

The following was presented to a group of academics and students at Einführung in die Digital Humanities, Universität Stuttgart, 22.04.2013.

Disclaimer: this presentation is provided for informational purposes only and should not be regarded as legal advice (rechtliche Beratung). Always contact an attorney when making any decision that could affect your rights.

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# Legal Issues in Digital Humanities: A Crash Course

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Can I legally do this?

Can I copy X?

Distribute it?

Place it online?

Modify it?

## **THE BIG PROBLEM: Digital humanities researchers in the EU have a hard time getting legal information**

- Not many lawyers available to scholars
  - Outside counsel expensive (100€, 200€, 300€ / hour)
  - Legal issues are all cutting-edge, all gray areas and evolving doctrines
-

## Digital = global

- If eHumanities scholars want a basic familiarity with legal concepts affecting their fields, then an introduction to international concepts and terminology is necessary

- Brief introduction
- Overview of laws affecting eHumanities and their international context
- Developments in EU and German laws: 2013-2016

# Who I am and what I do

## PUBLISHING RESOURCES ON LEGAL ISSUES AND RESEARCH DATA



- „Leitfaden zum Forschungsdaten-Management“ (Verlag Werner Hülsbusch, 2013)
  - Chapters on “Rechtliche Aspekte von Forschungsdaten” and Urheberrecht.
- Deutsche Forschungsgemeinschaft (DFG) Best practice guidelines (paper forthcoming 2013)
  - Data privacy best practices for building spoken corpora from interviews

## TALK TO A LAWYER

- I'm a legal scholar and researcher. Not your lawyer.
- When making any decision that could affect your rights, consult a licensed attorney and/or your institute's data privacy officer

# Legal Issues for eHumanities: Overview and International Context

## **FREEDOM OF RESEARCH GUARANTEED UNDER GERMAN LAW**

- „Kunst und Wissenschaft, Forschung und Lehre sind frei“ (Art. 5 Abs. 3 Satz 1 Grundgesetz [GG]).
- BUT, how this interacts with other laws is completely unclear

# MAINLAND EUROPE: MAJOR LEGAL DIFFERENCES



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# 99 Luftballons

From Wikipedia, the free encyclopedia

"**99 Luftballons**" (German for "99 Balloons") is a [protest song](#) by the German pop-rock band [Nena](#) from their 1983 self-titled album. Having achieved widespread success in [Europe](#) and Japan, plans were made for the band to take the song international with an English version by Kevin McAlea, titled "99 Red Balloons". The English version is not a direct translation of the German and contains a somewhat different set of lyrics.<sup>[1]</sup> The later-released English translation, "99 Red Balloons", was the version that became popular outside of Germany and neighbouring countries, with it topping the charts in Canada, Australia, and Ireland. American audiences preferred the original German version, which became the highest Billboard charting German song in US history when it peaked at #2 in the US.<sup>[2]</sup>

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## "99 Luftballons" / "99 Air Balloons"



### Single by Nena

from the album *Nena and 99 Luftballons*

<b>Released</b>	1983 (West Germany) 1984 (United Kingdom)
<b>Format</b>	CD single
<b>Recorded</b>	1982
<b>Genre</b>	Neue Deutsche Welle, New Wave



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Von A bis Z  
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## 99 Luftballons



Dieser Artikel behandelt das Lied 99 Luftballons. Zu dem gleichnamigen Album siehe [99 Luftballons \(Album\)](#).

**99 Luftballons** ist ein **Popsong** der Band **Nena** aus dem Jahre 1983. Der Text stammt von **Carlo Karges**, die Musik schrieb **Uwe Fahrenkrog-Petersen**. Das Stück war einer der erfolgreichsten Titel der **Neuen Deutschen Welle** und auch international einer der erfolgreichsten Popsongs in deutscher Sprache. Die 1984 veröffentlichte englische Version des Songs entwickelte sich ebenfalls zu einem internationalen Hit.

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### Hintergründe und Entstehung [\[Bearbeiten\]](#)

*99 Luftballons* entstand vor dem Hintergrund der letzten Phase des **Kalten Krieges** in den 1980er Jahren in Deutschland.<sup>[1]</sup> Aufgrund des **NATO-Doppelbeschlusses** von 1979 begann 1983 in Deutschland die Stationierung von atomaren **Pershing-II-Raketen**. Diese nukleare Aufrüstung führte zu Befürchtungen, dass die Gefahr eines Atomkrieges steige und stieß daher auf massive *Widerstände in der Bevölkerung*. Diese formierten sich in der **Friedensbewegung** der 1980er Jahre.

