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1. EXECUTIVE SUMMARY

The focus of this paper is the legal framework for the management of content of cooperating repositories. The focus will be on the regulation of copyright and protection of personal data.

1.1. COPYRIGHT

The repositories will have to develop management systems that are able to handle different types of licenses and different sets of rules.

1.1.1. The information is submitted to the repository by the author or the rights owner

This is the least complicated scenario. In this case one normally makes a licence agreement with the author or right holder and the objective is to secure that all important issues are dealt with. These are

- Reproduction of the files
 - for preservation purposes
 - for private use.
- Communication to the public or making available to the public
 - on site
 - remote access on demand
- Technical Protection Measures
 - removal
 - means to circumvent them
- Rights Management Information

1.1.2. The information is ingested to the repository without any active participation of the author or rights owner

When there is no contact with the author or rights holder there is only the law to regulate.

EU legislation sets a minimum standard for this, but as exceptions and limitations are possible it is necessary to check with Member States' legislation how the directives are implemented.

The same issues have to be checked.

1.2. PROTECTION OF PERSONAL DATA

The purpose of the Directive on the protection of personal data was to enable the free flow of data within the European Union by securing the same level of protection. Even though the directive may be implemented differently in national legislation of the Member States, an adequate level of protection is taken for granted. Therefore personal data may freely be transferred within the European Union.



Some third countries have been recognised by the Commission as providing an adequate level of protection, and consequently personal data may also be freely transferred to those countries.

A special arrangement has been established with USA. Private organisations may certify as a “Safe Harbour” and be registered as such by the Federal Trade Commission. Personal data may be transferred to these organisations.

Personal data may be transferred to other third countries after permission is granted by the national Supervisory Authority. When the transfer is regulated by a contract containing the Commissions Standard Contractual Clauses, permission will normally be given.

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2. INTRODUCTION

The focus of this paper is the legal framework for the management of content of cooperating repositories. The focus will be on the regulation of copyright and protection of personal data.

That copyright is important when managing data repositories is common knowledge. However, there is an increasing tendency among authors not only to deposit their published scientific work, scientific articles, dissertations or books, but also the underlying data. In addition to this ordinary publicly available sources like internet web pages contain personal data, often of a sensitive nature. Due to this emergent trend repositories will have to comply with the rules governing the use and protection of personal data, especially in the medical and social sciences.

The scenario is the following:

- National repositories acquire material from different sources and in different formats.
- The repositories cooperate with repositories in other countries in the preservation of data.
- There is some degree of specialisation, some repositories specialise on preserving certain formats and other repositories on the preservation of other formats.

This paper describes the legal framework regulating the two decisive actions which have to take place if this scenario is to become a reality:

1. The reproduction of data
2. The transfer of data to other repositories

Other copyright issues like the rules concerning communication with the public and the protection of databases will also be touched upon.

The first section of this paper will describe the rules regulating copyright the second, rules governing the protections of personal data.

3. COPYRIGHT

The author of a work has the exclusive right to

- authorise or prohibit any reproduction of the work and to
- authorise or prohibit the communication of the work to the public.

The right to authorise communication to the public includes the right to make it available to the public by on demand services. This means that the author has to authorise that the work may be reproduced and made available to the public from a digital repository, unless there are specific exceptions or limitations to his right provided for by law.

The legal regulation of reproduction and transfer of data differs according to how the information has entered the repository.

There are in principle two ways for information to enter a repository:

1. The information is submitted to the repository by the author or the rights owner. This act is accompanied by a license agreement between the author or the rights owner, and the administrators of the repository.
2. The information is ingested to the repository without any active participation of the author or rights owner, perhaps even without his knowledge. This may happen in different circumstances, e.g. due to legal deposit regulations for published material or archiving regulations that apply to the employing institution (e.g. a university). There is no license agreement between the author and the repository

3.1. THE INFORMATION IS SUBMITTED TO THE REPOSITORY BY THE AUTHOR OR THE RIGHTS OWNER

This situation is relatively uncomplicated. The author usually is the rights owner, unless he has transferred his rights to some other person (e.g. a publisher) or the work is carried out for hire and the employment contract specifies that copyright is transferred to the employer¹.

EU Member States have different traditions concerning copyright regarding “work for hire”. However, the decisive factor from the point of view of the repository, is that the person submitting the information to the repository can confirm that he is the rights owner, and thus indemnify the repository against any claim from a third party.

