however, evidence that this view may change in favour of leaving facts (and consequently data) free to use by third parties, perhaps as a corollary to a higher originality requirement for compilations/copyright-protected databases (see section 2.1.5). A recent case concerned copyright infringement (the copying of data) from a database known as “Football Live”. This database contained football data on goal scorers, penalties, yellow and red cards, substitutions etc. The data were updated and provided to third parties while matches were being played. The issue concerned a third party’s use/copy of the data for use in its own database. The Court of Appeal stated the following:

“(…) It may be that some of the information collected for the claimants includes matter which involves intellectual creation. So there may be copyright in Football Live. But what is alleged to have been copied is mere data on any reasonable view [emphasis added]. Its recording may sometimes involve some skill (who scored in a goalmouth scramble) but it is not creative skill.”

Consequently, it must be assumed that copying facts/data in UK copyright law has a wider scope than has been assumed so far. This is important information for a researcher. The researcher should perhaps still proceed with caution if the entire collection of data or the entire selection of data of a copyright work is used (and consider whether perhaps a database right applies, see section 3.1).

2.2.2 What use is subject to copyright?

The copyright owner has the right to control certain uses of a copyright work. The Copyrights, Designs and Patents Act 1988, sections 16-27 define the restricted acts in general terms separated into acts of primary and secondary infringement, each type applying to the various categories of work unless a specific exception is given. In this section the primary infringements, relevant in a research context, will be observed.

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26 Laddie, Prescott and Vitoria, 2000, p. 110.
Generally, the copyright owner has two types of rights; rights concerning reproduction and adaptation (for example, translation) and rights concerning communication to the public. The fact that these rights belong to the owner means that a researcher will infringe these rights if he proceeds without the consent of the owner (unless a specified exception exists).

The reproduction right of the copyright owner may be infringed by copying the work, issuing copies thereof to the public or by adapting it. Copying a literary or artistic work means reproducing the work in a material form. This includes making a manual or digital copy (for instance, storing the work on a medium electronically).

Communication to the public covers all kinds of communication to the public, including communication on the internet, broadcasting on radio or TV and performance (e.g. in a lecture or speech).

2.2.3 No general exception for works produced by the authorities
Generally, works produced by an officer or servant of the crown such as material created by civil servants, government departments and agencies will be covered by crown copyright. Works created by the House of Commons or the House of Lords will be covered by parliamentary copyright. This applies to documents such as Acts of Parliament, official reports, public statistics and possibly case law. Consent is consequently, principally, required if one wants to use such works in a manner requiring consent, for example, by communication to the public.

Such works are, however, likely to be available free of charge through an open government licence setting out the terms and conditions for the reuse of public sector information.

It should be noted that Regulations on the reuse of public sector information have been passed based upon the European Directive on the Reuse of Public Sector Information. The regulations encourage a transparent and fair reuse of public data for commercial and non-commercial purposes. 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 charge. Such a charge should not exceed the cost of collection, production, reproduction and dissemination of documents and a reasonable return on the investment.

2.2.4 Exception: fair dealing, quotations
Publicly available works may be used for purposes of news reporting and for purposes of criticism and review (of themselves or of another work), provided that it is accompanied by sufficient

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34 Reuse of Public Sector Information Regulations (SI2005/1515).
acknowledgement.  

There is relatively little case law on this rule. Criticism or review may concern the ideas expressed as well as the mode of expression. Further, the courts will not permit wholesale borrowing to be dressed up as critical quotation.  

A researcher wishing to quote 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;
- copyright-protected data should have been made public. One should not quote from works that have not been made public;
- if the data are copyright protected, the author must be acknowledged;
- the quotation must be fair and not concern the entire work.

2.2.5 Exception: fair dealing, research or private study

There is a fair dealing exception covering the purposes of private study and non-commercial research applying to literary and artistic works. Certain more specific exceptions should also be mentioned together with these fair dealing exceptions: (i) copying by librarians and archivists, (ii) copying short passages of works in collections for schools and (iii) copying works in the course of instruction and examination in schools.

The question of what “fair” means will vary to fit each case. It is however important to note that the general fair dealing exception for research or private study does not grant a researcher the right to make more than a single paper copy and does not include the right to make a digital copy of a work (other than an incidental digital copy, e.g. for on-screen view but in this case not of a copyright-protected database). The researcher may be entitled to copy parts of a work.

