

UBVA's recommendations on data management policies regulating the rights of researchers

25/1/2016
Case no. S-2015-850

UBVA

The Committee for the Protection of Scientific and Scholarly Work, UBVA, is a standing committee under the Danish Confederation of Professional Associations (Akademikerne). The Committee represents the interests of research professionals in relation to intellectual property rights. For more details, please refer to www.ubva.dk.

Data management policies and the rights of researchers

Section 2 of the Danish "Code of Conduct for Research Integrity", issued by the Danish Ministry of Higher Education and Science in 2014, recommends that the universities introduce rules on "data management". Policies addressing this issue are therefore being made at a number of faculties etc. The Danish Code of Conduct for Research Integrity distinguishes between "primary materials" and "research data", cf. section 2 of the Code:

"DEFINITIONS

Primary material is any material (e.g. biological material, notes, interviews, texts and literature, digital raw data, recordings, etc.) that forms the basis of the research.

Data are detailed records of the primary materials that comprise the basis for the analysis that generates the results. "

There is often a need to provide the policies with rules governing the legal rights to the primary materials or data. In that way you can, among other things, anticipate the problems that may arise in research collaborations, including when the researchers leave the research projects ahead of time. It can, among other things, be appropriate to clarify to what extent the various researchers in the projects are allowed to have a copy of the primary materials and data that have been collected, and to what extent they are allowed to continue working with them.

Some data management policies tentatively use wordings such as "all forms of research data will remain the property of the university" and the like. However, UBVA finds that such wording is unsuitable. The fact is that rights to research data is a very complicated matter to handle in terms of the legal aspects. Thus, it is legally unclear what it means to

have rights to research data. And the rights that might come into play arise from different legal rules with different legal effects.

What legal rules protect research data?

Primary materials and research data can in some cases be protected by *copyright law*, in particular

- as *literary or artistic works* under section 1 of the Danish Copyright Act. This applies to interviews, notes, etc.
- as *sound recordings* under section 66 of the Danish Copyright Act. This applies to, for example, audio interviews.
- as *video recordings* under section 67 of the Danish Copyright Act. This applies to, for example, video interviews.
- as *photographs* under section 70 of the Danish Copyright Act. This applies to, for example, X-rays, satellite photographs, holograms, digital photos, etc.

Side 2 af 5

Systematic compilations of primary materials and/or research data may be subject to copyright protection, either as works under section 1 and/or 5 of the Danish Copyright Act or as "databases" under section 71 of the Act.

Adaptations of primary materials and/or research data may be subject to copyright protection, typically as works under section 1 and/or 4 of the Danish Copyright Act. For example articles and books are copyright protected.

Results based on primary materials and/or research data can to a certain extent also be protected by a patent or protected under the *design law*.

Primary material and/or research data in the form of *physical things* - such as tissue samples, geological samples, etc. - will be subject to ordinary ownership according to property law.

Primary material and/or research data which fall outside the categories mentioned above are not subject to ownership under property law or protected by intellectual property rights. Thus, much primary material and data in the form of *abstract information* is not protected by the above-mentioned legal rules.

However, people that take part in a research project may undertake *contractual obligations* related to primary material and/or research data. This applies regardless of whether the material is subject to protection under the above-mentioned rules or not. Such agreements may, for example, give researchers a right to access to, and possibly obtain a copy of the research data/primary materials that have been collected, as well as regulate the extent to which they subsequently will be allowed to continue working with them. The agreements derive their legal validity from *general contract law*, including the Danish Contracts Act.

Furthermore, primary materials and research data can in some cases also be subject to other legal regulation, including the protection of trade secrets, personal data protection legislation, etc.

You can read more about the above issues at UBVA's information portal www.forskerportalen.dk.

It is important to note that the above mentioned rules have different legal effects. Ownership of physical things means that the owner to a large extent has a legal right of access to the things owned. In contrast, protection by copyright, patent and design right only means that rights holders can prohibit copying etc., but it gives them no right to access to the protected work themselves. And rights based on contractual obligations only have the legal effects which result from the agreements. That is, the agreements should explicitly state what happens if the parties do not comply with them. Otherwise, they are hardly more than an empty gesture.

Who holds the rights?

It is also important to note that it may vary who holds the various rights:

The copyright to literary and artistic works generally lies with the researchers who have produced them, according to the general principles of copyright during employment. The copyright to books and articles therefore lies with the researcher under the general rules on copyright during employment. At The University of Copenhagen this was approved in an agreement concluded by the General Collaboration Committee of Copenhagen University on 24 June 2005.

