

2.2.4 Germany

In Germany, there is currently no national policy or regulation on Open Access in place. However, efforts are being made in this direction. According to the latest work from the EOSC Landscape Working Group, Germany plans the creation of a publication policy, including a mandate for open access, as well as a policy regarding data/services, which includes an open access mandate and also a policy for open learning⁵⁰.

However, the German law already contains rights for authors of scientific contributions which result from research activities at least 50% of which were financed by public funds to publish in open repositories after one year embargo time even if they have granted an exclusive right to a publisher⁵¹.

Back in January 2006, the Joint Committee of the German Research Council (DFG - the main national research funder) adopted a set of guidelines for the publication of results from DFG-funded projects on an open-access basis. These guidelines stipulate that, if possible, recipients of DFG research grants should make their results available online in digital format and free of charge, either instead of or in addition to traditional publication. The guidelines recommend publication in suitable open-access journals or the retroactive provision of previously published papers in open-access repositories⁵².

In 2015, the DFG went a step further in its guidelines on the handling of research data („Leitlinien zum Umgang mit Forschungsdaten“) by highly recommending researchers of DFG-funded projects to make their research data freely accessible. The DFG policy focuses on research data, although it also addresses the software and methods necessary for validation and/or replication.⁵³

At the beginning of 2021, the DFG launched its newly accentuated Infrastructures for Scientific Publishing program, whose main objectives include promoting the Open Access transformation by establishing and expanding suitable publication infrastructures and (further) developing structural frameworks.

In September 2016, the German Federal Ministry of Education and Research (BMBF) released its Open Access Strategy entitled "Open Access in Germany" which contains a clear commitment to the principles of open access and open science. The strategy includes 5 major action fields which should be worked on both at regional (“Länder”) and national level. Particular emphasis lies on developing guidelines concerning Open Access to outputs from publicly funded research projects, as well as on engagement of universities and research institutes to develop their own Open access policies. The BMBF is currently funding 20 innovative projects in Open Access.

Besides these two main national funders, several German research organisations, universities, and initiatives have developed their own Guidelines/policies on Open Access to publications and/or Data: as of 2020, 72 German universities and other higher education institutions had a published OA policy according to ROARMAP⁵⁴. Also, all of the four large German research associations (Max Planck Society,

⁵⁰ Landscape of EOSC-related infrastructures and initiatives (EOSC Landscaping WG report)

<https://op.europa.eu/en/publication-detail/-/publication/cbb40bf3-f6fb-11ea-991b-01aa75ed71a1/language-en/format-PDF/source-156485650>

⁵¹ https://www.gesetze-im-internet.de/englisch_urhg/index.html

⁵² https://www.dfg.de/formulare/2_00/index.jsp

⁵³ <https://sparceurope.org/new-sparc-europe-report-analyses-open-data-open-science-policies-europe>

⁵⁴ ROARMAP: Registry of Open Access Repository Mandates and Policies

<http://roarmap.eprints.org/view/country/040.html>

Fraunhofer-Gesellschaft, Helmholtz Association and Leibniz Association) have open access policies and actively support open data projects and initiatives.

These policies are based on the national guidelines. As an example, the Helmholtz Association (a union of 18 German scientific research Centres) adopted a position paper on the management of research data. This includes a commitment to “store research data from the Centres within suitable data Infrastructures and make them available openly and free of charge for subsequent use by Science and society.”⁵⁵ The German rectors’ conference (Hochschulrektorenkonferenz HRK) also developed at least 2 recommendations on Research Data Management.⁵⁶

At regional level, many states have funded Research Data Management projects that resulted in recommendations and policies⁵⁷.

⁵⁵ https://www.helmholtz.de/fileadmin/user_upload/01_forschung/Open_Access/EN_AKOS_TG-Forschungsdatenleitlinie_Positionspapier.pdf

⁵⁶ https://www.hrk.de/uploads/tx_szconvention/HRK_Empfehlung_Forschungsdaten_13052014_01.pdf ;
https://www.hrk.de/uploads/tx_szconvention/Empfehlung_Forschungsdatenmanagement_final_Stand_11.11.2015.pdf

⁵⁷ <https://www.forschungsdaten.info/fdm-im-deutschsprachigen-raum/>

6.2.5.4 Germany

6.2.5.4.1 Authorship

Under the German *Urheberrechtsgesetz* (UrhG),¹¹⁵ the author is the creator of the work (§7 UrhG). Also here the act provides for a presumption of authorship, according to which the author is who is indicated as such, unless it is proven otherwise. In case of missing indication of the author, the editor or, if missing, the publisher is considered as authorized to assert the author's rights (§10 UrhG).

As to co-authorship, all co-authors jointly hold copyright if their contributions to the work are indistinguishable, and they are supposed to jointly exercise their rights of publication and exploitation (§8 UrhG). The author of a compound work needs the authorization of other authors to publish, exploit or alter the work, for no joint exercise of rights over the single contribution is allowed (§9 UrhG).

