

Walking the line, finding the sweet spot. How to keep operations legal, researchers happy and administrative costs minimal

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Legal operations, happy researchers, costs down...

Contents of this presentation

- 1) The principle of proportionality and how it is applied to cases involving copyright and personal data as part of research data
- 2) Examples of solutions and legal tools that help to make data FAIR (Findable, Accessible, Interoperable, Reusable) and “As open as possible, as closed as necessary “
- 3) Open science solutions that help to keep administrative costs down

Keeping operations legal – copyright, personal data and the principle of proportionality

Scope of rights in research use

It is the task of the lawyer to interpret legislation in a way that enables research, however not crossing the boundaries of what it is possible to achieve with legal interpretation. This requires constant learning and updating of knowledge, and a lawyer must be allowed and prepared to use the time for learning.

In Aalto, lawyers helping researchers meet every week, and additionally there are regular meetings to discuss questions and solutions on Aalto level and in national meetings of university lawyers.

I will offer some example cases as starting point for conversation on today's topic.

Copyright and use of images in researchers presentation

Case: Use of images in a presentation + eLibrary

International Symposium presenters are offered the opportunity to submit their slides as PDF files for inclusion in a Society Library. These presentations will then be available as password-protected files in the Society e-Library. Society e-Library can be accessed by Symposium attendees and by members of the Society.

Researcher must sign a Copyright & Release Form for the presentation. Researcher asks, how she can include images that are previously published by scientific publishers in the presentation, and to how comply with the Copyright & Release form.

Is quotation allowed or should permission be required ?

Can the researcher rely on a copyright exception, or must she acquire a license.

The Finnish copyright legislation allows use of works as quotations and use of artwork to illustrate a scientific presentation. InfoSoc Directive (Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society) or other legislation does not define 'quotation'.

EU :Court of Justice of the European Union

Pelham, C-476/17

JUDGMENT OF THE COURT (Grand Chamber) 29 July 2019

The Court found that characteristics of quotation are (para 71):
use, by a user other than the copyright holder, of a work or, more generally, of an extract from a work;
for the purposes of illustrating an assertion, of defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user;
as such, the user of quotation exception must have the intention of entering into 'dialogue' with that work.

Court of Justice of the European Union

Pelham, C-476/17

Para 33) and 34) :

With particular regard to the Charter and recognition of IP (and, so, copyright) as a fundamental right, the CJEU recalled that nothing in the wording of Article 17(2) of the Charter suggests that its protection should be absolute. Rather, IP protection should be weighed against other fundamental rights and freedoms, including freedom of the arts (Article 13) and freedom of expression (Article 11 and Article 10(1) ECHR)

Copyright exceptions for scientific research

Interpretation must stay within the InfoSoc Directive Article 5 (3)

(a) use for the sole **purpose of illustration for teaching or scientific research**, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and **to the extent justified by the non-commercial purpose to be achieved**. (d) quotations for purposes such as criticism or review, provided that they relate to a work which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;

US : Fair use, Section 107 of the United States Copyright Act

Four factors to help judge, when content usage may be considered “fair use.”

1) The purpose of the use, whether such use is of a commercial nature or is for nonprofit educational purposes. If a usage is intended to derive financial benefits from the copyright material, then that is probably not fair use.

2) Use of a purely factual work is more likely to be considered fair use than use of someone’s creative work.

3) The amount and substantiality of the portion used in relation to the copyright protected work as a whole.

Fair use factor : Effect on the market (by Dr. Kenneth Crews)

Effect on the market is more complicated than the other three factors. Fundamentally, if you could have licensed the copyrighted work, that weighs against fair use. “Effect” is also closely linked to “purpose.” If your purpose is research or scholarship, market effect may be difficult to prove. If your purpose is commercial, then adverse market effect may be easier to prove. Occasional quotations may have no adverse market effects, but reproductions of entire software works can make direct inroads on the potential markets for those works. <https://copyright.columbia.edu/basics/fair-use.html>

<https://copyright.columbia.edu/basics/fair-use.html>

US: Fair use

Examples of Fair Use Include:

Quotation of excerpts in a review or criticism for purposes of illustration or comment.

Quotation of short passages in a scholarly or technical work for illustration or clarification of the author's observations.

See more : Copyright Clearance Center

<https://www.copyright.com/learn/about-copyright/>

Availability of license

Copyright Clearance centers offer single use licenses
<https://www.copyright.com/academia/pay-per-use/>.