In order to promote the administration of copyright through licensing schemes conducted for groups of rights owners, there are various exceptions which will apply in the absence of a certified licensing scheme covering the proposed use. One of these exceptions provides that (in the absence of a licence scheme) one may copy and issue copies of the published abstracts of scientific or technical articles in periodicals.

2.3 Who is the right holder?

First ownership of a copyright-protected work rests with the author or co-authors unless the exception concerning employment applies.

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40 Cornish and Llewelyn, 2007, p. 476.
42 Copyrights, Designs and Patents Act 1988, Section 60.
43 This does not apply to crown and parliamentary copyright; see further Copyrights, Designs and Patents Act 1988, Section 11(3).
2.3.1 Shared copyright
If the copyright-protected work has been created by more than one person, it may not be clear who counts as the author and thereby as the copyright owner. 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 as co-authors providing there has been a sufficient contribution of “skill, labour and judgment” by each researcher.\(^{44}\)

2.3.2 Cases in which the law allocates copyright
According to the Copyrights, Designs and Patents Act 1988, the holder of the copyright to a literary or artistic work is the employer if the work has been made by an employee in the course of his employment unless there is a contract to the contrary.\(^{45}\)

What falls within the scope of employment will depend on the nature and terms of the job and the relation of the work to the job.\(^{46}\) There has been some debate on the position of academics employed at universities. To what extent may university academics be considered to produce “works” in the course of their employment? Case law shows that a court will not necessarily see this as the position, and has also stated that an employer’s long-standing practice of allowing employees to exercise the copyright to their works will prevent a subsequent claim to copyright in those works by the employer. In fact, higher education institutions seem to have employed a practice of waiving any rights of ownership concerning copyright.\(^{47}\)

2.3.3 Cases in which contractual provisions may be relevant
There are a number of situations in which contractual provisions may be relevant for determining who the copyright holder is. Copyright is a property right which can be granted entirely or partially. This only applies to exclusive (economic) rights. Moral rights such as the right to be named are not transferable. The author(s) may have assigned the rights or some of the rights in advance or after the work has been completed.\(^{48}\)

2.4 Reuse of 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 obtain consent from the right holder. The question, then, is what the status of the new collection is. The new collection may be deemed to be a compilation/database of works or data. If the new collection is original (added skill, judgment and labour), a new user/researcher may need consent from more copyright holders in order to include the entire collection in his own research data.

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\(^{44}\) Cornish and Llewelyn, 2007, p. 503.
\(^{45}\) Copyright, Designs and Patents Act 1988, section 11(2).
\(^{46}\) Cornish and Llewelyn, 2007, p. 503.
\(^{47}\) British Academy, Copyright and research in the humanities and social sciences – Guidelines on Copyright and Academic Research, on http://www.britac.ac.uk/policy/copyright/guidelines.cfm#5, consulted 6.04.2011.
\(^{48}\) Copyright, Designs and Patents Act 1988, sections 90-92, 94.
Summary

It is possible that research data may be covered by copyright, for example, as an original text, matrix, compilation of works or data and/or a database if the modest originality requirement of “skill, judgment and labour” is met. Caution with respect to compilations that are databases (which they will often be) is required. Perhaps the modest originality requirement in UK law is increasing due to the influence of the European Database Directive. If research data are protected, the following main actions can be carried out without consent:

- With some caution, the copying and using of bare facts of a work;
- non-substantial taking (copying);
- fair dealing: news reporting and critical review;
- fair dealing: non-commercial research and private use, but excluding the right to make more than a single paper copy or a digital copy.

