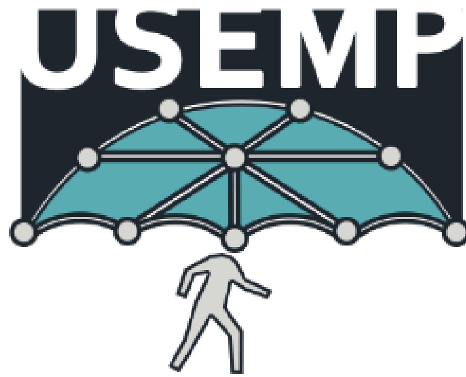

# D3.3

# Copyrights and portrait rights in content posted on OSNs – v1

v 1.1 /2015-03-31

Katja de Vries, Sari Depreeuw, Niels van Dijk, Mireille Hildebrandt (ICIS-RU)

This document presents a first analysis of the copyrights and portrait rights involved in content posted on OSNs. It also investigates to what extent (an analogue to) the portrait right could provide users of OSNs with an effective legal remedy to restrict the exercise of IP rights by OSNs, notably with regard to IP rights in the profiles compiled or constructed based on user generated content and behavioural data of OSN users The report includes indications for design implications for OSN Presence tools and the OSN Economic Value Awareness tools operated in a commercial context. It concludes with a research agenda for the second version of this report (D3.8), due in month 24 of the USEMP project.

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| 0.3 | External Review (Popescu, Lund) |
| 1.0 | Final (Hildebrandt, Depreeuw) |
| 1.1 | Revised release after EC review |



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# 1. Structure of the legal deliverables in WP3[1]

## 1.1. Empowerment and compliance

The overall goal of the legal input in Work Package 3 (*Legal Requirements and the Value of Personal Data*) is to elicit/engineer legal requirements that should inform the development of the various USEMP tools. Thus, the legal deliverables in WP3 are not just theoretical legal treatises on data protection, anti-discrimination, and intellectual property rights in relation to the profiles built in and through OSNs, but they aim to provide hands-on input. The first step ("finding the applicable law") in providing legal input is *descriptive*: it is an inventory of the applicable law and how it applies in the case of USEMP. This first step can be further subdivided in three sub-steps:

(i) A concise description of the applicable law;
(ii) An inventory of how the various rights at stake (that is, privacy, data protection, anti-discrimination, copy- and portrait rights of the user and the copy- and database rights of the OSN's and profile building companies) interact with each other;
(iii) An inventory of how the (interactive) functioning of these various rights could affect tools that aim to empower users who are tracked and profiled when browsing the internet and acting in OSNs.

The second step ("putting the law to work to create tools that make the user more empowered while also being compatible with the various rights at stake") of the legal input in WP3 is *constructive*, in that it aims to translate the legal conditions into legal requirements which specify:

(i) how the USEMP tools can contribute best in the effectuation of privacy, data protection, non-discrimination, profile transparency and (possibly) portrait rights. This is about empowerment.
(ii) how to make sure that the USEMP tools are compatible with the legal fields of privacy, data protection, anti-discrimination and intellectual property law. This is about compliance.

The two steps (descriptive and constructive) are not always explicitly distinguished, but they have an implicit structure in writing the legal deliverables of WP3.

## 1.2. Original legal research and legal coordination support

Despite the fact that all of the legal input in WP3 is quite hands-on, there are some deliverables which provide cutting-edge legal research (D3.1-3.3 and D3.6-3.8; the latter set of deliverables builds on the former) on the operationalization of "legal empowerment" from a multiple rights perspective (see Table 1). The integration of the legal requirements is taken

[1] Because this chapter discusses the overall structure of all the legal deliverables in WP3, it is repeated in the beginning of each of the legal deliverables (currently: D3.1, D3.2 and D3.3).



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up in deliverables D3.4 and D3.9 that report on how the legal requirements are interfaced with the tasks at hand in the other WPs (see Figure 1).

| | Version 1 | Version 2 |
|---|---|---|
| Fundamental Rights Protection by Design for OSNs | D3.1 (delivery date: M12) | D3.6 (delivery date: M21) |
| Profile transparency, trade secrets and Intellectual Property rights in OSNs | D3.2 (delivery date: M12) | D3.7 (delivery date: M24) |
| Copyrights and portrait rights in content posted on OSNs | D3.3 (delivery date: M12) | D3.8 (delivery date: M24) |

*Table 1: Overview of the deliverables in WP3 containing original legal research*

As shown in Figure 1, the legal research (D3.1-3.3 and D.3.6-3.8) and the integration of the legal requirements into the design of the USEMP tools (D3.4 and D.3.9) are intertwined with each other. D3.1-3.3 and D.3.6-3.8 reflect the work done in T3.1-3.5 [M1-M24]. D3.4 and D.3.9 reflect the work done in T3.6, which implements legal coordination.