In this case a license for using images or other excerpts from the article to presentations was not available.

Also there is no available license for use without limitation of number of users or time, and this kind of license would be required for use in the Society- eLibrary

Use as quotation or fair use

The use by the Society would be non-commercial and not primarily intended for financial gain, although there are membership fees and symposium fees collected by the society.

In this case use of image can be justified as a quotation or fair use. The source and authors have to be cited according to good scientific practice. When images are used as quotation the source of the image, a scientific article, and the authors of the image, have to be stated in the same way in the presentation, as they would be stated in a scientific journal article.

Guide for using images in academic publications

Aalto University has published a guide, ImagOA, for the use of images in presentations and in other academic publications.

https://libguides.aalto.fi/imagoa_eng

There has to be more work done to change citation practices of images, too often sources and authors of images are not mentioned properly.

Personal Data: photography as a participatory method, photos as research data

Photos in PhD thesis by people who had experienced homelessness

The stories of life on the streets, survival and the moments that gave life meaning were expressed in photographs taken by people who had experienced homelessness. They participated with their photos in an exhibition in Kiasma, the contemporary museum of Finnish National Gallery. The pictures and texts in the exhibition were named in accordance with the wishes of the participants – two of them wanted their surnames removed, others wanted to be shown under their own names. The exhibition and photographers received wide publicity. Researcher organising the exhibition also started PhD research, which evaluated photography as a participatory method. The participants would also appear in the PhD thesis under their own names as authors to their photos with the published photos.

Principle of proportionality

Charter of Fundamental Rights of the European Union

Article 52 Scope and interpretation of rights and principles

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the **principle of proportionality**, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

GDPR balances fundamental rights, as required by the principle of proportionality

General Data Protection Regulation GDPR (2016/679)

The aim of GDPR : Recital 4):

The processing of personal data should be designed to serve mankind. The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality.

Charter of Fundamental Rights of the European Union (2012/C 326/02)

Article 8 Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her. 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. 3. Compliance with these rules shall be subject to control by an independent authority.

Charter of Fundamental Rights of the European Union

Article 13 Freedom of the arts and sciences

The arts and scientific research shall be free of constraint. Academic freedom shall be respected.

Charter of Fundamental Rights of the European Union

Article 11 Freedom of expression and information

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

GDPR

Recital 50)

The processing of personal data for purposes other than those for which the personal data were initially collected should be allowed only where the processing is compatible with the purposes for which the personal data were initially collected.

Further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes should be considered to be compatible lawful processing operations.

GDPR

Recital 157)

By coupling information from registries, researchers can obtain new knowledge of great value with regard to widespread medical conditions. On the basis of registries, research results can be enhanced, as they draw on a larger population. Within social science, research on the basis of registries enables researchers to obtain essential knowledge about the long-term correlation of a number of social conditions. Research results obtained through registries provide solid, high-quality knowledge. In order to facilitate scientific research, personal data can be processed for scientific research purposes, subject to appropriate conditions and safeguards.

GDPR

Recital 159)

The processing of personal data for scientific research purposes should be interpreted in a broad manner including for example technological development and demonstration, fundamental research, applied research and privately funded research. In addition, it should take into account the Union's objective under Article 179(1) TFEU of achieving a European Research Area. To meet the specificities of processing personal data for scientific research purposes, specific conditions should apply in particular as regards the publication or otherwise disclosure of personal data in the context of scientific research purposes.

GDPR Article 9 Processing of special categories of personal data

1. Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation shall be prohibited. 2.

Paragraph 1. shall not apply if :

(j) processing is necessary for scientific research purposes in accordance with Art 89(1) based on law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject.

Finnish Personal Data Act 1050/2018

Section 6 § Processing of special categories of personal data

GDPR Art 9.1 shall not apply:

7) If processing is necessary for scientific research

Finnish Personal Data Act 1050/2018

4 § Lawfulness of processing

Processing of personal data is allowed according to GDPR Article 6(1) subsection if

3) processing is necessary for scientific research and it is proportionate to the legitimate public interest aim pursued.