## MAINLAND EUROPE: MAJOR LEGAL DIFFERENCES

- No **fair use** doctrine in Germany
  - Fair use allows much more copying of texts and images
- Fair Use framework (US)
  - The fair use of copyrighted work, for purposes such as criticism, comment, news reporting, teaching, scholarship and research is not an infringement of copyright. 17 USC § 107

## MAINLAND EUROPE: MAJOR LEGAL DIFFERENCES

- Potential uses of fair use
  - Limited, “fair” use of content still protected by copyright
  - Thumbnails of images in search engine results. Kelly v. Arriba Soft (2002, 2003), Perfect 10 v. Amazon.com (2007)
  - Creation and sharing of corpora
  - Illustration of commentaries, online dictionaries, annotation, scholarship, etc.

## MAINLAND EUROPE: MAJOR LEGAL DIFFERENCES

- **Very narrow statutory exceptions** for research data
  - § 52a: make small parts of a work available to the public for research and instruction
- **Strictest data privacy laws**
  - Creates strict requirements for humanities

## WHAT IS PROTECTED UNDER COPYRIGHT LAW?

- Copyright / authors' rights (Urheberrecht) – slightly different concepts, used interchangeably in the literature
- *Urheberrechtsgesetz (UrhG)*
- § 2 UrhG: Protected works in the literary, scientific and artistic domain include, in particular:
  - Literary works, such as written works, speeches and computer programs;
  - Musical works
  - Artistic works
  - Photos, films, illustrations, etc.

## WHAT IS **NOT** PROTECTED BY COPYRIGHT?

- No protection for bare **facts**
  - No protection for some types of works issued by the **government** (i.e. the text of laws). § 5 UrhG
  - Works whose **term** has expired
-

## Term of protection

### Die Schutzdauer des Urheberrechts

- § 64 UrhG: Protection is for **life of author + 70 years**
- § 65 UrhG: Collaborative work - **life of last surviving author + 70 years**
- Films: life of last surviving from a list of key creators (director, writer, composer, etc.) + 70.
  - Directive 2006/116/EC on the term of protection on copyright

## OVERVIEW: Is it protected by copyright?

- **NO** – many uses allowed
  - Someone could still gain rights to **unpublished works** (§71)
  - **database** rights can still protect collections of facts and unprotected works
- **YES** – some uses allowed without author's permission. Other uses require permission.
- **You can't find out** – orphan work (verwaistes Werk)

# PROTECTED WORKS

## FOR PROTECTED WORKS:

- **You need permission** from the author to:
  - Publish in whole or part
- **No permission needed** to:
  - **Quote** from works
  - Certain kinds of illustration for teaching
  - § 52a: make small parts of a work available to the public for research and instruction

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## OTHER USES OF PROTECTED WORKS

- **get permission** for such uses as:
  - Reproduction - das Vervielfältigungsrecht (§ 16)
  - Distribution - das Verbreitungsrecht (§ 17)
  - Exhibition - das Ausstellungsrecht (§ 18)
  - Audio/video recordings - das Recht der Wiedergabe durch Bild- oder Tonträger (§ 21)
  - Etc.

**OKAY, SO NOW YOU'RE ASKING A**  
**PUBLISHER/RIGHTHOLDER FOR PERMISSION**

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## **BEST PRACTICES FOR DEALING WITH AUTHORS/PUBLISHERS (1)**

- There will be unique circumstances for your license and project. Always **consult attorneys to draft licenses**.
- **Start early**. Since it is by no means guaranteed that authors/publishers will grant you the rights you need in the end, start licensing steps early when planning projects.
- Emphasize the limited, non-commercial, **purely academic uses** you wish to obtain from authors/publishers.
  - Authors/publishers will expect license fees for direct or indirectly commercial uses.

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## **BEST PRACTICES FOR DEALING WITH AUTHORS/PUBLISHERS (2)**

- The license fee is typically **negotiated**.
- Authors/publishers often do not request license fees for non-commercial research uses.
- Authors/publishers are concerned about rights of use that allow **third parties** (i.e. other institutes and researchers, publishing openly on the web) access to their material.
- One thing that scholars can propose is taking only **parts of the text** (i.e. X words, X sentences, etc.).