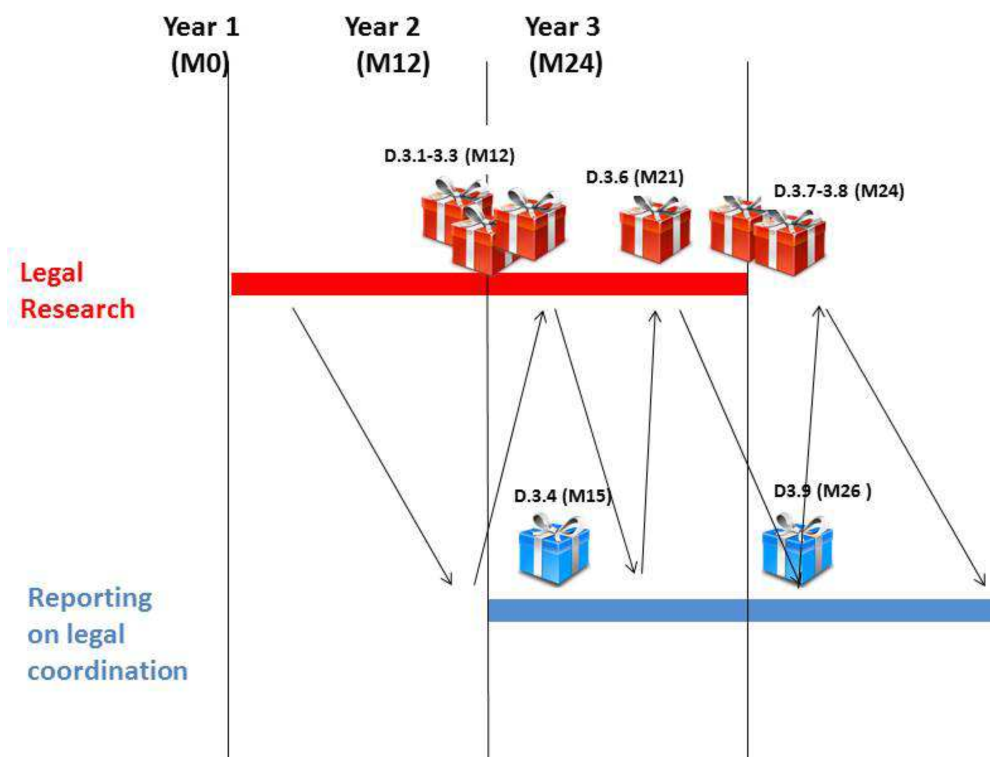


*Figure 1. Timeline legal input in USEMP WP3.*

## 1.3. Interaction between the three strands of legal research: the logic of rights trumping each other

With regard to the three strands of legal research ((a) “Fundamental Rights Protection by Design for OSNs”; (b) “Profile transparency, trade secrets and Intellectual Property rights in



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OSNs"; and (c) "Copyrights and portrait rights in content posted on OSNs") it is good to mention that these, despite the fact that they are dealt with in separate deliverables, are intertwined as well. They relate to each other as a sequence of cards, where each consecutive card could trump the previous one. Thus, one could say that the *basic* legal compatibility assessment of OSNs is based on a check against data protection, privacy and anti-discriminatory requirements. When creating an application on the internet which tracks and profiles its users, the *first* question to ask is: does it infringe on data protection, privacy and anti-discriminatory requirements by doing so? And if yes: how could one adjust the *design* of the system or practice to prevent this (i.e. fundamental rights protection by design)? These are questions explored in the first step of the legal analysis (D3.1 and D3.6). The *second* question is how the outcome of the first legal step is affected when the rights of others are also taken into account. In the context of USEMP this second step is in particular interesting when profile transparency (a requirement from data protection, i.e. the "first step") is confronted with trade secrets and intellectual property rights (copy- and database rights) of the creators of the system or practice which tracks and profiles its users. With regard to this possible clash of rights, *Data Protection Directive 95/46* states in Recital 41 that:

> Whereas any person must be able to exercise the right of access to data relating to him which are being processed, in order to verify in particular the accuracy of the data and the lawfulness of the processing; whereas, for the same reasons, every data subject must also have the right to know the logic involved in the automatic processing of data concerning him, at least in the case of the automated decisions referred to in Article 15 (1); whereas this right must not adversely affect trade secrets or intellectual property and in particular the copyright protecting the software; whereas these considerations must not, however, result in the data subject being refused all information;

And in Recital 51 of the proposed *General Data Protection Regulation* one can find a similar call for a balanced approach:

> Any person should have the right of access to data which has been collected concerning them, and to exercise this right easily, in order to be aware and verify the lawfulness of the processing. Every data subject should therefore have the right to know and obtain communication in particular for what purposes the data are processed, for what estimated period, which recipients receive the data, what is the general logic of the data that are undergoing the processing and what might be the consequences of such processing. This right should not adversely affect the rights and freedoms of others, including trade secrets or intellectual property, such as in relation to the copyright protecting the software. However, the result of these considerations should not be that all information is refused to the data subject.

Can you have your cake and eat it too? Is it possible for the right to profile transparency to have some bite, if it "should not adversely affect the rights and freedoms of others, including trade secrets or intellectual property"? And what does it mean that the protection of trade secrets or intellectual property rights should not result in the data subject being refused *all* information? Is there indeed a nuanced approach possible where trade secrets or intellectual



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property rights only *partly* trump the right to profile transparency? These are questions explored in the second step of a legal compatibility check D3.2 and D3.7). Finally, there is the third step of a legal compatibility check (D3.3 and D3.8), which looks at the copyrights and portrait rights in content of the end-users of OSNs and browsers. In the same way as fundamental rights can be curtailed by trade secrets or intellectual property rights of an OSN, browser or third party tracker-profiler, the protection of the latter could be curtailed ("trumped") by copy-, personality and portrait rights of the end-users of these systems.

The three-fold structure of how the various legal deliverables in WP3 build on each other implies that the *interactive* functioning of the various rights (see above, the first paragraph of this chapter) will *not* be discussed in the first step of the legal analysis (D3.1 and D3.6), but only in the second (D3.2 and D3.7) and third (D3.3 and D3.8).

## 1.4. A legal compatibility analysis of *what*? The double bind of the USEMP tools as both the subject and the mouthpiece of the law

In constructing the various USEMP tools, end-users are able to gain knowledge about which data are part of their digital trail, what knowledge could be inferred from such data, who is tracking them, to which actors this knowledge could be of interest and what economic value this knowledge could approximately represent. As such the information provided to the end-user of USEMP is one possible example of how legal protection by design could be implemented with regard to systems and practices which track and profile their end-users. The USEMP tools can thus be understood as supportive tools which try to embody *legal protection by design*: not only the requirement of profile transparency as formulated in EU data protection law, but also other legal requirements.

However, the USEMP project and its tools are also a research project which processes many (sensitive) data and which faces the same legal issues as any other data processor. As such, the USEMP consortium is bound by all data protection requirements: it needs to have a proper ground and purpose for the processing of data, process the data in an appropriately secure way, notify the supervisory authority of the processing (at least, if this is required by national data protection law), provide the data subject with all the necessary information about the processing of the data, etc.

Thus, from a legal perspective the USEMP project operates on two levels. On the one hand it tries to embody "legal protection by design" and as such aims to act as the *mouthpiece of the law* (or at least as a technological translation of the law) where OSNs, browsers and third-party profilers are the legal subjects addressed by the law. On the other hand USEMP is also itself a legal subject addressed of the law (at least each and every individual USEMP partner is addressed as such). As a result of this double bind (USEMP is both a translation of and a legal subject addressed by the law), the legal analyses in WP3 operate on two conceptual levels:

(a) the legal compatibility of the tracking and profiling practices performed by OSNs, browsers and third-parties, and the possibility of legal protection by design by tools such as the ones developed by USEMP, and
(b) the legal compatibility of the tracking and profiling practiced by the USEMP tools themselves.