Provided that the author has not transferred his rights he may enter into a license agreement with the administrators of the repository. This agreement decides what the repository may do with the deposited work. It is therefore of vital importance, that the repository lists the purpose of the repository and all uses made by the repository (and eventually also uses made by patrons of the library or archive) of the material they may anticipate. Copyright license agreements are interpreted in favour of the rights owner, therefore uses that are not stipulated will be regarded as unauthorised and will be prohibited.

¹ The copyright of computer programmes made by an employee in the execution of his duties or following the instructions given by his employer represent a special case: The economic rights always belong to the employer. It is disputed whether the copyright of computer programmes made in the context of a research programme, e.g. at a university, belongs to the author or the employer



3.2. THE INFORMATION IS INGESTED TO THE REPOSITORY WITHOUT ANY ACTIVE PARTICIPATION OF THE AUTHOR OR RIGHTS OWNER

The fact that the author has the exclusive right to authorise that his work may be reproduced and made available to the public in a digital repository implies that a work may not be ingested into a repository unless there are specific exceptions or limitations provided for by law to the author's exclusive right.

The usual laws to provide the necessary title for acquiring and ingesting material in a repository are the laws on Legal Deposit regarding published material and Archival regulations regarding non published material.

- The provisions of legal deposit can differ considerably between member states, but generally either the publisher or the producer is obliged to deposit a specified number of copies to one or more legal deposit libraries or the National Library. The law on legal deposit then specifies the obligations and the options of the library – often in combination with the provisions of the copyright act.
- Archival regulations usually specify the extent to which public administrative bodies or other public institutions, or institutions financed by public funds, have to deposit material produced to public archives. Again the law specifies the obligations and the options of the archive – often in combination with the provisions of the copyright act.
- Finally both libraries and archives may get donations of both published and unpublished material. This may be in different formats and media: written (e.g. letters or diaries), printed material, recordings on analogue and digital media. The donor, the owner of the physical copy, is not usually the copyright owner of the works. Therefore the copyright is not transferred to the institution, nor can a license agreement be made governing what the institution may do with the work, as it would usually be the case, if the author donated it himself. In these cases the institution depends on the general exceptions and limitations of the copyright act or perhaps special national provisions relating to the institution in question.

4. EU COPYRIGHT REGULATION

There is no uniform harmonised copyright regulation within the European Union. Author's rights (copyright) and the rights of performers and producers (related rights) are harmonised, but the exceptions and limitations to these rights are not.

The structure of the system is, that initially one specifies a series of rights for authors and performers and producers, and then there are exceptions and limitations to these rights. These exceptions and limitations are not harmonised. Within the limits specified by the directives, Member States are free to impose exceptions and limitations on copyright and related rights. In order to establish the actual level of protection in the European Union. One therefore has to investigate which exceptions and limitations are implemented in each Member State. This is a complicated enterprise which requires an investigation of the legal texts and the judicial practise of the Member States. To establish such an overview would be a major undertaking involving experts from all Member States.

In this context the aim of this document is to present the general framework of the copyright regulation within the European Union and the limits of national discretion. This will highlight the issues that one must investigate when launching concrete cross border projects of cooperation.

In this context three directives are important².

- Directive 2001/29/EC on the harmonisation of copyright and related rights in the information society. (This directive is often called "The Information Society Directive" or "Infosoc".)
- Directive 93/98/EEC harmonizing the duration of the protection.
- Directive 96/9/EC on the protection of Databases.

4.1. THE INFORMATION SOCIETY DIRECTIVE

The Information Society Directive specifies the legal protection of copyright (author's rights) and related rights (performers and producers rights) in the framework of the internal market which Member States are obliged to provide.

With this directive, the European legislators aimed to harmonise authors' rights³ to control

- use of their works with respect to reproductions;
- communication to the public by electronic means;
- distribution of hard copies.

The directive also contains rules for the protection of technical protection measures, TPMs.

² Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights (Official journal L 290, 27/11/1993 p.9 – 13)

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (Official Journal L 167, 22/06/2001 p. 10 – 19)

Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of Databases (Official Journal L 077, 27/3/1996 p. 20-28)

³ The rights specified for authors of intellectual and artistic works do also apply to related rights, i.e. the rights of performers, producers of phonograms and films and broadcasting organizations. For the sake of brevity and legibility I will only mention related rights when they differ from author's rights.

In the context of this enquiry the distribution of hard copies is not of concern. We will therefore concentrate on the rules concerning reproductions; communication to the public, TPMs – and on the exceptions and limitations to these rights.

4.1.1. Reproduction

Article 2 of the Directive states that :

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

- a) for authors, of their works;*
- b) for performers, of fixations of their performances;*
- c) for phonogram producers, of their phonograms;*
- d) for the producers of the first fixations of films, in respect of the original and copies of their films;*
- e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.*

In order to see the extent of this right one has to examine the exceptions and limitations to it. These are found in article 5(1) and 5(2)(a-e).

