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Answers to Questions Asked During the Launch Event of DMLawTool - 30.03.2021

QUESTION 1:

Do videos also get 50 years of copyright from the date of creation, as photos lacking of individuality?

Answer 1:

No, the protection of videos lasts for 70 years after the author's death, as for all other kinds of works.

QUESTION 2:

How should researchers behave if on the one hand they should keep their data for 10 years and on the other hand they should destroy those data after the research is finished?

Answer 2:

In this case different interests enter in conflict: 1) the general interest of accessing and eventually reusing collected research data; 2) the personal interests of data subject for privacy.
Data protection law does not prevent you from collecting and processing personal data but you have to manage this data with due care and in accordance to data protection principles. This for example means that you have to inform the data subject about the fact that their data is kept for X years and about the need to take security measures. You must however be transparent, and perhaps not all data shall be kept for such a long period of time.

QUESTION 3:

I am in charge of a faculty repository where we make pdf versions of master thesis available. Do I have to ask the author of the thesis to remove the images/screen captures from their thesis before loading them on the repository?

Answer 3:

It is indeed a use of the work. Various exceptions exist however, and among them the exception of quotation. Provided that the criterias are met, both the use by the student and the storage or the distribution of the work are covered.
If the images/screen captures are correctly used as quotations in the master thesis, it is not necessary to remove them.
But if they are not used as quotations, the author of the master should have received permission to reproduce the images in their thesis. And according to the permission this use is probably limited to the text of the thesis and cannot be extended to further reproductions. Therefore, it is needed to either remove the images or to ask for a new permission to reproduce the thesis and make it available on a repository.

QUESTION 4:

What exactly does the exception for quotation allow for?

Answer 4:

If the following conditions are given, it is possible to quote a work without asking for the author's consent:

1. The cited work shall be a divulgated work.
2. A link must exist between the cited work and the content. The work must serve as an explanation, a reference or an illustration, and serve the purpose of the work encompassing it. The extends of the cited work shall also b proportionnate.
3. The citation shall respect moral rights: it is easy to modify the work or put it out of context when citing it.

Moreover, in the scientific field, good practices usually impose stricter rules. For more details, please see either the Quotation node of the DMLawTool or the CCdigitallaw page: https://ccdigitallaw.ch/index.php/english/copyright/5-how-may-other-people-use-work/55-right-quotation.

QUESTION 5:

Question 5.1:

What about the "intellectual creation" of research video content: if we have to leave the camera in the room to film e.g. children in an uninterrupted way, do these videos get copyright protection despite the "author" not being behind the camera?

Answer 5.1:

This is a difficult question. By "intellectual creation", the legislator decided to limit the protection of copyright to expressions of the human mind, and to exclude purely natural or technical creations. More specifically, when the person controls the camera and determines what and how the camera films, the intellectual creation can certainly be recognised. But when the person just pressed the "on" button and the camera films the whole time without any or much control from the person, the level of the intellectual creation drops a lot and in some cases can't even be recognised.

Question 5.2:

Follow-up question: if the children (or adults let's make things easier from the point of view of responsibility) trigger the recording, are they considered as co-authors?

Answer 5.2:

The recording can be protected by copyright if it has the character of originality/individuality even if it is made by a child. Every person, whether a child or an adult, that gave their personal contribution to the filming and/or the performance filmed is a co-author.

QUESTION 6:

If I conduct qualitative interviews with open questions, what kind of consent should I get from the participants (written, verbal), and is it enough to only pseudonymize the data if they give their consent?

Answer 6:

Written consent is always better because it is more clear and it is more easy to prove in case a consent problem occurs. Moreover, even when you have the consent to process personal data and it is pseudonymised, you still have to consider all precautionary measures in order to protect the subject's privacy (security measures, subject's rights, etc.). Only when data are truly anonymised

data protection requirements don't apply anymore. That's why it is good practice to anonymise data as soon as possible.