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Operating constantly on these two levels of analysis resolves the paradoxical problem that by informing the end-user about the possible "risks" of certain data (showing how sensitive metadata can be inferred: e.g., health or sexual preference from a seemingly "innocent" holiday picture), the USEMP tool itself enters in a field where one has to trod carefully, not to end up infringing fundamental rights while trying to point out (in speculative manner) how such metadata could be extracted by *other* players.

The two levels of the legal analyses in WP3 are nicely exemplified by what was mentioned above (section 1.1) as the two *constructive* forms of legal input, namely that that we need to specify both:

(i) How the USEMP tools can contribute best in the effectuation of privacy, data protection, non-discrimination, profile transparency and (possibly) portrait rights (empowerment).

(ii) How to make sure that the USEMP tools are compatible with the legal fields of privacy, data protection, anti-discrimination and intellectual property law (compliance).

Finally it should be noted that when looking at the legal compatibility between (a) the tracking and profiling practices the USEMP tool and (b) the requirements following from privacy, data protection, anti-discrimination and intellectual property law, the legal analyses also give insight about how legal compatibility would be affected if tools similar to those created by the USEMP project would be commercialized. Within the USEMP project much of data processing and profiling is allowed precisely because the purpose of the processing is purely scientific – but what would happen if (after the end of the project) these tools would still be used and they would be no longer fall under exemptions of scientific research? On top of distinguishing the two aforementioned conceptual levels of legal analysis, we should add that there are two sub-levels which can be distinguished within the second level:

(a) the legal compatibility of the tracking and profiling practices performed by OSNs, browsers and third-parties, and the possibility of legal protection by design by tools such as the ones developed by USEMP, and
(b) the legal compatibility of the tracking and profiling practices of the USEMP tools themselves.
    (i) the legal compatibility of the tracking and profiling practices of the USEMP tools as they are now, that is: processing data with the sole purpose of scientific research;
    (ii) the legal compatibility of the tracking and profiling practices of the USEMP tools as they could hypothetically be in the future, that is: commercialized and no longer part of a research project.

## 1.5. First and second versions of the legal research deliverables

As shown in table 1 the three strands of legal research result in six deliverables. After the first year each strand of legal research results in intermediate reports (D3.1-3.3), that will be further developed into three final reports in the second version at the end of the second year, taking into account the progression on the technical side (D3.6-3.9). D3.4 and 3.9 form the interface between the legal requirements and the technical specifications of the DataBait



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tools. In the current deliverable 3.1 we have added an annex with a first version of the integration tables[2] that will be presented in 3.4.

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[2] The integration tables in D3.4 contain legal qualifications of the data/content processed within the USEMP project, the requirements which are derived from these qualifications and their embodiment in the technical specifications of the DataBait tools. The qualifications and requirements follow from the various legal fields studied with regard to the USEMP project (notably data protection, antidiscrimination, copyright, sui generis database right and portrait rights derived from Art. 8 ECHR). The preliminary integration tables in annex B of this deliverable only regard requirements following EU data protection requirements and a little bit of EU antidiscrimination law.



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# 2. A final trump card? Copyrights and portrait rights in content and profiles by end-users on OSNs

Deliverables 3.1, 3.2 and 3.3 have a layered structure, exploring a multiplicity of rights with regard to profiling in OSNs and browsers. The "ground layer" has been presented in D.3.1, where we explored different means to empower users in relation to the commercial profiling of their digital trail in the context of OSNs. This is based on their relevant fundamental rights within the EU. The spotlight was especially on how USEMP tools could give substance to profile transparency in the legal relationship between an individual end-user of a social network or a browser and (part of) the profiling operations to which this end-user is subjected. In D3.2 the spotlight shifted to the relationship between profiles and the commercial profilers which (partly) constitute them through intellectual or economic efforts. We showed how the right to profile transparency can be (partly) trumped by the trade secret and intellectual property (IP) rights of profilers. However, profilers are not the only ones who possibly hold IP rights towards profiles. End-users can also have rights towards either parts or the whole of their profile.