Database right

A collection of data may be subject to protection as a database. The database right is a property right. The object is to protect the investment made in obtaining, verifying and presenting the contents of the database.49

The European Database Directive was transposed into UK law by the Copyright and Rights in Databases Regulations 1997 taking effect as from 1 January 1998.50 These Regulations generally apply both to databases made before and after 1998. There are, however, complex transitional provisions applying to databases which were not made after 27 March 1996. Such databases may

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49 Laddie, Prescott and Vitoria, 2000, p. 1072.
50 SI 1997/3032.
continue to be copyright protected under the old regime (even though they would not fulfil the requirement for copyright protection and/or database protection after the implementation of the European Database Directive). The Copyright and Rights in Databases Regulations 1997 contain a detailed rephrased and rewritten (and to some extent amended) version of the European Database Directive. These regulations must, however, be interpreted as being in conformity with the European Directive. As stated by the Court of Appeal in the recent Dataco case:

“The UK has implemented the Directive, amending the Copyright Designs and Patents Act 1988 by the Copyright and Rights in Database Regulations 1997. (…) Both sides were agreed that nothing turns on the Act as amended: that it means exactly whatever is meant by the Directive, no more and no less. As is so depressingly common the draftsman has gone to a lot of trouble to re-phrase and re-write what he could and should have simply copied from the Directive. I do not bother with the re-write [emphasis added]”.

3.1 Definition of a database
A database is defined as meaning:

• A collection of independent works, data or other materials which are;
• arranged in a systematic or methodological way and are;
• individually accessible by electronic or other means.

If the database is to be protected by the database right there must also have been a substantial investment in obtaining, verifying or presenting the contents of the database. It should be noted that a database may also qualify for copyright protection (see section 2.1.5).

3.1.1 Collection
In the legal sense, a database must contain a collection of independent elements. The collection may comprise all kinds of elements (such as texts, images, numbers, facts or data) but the elements must be able to be regarded as independent. This means that the elements should be able, or intended to be, appreciated or used in isolation.

There are no requirements as to the size of the database as long as the other requirements are met. Moreover, 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. These are not strict requirements. What is required is some form of

51 Laddie, Prescott and Vitoria, 2000, p. 1057.
52 Court of Appeal, 29.03.2011, (Rev 1) [2011] EWCA Civ 33, Football Dataco Ltd and others v. Sportradar.
53 Copyright, Designs and Patents Act 1988, section 3A.
54 Copyright and Rights in Databases Regulations 1997, section 13.
55 Laddie, Prescott and Vitoria, 2000, p. 1064.
arrangement to allow the individual independent parts to be located without searching through all the contents. This may be achieved through a search function or indexation.\textsuperscript{56}

3.1.3 Substantial investment

To determine 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 creation of these data themselves. The substantial investment must relate to the database itself. If the investment concerns the creation of data rather than the processing and storage of data, the database is not protected.\textsuperscript{57}

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. The database will consequently not be a protected database. If, however, existing data or new data are used \textit{and} there is an (independent) substantial investment in obtaining, presenting or verifying such data, the database containing research data may well be protected by the database right.

3.2 What actions require consent?

The producer of a protected database has the right to prevent any extraction or re-utilization of all parts or a substantial part of the database content. The repeated and systematic extraction or re-utilization of \textit{non-substantial parts} of the contents of a database may also infringe the exclusive rights of the maker of the database.\textsuperscript{58}

3.2.1 Extraction

Extraction is defined as the permanent or temporary transfer of the contents to another medium (copying). For electronic databases this is inevitably necessary for onscreen display or electronic searching as the database will have to be transferred into the computer memory. The effect is that electronic databases cannot be used without a licence (lawful user) according to the database right.\textsuperscript{59}

This does not apply to paper databases. These can be used (but not copied) without a licence. Extraction of a substantial part of the contents \textit{or} systematic and repeated extractions of non-substantial portions, for example by means of copying the data by hand, infringes the rights of the database maker.\textsuperscript{60}

\textsuperscript{56} Laddie, Prescott and Vitoria, 2000, p. 1065-1066.

\textsuperscript{57} European Court of Justice, 09.11.2004, C-46/02, C338/02, C444/02, Fixtures, C-203/02,British Horseracing Board. For the application of the preliminary ruling by the Court of Appeal in the British Horseracing case, see; [2005] R.P.C. (35) 883.

\textsuperscript{58} Copyright and Rights in Databases Regulations 1997, section 16.

\textsuperscript{59} Copyright and Rights in Databases Regulations 1997, section 16. Laddie, Prescott and Vitoria, 2000, p. 1078.

