



Datenschutz und Datentracking in Verlagsverträgen

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Dr. Bernhard Mittermaier



0000-0002-3412-6168

b.mittermaier@fz-juelich.de



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Agenda

Problemlage

- 1) Wissenschaftstracking
- 2) DSGVO

Datenschutzbestimmungen in den DEAL-Verträgen

- 1) Gemeinsame Datenverarbeitung (Joint Controllership)
- 2) Tracking
- 3) Cookies
- 4) Datentransfer in Nicht-EU-Länder
- 5) Datensparsamkeit

Konsequenzen

DEAL-Elsevier-Vertrag:

<https://doi.org/10.17617/2.3523659>

DEAL-Wiley-Vertrag:

<https://doi.org/10.17617/2.3551268>

DEAL-Springer Nature-Vertrag:

<https://doi.org/10.17617/2.3551270>



Der Forschungszyklus

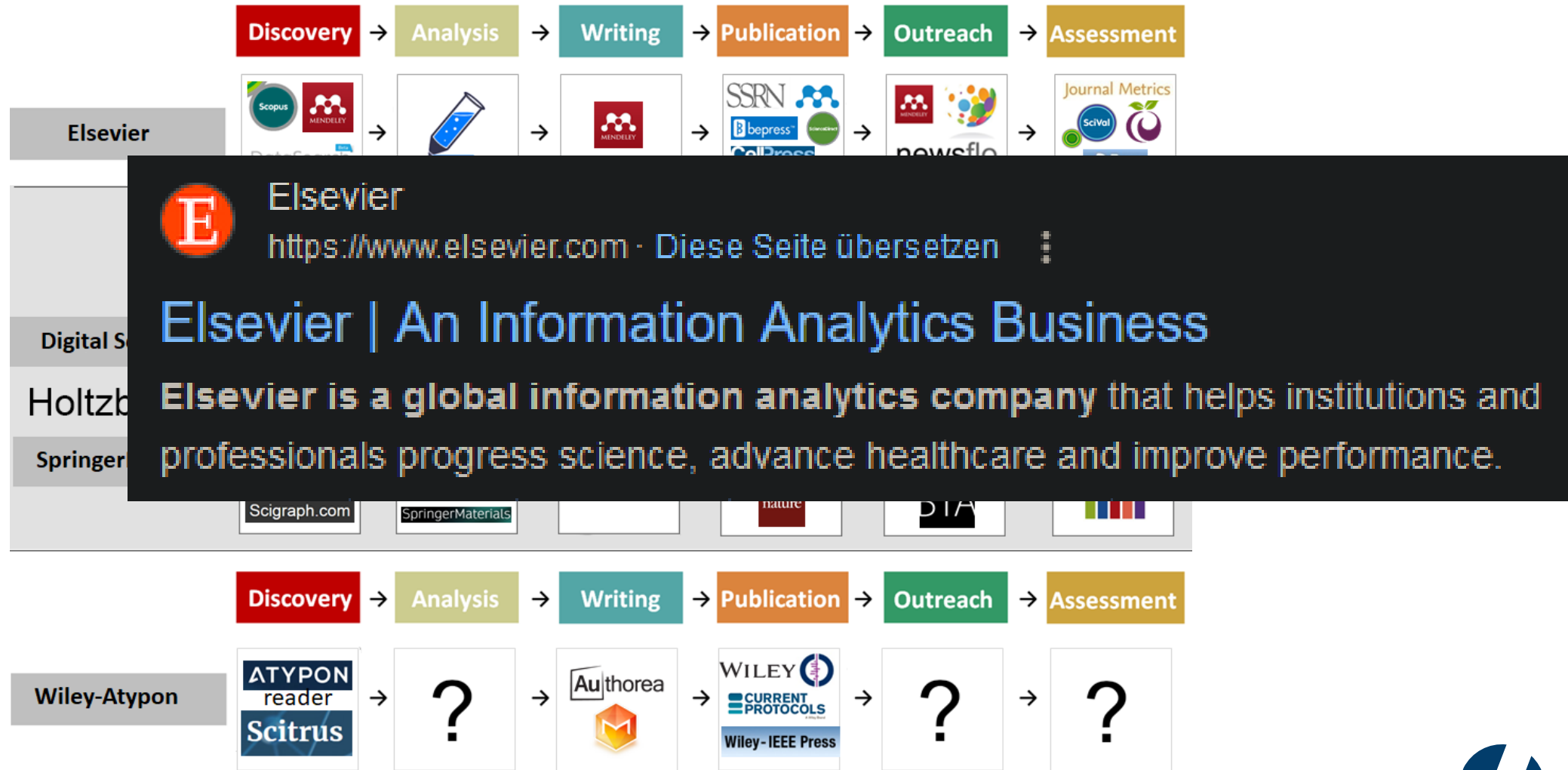


<https://staff.napier.ac.uk/services/information-services/research-cycle/pages/home.aspx>