The only obligatory exception to the reproduction right is article 5(1)

1. Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:

- a) a transmission in a network between third parties by an intermediary, or*
- b) a lawful use*

of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

This means that cache copies in the networks and temporary copies in the personal computer are allowed for.

The other exceptions to the reproduction right are found in article 5(2)(a-e).

2. Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

- a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation;*
- b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned;*
- c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;*



- d) *in respect of ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts; the preservation of these recordings in official archives may, on the grounds of their exceptional documentary character, be permitted;*
- e) *in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the rightholders receive fair compensation.*

These exceptions are not mandatory and Member States may decide not to implement them. It is therefore necessary to check with the national legislation to see whether and how these exceptions are implemented.

5(2)(a) allows for photocopying or the making of prints. This in many countries is regarded as uncontroversial as long as the product is an analogue item. No purpose is specified. Therefore these copies may be made for any purpose. The remuneration is often provided for by levies on reproduction equipment.

5(2)(b) This article allows for copying on any medium, i.e. also digital copying, but only for private purposes.

Before the second reading by the Parliament the wording of this article was: “in respect of reproductions on any medium made for the private use of a natural person and for non-commercial ends, on condition that the rightholders receive fair compensation ...”

Note the difference between the two versions:

- 1) “made for the private use of a natural person ...”
- 2) “made by a natural person for private use ...”

The normal interpretation of this change would be that patrons should have to do the copying themselves. However, the Commission has made it clear that this was not intended. 5(2)(b) does not prevent library staff from making digital copies for the private use of patrons.

However, digital copies made by the library may not be sent by e-mail. The reason for this we find in Recital 40.

(40) “Member States may provide for an exception or limitation for the benefit of certain non-profit making establishments, such as publicly accessible libraries and equivalent institutions, as well as archives. However, this should be limited to certain special cases covered by the reproduction right. Such an exception or limitation should not cover uses made in the context of on-line delivery of protected works or other subject-matter....”

5(2)(c) This article allows Archives, educational institutions and libraries to make reproductions necessary for their activities. Note that no purpose or the use of specific media is specified in the article. This means that Member States are free to specify the purposes for which the reproductions may be made and the media used. However, this is not a Blank check. All exceptions and limitations have to comply with the so-called three step test. This means that the exceptions

1. shall only be applied in certain special cases
2. which do not conflict with a normal exploitation of the work or other subject-matter and
3. do not unreasonably prejudice the legitimate interests of the rightholder.

The customary practise has been that the test of compliance with the three step test is made by the national parliaments when legislating, and that it is not a question individual users need to worry about. However, it may be advisable when making use of an exception to make sure the action is not only within the letter of the law but also that it complies with the spirit. The law is usually held in quite

general terms that may not catch the specificity of some new activity or the consequences of the use of new media.

Article 5(2)(d-e) are not relevant in the present context.

These articles only concern reproduction of protected works. Except for 5(1) they are not mandatory. The types of reproduction allowed in Member States depend on whether they are implemented in national legislation and to which extent. This question cannot be answered without investigating the legislation and legal practices of particular Member States.

4.1.2. Communication to the public

The communication to the public by electronic means is regulated by article 3. It says

1. *Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.*
2. *Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:*
 - a) *for performers, of fixations of their performances;*
 - b) *for phonogram producers, of their phonograms;*
 - c) *for the producers of the first fixations of films, of the original and copies of their films;*
 - d) *for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.*
3. *The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.*

Article 3(1) concerns copyright proper (authors rights) and article 3(2) concerns related rights (the rights of performers and producers). The important article is 3(3) which states that the rights conferred in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public.

This means that every single act of communication or making available to the public in principle requires a new authorization and that this remains the case for the duration of the term of protection. The author or right holder remains in control. He may at any time stop the show. The act of communication to the public may never be repeated, e.g. a broadcast may never be re-broadcasted or made available to the public, and the work made available to the public via a database may be removed from it, and thus become unavailable.

Communication or making available to the public by electronic means differs from publishing hard copies of works. Once published the copy remains available to the public. The act cannot be undone. Therefore the right to do so is said to be exhausted, at least in the country where the work was published.