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## CHECKLIST FOR LICENSES TO INCLUDE (1)

- ✓ general **purpose of the agreement** (which helps keep the license short and requiring fewer details)
- ✓ **subject of the license** (may be kept generic in order to add to it later)
- ✓ where will the **data be stored**? Is off-site long term preservation allowed?
- ✓ the **scope of transferred rights**, i.e. what may be done with the text/data (copied, published, distributed, etc.)
- ✓ reference to any **end-user license agreement (EULA)** that researchers must sign to access the project

## CHECKLIST FOR LICENSES TO INCLUDE (2)

- ✓ **maximum amount of text** visible to end-users
- ✓ liability clauses: **Who is liable if the data is misused?**  
What do researchers guarantee to do?
- ✓ regulations concerning **technical measures to prevent abuse**
- ✓ termination or revocability of the agreement: **How is the license revoked?** By writing? By act? Does it expire after a number of years? Authors/publishers like the ability to revoke at any time.

Reference: Perkuhn, R. / Keibel, H. / Kupietz, M. (2012):  
Korpuslinguistik. Paderborn: Fink. (UTB 3433).

# OPEN LICENSES

## CREATIVE COMMONS

## CREATIVE COMMONS

- Allows rightsholders to allow (license) certain uses of their works
- Hundreds of millions of works licensed under Creative Commons licenses
- Especially valuable in EU where there's no fair use



# I CAN'T FIND THE RIGHTHOLDER:

ORPHAN WORK

VERWAISTES WERK

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## ORPHAN WORK

### VERWAISTES WERK

- Definition: a work protected by copyright, such as books, films, or music, for which the copyright owner **cannot be identified or, if identified, cannot be located.**
- Perhaps the copyright owner:
  - is unaware of their ownership, or
  - the copyright owner has died and heirs can't be found, or
  - the company gone out of business, and
  - it is not possible to establish to whom ownership of the copyright has passed.

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## ORPHAN WORK

### VERWAISTES WERK

- **EU Orphan Works Directive – 2012**
- Formally approved by the EU Parliament in late 2012
- Not yet implemented in Germany, but will set all the rules for orphan works in the coming years
- Bodies must conduct a “diligent search” w/ requirements
- If a rightholder does turn up, he/she may end the orphan status of the work at any time

# DATABASE RIGHTS

## DATABASE RIGHTS

### SCHUTZ DES DATENBANKHERSTELLERS

- EU directive 96/9/EC (1996) - **Sui generis right**
  - **Database:** a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means (e.g. corpora, collections of facts)
  - **Substantial investment** (human / financial) in either the obtaining, verification or presentation of the contents is a criterion
  - **Receive double protection:** under UrhG as a collection of works and separate EU Database Directive (1995)
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## DATABASES

### SCHUTZ DES DATENBANKHERSTELLERS

- Using a **non-substantial portion** of the database is allowed without the consent of the database producer.
- **Consent is required for:**
  - Reproduction of an entire database or a substantial portion thereof;
  - Systematic and repeated reproductions of non-substantial portions of a database;
  - Communication of the database to the public;
  - Distributing the database

## DATABASES

### SCHUTZ DES DATENBANKHERSTELLERS

- **To use a substantial portion** of a database, no consent required for:
  - Private use;
  - Illustration for teaching (non-commercial)
- **Duration of protection:** 15 years from completion of the database, + 15 years after each substantial investment – potentially unlimited time

## DATABASES

### SCHUTZ DES DATENBANKHERSTELLERS

- Remember, just because **facts** or **public domain works** are not protected, they may be protected *as a database or collection of works*

# PERSONAL DATA PRIVACY

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## PERSONAL DATA PRIVACY

### DATENSCHUTZ

- Extremely advanced in Germany
- Lots of rules and best practices for eHumanities researchers to follow
- Anonymization of data, etc.
- Universities and institutes often have **Data Privacy Officers**. Do you know who yours is?
- *See forthcoming*: “Informationen zu rechtlichen Aspekten bei der Erhebung mündlicher Korpora” (DFG.de)

# Developments in EU law:

## 2013-2016

## REFORM OF THE COPYRIGHT DIRECTIVE 2001/29?

- Being urged by numerous EU groups
- Badly needed for digital humanities?
- Much easier said than done:
  - involves dozens of lobbying groups, major money interests, even public protests.

## ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA)

- Trade agreement / treaty to establish international standards for intellectual property **rights enforcement**
- Signed by EU in 2012
- Subsequent opposition:
  - 5 parliamentary committees recommended against ratification.
  - Jan. 2012: European rapporteur for ACTA resigns in protest. "I will not take part in this masquerade."
  - Public protests across EU. 4,000 demonstrators in Stuttgart alone

## ANTI-COUNTERFEITING TRADE AGREEMENT (ACTA)

- Ratification rejected by European Parliament in July 2012
  - 478 against, 39 for
- This is what changes to copyright law can trigger in 2013.