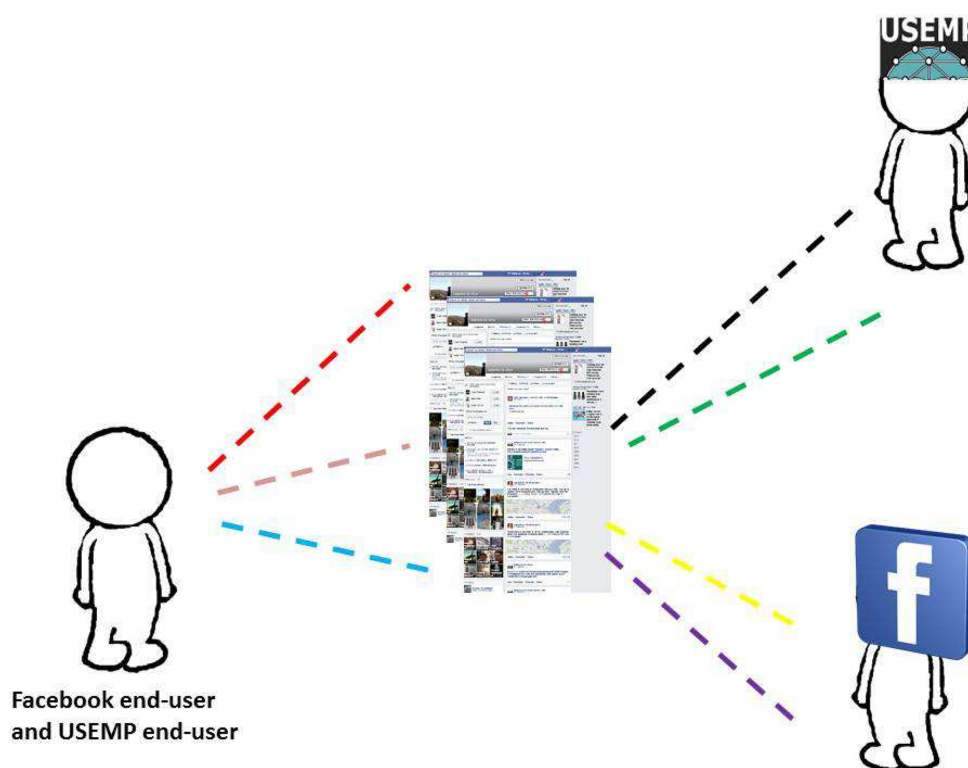


*Figure 2: The "same" profile can be the object of various legal relations with multiple actors.*

The analysis of intellectual property rights commonly takes the following issues into consideration (i) the protected subject matter, (ii) ownership issues (first owner, transfer of rights), (iii) scope of protection: protected acts and exceptions, term of protection; (iv) enforcement. While in D3.2 the issues are rather the protected subject matter (e.g. are there



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protected databases or other works ?) and the scope of protection (e.g. is there a reproduction of a protected element ? is there an extraction of a protected section ? do exceptions cover these protected acts ?), the issues in D3.3 are more related to ownership and the valid transfer/licensing of rights by users/authors. When signing up for Facebook you sign the terms and conditions in which you agree to a number of IP issues (including the non-exclusive license to Facebook for all your IP-matter). Thus, when studying the issues related to copyrights/database rights of the users it is important to look at the terms and conditions of the agreement between the OSN and the users (Wauters e.a., 2014).

This deliverable D3.3 will indeed explore the different types of rights that end users might have in profiles. Two types of user rights will be discussed: copyrights and image rights. It should be born in mind that this analysis is valid for the acts by OSN providers, but also for the Databait tools that will provide the user with empowering tools.

## 2.1. Profiling and copyright?

Intellectual Property (IP) rights (such as patents, copyrights and *sui generis* database rights) are, contrary to “ordinary” property rights, not based on something “material” but on an “intangible” product of the mind like a particular expression (copyright) or invention (patent). Being the *owner* of a book only means that one owns the book as a “material object” and does not imply that one also has the intellectual property rights on the novel contained by the book, or that one is entitled to copy the book, to share it with one’s friends or adapt it into a play or a film (though exceptions are often made for sharing within a small set of people). Compared to ordinary property rights, IP rights are similar in that they can be enforced against anybody (in that sense they are absolute rights), whereas a contract or tort action concerns rights that can be enforced against specific others, such as the tortfeasor or the other party in the contract (in that sense a contract or tort provides relative rights). IP rights differ from material property rights in their limited duration. In Europe, copyright for example lasts for the life of the author until 70 years after her death[3]. After this time, the work enters the public domain and is available to be used freely.