The communication to the public right is balanced by exceptions and limitations. These are specified in article 5(3), here in abbreviated form:

Member States may provide for limitations to the rights referred to in Articles 2 and 3 in the following cases:

- a) *use for the sole purpose of illustration for teaching or scientific research,...to the extent justified by the non-commercial purpose to be achieved;*
- b) *uses, for the benefit of people with a disability,...*
- c) *reproduction by the press,...*
- d) *quotations for purposes such as criticism or review,...*
- e) *use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings;*
- f) *use of political speeches as well as extracts of public lectures or similar works...*
- g) *use during religious or official celebrations organised by a public authority;*
- h) *use of works, such as works of architecture or sculpture, made to be located permanently in public places;*
- i) *incidental inclusion of a work or other subject matter in other material;*
- j) *use for the purpose of advertising the public exhibition or sale of artistic works,...*
- k) *use for the purpose of caricature, parody or pastiche;*
- l) *use in connection with demonstration or repair of equipment;*
- m) *use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building;*
- n) *use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works or other subject matter not subject to purchase or licensing terms which are contained in their collections;*
- o) *use in certain other cases of minor importance where exceptions already exist under national law, provided that they only concern analogue uses..."*

This list of exceptions demonstrates that, in reality, 'the communication to the public' right is not harmonised at all, giving Member States the option to maintain their existing exceptions.

Special attention should be given to Article 5(3)(n). The combination of articles 5(2)(c) and 5(3)(n) will enable archives, educational establishments and libraries to digitise their collections and provide access to them on the library premises. A similar exception in Danish copyright law has proved very valuable, particularly for research libraries.

Again, one must keep in mind that these exceptions are optional. Which of them, if any, are implemented in Member States must be checked in national legislation.

4.1.3. Technical Protection Measures

Obligations as to technological protection measures are found in article 6. This article obliges Member States to provide adequate legal protection against

- the circumvention of any effective technological measures, and
- the manufacture, import, distribution, sale, rental, etc. of devices, products or components or the provision of services which are promoted advertised or marketed for the purpose of circumvention of technological protection measures.

A technological protection measure is any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts which are not authorised by the right holder.



A technological protection measures is "effective" when the use of a protected work is controlled by the right holders through application of an access control or protection process, such as encryption etc or a copy control mechanism, which achieves the protection objective.

By introducing technological protection measures like encryption or copy control programmes, rights holders can prevent users from taking advantage of lawful exceptions as specified in Article 5.

Article 6.4 deals with this issue:

"..., in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation....."

By including article 5(2)(c) archives, educational establishments and libraries should be in safe harbour. Whether they are depends on what exceptions and limitations apply in their national legislation.

It should be noted, however, that the primary remedies foreseen are "voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned". This may imply complicated and time consuming procedures before the TPM may be legally circumvented.

Another obstacle is the prohibition to manufacture or import devices or products for the purpose of circumvention of technological protection measures. How shall one come about circumventing the TPM when it is forbidden to manufacture or import the means to do so?

4.1.4. Rights Management Information

Obligations concerning rights-management information are dealt with in article 7

It is not allowed without authority to

- remove or alter any electronic rights-management information or to
- distribute ... or to communicate or making available to the public works

if one knows, or has reasonable grounds to know, that by so doing one is inducing, enabling, facilitating or concealing a copyright infringement.

Rights-management information is any

- information provided by right holders which identifies the work, the author or any other right holder
- information about the terms and conditions of use of the work
- numbers or codes that represent such information.

For archives and repositories this does not represent a problem. On the contrary: Rights-management information facilitates the administration of the contents of the archive or repository.

4.1.5. Term of Protection

For the internal market to function it is, of course, vital that the duration of the protection is the same in all Member States. Therefore this was one of the first issues to be harmonized. Copyright consists of two types of rights:

- The right to exploit the work – these are called economic rights.
- The right to be identified in connection with the work and not to have it used in a way or in a context that is derogatory to the author – these are called ideal rights.

When talking of the term of protection we mean protection of the economic rights. The ideal rights usually do not expire.

The duration of the term of protection for:

Authors

70 years after death of the author

Joint authors

70 years after death of the last surviving author

Anonymous or pseudonymous works

70 after the work have been made lawfully available to the public. If the identity of the author is disclosed during the period of 70 years after the first lawful publication, the term of protections is life of author + 70 years after death.

Cinematographic and audiovisual works

70 years after the death of the last of the following persons to survive:

the principal director

the author of the screenplay

the author of the dialogue and

the composer of music specially created for use in the cinematographic or audiovisual work

Performers

50 year after the date of the performance. If a fixation of the performance is lawfully published or communicated to the public within this period, the rights expire 50 years after the first publication or communications to the public, whichever is the earlier.