Side 3 af 5

The copyright in photographs under section 70 usually lies with the researcher who took the picture. In the case of products covered by sections 66 ff of the Danish Copyright Act (audio and film recordings) and by section 71 (compilations), it may be unclear whether the copyright created by university researcher lies with them or the university. If you want to be sure, you should enter into an agreement.

It may also be unclear who owns the primary materials/research data which take the form of physical things. If a researcher has collected them during his tenure, it will in many cases probably be the university that has the ownership. However, the safest thing is to enter into an agreement on this.

Whoever is the holder of agreed rights to primary information and/or research data depends on what is agreed.

It is important that data management policies address the issue of who owns research data in a way that takes the above legal aspects into account. Wordings such as "all research data will remain the property of the University" are, however, inadequate and do not meet the need.

UBVA's considerations

a. Research publications and inventions

That the researchers own the copyright to their books and articles are key to academic freedom and a prerequisite for publishing work via publishers under publishing agreements. That this is indeed the case follows, as already mentioned, by the general copyright rules and has been approved at the University of Copenhagen in the above mentioned agreement concluded by the University's General Collaboration Committee on 24 June 2005. To avoid any ambiguity on the issue, UBVA recommends that data management policies which address the question of rights to research data mention it explicitly. In addition, UBVA finds that

as a precaution it should be mentioned that the question of who has the right to patentable inventions is regulated by the Danish Act on Inventions at Public Research Institutions, and that it may involve restrictions on researchers' access to publish research results that form the basis for patent applications.

b. Primary materials in the form of physical objects

Primary materials in the form of physical objects are, as mentioned above, subject to common property right. UBVA holds the view that, as mentioned earlier, it is more than likely that the right to a great extent will belong to the university. In order to avoid any doubt and discussion about this issue, UBVA recommends incorporating this explicitly in the data management policies of the universities.

c. Access to and the right to dispose of primary materials/research data

UBVA has considered whether data management policies should include provisions for the extent to which the various researchers in research projects can

- (i) get access to the research data/primary materials collected,
- (ii) obtain a copy thereof, and
- (iii) the extent to which they are subsequently allowed to work with them, including the extent to which the material may be used in future projects.

Side 4 af 5

The Committee finds it particularly difficult to formulate general rules on the issue. Research projects differ widely, and what is reasonable in one project is not necessarily appropriate in another. It depends on the number of participants in a research project, the roles of the participants, organisation and funding, etc.

UBVA therefore recommends that data management policies, rather than introducing general rules on the above (i) - (iii), require researchers in research projects to relate to them and, if necessary, enter into agreements with them as part of the individual research projects. This is consistent with the Danish Code of Conduct for Research Integrity, sections 2 and 5, which recommend that participants in research projects among other things conclude an agreement on "Intellectual property rights" and "Use, sharing, ownership and management of data."

A number of research institutions and third parties providing external funding of research require that primary material and research data are made publicly available as part of "Open Access". It is important that agreements concerning rights in research data/primary materials takes this fact into account. Among other things, it can be problematic if the participants in a research project in whole or in part transfer rights to primary material and/or research data to scientific journals or other commercial players.

Proposed wording

UBVA therefore recommends that data management policies be provided with the following provisions:

1. Researchers have the copyright to books and articles in accordance with the general rules of copyright during employment. Who has the

rights to research inventions is regulated by the Act on Inventions at Public Research Institutions. This may also entail restriction of researchers' access to publish research that forms the basis for patent applications.

2. Primary materials collected by employees of the University during their service, and which are physical objects, for example biological samples, belong to the university and may not be removed without permission.
3. As part of a research project, the following should be clarified and if necessary adjusted by agreement, cf. sections 2 and 5 of the Danish Code of Conduct for Research Integrity:
 - a. To what extent can the participating researchers and others
 - (i) have access to the research data/primary materials collected,
 - (ii) are entitled to obtain a copy of the primary materials and data,
 - (iii) may use primary materials and data, including in other projects and for other purposes. In this context it should be determined what rules apply if a researcher leaves the project and / or the institution at which the researcher is currently employed by, as well as
 - (iv) the terms governing the above, including whether there are special loyalty or confidentiality obligations
 - b. Intellectual property rights, including whether the research project makes use of material that interferes with the rights of others, and who should make the clearing of rights.

Side 5 af 5

Agreements concerning rights in research data must take into account the requirements of "Open Access" in primary material and/or research data which might follow from the policies of the relevant research institutions, third parties providing external funding of research, etc.