In deliverable 3.2 we discussed how an OSN could rely on its Intellectual Property Rights to object to the creation or exploitation of transparency tools. In this deliverable we will focus on the OSN user and whether she can rely on her intellectual property rights (mainly copyright) to strengthen her legal position vis-à-vis the OSN (or creators of transparency tools for that matter). In the double bind model of the USEMP tools discussed in 1.4, these considerations of user rights in content and profiles however also pertain to the Databait tools developed in the project and will thus also be analyzed in D3.4.The **subject matter** protected under copyright is not uniformly defined[4] but indications can be found in various legal instruments, such as the Berne Convention (BC), the 1996 WIPO Copyright Treaty (WCT) and, at EU level, the directives in the field of copyright.[5] Copyright can offer protection for different types

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[3] Art. 1 of Directive 2006/116/EC of 12 December 2006 on the term of protection of copyright and certain related rights, OJ L 372, 27.12.2006, p. 12–18.

[4] Copyright is granted at the national level and is regulated in national laws but many harmonisation efforts have been made at the international and European levels.

[5] *Berne Convention for the Protection of Literary and Artistic Works* (“the Berne Convention”) from 1886, *WIPO Copyright Treaty*, adopted 20 December 1996, Geneva. Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version), *OJ* L 111, 5.5.2009, p. 16–22. Directive 96/9/EC of the European Parliament and of



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of creations in the literary, scientific and artistic domain: books, theatre plays, operas, music and lyrics, dance choreographies, press articles or scientific publications (art. 2 BC). Moreover, computer programs are considered literary works and therefore protected under copyright (art. 4 WCT; art. 1 Directive 2009/24/EC on the legal protection of computer programs, hereafter CPD) and certain aspects of a database may also be protected under copyright (Directive 96/9/EC on the legal protection of databases).

A copyright cannot be based on a mere idea (e.g., a guy and a girl fall in love with each other but their respective families have a feud), but only on a particular expression of an idea (Shakespeare's *Romeo and Julia* is very unique *expression* of the aforementioned idea).

> 'Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.' (WCT, art. 2)

Some differences may subsist in the definition of the "work", i.e. the protected subject matter of copyright, but one can broadly say that in order to be a copyrightable, the subject matter should be "**original**" or the author's own "intellectual creation"[6] and reflect the author's personality[7]. More specifically, this is the case if the author was able to express his or her creative abilities in the production of the work by making free and creative choices[8]. The Court of Justice of the EU has played a major role in the harmonisation of the originality requirement and has in one case suggested some criteria to assess whether a portrait photograph was protected under copyright: "the photographer can choose the background, the subject's pose and the lighting. When taking a portrait photograph, he can choose the framing, the angle of view and the atmosphere created. Finally, when selecting the snapshot, the photographer may choose from a variety of developing techniques the one he wishes to adopt or, where appropriate, use computer software. By making those various choices, the author of a portrait photograph can stamp the work created with his 'personal touch'"[9]. Consequently, protection is not only granted for artistic expressions of high quality or achievement. It suffices that expression of the author's "own intellectual creation" can be found. It has thus been decided that newspaper articles, even excerpts of merely 11 words, and portrait photographs could be protected (subject to the factual assessment of the national courts).

Whether one has copyright over a Facebook post, a status update, music, or an uploaded picture (so-called User Generated Content) is thus an empirical question that requires investigating the facts: can it be qualified as an expression of the author's own intellectual creation? A statement of fact like "today it is hot" is not likely to be protected by copyright. However, whether something is subject to copyright does not depend on having an extraordinary talent. Even a very badly composed piece of text, music or software code can be subject to copyright. In D3.4 (and the follow-up in D3.9) and D3.8 we explore which data (content) processed in USEMP could be qualified as protected by copyright. In its general terms and conditions Facebook requires the user to grant a broad licence for the use of this

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the Council of 11 March 1996 on the legal protection of databases, *O.J. L 077, 27/03/1996 P. 0020 – 0028.*

[6] Infopaq International A/S v Danske Dagblades Forening, C-5/08, ECLI:EU:C:2009:465, para. 37.

[7] Recital 17 in the preamble to Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, *O.J. L 290 , 24/11/1993 P. 0009 – 0013 ;*

[8] Eva-Maria Painer v Standard VerlagsGmbH and Others, C-145/10, ECLI:EU:C:2011:798, para. 89.

[9] Painer, ECLI:EU:C:2011:798, para. 90-92.