Producers of phonograms

50 year after the date of the fixation is made. If the phonogram is lawfully published or communicated to the public within this period, the rights expire 50 years after the first publication or communications to the public, whichever is the earlier.

Producers of films

50 year after the date of the fixation is made. If the film is lawfully published or communicated to the public within this period, the rights expire 50 years after the first publication or communications to the public, whichever is the earlier.

Broadcasting organizations

50 years after the first transmission of a broadcast.

Previously unpublished works – published after expiry of copyright protection

25 years after first lawful publication or communications to the public. The right owner is the person who, after the expiry of copyright protection, for the first time lawfully publishes or lawfully communicates to the public a previously unpublished work. The protection granted is equivalent to the economic rights of the author.

Protection vis-à-vis third countries

Authors:

Same as country of origin, but not longer than EU.

Performers and producers:

Same as country of origin, but not longer than EU

4.1.6. Database Protection

A database is a collection of data. It can be both electronic or non-electronic, e.g. a card catalogue

Databases may be protected by copyright law if the selection and systematic arrangement of the data is the result of an intellectual creation. Some level of originality is required. Most databases do not display this kind of originality in the selection and systematic arrangement of the data, and they are therefore not protected by the normal copyright criteria. In the European Union such databases are protected by a sui generis right.

The sui generis right provides a right for the maker of a database, which has been a substantial investment in either the obtaining, verification or presentation of the contents, to prevent

- extraction and/or re-utilization of the whole or of a substantial part of the contents of that database, or
- the repeated and systematic extraction and/or re-utilization of insubstantial parts of the contents of the database, if this is in conflict with a normal exploitation of the database or unreasonably prejudice the legitimate interests of the maker of the database.

The sui generis protection last for 15 years, but can be extended if the database is updated.

This protection applies to all European databases irrespective of whether they are also protected by copyright.

In order to qualify for the sui generis database protection there must have been a substantial investment in either the obtaining, verification or presentation of the contents. The European Court of Justice ruled in a test case⁴, that if the substantial investment is related to the production of data, which are then collected in a database, the requirement is not met.

Electronic archives whose main objective is not the production of data (or other types of content) but rather the obtaining, verification or presentation of them, will, according to this ruling, be protected by the sui generis right.

4.1.7. Exceptions and limitations

There are exceptions to the sui generis right in the following cases:

- a) in the case of extraction for private purposes of the contents of a non-electronic database;
- 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;
- c) in the case of extraction and/or re-utilization for the purposes of public security or an administrative or judicial procedure.

For databases protected by copyright also the exceptions to copyright which are traditionally authorized under national law will apply, without prejudice to the mentioned points (a), (b) and (c).

⁴ COURT OF APPEAL, ENGLAND & WALES: Coram William Hill Organisation Ltd - vs - British Horseracing Board Ltd. 31 JULY 2001.

[http://www.ipsufactoj.com/international/2002/Part02/int2002\(2\)-006.htm](http://www.ipsufactoj.com/international/2002/Part02/int2002(2)-006.htm)



5. SUMMARY OF COPYRIGHT ISSUES

5.1.1. The information is submitted to the repository by the author or the rights owner

This is the least complicated scenario. In this case one normally makes a licence agreement with the author or right holder, and the objective is to secure, that all important issues are dealt with. These are

- Reproduction of the files
 - for preservation purposes
 - for private use.
- Communication to the public or making available to the public
 - on site
 - remote access on demand
- Technical Protection Measures
 - removal
 - means to circumvent them
- Rights Management Information

5.1.2. The information is ingested to the repository without any active participation of the author or rights owner

When there is no contact with the author or rights holder there is only the law to regulate.

EU legislation sets a minimum standard for this, but as exceptions and limitations are optional it is necessary to check with Member States' legislation how the directives are implemented. In general the same issues have to be checked:

- Reproduction of the files
 - for preservation purposes
 - for private use.
- Communication to the public or making available to the public
 - on site
 - remote access on demand
- Technical Protection Measures
 - removal
 - means to circumvent them
- Rights Management Information

Repositories will have to develop management systems that are able to handle different types of licenses and different sets of rules.

6. PROTECTION OF PERSONAL DATA

6.1. THE OBJECTIVE

Protection of privacy has become increasingly important in recent years. Information technology has made the processing and exchange of personal data easy. Personal data is available from many sources and it is easy to draw up a personal profile after a few searches on the internet. Even data such as names and addresses, that may not be considered sensitive, when used for marketing can feel like an invasion of privacy. Sensitive personal data may become available due to negligence or errors and can cause serious harm to the persons affected.