6.2.5.4.2 Subject matter

According to §§2-5 UrhG, the subject matter of copyright includes only author's own intellectual creations, which are exemplified in a list containing works traditionally included under the umbrella of author's rights. Official works and acts are excluded from the subject matter.

6.2.5.4.3 Exceptions

Illustration for teaching and scientific research. §60 UrhG identifies three exceptions for teaching and scientific research, all very narrowly tailored and very detailed. Paragraph A provides that up to 15% of a published work can be reproduced, communicated, distributed on a non-commercial basis for teachers, examiners, third party participants to education institutions and education activities. Full works can be used for the same purpose only if they are illustrations, singled-out articles of a professional or scientific journal, small-scale works and out-of-commerce works. Recording of a public presentation of a work, content specifically intended for education markets are excluded from the scope of this exception. Paragraph B states that up to 10% of a published work can be reproduced, communicated and distributed for media collections for teaching purposes. Paragraph C allows the reproduction, distribution and making available to the public of up to 15% of a work for the purpose of non-commercial scientific research (i) for a specifically limited circle of persons for their personal scientific research and (ii) for individual third persons insofar as this serves the monitoring of the quality of scientific research". It adds that up to 75% of a work may be reproduced for personal scientific research, and that full use may be made only of illustrations, isolated articles from the same professional or scientific journal, other small-scale works and out-of-commerce works. The entire provision cannot be overridden by contract (§60g(1) UrhG). § 47 UrhG contains the traditional teaching exception, stating that schools, teacher training and further training institutions may make individual copies of works to be used as part of a school broadcast by transferring the works to video

¹¹⁵ Urheberrechtsgesetz vom 9. September 1965 (BGBl. I S. 1273), as last amended by Artikel 1 des Gesetzes vom 28. November 2018 (BGBl. I S. 2014) (hereinafter UrhG).

or audio recording mediums exclusively for teaching purposes. The digital teaching exception under Article 5 CDSM Directive has yet to be implemented.

Private use for non-commercial purposes. With some additional specification compared to the text of the InfoSoc Directive, §53(2)(2) UrhG permits to make single copies of a work or to have these made for inclusion in a personal archive if and insofar as the reproduction is necessary for this purpose, and one's own personal copy of the work is used as the model from which the copy is made.

Text and data mining. Although Germany still has to implement the TDM exceptions provided by Articles 3 and 4 CDSM Directive, the German Copyright Act already features mechanisms allowing TDM activities. In order to enable the automatic analysis of large numbers of works for scientific research, §60d UrhG allows (i) the reproduction of the source material in order to create, particularly by means of normalisation, structuring and categorisation, a corpus which can be analysed and (ii) the making available of the corpus to a specifically limited circle of persons for their joint scientific research, as well as to individual third persons for the purpose of monitoring the quality of scientific research. Such uses are admitted only if for non-commercial purposes. Once the research work has been completed, the corpus and the reproductions of the source material shall be deleted. They may no longer be made available to the public. It is, however, permitted to transmit the corpus and the reproductions of the source material to specific institutions for the purpose of long-term storage. The provision cannot be overridden by contract.

Public lectures. Under §48 UrhG, it is permissible to reproduce and distribute public speeches for informative purposes, with no quantitative limitation. No specific mention is made to lectures or academic speeches. The exception does not cover the reproduction and distribution of public speeches in the form of a collection predominantly containing speeches by the same author. Similarly, §53(7) UrhG always requires consent of the rights holder for “the recording of public lectures, productions or performances of a work on video or audio recording mediums, the realisation of plans and drafts of artistic works and the reconstruction of architectural works”.

Quotation. Adding more specification to the provision of the Berne Convention and the InfoSoc Directive, §51 UrhG permits the reproduction, distribution and communication to the public of a published work for the purpose of quotation so far as such use is justified to that extent by the particular purpose. The provision specifies that this should be particularly the case where after publication individual works are included in an independent scientific work for the purpose of explaining their content.

Uses in libraries and other CHIs. Although Article 6 CDSM Directive has yet to be implemented, German law already contains a number of provisions pursuing similar goals. Very punctually, §60e UrhG allows publicly accessible libraries, which neither directly nor indirectly serve commercial purposes, to reproduce a work from their collections or exhibitions, or have such a work reproduced, for the purpose of making available, indexing, cataloguing, preservation and restoration, including more than once and with technically required alterations. For restoration purposes, libraries may also distribute reproductions of a work to other libraries or to institutions, and lend restored works and copies of newspapers, out-of-commerce works or damaged works. Under §60f UrhG, archives which also act in the public interest may reproduce a work or have a work reproduced in order to include it as archival material in their collection. §60e UrhG also reports the InfoSoc exception that allows libraries to make works from their collections available to their users for personal research or private

studies at terminals on their premises. The provision adds, however, a specification: patrons may reproduce for non-commercial purposes, to reproduce up to 10% of a work per session and to make reproductions of isolated illustrations, articles from the same professional or scientific journal, other small-scale works and out-of-commerce works. In addition, and in response to individual orders for non-commercial purposes, libraries may transmit to users reproductions of up to 10% of a published work or of isolated articles which have appeared in professional or scientific journals. None of these provisions is overridable by contract, except for the case of access from terminals in libraries and other institutions, where contractual agreements prevail.