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content, which could mean that Facebook is entitled to exercise copyright rights on content submitted by its users. Furthermore, protected subject matter from other sources than the OSN may be used during the development of the DataBait tools, e.g. images that are part of "training sets". It should be verified whether such third sources are used and on which legal basis (exception, consent). This will be done in D3.4 (and the follow-up in D3.9) and D3.8.The copyright holder enjoys a certain **scope of protection**, determined by the interplay of exclusive rights and exceptions. Holding copyright over a work means, according to the *EU Copyright* or *"Infosoc" Directive*[10], to hold the right over its reproduction[11], publication[12] and distribution.[13] Based on the technical description of the DataBait tools, it will be verified in D3.4 (and the follow-up in D3.9) and D3.8 to which extent any acts of reproduction, distribution or communication to the public are performed during the development and operation of the DataBait tools. Should it be found that no exception applies, a licence from the rightholder should cover the USEMP activities.

The exceptions to the exclusive rights are listed in art. 5 InfoSoc Directive. During the phase of development of the transparency tool, the exceptions for scientific research may be interesting for the USEMP consortium (art. 5(3)(a) InfoSoc Directive[14])[15]. It should however

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[10] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, O.J. L 167 , 22/06/2001 P. 0010 – 0019.

[11] Article 2. Reproduction right.
Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:
(a) for authors, of their works;
(b) for performers, of fixations of their performances;
(c) for phonogram producers, of their phonograms;
(d) for the producers of the first fixations of films, in respect of the original and copies of their films;
(e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.

[12] Article 3. Right of communication to the public of works and right of making available to the public other subject-matter.
1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.
2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:
(a) for performers, of fixations of their performances;
(b) for phonogram producers, of their phonograms;
(c) for the producers of the first fixations of films, of the original and copies of their films;
(d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.
3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.

[13] Article 4. Distribution right
1. Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.
2. The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent.

[14] Article 5 Exceptions and Limitations (…)
3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:



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be verified in the applicable national law which exceptions have been transposed and under which conditions. Considering the condition that the exception only covers the use of works "to the extent justified by the non-commercial purpose to be achieved", it is unlikely that the exception provides a legal basis for commercial usage of the DataBait tools. In the next version of this deliverable (D3.8), we will analyse whether any exception applies to the DataBait tools, considering the circumstances in which they are developed and will be used.Generally, the author – the person who has created the work – is the first **owner** of the copyrights. The author will often rely on a professional – commercial – partner for the exploitation of the work and thus grant rights to the publisher, the record label or film producer. In our present media environment, authors can also share their works with their interested public via social platforms, which often provide a copyright clause in the terms and conditions of their services.

In D3.4 (and the follow-up in D3.9) it will be verified, based on the technical description of the development and use of the DataBait tools, whether any protected part of the copyrighted content submitted by users to the OSN will be used and, if so, an exception can be relied on. In case the development and operation of DataBait entails restricted acts (reproduction) relating to protected content and no exception applies to such activities, then USEMP should seek the consent of the right holder of the used content. If the users have validly transferred their copyrights in the posted content to Facebook, then Facebook can grant or refuse such licence. If the copyrights cannot be validly transferred by the Facebook general terms and conditions, then the consent of the individual right holders should be acquired.

In Article 2 of the *Facebook Statement of Rights and Responsibilities*[16] (version of November 15, 2013) every Facebook user gives a non-exclusive, transferable, sub-licensable license to Facebook. This means that, as a Facebook user you continue to be the copyright holder over your own IP content[17] and that you can license others next to Facebook (the license is non-exclusive). However, Facebook claims the right to reproduce, publicize and distributed the user's copyrighted material and the right to license it to others (the license is transferable, sub-licensable and worldwide) – and, finally, Facebook stipulates that the user cannot claim royalties over any of this. This could mean, at least in theory, that Facebook could sell a user's pictures to an advertiser who uses them in an ad campaign or reproduce that user's status updates in a hard copy book. From the perspective of IP rights this would be lawful. However, this might violate privacy or data protection rights and would probably create lots of public outrage and bad publicity, so we suspect that Facebook is unlikely to do this – and definitely not on a massive scale.

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(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;

[15] The InfoSoc Directive does not provide an equivalent exception to the exception for decompilation (in view of developing an interoperable software) in the Computer Programs Directive (art. 6 CPD).