Der Forschungszyklus aus Verlagsperspektive



Der Forschungszyklus aus Verlagsperspektive



Publikationen und Aktionen zum Wissenschaftstracking

- Cody Hanson (2019): „User Tracking on Academic Publisher Platforms”
- AWBI (2021): „Datentracking in der Wissenschaft: Aggregation und Verwendung bzw. Verkauf von Nutzungsdaten durch Wissenschaftsverlage“
- ABI Technik Bd. 42 Heft 2 (2022): Themenschwerpunkt Datentracking
- Petition „Stop Tracking Science“ (2023). „*Tracking of academics must stop and can no longer be the subject of negotiations between research institutions and publishers.*”
- SPARC (2023): „Navigating Risk in Vendor Data Privacy Practices” (Bezug: Elsevier)
- Altschahhaffel et al. (2024): “Datentracking und DEAL. Zu den Verhandlungen 2022/2023 und den Folgen für die wissenschaftlichen Bibliotheken“. Eingereicht bei “RuZ – Recht und Zugang“

DSGVO

- Unmittelbar geltendes europäisches Recht
- In Bibliotheken bislang v.a. unter den Blickwinkeln „DSGVO-gerechter Internetauftritt“ und „Umgang mit Daten von Nutzer:innen“ betrachtet
- Neuer (?) Aspekt: Verträge mit Verlagen *können* einschlägig sein, weil *möglicherweise* **gemeinsame Datenverarbeitung** stattfindet
 - Übermittlung von IP-Adressen
 - Nutzungsstatistiken
 - Verifikationsprozess
 - Autorenverträge

Art. 26 DSGVO Gemeinsam Verantwortliche

(1) Legen zwei oder mehr Verantwortliche **gemeinsam die Zwecke der und die Mittel zur Verarbeitung** fest, so sind sie gemeinsam Verantwortliche. Sie legen in einer Vereinbarung in transparenter Form fest, wer von ihnen welche Verpflichtung gemäß dieser Verordnung erfüllt, insbesondere (..) wer welchen Informationspflichten gemäß den Artikeln 13 und 14 nachkommt (..) .

(3) Ungeachtet der Einzelheiten der Vereinbarung gemäß Absatz 1 kann **die betroffene Person** ihre Rechte im Rahmen dieser Verordnung bei und **gegenüber jedem einzelnen der Verantwortlichen** geltend machen.

<https://dsgvo-gesetz.de/art-26-dsgvo/>



Vorsicht - dünnes Eis!
Lebensgefahr! Betreten verboten!

Beware - thin ice!
Danger to life! Do not enter!

Schnee und Gefahrengestaltung Nürnberg
Königsplatz - Eingang 13 - 91054 Nürnberg



1) Gemeinsame Verantwortung (Joint Controllership)

- Von den Jurist:innen in der AWBI/DEAL-Arbeitsgruppe wurde das Vorliegen der gemeinsamen Verantwortung klar bejaht.
- Von den Jurist:innen aller DEAL-Verlage wurde eine gemeinsame Verantwortung ebenso klar verneint.
- Workaround: Nicht-Vorliegen wird angenommen; die Verlage übernehmen die volle Verantwortung für diese Einschätzung.

<https://dsgvo-gesetz.de/art-26-dsgvo/>

1) Keine gemeinsame Verantwortung (Joint Controllership)

The parties [DEAL and Elsevier] have assessed their respective personal data processing activities under this Agreement and have determined that they each carry out their respective processing as an independent controller.

If a competent supervisory authority or court decides that any personal data processing activity under this Agreement involves the parties processing personal data as joint controllers under Art. 26 GDPR, the parties agree to negotiate in good faith a joint controller addendum to allocate their respective data protection responsibilities and

Elsevier shall defend, indemnify and hold harmless DEAL Operating Entity and each Participating Institution for any violation or alleged violation of Art. 26 GDPR.

(Wiley und Springer Nature analog)

2) Tracking: Elsevier

Legitimate interest Art 6 (1) f GDPR

“Your company/organisation must also **check** that by pursuing its legitimate interests the rights and freedoms of those individuals are not seriously impacted, otherwise your company/organisation cannot rely on grounds of legitimate interest as a justification for processing the data and another legal ground must be found.”

https://commission.europa.eu/law/law-topic/data-protection/reform/rules-business-and-organisations/legal-grounds-processing-data/grounds-processing/what-does-grounds-legitimate-interest-mean_de

Elsevier will not generate, track, record, store, share, transfer, and/or sell personal data of Authorized Users without the consent of the respective Authorized User (which must not be included in a general opt-in), **unless the processing is necessary for** (i) the performance of this Agreement or other contract according to Art. 6 Par. 1(b) GDPR, (ii) compliance with a legal obligation to which Elsevier is subject according to Art. 6 Par. 1(c) GDPR; or (iii) **a legitimate interest according to Art. 6 Par. 1 (f) GDPR.**

This restriction on personal data processing by Elsevier includes but is not limited to the collection, analysis, profiling and aggregation of personal data, such as through utilization of cookies, device fingerprinting technology, or similar technologies that track user behavior that are outside the services under the Agreement and the rights and obligations of the Parties under the Agreement.