GDPR Art 35 Data protection impact assessment (DPIA)

1. Where a type of processing in particular using new technologies, and taking into account the nature, scope, context and purposes of the processing, is likely to result in a high risk to the rights and freedoms of natural persons, the controller shall, prior to the processing, carry out an assessment of the impact of the envisaged processing operations on the protection of personal data. DPIA shall in particular be required in the case of b) processing on a large scale of special categories of data referred to in Article 9(1), or of personal data relating to criminal convictions and offences referred to in Article 10;

WP 29 Guidelines on Data Protection Impact Assessment (DPIA) and determining whether processing is “likely to result in a high risk” for the purposes of Regulation 2016/679 (WP 248)

Sensitive data includes special categories of data as defined in Article 9 (for example information about individuals’ political opinions), as well as personal data relating to criminal convictions or offences. An example would be a general hospital keeping patients’ medical records. This criterion also includes data which may more generally be considered as increasing the possible risk to the rights and freedoms of individuals, such as electronic communication data, location data, financial data (that might be used for payment fraud). In this regard, whether the data has already been made publicly available by the data subject or by third parties may be relevant.

In Aalto University, DPIA questions are included and addressed in the ethical review of research projects.

Finnish Personal Data Act 1050/2018

If there is derivation from the rights of data subject as defined in GDPR Articles 15, 16, 18 ja 21 , and special category of data is processed, a data protection impact assessment is required, and the DPIA must be sent to the supervising authority, data ombudsman, before starting the processing

Article 17 EU GDPR "Right to erasure ('right to be forgotten')"

The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay... Paragraphs 1 and 2 shall not apply to the extent that processing is necessary: (a) for exercising the right of freedom of expression and information; (d) for .. scientific research purposes or statistical purposes in accordance with Article 89(1) in so far as the right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of the objectives of that processing;

The researcher's dilemma: copyright and data protection

Article on the case from researcher Liisa Söderlund and Maria Rehbinder

The researcher's dilemma: copyright and data protection

Photographic works previously on public display raised an ethical dilemma between the clashing demands of copyright and privacy protection.

<https://www.vastuullinentiede.fi/en/publishing/researcher's-dilemma-copyright-and-data-protectio>

Providing solutions for researchers

Researchers want to have valuable data assets

Data is an asset, if it is gathered and processed following ethical guidelines; in compliance with data protection legislation; and intellectual property rights to data are agreed. Rights to data can be agreed to enable both commercialization and societal impact through open access licensing, when appropriate.

Researchers are happy to work towards solutions that comply with GDPR and national legislation.

Solutions for personal data often require privacy by design and data minimization, which are done by researchers. Achieving FAIR data requires co-operation.

Lawful basis for scientific research

A lawful basis often used for processing of personal data is Article 6.1 e) of the GDPR; Processing is necessary for scientific research, a task carried out in the public interest, Article 9.2 j) of the GDPR and for processing done by Aalto, section 4 §1 3) of the Finnish Personal Data Act (1050/2018), which defines scientific research as a task carried out in the public interest according to GDPR and section 6 § of the Finnish Personal Data Act.

Ethical consent and lawful basis

Consent to participate in the research study is collected to ensure voluntary participation and compliance with research ethics.

However consent is not usually used as the lawful basis for processing personal data in scientific research studies. The researchers informs the data subjects of the lawful basis personally and the lawful basis is explained in the privacy notice.

Art 11 GDPR

1. If the purposes for which a controller processes personal data do not or do no longer require the identification of a data subject by the controller, the controller shall not be obliged to maintain, acquire or process additional information in order to identify the data subject for the sole purpose of complying with this Regulation. In such cases, Articles 15 to 20 shall not apply except where the data subject, for the purpose of exercising his or her rights under those articles, provides additional information enabling his or her identification.

Zenodo + restricted access

Data in data repository with restricted access can provide a solution to achieve "As open as possible, as closed as necessary"

Example : Ps2Share – Participation, Privacy, and Power in the Sharing Economy

Andreotti, Alberta; Anselmi, Guido; Eichhorn, Thomas; Etter, Michael; Fieseler, Christian; Hoffmann, Christian Pieter; Jürss, Sebastian; Lutz, Christoph; Micheli, Marina; Newlands, Gemma; Ranzini, Giulia; Stanoevska-Slabeva, Katarina; Vermeulen, Ivar

This data set contains: Cleaned data files of the 2017 survey on participation, privacy, and power in the sharing economy across 12 countries. Data are in sav (for SPSS), xlsx, and csv format. Survey questionnaires in 10 languages (zipped PDFs)

Methodological Appendix

<https://zenodo.org/record/1122633#.XOJst8gzZnl>

Current data related questions

- Is it allowed to analyze data obtained from public repositories (such as arXiv.com)
- Is it allowed to apply image classification methods to snapshots taken during the last holiday which also contains many other people for use as course material ?
- is it allowed to analyze the sound and snapshots of the audience during a lecture?
- What are legal specifications for data anonymization, i.e., when exactly is an algorithm considered as privacy preserving?