QUESTION 7:

Who is considered the creator of data in case of an interview: me, who designed and asked the questions, my respondent who answered the question, or both of us, since semi-structured interviews often flow more as a conversation between both sides?

Answer 7:

The question is tricky. First, not all expressions have the required level of individual character to be considered as a copyright protected work. So a very ordinary structure and drafting of the questions (e.g. what's your age/name/address) would not be protected. The same reasoning may be used for answers: short and ordinary answers aren't protected either. There is indeed a grey range, and much space for a case by case analysis. More original structure and elaborate answers may indeed be protected.

Regarding the attribution, the question lies whether or not personal contribution is brought by both parties and may be separated and be considered as a work in itself? Here also, things will really depend on the specific case and its circumstances.

QUESTION 8:

Is there a point at which personal data and possibly sensitive personal data should no longer be considered to be protected? Should personal and sensitive data of the deceased also be protected? I guess it also makes a difference if it is a public figure?

e.g. 1: database focusing on public figures from the first half of the 20th century: are their political commitments unknown to the general public, considered as sensitive personal data and are they protected?

e.g. 2: Database of photos/videos of anonymous but potentially identifiable psychiatric patients who have been dead for several decades, is it possible to make such database public?

Answer 8:

In principle, data protection ends with the death of the data subject (be careful, multiple data subjects may be identified with materials as writings, pictures or video). In practice however, the situation is more complicated. Art. 1 § 7 Ordinance to the Federal Act on Data Protection for example only enables access to the data of a deceased person when the person who wants to consult the data may have a legitimate interest. Moreover, other obligations branches of law may enter into account (criminal law with the breach of professional confidentiality, general right to the protection of personality (of which data protection is a subset)).

The situation is also different for persons of public interest. Art. 13 § 2 let. f Federal Act on Data Protection provides that data relating to the public activities of a person of public interest may justify a breach of privacy (which wouldn't have been justified for any other person). No special limitation is made regarding sensitive data (except that it shall relate to the public activities of the person, not their private life).

So if we take your first example, it is possible to create such a database, provided that other legal provisions are not infringed for dead personalities, and that data concerns the public activities of the living ones.

Example 2 is a bit trickier since the exception for public figures doesn't apply. Moreover, it is possible that descendents of patients may see their own right to personality (or even their right to data protection if the data involves them) violated by the publication. Such risk decreases however with time and generations.

QUESTION 9:

What about other popular licenses apart from Creative Commons licenses such as GNU GPL for Software/code?

Answer 9:

From a legal point of view all licences are treated the same way, provided that they organise how the right holder lets others use their work. They can be oriented toward open access, they can be restrictive, they can either apply to one particular user or to various users, be exclusive or not, limited geographically or not.

GNU GPL are more specifically indicated for softwares but as licenses themselves they can be considered as more broadly all copyleft licenses and are simply viewed as a license that guarantees a lot of freedom to users. It's also the same situation for contracts that are drafted (often orally) "on the go" or that are "tailor made" by the right holder and the user.

QUESTION 10:

According to Swiss law, is CC0 a legal license, given that moral rights cannot be abandoned?

Answer 10:

Open source and open access philosophies use copyright law to reach goals that were not originally pursued by the legislator. In Switzerland (but not in all countries), the author shall indeed not waive their moral rights (or at least the core of such rights). As a result, in Switzerland it is indeed not possible to reach a "true" CC0, where the author completely waives all their rights, as it happens in common law countries. In order to solve this problem however, CC0 license provides that the author waives as much rights as possible, in situations where it is impossible to waive everything. So according to Swiss legislation, by releasing a work under a CC0 license you give up as many rights as possible (but indeed not all your rights).

The consequences of such license are the following: if the author wants to release the work under CC0, they will renounce to file a complaint if someone uses the work in this configuration. If, for any reason, the author decides to file a complaint, we could argue that such behaviour goes against law's general principles such as good faith. To our knowledge, no court decision has established a balance so far.