„Stellungnahme 06/2014 der Artikel-29-Datenschutzgruppe zum Begriff des berechtigten Interesses des für die Verarbeitung Verantwortlichen gemäß Artikel 7 der Richtlinie 95/46/EG“, insbesondere die Beispiele 5 und 7 auf Seite 76f
https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp217_de.pdf

2) Tracking: Wiley

Wiley will not track, record, store, share, transfer and/or sell usage or personal data of Authorized Users (Science Tracking) without the consent of the Authorized User, **unless** the processing is necessary for the services to be provided under this Agreement, Wiley has a legal obligation, or **Wiley has a legitimate interest according to Art. 6 Par. 1 (b), (c) or (f) GDPR, respectively**. This Section 3.2 applies to Wiley's collection, analysis, profiling, and aggregation of personal data, that **track Authorized User behavior outside the services under the Agreement** and the rights and obligations of the Parties under the Agreement.

3) Tracking: Springer Nature

Springer Nature is obligated not to track, record, store share, transfer and/or sell usage data or personal data of users accessing content under this Agreement, **unless absolutely necessary for the performance of this Agreement or in case of any security or content protection measures, but only if Springer Nature has a legal obligation or a legitimate interest according to Art. 6 Par. 1 (c) or (f) GDPR, respectively.** That includes the prohibition of collecting detailed real-time data on the informational behavior of users, including but not limited to the collection, analysis, profiling and aggregation of personal and other academic or private data from various sources, such as user tracking, duration of stay and category of information source, offline tracking of any kind, utilization of fingerprint technology, software toolboxes or similar to implement advanced tracking or profiling, meaning any data processing operations that are outside the common purpose of the Parties, the granting of access to online resources and the provision of anonymous usage statistics according to the COUNTER standard.

4) Cookies: Elsevier

- Elsevier shall **implement a cookie management platform** on the website of the Products to enable Authorized Users to **view the nature and duration of cookies** and **manage their choices** with respect to cookies that are not strictly necessary to provide, manage, operate and secure the website of the Products or otherwise for the performance of this Agreement.
- Elsevier shall **refrain from using technologies allowing the recovery of cookies** or similar technologies deleted by the users in their browsers.

4) Cookies : Wiley

- Wiley shall **implement a cookie management platform** on the websites of the applicable Wiley Product to enable Authorized Users to **view the nature and purposes of the cookies and manage their consent on use of cookies** that are not strictly necessary to provide, manage, operate, and secure the websites or otherwise for the performance of this Agreement.
- Wiley **will use reasonable efforts** to refrain from using technologies allowing the recovery of cookies deleted by the users in their browsers.

4) Cookies: Springer Nature

- Springer Nature shall **limit the operational time** of cookies or similar technologies strictly necessary for the performance of this Agreement to a minimum operational time of **1 month or less except** where the nature of the service supported by the cookie can be proven to require a longer duration.
- Springer Nature shall **refrain from using technologies** allowing the recovery of cookies or similar technologies, deleted by the users in their browsers.

5) Datentransfer in Länder außerhalb der EU

- Zu Beginn der Gespräche als Folge des „Schrems II“-Urteils nur sehr eingeschränkt erlaubt (*was Elsevier und Wiley aber nicht weiter störte*).
- Elsevier und Wiley bestanden mit Verweis auf die (IT-)Strukturen in ihren globalen Konzern auf die Möglichkeit dieses Datentransfers.
- Neue Situation aufgrund des Angemessenheitsbeschluss der EU-Kommission zum Datenschutzrahmen EU-USA am 10. Juli 2023
- Offene Frage: Was ist mit all den anderen Ländern? „Your personal information may be stored and processed in your region or another country where Elsevier companies and their service providers maintain servers and facilities, including Australia, China, France, Germany, India, Ireland, the Netherlands, the Philippines, Singapore, the United Kingdom, and the United States.“ <https://www.elsevier.com/de-de/legal/privacy-policy>

5) Datentransfer in Länder außerhalb der EU

- **Elsevier und Wiley:** The Parties agree that personal data shall only be processed in a Member State of the European Union (EU). Any relocation to a third country shall only be allowed if the specific conditions of Art. 44 et. seq. GDPR are met.
- **Springer:** The Parties agree that data shall only be processed in a Member State of the European Union (EU) or in countries benefitting from an adequacy decision pursuant to Article 45 GDPR. Any relocation to a third country **requires the prior consent of MPDLS in text form** and shall only be allowed if the specific conditions of Art. 44 et seq GDPR are met.