For these reasons most countries have had legislation to protect the privacy of personal data for several years. Within the European Union this represented a problem. The difference in levels of protection of personal data prevented the transmission of such data from one Member State to another. The establishment of the Internal Market requires that the free movement of goods, persons, services and capital is ensured, and this also includes that also personal data should be able to flow freely from one Member State to another.

In 1995 the directive 95/46/EC on the protection of personal data was adopted⁵. The aim of this directive is to provide a uniform protection of personal data and thereby make the free flow of such data possible within the union.

This is objective stated explicitly in the first article of the directive:

- 1. In accordance with this Directive, Member States shall protect the fundamental rights and freedoms of natural persons and in particular their right to privacy with respect to the processing of personal data.*
- 2. Member States shall neither restrict nor prohibit the free flow of personal data between Member States for reasons connected with the protection afforded under paragraph 1.*

6.1.1. Scope of the Directive

The Directive applies to the processing of personal data wholly or partly by automatic means, and to manual processing of personal data which form part of a filing system or are intended to form part of a filing system.

The Directive does not apply to the processing of personal data:

- in the course of an activity which falls outside the scope of Community law, public security, defence, state security and in areas of criminal law.
- by a natural person in the course of a purely personal or household activity.

⁵ 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. (Official Journal, L. 281, 23/11/1995, p. 31ff.)

The Commission has established a website collecting relevant information concerning this directive at

http://ec.europa.eu/justice_home/fsj/privacy/

6.2. CONTROLLER

Any processing of personal data in the Community must be carried out in accordance with the law of one of the Member States and carried out under the responsibility of a controller who is established in a Member State.

A controller is a natural or legal person which determines the purposes and means of the processing of personal data and is responsible for the correct processing of data and the safe guarding of the rights of the data subject.

If the controller fails to respect the rights of data subjects, national legislation provides for sanctions. Any damage which a person may suffer as a result of unlawful processing must be compensated for by the controller, who may be exempted from liability if he proves that he is not responsible for the damage.

6.3. CHOICE OF LAW

The main principle is that the place where the controller is established decides the applicable law. The national law of a Member State applies

- when the controller is established in the said Member State.
- when the controller is not established on the Member State's territory, but in a place where its national law applies by virtue of international public law;
- when the controller is not established on Community territory but makes use of equipment situated on the territory of the said Member State for processing the personal data. In this case the controller must designate a representative established in the territory of that Member State.

Data is said to be transferred when it comes under the jurisdiction of another Member State or under the jurisdiction of a third country.

6.4. PROTECTION GRANTED

The protection granted by the directive consists of several elements, which together constitute the lawful processing of personal data. In the following there is a short, summary description of these elements

6.4.1. Data quality

Personal data must be processed fairly and lawfully. It is the responsibility of the controller to safeguard this.

Personal data may only be collected for specified, explicit and legitimate purposes and they may not be further processed in a way incompatible with those purposes. Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible.

Personal data collected must be adequate, relevant and not excessive in relation to the purposes, for which they are collected or further processed; they must be accurate and, where necessary, kept up to date. Inaccurate or incomplete data should be erased or rectified, having regard to the purposes for which they were collected or for which they are further processed⁶.

⁶ In the Danish Act on Legal Deposit it is specified, that incorrect personal data collected via internet harvesting are not erased but rectified if possible.

Personal data may not be kept in a form which permits identification of data subjects longer than is necessary for the purposes for which the data were collected or for which they are further processed. Personal data may be stored for longer periods for historical, statistical or scientific use.

6.4.2. Criteria for making data processing legitimate

The criteria for making data processing legitimate are specified in article 7.

Member States shall provide that personal data may be processed only if:

- a) the data subject has unambiguously given his consent; or*
- b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; or*
- c) processing is necessary for compliance with a legal obligation to which the controller is subject; or*
- d) processing is necessary in order to protect the vital interests of the data subject; or*
- e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed; or*
- f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Article 1 (1).*

Comment:

The processing of data by libraries and archives will normally be warranted by art. 7(c) or 7(e).

The weighing of interests mentioned in art. 7(f) will in practice depend on the decisions of the Supervisory Authority which operate in Member States. This is especially relevant for the private sector.

6.4.3. Sensitive data

The directive identifies the personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life as being of a special category. In addition to these some Member States may specify other categories of data as being sensitive, e.g. economic data and data provided by social security agencies.

Sensitive data may not be processed unless the data subject has given his explicit consent. There are several other exceptions specifying conditions when sensitive personal data may be processed, but no one that applies to document repositories kept by libraries and archives. For them to process sensitive personal data exception in article 7(4) may be used.