\textsuperscript{60} Copyright and Rights in Databases Regulations 1997, section 12 and 16.
Consequently, consent is required if one wants to:

- Use an electronic database (whether or not one intends to copy the content or parts thereof);
- copy a substantial part of a database or systematically and repeatedly copy insubstantial parts.

A researcher can consequently only make use of an electronic database if he has obtained consent from the maker (typically through having obtained a licence). If such consent or licence has been obtained a person may make a copy of non-substantial parts of the content of the database and use these in a publication or in a repository without consent, unless this is done repeatedly and systematically.

3.2.2 Re-utilization

Re-utilization is defined by the Copyright and Rights in Databases Regulations 1997 as making available to the public by any means.\textsuperscript{61} This definition restricts use to a greater extent than the definition employed by the European Database Directive. The European Database Directive defines re-utilization as:

\textit{“Any form of making available to the public all or a substantial part of the contents of the database by the distribution of copies, by renting, by on-line or other forms of transmission.”}\textsuperscript{62}

While both definitions are fairly comprehensive, restricted use according to the Copyright and Rights in Databases Regulations 1997 could involve displaying in public, for example, at a cinema which would not be covered by the definition contained in the European Database Directive. In so far as UK law goes further than the Directive, this must be considered to be invalid.\textsuperscript{63}

3.2.3 Substantial part

The question whether re-utilization or extraction concerns a “substantial part” of the contents of a database is both quantitative and qualitative. Isolated works or pieces of data are very unlikely to be a substantial part of the contents. If, however, re-utilization or extraction is done systematically and repeatedly it may amount to copying a substantial part thereof.\textsuperscript{64}

3.2.3 No exception for government databases

There is no exception for government databases containing works produced by the authorities. Works such as Acts of Parliament, official reports, public statistics and case law are generally covered by crown or parliamentary copyright as deliberated above in section 2.2.3.

The owner (maker) of a government database is the crown or Parliament.\textsuperscript{65}

3.2.4 No exception for private use

\textsuperscript{61} Copyright and Rights in Databases Regulations 1997, section 12(1).
\textsuperscript{62} EU Directive 96/9, art. 7(2)(b).
\textsuperscript{63} Laddie, Prescott and Vitaria, 2000, p. 1079. See also above in Section 3 (Dataco case).
\textsuperscript{64} Laddie, Prescott and Vitoria, 2000, p. 1079. Copyright and Rights in Databases Regulations 1997, section 12(1).
\textsuperscript{65} Copyright and Rights in Databases Regulations 1997, section 14.
The UK has not adopted an exception for private use despite having the option to do this. This means that a lawful user may only extract or re-use non-substantial parts of the contents of the database.\textsuperscript{66}

### 3.2.5 Exception: research and education

The exception in relation to research and teaching is limited to the lawful user. The lawful user may extract (copy) substantial parts of a database (fair dealing) for the purpose of non-commercial illustration for teaching and research purposes.\textsuperscript{67}

### 3.2.6 Consent, consultation and contractual arrangements

For obtaining consent from a right holder to use a database, it is irrelevant whether the database is already available (including being generally available) to third parties. Consent is still required to extract (copy) or re-use (make available to the public) a substantial part of the contents of the database. For electronic databases consent is also required for the inspection of a database (lawful user).

The owner of the database may stipulate that access to the database depends upon payment being made. The user who has secured access (lawful user) may always extract and re-use non-substantial parts of the contents of the database; this right cannot be excluded.\textsuperscript{68}

If databases are programmed in such a way that certain actions are technically impossible, for example to print out or download the database, these technical protection measures may not be circumvented even if it is normally allowed to print out or download the database contents.\textsuperscript{69}

### 3.2.7 New databases and borrowing

The creation of a similar or nearly 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 extracted from the protected database by whatever manner used, for example, by copying all the data or a substantial selection thereof, then it will be an infringement.

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 are consequently free to be used, this only applies to non-substantial parts of a protected database (for the lawful user). Furthermore, the researcher who is a lawful user engaged in non-commercial research may also copy substantial parts of the database. A researcher is consequently not allowed to make a copy of the entire protected database whether or not the purpose is to include this in his/her own database or a new publication.