5) Datensparsamkeit: Elsevier

- Elsevier shall refrain from storing any full IP addresses for a time period longer than necessary for the purpose of the processing.
- The parties agree to hold a joint workshop during the first twelve (12) months of the term of the Agreement to discuss further steps to strengthen data protection and data privacy. In the workshop, the parties will, regarding IP address geolocation, assess whether and how to delete or overwrite the final two octets of any IP addresses collected from Authorized Users using the Products that are not the IP addresses of any Participating Institutions. The parties shall undertake good faith efforts to contribute by means of an outcome-focused design process.

5) Datensparsamkeit: Wiley

- Wiley shall refrain from storing any Authorized User's full IP addresses for a time period longer than necessary for the purpose of the collection. When storing IP addresses in the database of the Wiley Online Library application, Wiley will use encryption technology as applicable.
- The Parties agree to hold a joint workshop during the first twelve (12) months of the term of the Agreement to discuss further steps to strengthen data protection and data privacy regarding full IP addresses collected from Authorized Users using the Products that are not the IP addresses of any Participating Institutions. The Parties shall undertake good faith efforts to contribute by means of an outcome-focused design process.

5) Datensparsamkeit: Springer Nature

- Springer Nature is obligated to **delete or overwrite the final two octets of the IP addresses** collected from the users for the purpose of performance of contract prior to any geolocation.
- Springer Nature shall refrain from storing any full IP addresses for a time period longer than necessary for the purpose of the collection, but **in no case for more than 48 hours**. Where IP addresses, immediately after collection, are stored in an encrypted and anonymized manner, Springer Nature is obligated to utilize encryption technology, which precludes any state of the art de-anonymization.

Wichtige Datenschutzaspekte und deren Berücksichtigung in den DEAL-Verträgen

	Wiley	Elsevier	Springer Nature
Gemeinsame Verarbeitung	Von Verlagen abgelehnt, stattdessen ein Workaround		
Tracking	Erlaubt bei legitimen Interessen		Nur wenn zur Vertragserfüllung notwendig
Wiederherstellung von Cookies	unternimmt angemessene Anstrengungen	Der Verlag unterlässt es	
Cookies Speicherdauer	Keine Begrenzung		Maximal 1 Monat
Datentransfer	Erlaubt gemäß Art. 44 ff DSGVO		Erlaubt nur mit Zustimmung der MPDLS
Datensparsamkeit	Volle IP-Adresse: nicht länger als notwendig; gemeinsamer Workshop		Volle IP-Adresse: maximal 48 Stunden

Konsequenzen: Was können Wissenschaftler:innen tun?

- Als Autor:in: stets CC-BY wählen
- Als Leser:in: stets “only essential cookies” wählen
- Lektüre und Reflexion der Datenschutzrichtlinien
 - <https://www.elsevier.com/legal/privacy-policy>
 - <https://www.wiley-vch.de/de/ueber-wiley/impressum#datenschutz>
 - <https://www.wiley.com/en-us/privacy>
 - <https://link.springer.com/privacystatement>
- Nachfrage, **welche** persönlichen Daten **warum**, **wo** und **wie lange** gespeichert werden
 - <https://www.elsevier.com/legal/privacy-policy/data-request>
 - datenschutz@wiley.com
 - dataprotection@springernature.com
- ggf. Beschwerde bei der zuständigen ²⁴Datenschutzbehörde

Legitimate interest Art 6 (1) f GDPR

“Your company/organisation must also **check** that by pursuing its legitimate interests the rights and freedoms of those individuals are not seriously impacted, otherwise your company/organisation cannot rely on grounds of legitimate interest as a justification for processing the data and another legal ground must be found.”

https://commission.europa.eu/law/law-topic/data-protection/reform/rules-business-and-organisations/legal-grounds-processing-data/grounds-processing/what-does-grounds-legitimate-interest-mean_de

Konsequenzen: Was können Bibliotheken tun?

- Relevanz mindestens bei Transformationsverträgen und Gold OA-Verträgen
- Bei Lizenzverhandlungen vorab „Gemeinsame Verantwortung“ (Art 26 DSGVO) ansprechen und Musterklauseln (AWBI/DEAL-Arbeitsgruppe) anbieten.
Rückfalloption: Workaround wie in den DEAL-Verträgen
- DEAL-Springer Nature-Vertrag als Vorlage für weitere Klauseln verwenden
- Aktivitäten von Datenschutzbehörden?
- Änderungen aufgrund der DEAL-Workshops?
- Nächstes Thema: KI-Klauseln

Vielen Dank!