“Subject to the provision of suitable safeguards, Member States may, for reasons of substantial public interest, lay down exemptions in addition to those laid down in paragraph 2 either by national law or by decision of the supervisory authority.”

This article was used as the warrant in the Danish Act on Legal Deposit.

6.4.4. Information to be given to the data subject

Personal information may be collected from the data subject, who is actively supplying the information. In these cases the controller must provide the data subject with at least the following information:

- a) the identity of the controller and of his representative, if any;
- b) the purposes of the processing for which the data are intended;
- c) any further information such as
 - the recipients or categories of recipients of the data,
 - whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply,
 - the existence of the right of access to and the right to rectify the data concerning him

When personal data has not been obtained from the data subject the controller must at the time of recording or if a disclosure to a third party is envisaged, no later than the time when the data is first disclosed provide the data subject with at least the following information:

- a) the identity of the controller and of his representative, if any;
- b) the purposes of the processing;
- c) any further information such as
 - the categories of data concerned,
 - the recipients or categories of recipients,
 - the existence of the right of access to and the right to rectify the data concerning him

However, the obligation to provide the data subject with this information does not apply where, in particular for processing for statistical purposes or for the purposes of historical or scientific research, the provision of such information proves impossible or would involve a disproportionate effort or if recording or disclosure is expressly laid down by law.

Comment:

This exception is applied in the Danish Act on Legal Deposit. The National Library is not obliged to inform data subjects when harvesting their personal data from Danish internet sources.

6.4.5. The data subject's right to access data

The data subjects have the right to obtain from the controller following information:

- a) without constraint at reasonable intervals and without excessive delay or expense:
 - confirmation as to whether or not data relating to him is being processed and information at least as to the purposes of the processing, the categories of data concerned, and the recipients or categories of recipients to whom the data are disclosed,
 - communication to him in an intelligible form of the data undergoing processing and of any available information as to their source,
 - knowledge of the logic involved in any automatic processing of data concerning him at least in the case of the automated decisions referred to in Article 15 (1);



- b) as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data;
- c) notification to third parties to whom the data has been disclosed of any rectification, erasure or blocking carried out in compliance with (b), unless this proves impossible or involves a disproportionate effort.

Comment:

The controller of a document repository containing personal information, e.g. collected via internet harvesting, may have difficulties in identifying which data belong to which individual. For this reason it may be impossible to give the data subject correct information, and for the same reason it may be impossible to rectify information claimed to be incorrect.

6.4.6. The data subject's right to object

The data subject has the right to object to the processing of data relating to him. According to the Directive Member states shall in their legislation provide for this possibility at least when processing is carried out

- in the public interest, or for purposes of legitimate interests pursued by the controller or by a third party to whom the data are disclosed, and
- for the purposes of direct marketing.

6.4.7. Security of processing

When the processing is carried out by way of a processor on behalf of the controller, this must be governed by a contract binding the processor to the controller and stipulating in particular that:

- the processor shall act only on instructions from the controller,
- the obligations as defined by the law of the Member State, in which the processor is established, shall also be incumbent on the processor.

The contract shall be in writing or in another equivalent form.

6.4.8. Notification of the supervisory authority

The controller or his representative must notify the supervisory authority before carrying out the processing operations. Member States may provide for the simplification of or exemption from notification only in certain specified cases when the interests of the data subjects are unlikely to be adversely affected by the processing operations.

The information to be given in the notification shall include at least:

- a) the name and address of the controller and of his representative, if any;
- b) the purpose or purposes of the processing;
- c) a description of the category or categories of data subject and of the data or categories of data relating to them;
- d) the recipients or categories of recipient to whom the data might be disclosed;
- e) proposed transfers of data to third countries;
- f) a general description allowing a preliminary assessment to be made of the appropriateness of the measures taken to ensure security of processing.



A public register of notified processing operations shall be kept by the supervisory authority. The register shall contain at least the information listed above. The register may be inspected by any person.

6.5. TRANSFER OF PERSONAL DATA TO THIRD COUNTRIES

The transfer of personal data to a third country implies that the data come under the jurisdiction of that country.

6.5.1. Approved countries

Transfer to a third country of personal data may take place only if the country in question ensures an adequate level of protection. The Commission may find that a third country provides an adequate level of protection. Such a decision is binding for Member States. So far only Argentina, Canada, Guernsey, Isle of Man and Switzerland are approved. Personal data may freely be transferred to countries which are approved⁷.