Marrakesh (accessibility for visually impaired individuals). §45a(1) UrhG already provided for an exception to reproduction and distributions rights in order to facilitate access to protected works for people with disabilities “whose access to the work is, due to a disability, not possible or is made considerably more difficult by the already available means of sensual perception. The Marrakesh Directive has been implemented by §45b and §45c UrhG, which closely follow the EU text, and request equitable remuneration to be paid by authors via collecting societies. Authorized entities are regulated through acts emanated by the Federal Ministry of Justice and Consumer Protection.

Orphan works. Compared to the UE text, §61(4) UrhG adds a legal presumption according to which if the orphan works have already been made available to the public with the permission of the rights holder, it can be assumed in good faith that the rightholder would agree to the use” in libraries or other cultural institutions. Furthermore, the same exception is extended to the use of orphan works by public broadcasting organisations (§61c UrhG).

Out-of commerce works. Article 8(3) CDSMD has yet to be implemented. However, German law already contains provisions devoted to out-of-commerce works. §§53(2)(4)(b) makes it possible to make single copies of a work or to have these made for other personal use in the case of a work which has been out of print for at least two years. §53(4) UrhG specifies, instead, that the consent of the rights holder is always required for the reproduction of graphic recordings of musical works, a book or a periodical, in the case of an essentially complete reproduction, insofar as this does not occur by means of manual transcription, unless it is for personal use and the work has been out-of-commerce for at least two years. §53(6) UrhG specifies that the copies so made may neither be distributed nor communicated to the public, but it should be possible to lend lawfully produced copies of newspapers and out-of-commerce works.

Other software exceptions. The UrhG follows the Software Directive and includes exceptions for lawful uses, unless otherwise provided by contracts (§69d), making of backup copies and study or test of functioning of the program. §60e UrhG contains a faithful reproduction of the Directive’s interoperability exception.

Other database exceptions. Apart from the text and data mining exception (§60d), §87c UrhG allows the reproduction of a qualitatively or quantitatively substantial part of a database in case of private use (but not for databases whose elements are accessible individually by electronic means), purposes of scientific research and illustration in teaching, court proceedings and purposes of public safety.

Open repository right. According to §38(4) UrhG, the author of a scientific contribution which results from research activities at least 50% of which were financed by public funds, and which was reprinted in a collection which is published periodically at least twice per year, has the right, if he has granted the publisher or editor an exclusive right of use, to make the contribution available to the public upon

expiry of 12 months after first publication in the accepted manuscript version, unless this serves a commercial purpose. The source of the first publication must be cited. The provision is deemed mandatory and cannot be overridden by contract.

6.3.5.2 Germany

Relevant legislative initiative

- Bundesdatenschutzgesetz (BDSG) Federal Data Protection Law

Issues:

- Legal basis for processing sensitive data for research purposes are described by Section 27
 - o Consent is considered as a general rule.
 - o Consent is not necessary under conditions described under section 22(2), namely:
 1. the implementation of technical organizational measures to ensure that processing complies with Regulation (EU) 2016/679;
 2. measures to ensure that it is subsequently possible to verify and establish whether and by whom personal data were input, altered or removed;
 3. measures to increase awareness of staff involved in processing operations;
 4. designation of a data protection officer;
 5. restrictions on access to personal data within the controller and by processors;
 6. the pseudonymization of personal data;
 7. the encryption of personal data;
 8. measures to ensure the ability, confidentiality, integrity, availability, and resilience of processing systems and services related to the processing of personal data, including the ability to rapidly restore availability and access in the event of a physical or technical incident;
 9. a process for regularly testing, assessing and evaluating the effectiveness of technical, and organizational measures for ensuring the security of the processing;
 10. specific rules of procedure to ensure compliance with this Act and with Regulation (EU) 2016/679 in the event of transfer or processing for other purposes.
- Organizational and technical measures
 - o Special categories of data shall be rendered anonymous as soon as the research or statistical purpose allows, unless this conflicts with legitimate interests of the data subject.
 - o Token and data shall be separately stored.
 - o Data can be published only if data subject has given consent, or it is indispensable for the purposes of the research.

- Data subjects' rights limitations are described under Section 27.
 - Limitation refers to rights to access, correction, erasure/be forgotten, objection.
 - Regarding data processing for archiving purposes in the public interest Section 28 specifies:
 - that if the data subject disputes the accuracy of the personal data, he or she shall have the opportunity to present his or her version. The archive responsible shall be obligated to add this version to the files.
 - Article 15 GDPR is not applicable.