However, most databases containing research data will not meet the requirement of a “substantial investment” concerning the obtaining, presenting and verifying of the contents of the database (the investment concerning the creation of data is not relevant). Therefore most (published) research data

\textsuperscript{66} Laddie, Prescott and Vitoria, 2000, p. 1081.
\textsuperscript{67} Copyright and Rights in Databases Regulations 1997, Section 20.
\textsuperscript{68} Copyright and Rights in Databases Regulations 1997, Section 19.
\textsuperscript{69} Copyright and Rights in Databases Regulations 1997, Sections 296-296ZA.
will not be protected by the database right and are therefore free to be used (provided there is no copyright protection).

3.3 Who is the right holder?
The right holder in respect of a database is the qualifying\textsuperscript{70} natural person or body corporate who is responsible for obtaining, verifying or presenting the contents of the database and assumes the risk of investing in such obtaining, verification and presentation. In essence, it is the person or body corporate who makes the investment by which the database can be created that is considered to be the right holder (the producer of a database). This is not necessarily the persons/person who actually undertake(s) the work.\textsuperscript{71}

Example
A publisher decides that there is a market for a database containing a legal commentary. A legal research institute is engaged to create the database (writing and updating the commentary as well as putting the information into the database itself).

The publisher is the person who takes the initiative and makes the investment in the database, consequently being the maker/producer of the database. The legal research institute has not taken any initiative and has also made no investment – it simply carried out the work it was engaged to do. It may be that the legal research institute had a copyright in the commentary (subject to an agreement to the contrary) but this does not influence the property right in the database.

3.4 Relationship to copyright
Database protection does not exclude copyright protection. The database right exists independently from any copyright which may exist in the database itself or any copyright which may subsist in any of the contents of the database.\textsuperscript{72}

3.5 Summary
A collection of separate data elements may constitute a protected database if these have been arranged systematically and the elements are individually accessible. 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) has no relevance to the substantial investment criterion.

If there is a protected database, consent is required for the following actions:
- Making use of an electronic database (lawful user);
- making copies of the entire database or essential parts hereof (extraction);
- making the entire database or essential parts thereof available to the public (re-utilization);

\textsuperscript{70} Generally, residents in the European Economic Area or a body incorporated in the European Economic Area, Copyright and Rights in Databases Regulations 1997, section 18.
\textsuperscript{71} Laddie, Prescott and Vitoria, 2000, p. 1073. Copyright and Rights in Databases Regulations 1997, Section 14.
\textsuperscript{72} Laddie, Prescott and Vitoria, 2000, p. 1072.
• making copies of and/or making available to the public insubstantial parts of the contents of the database if the use is made repeatedly and systematically (repeated and systematic acts of re-utilization and extraction).
4. Privacy

4.1 Personal data

The Data Protection Act 1998 is the main source of law for the protection of personal data in the UK. This Act ensures that personal data held on living identifiable individuals (data subjects) in automatic equipment or another filing system are not disclosed contrary to the principles contained in the Act. The Act gave effect to (primarily) the European Directive on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of such Data.\(^\text{73}\) The Act protects personal data (relating to a living individual who can be identified from that data or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller). There is specific regulation of sensitive personal data concerning the subject's race, ethnicity, politics, religion, trade union status, health, sex life or criminal record.

A researcher who uses personal data has two options: to comply with the principles of the Data Protection Act, for example, to obtain consent from the data subject or to use anonymized data whereby the Data Protection Act does not apply. It is preferable to work with anonymized data. If this is not possible an important exemption applies to data being used exclusively for research purposes fulfilling certain conditions.

In this chapter, the main features of the Data Protection Act 1998 in relation to research data will be discussed. The Act applies to data processed by research institutions, businesses and private persons as well as public authorities. Data covered by the Act include electronic and manually (paper) recorded data which form part of a filing system or are intended to be part of a filing system. In fact, any data which can identify an individual are covered by the Act.