6.5.2. Safe harbour – USA

In 2000 the Commission recognised the “Safe Harbour international Privacy Principles”, issued by the US Department of Commerce, as providing adequate protection for personal data transfers from the EU⁸. Safe harbour is a system of governed self regulation where organisations may register as a “Safe Harbour” at the Federal Trade Commission. The system applies to the private sector.

Organizations have to provide annual self certification letters in order to remain on the list of participants. In order to be certified as a “Safe Harbour” organizations must comply with the seven Safe Harbour Principles concerning

- Notice
- Choice
- Onward Transfer (Transfers to Third Parties)
- Access
- Security
- Data integrity
- Enforcement

The principles on these issues do not substantially differ from the European.

The Safe Harbour registration only applies to the importer of the personal data. Accordingly only US law applies.

The Safe Harbour Website gives this general information concerning enforcement:

“In general, enforcement of the safe harbour will take place in the United States in accordance with U.S. law and will be carried out primarily by the private sector. Private sector self-regulation and enforcement will be backed up as needed by government enforcement of the federal and state unfair

⁷ Commission decisions on the adequacy of the protection of personal data in third countries.

http://ec.europa.eu/justice_home/fsj/privacy/thridcountries/index_en.htm

⁸ <http://www.export.gov/safeharbor/>



and deceptive statutes. The effect of these statutes is to give an organization's safe harbour commitments the force of law vis a vis that organization.”⁹

Personal data may be freely exported to organisations registered as safe harbours, but in some countries (e.g. Denmark) the national Supervisory Authority has to be notified.

6.5.3. Not approved Countries

Transfer of personal data to a third country which does not ensure an adequate level of protection may take place on condition that:

- a) the data subject has given his consent unambiguously to the proposed transfer; or
- b) the transfer is necessary for the performance of a contract between the data subject and the controller or the implementation of pre-contractual measures taken in response to the data subject's request; or
- c) the transfer is necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and a third party; or
- d) the transfer is necessary or legally required on important public interest grounds, or for the establishment, exercise or defence of legal claims; or
- e) the transfer is necessary in order to protect the vital interests of the data subject; or
- f) the transfer is made from a register which according to laws or regulations is intended to provide information to the public and which is open to consultation either by the public in general or by any person who can demonstrate legitimate interest, to the extent that the conditions laid down in law for consultation are fulfilled in the particular case.

Member States, i.e. the Supervisory Authority, may authorize a transfer of personal data to a third country which does not ensure an adequate level of protection if the controller provides adequate safeguards. Such safeguards may in particular result from appropriate contractual clauses.

6.5.4. Model contracts

The Commission may decide that certain standard contractual clauses offer sufficient safeguards. Member States shall take the necessary measures to comply with the Commission's decision.

The commission has established a homepage for model contracts for the transfer of personal data to third countries. This website contains reference to relevant information and to two model contracts¹⁰:

- 1) Standard contractual clauses for the transfer of personal data to third countries, and
- 2) Standard Contractual Clauses for Data Processors established in Third Countries.

⁹ http://www.export.gov/safeharbor/SH_Overview.asp

¹⁰ Model Contracts for the transfer of personal data to third countries.

http://ec.europa.eu/justice_home/fsj/privacy/modelcontracts/index_en.htm

Standard contractual clauses for the transfer of personal data to third countries

http://eur-lex.europa.eu/LexUriServ/site/en/oj/2001/l_181/l_18120010704en00190031.pdf

Standard Contractual Clauses for Data Processors established in Third Countries with Annex

http://eur-lex.europa.eu/LexUriServ/site/en/oj/2002/l_006/l_00620020110en00520062.pdf



The first applies to transfer from one controller to another. The second applies to transfer of personal data from the controller to a data processor, who is subject to the instruction of the controller.

Notwithstanding the use of standard contractual clauses, permission for the data transfer has to be applied for at the national Supervisory Authority.

6.6. SUMMARY OF PROTECTION OF PERSONAL DATA

The purpose of the Directive on the protection of personal data was to enable the free flow of data within the European Union by securing the same level of protection. Even though the directive may be implemented differently in the national legislation of Member States, an adequate level of protection is taken for granted. Therefore personal data may be freely transferred within the European Union.

Some third countries have been recognised by the Commission as providing an adequate level of protection, and consequently personal data may also freely be transferred to those countries.

A special arrangement is established with USA. Private organisations may certify as “Safe Harbour” and be registered as such by the Federal Trade Commission. Personal data may be transferred to these organisations.

Personal data may be transferred to other third countries after permission is granted by the national Supervisory Authority. When the transfer is regulated by a contract containing the Commissions Standard Contractual Clauses, permission will normally be given.

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