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## EU'S NEXT ATTEMPT AT COPYRIGHT REFORM: "LICENCING FOR EUROPE"

- "Licensing for Europe" (2012-?) – EU initiative working on:
  - Text and data mining for scientific research purposes
  - Audiovisual works and cultural heritage institutions
- CLARIN is represented in Brussels

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## EU'S NEXT ATTEMPT AT COPYRIGHT REFORM: "LICENCING FOR EUROPE"

- Some possible results:
  - Simplified licensing process for researchers (i.e. a one-page EU sample license for text and data mining)
  - Databases from publishers that (may) speed up the licensing process

## MEANWHILE, REFORM IN THE UK

- 2010: Prime Minister commissioned a review of the IP system
- 2011-2012: Hargreaves Review makes recommendations, UK government proposes many of its solutions as law, including a copyright exception that allows text and data analysis for non-commercial research.
  - *May improve on ability to share data*
- 2013: UK government will propose draft legislation. Intention to come into force October 2013.

## GERMANY *COULD* FOLLOW THE UK

- Member states do not need to wait for EU action
  - UK's example and the text of Art. 5 of the Copyright Directive 2001
- What would it take to create such a law in Germany?
- Lobbying, involvement, action

## ORPHAN WORKS DIRECTIVE (2012)

- EU Orphan Works Directive (2012/28/EU)
  - Approved by EU Parliament late 2012
  - Germany and other member states must implement by October 2014.
  - Problem for eHumanists:
    - Directive applies to libraries and “educational institutions” – not explicitly researchers or research institutes

## ORPHAN WORKS DIRECTIVE (2012)

- EU Orphan Works Directive (2012/28/EU)
  - Permitted uses of orphan works:
    - make the orphan works available to the public. Article 6(1)(a).
    - make reproductions, for the purpose of digitisation, making available, indexing, cataloguing, preservation or restoration. Article 6(1)(b).
  - Problem for eHumanists: are these the uses you want?

## ORPHAN WORKS DIRECTIVE (2012)

- EU Orphan Works Directive (2012/28/EU)
  - Germany and other member states must implement by October 2014.
  - Groups will have a voice in influencing implementation. Will yours be represented?

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## PERSONAL DATA PROTECTION

- 2012: EU Commission announced comprehensive reform of 1995 Data Protection Directive
  - Purpose: “to strengthen online privacy rights and boost Europe's digital economy”
  - MAJOR lobbying from US tech companies
  - Debate over “right to be forgotten”
  - In draft throughout 2013
  - EU Parliament *may* vote summer or fall 2013

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## MAJOR EU AND GERMAN LAWS THAT AFFECT EHUMANITIES WILL ALL BE LOBBIED, WRITTEN AND IMPLEMENTED 2013-2016

- Will **you** be represented at these tables? Talk to:
  - CLARIN
    - Uni Stuttgart represented through Institut für Linguistik and Institut für Maschinelle Sprachverarbeitung
  - LIBER (Association of European Research Libraries)
    - ~50 libraries in Germany

**“IMPLIED LICENSE”:**  
**COURT-CREATED DOCTRINE FOR**  
**USE OF ONLINE CONTENT**

## Implied License

- **Concept: when people place things online, they know (or should know) that people will *do things* with that content:**
    - Print it out
    - Email to friends and coworkers
    - Websites will crawl, cache, and analyze it
    - Search engines will index it
    - Images will end up in image search
-

## Fair Use and Implied License

- USA: caching entire pages by search engines – OK as implied license. Field v. Google (2006), Parker v. Yahoo (2008)
  - USA: thumbnails in image search – OK as fair use. Kelly v. Arriba Soft (2003), Perfect 10 v. Amazon (2007)
  - DE: thumbnails in Google Image search – OK as implied license. BGH, 29.04.2010 - I ZR 69/08, BGH, 19.10.2011 - I ZR 140/10
-

## Implied license

- *Bundesgerichtshof* twice adopted an implied license doctrine to hold that Google (Images) was not liable for copyright infringement
  - could potentially be used to justify:
    - Using X words, sentences, pages, for corpora and other language science tools
  - Requirements:
    - author places copyrighted works online
    - and does not use widely-known methods (code, etc.) to prevent certain types of copying (searching, creating thumbnails, etc.)
-

## Implied license

- No one knows what this will mean for digital humanities.
  - A new and untested (?) doctrine in EU law, but one to be aware of.
-

# BEST PRACTICE: BUDGETING

## BEST PRACTICE: BUDGETING

- Suddenly it's year 3 of the project, NOW you need legal advice, but there's no budget for it
- Include legal advice in budgets from the beginning: X hours with attorney specialist

## DIGITAL HUMANITIES AND LAW

- Learn the issues
- Stay informed
- Talk to lawyers

# Thank you

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