4.1.1 Directly and indirectly identifying data

If research data contain personal information about living persons, they must comply with the regulation contained in the Data Protection Act. Such data may consist of information which directly leads to the identification of a living person such as his/her name and address or information which in combination may lead to identification, for example, a name and a place of work or other information. The fact that there is no recording of a name does not necessarily mean that the person cannot be identified. A combination of data, for example on gender, age, or salary may well enable a researcher to identify a particular person.\(^\text{74}\)

In determining whether a person is identifiable, account should be taken of all the means likely to be reasonably used either by the data controller or any other person. The possibility of identification is restricted to the likeliness of anyone doing so by a reasonable use of all available means. Although it is conceivable that someone could identify a particular individual or individuals if they devote sufficient

\(^{73}\) Directives 95/46/EC and 97/66/EC.

effort and resources to the task, if it is unlikely that anyone will do so then the individual(s) are not “identifiable”.75

4.1.2 Anonymized data

If data relating to living persons have been wholly anonymized, they are not covered by the Data Protection Act. Data are only anonymized if there is no information which can be directly or indirectly used to trace the person in question. Such information may consist of directly identifying information but also of information which may indirectly be used 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.

The fact that the research data are separated from the identifying information, for example they are stored in two separate media, does not bring such data outside the scope of the Data Protection Act. If a data controller is still able to combine the information and identify persons then the Data Protection Act applies. If the identifying data are not held by the data controller himself, the data may be considered to be anonymous.76

4.1.3 Special personal data

Certain personal information is considered to be specifically sensitive and is therefore subject to a stricter regime than other personal information. This applies to information concerning racial and ethnic origin, political opinions, religious beliefs or other beliefs of a similar nature, trade union membership, physical and mental health, one’s sex life and information pertaining to criminal offences.77

4.2. Obtaining of personal data

There are several ways that a researcher can obtain data about living persons. If the data are not wholly anonymized (not covered by the Data Protection Act) they must be collected for specified, explicit and lawful purposes and not be excessive in relation to the purposes for which the data are collected.78

The data can be obtained in a number of ways:
• By collecting the data from the persons themselves;
• by collecting data about the persons concerned from third parties;
• by reusing a file that has already been created.

77 Data Protection Act, section 2 and schedule 3.
78 Data Protection Act, schedule 1 (the data protection principles).
If data are collected directly from the persons concerned, they must give their consent thereto (consent must be explicit when processing sensitive data). The persons concerned must be informed of the purpose of the research and of the identity of the recipients of the data. 79

If personal data are collected from someone other than the data subject, the data subject must still give his/her consent for this processing. 80

The reuse of data is only allowed if the reuse is not incompatible with the original purposes. 81 An important exemption applies to data which are being used exclusively for research purposes (including historical and statistical purposes) and which fulfil certain conditions. If the data have been obtained from a third person (the reusing of data), it is not necessary to inform the data subjects of the intended use. The researcher must still comply with the remainder of the data protection principles, e.g., not collecting more material than is necessary, security provisions etc. Personal data used exclusively for research may, however, be kept indefinitely. 82

4.3 The Information Commissioner’s Office

The Information Commissioner’s Office is an independent official body. The Commissioner is responsible for administering the provisions of the Data Protection Act 1998 (as well as the Freedom of Information Act 2000).

The Data Protection Act 1998 requires every data controller who is processing personal information in an automated form to notify the Information Commissioner’s Office, unless they are exempt (which is unlikely). Failure to notify is a criminal offence.

5. Conclusion and overviews

The purpose of this report is to identify legal flaws and hindrances in 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 chapter has dealt with the intellectual property right protection of research data in UK law, namely the intellectual property regime concerning original works in chapter 2 and the intellectual property protection of other “unoriginal” collections of data in chapter 3 (database right). Furthermore, there has been an observation on the relevant privacy regulation in relation to personal data in chapter 4.

Generally, it must be concluded that the UK’s intellectual property regime may be viewed as forming a hindrance to accessing research data, primarily because research data may qualify for copyright protection. There may, however, be a development in progress requiring a higher degree of originality with respect to factual collections/databases (which research data are likely to be). More will be known when the European Court of Justice delivers the preliminary ruling in the Football Dataco (Fixtures list) case. As a corollary, it may be possible to make use of facts contained in copyright-protected work to a greater extent than is traditionally assumed.

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79 Data Protection Act, schedule 2 and schedule 3.
80 Data Protection Act, schedule 2 and 3.
81 Data Protection Act, schedule 1 (second data protection principle).
82 Data Protection Act, section 33.
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).

The regulation of personal data may actually form a more serious hindrance to the open access to research data unless anonymized data are used.