Co-operation with data scientist

It is essential for lawyers working with research data to have a possibility to co-operate with data scientists. Aalto University is fortunate to have data scientists providing training, advice and co-operation for finding solutions. More information:

<https://www.aalto.fi/en/events/research-data-management-rdm-training-introduction-and-basics>

<https://www.aalto.fi/en/events/research-data-management-rdm-training-best-practices-in-rdm-and-personal-data-handling>

Minimizing administrative costs with open science tools

Promote the use of standards and open science tools

Promote the use of ORCID ID

ORCID can reduce the time-consuming process of maintaining up-to-date records, and provides a validation step with updates from trusted sources. ORCID improve the accuracy of name-based article repository searches.

<https://orcid.org/organizations>

Legal interoperability – part of making outputs FAIR

Creative Commons (CC) licenses have become standard licenses for open science. Each license includes the *Attribution (BY)* condition. There are three other conditions that licensors can add. CC BY 4.0 license was adopted by Ministry of Finance as the legal tool for opening publicly funded data in recommendation JHS 189 (okf.fi/jhs189) and by the Ministry of Education and Culture as the license recommended by Open science and research initiative <http://avointiede.fi/kasikirja>. Licenses prior to 4.0 licenses do not refer to sui generis database right and should not be used for research data.

Non-Commercial

There is a *Non-Commercial* condition, where commercial is defined as ‘primarily intended for or directed toward commercial advantage or monetary compensation.

If ownership of research data is assigned to university or sui generis data base right applies, making university the owner of database right of employees, the non-commercial condition can be used, if goal is dual licensing, meaning keeping a possibility for commercial licensing later. License text must include a source URL of website, where further licenses can be obtained. For Aalto University this is <https://innovation.aalto.fi/>

ShareAlike - has to be used if SA material is licensed in

All AALTO IN SPACE source code is based on a work at [http://open.esa.int/rosetta-3d-model/..](http://open.esa.int/rosetta-3d-model/)

and governed by the following license:

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=====LICENSE_START=====
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* Copyright (c) 2019 Aalto University and Markku Alho.
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* =====
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CC0 for research data

With people in a number of disciplines increasingly combining and analysing large collections of data, CC0 is a waiver that does not impair one's capability to conduct data-driven research.

See UCL <https://www.ucl.ac.uk/research-it-services/news/2018/dec/opinion-role-data-repository-supporting-research>

Dataset use, especially when combining large amounts of data sets, can suffer from *attribution stacking*, where a derivative work must acknowledge all contributors to each dataset from which it is derived, this is caused by the Attribution term in CC BY 4.0 license

Example : RULES OF THE ROAD

DATA QUALITY

All data on the CSA are publicly available to the world-wide science community. However, the data production is often based on routine calibration processes, and so some of the features in the data can be instrumental rather than representing physical processes. Therefore users who are not experts of given data files may wish to be in contact with the PI team or knowledgeable co-I in order to interpret the measurements correctly.

For presentations and publications, please acknowledge the instrument teams and the Cluster Science Archive. In publications, please refer to Laakso et al., 2010 when mentioning the usage of the Cluster Science Archive. Laakso, H., C. Perry, S. McCaffrey, D. Herment, A.J. Allen, C.C. Harvey, C.P. Escoubet, C. Gruenberger, M.G.G.T. Taylor, and R. Turner, Cluster Active Archive: Overview, 3-37, The Cluster Active Archive, Astrophysics and Space Science Proceedings, H. Laakso et al. (eds.), Springer, 2010

Open science tools

Images and other works can be searched and obtained from sources licensed with Creative Commons licenses or a CC0 waiver.

<https://oldsearch.creativecommons.org/>

Educational materials too often use images with copyright restrictions and /or without proper information on sources and authors of images.

Aalto has prepared guidance to using open access licensed images and good citation practices of images.

https://libguides.aalto.fi/imaqoa_eng

Thank you !

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