[16] Online available at : <https://www.facebook.com/legal/terms>.

[17] The matter is more complicated where users share works to which they do not hold the copyright, such as pictures, news articles or videos.



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**Art. 2. Sharing Your Content and Information**

You own all of the content and information you post on Facebook, and you can control how it is shared through your privacy and application settings. In addition:

1. For content that is covered by intellectual property rights, like photos and videos (IP content), you specifically give us the following permission, subject to your privacy and application settings: you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook (IP License). This IP License ends when you delete your IP content or your account unless your content has been shared with others, and they have not deleted it.
2. When you delete IP content, it is deleted in a manner similar to emptying the recycle bin on a computer. However, you understand that removed content may persist in backup copies for a reasonable period of time (but will not be available to others).
3. When you use an application, the application may ask for your permission to access your content and information as well as content and information that others have shared with you. We require applications to respect your privacy, and your agreement with that application will control how the application can use, store, and transfer that content and information. (To learn more about Platform, including how you can control what information other people may share with applications, read our Data Use Policy and Platform Page.)
4. When you publish content or information using the Public setting, it means that you are allowing everyone, including people off of Facebook, to access and use that information, and to associate it with you (i.e., your name and profile picture).
5. We always appreciate your feedback or other suggestions about Facebook, but you understand that we may use them without any obligation to compensate you for them (just as you have no obligation to offer them).

One could debate whether the formulation of Art. 2 of the *Facebook Statement of Rights and Responsibilities* is in accordance with copyright law. For example, Wauters e.a. (2014) argue that the clause lacks specificity and is thus not in accordance with Belgian law[18]. However, if we assume, for the sake of simplicity, that the clause is legally binding, what does this imply? Most contemporary data analytics ("data mining" including "profiling") involve the need to *copy* data in some way before one can extract information from it (Triaille et al, 2014). We know that a user's Facebook profile may contain expressions protected under copyright, such as status updates or pictures she has made. Making a copy of such works (e.g.

[18] "For instance, under Belgian law, there are strict rules that have to be taken into account when licensing copyright to a third party. For each mode of exploitation the remuneration, the duration and the geographical scope has to be determined.65 Also, it is not possible to transfer rights for modes of exploitation that do not yet exist at the conclusion of the contract.66 Given the broad scope of the provision in Facebook's Terms of Use, this clause would most likely not be enforceable under Belgian law". (p. 267)



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downloading them to one's server in order to analyze them) is to *reproduce* the works, an act that requires the author's prior consent (i.e. the Facebook user's consent or even a third party where the Facebook user has "posted" works from another author[19]), which is only allowed when the copyright holder has allowed one to do so ("given you a license"). Even though there are authors (Triaille et al, 2014) who argue that there should be an exception to copyright protection for technical copies made during the process of (scientific) data analysis, such an exception currently only exists in Japan. This makes Art. 2 of the Facebook *Statement of Rights and Responsibilities* very important: because it gives Facebook, and third parties licensed by Facebook, the right to make copies of the user's IP content - including copies made for the sake of the automated extraction of information (although this is not explicitly stated).

In the data license agreement (see D3.1) signed by DataBait users, a license is given to the USEMP Consortium Partners to use all data gathered through the DataBait Facebook app and the browser plug-in. An interesting question is whether, if no such direct agreement is signed with the author of copyrighted material, the IP license is implicitly provided by Facebook to app developers as a form of sublicensing. This question is not answered by Art. 9 (*Special Provisions Applicable to Developers/Operators of Applications and Websites*) or Art.10 (*About Advertisements and Other Commercial Content Served or Enhanced by Facebook*) of the *Facebook Statement of Rights and Responsibilities*[20] (see the Annex for the full text of these two articles).

Art. 2 of the Facebook Statement of Rights and Responsibilities, however, does not provide a watertight solution for the cases where a Facebook user has posted protected subject matter created by another author to her profile, without this author's consent. Where such protected content is then processed in an automated way, the general consent clause vis-à-vis the Facebook user cannot provide a legal basis towards an author, who has not authorised her work being shared by the Facebook user in the first place. It may be necessary to include a warranty clause in the data licensing agreement (DLA),[21] or develop a separate DLA regarding copyright issues. This will be explored in D3.8, where the modular DLA will be further developed.

Up until now we have focused on copyrighted content which is part of one's OSN profile (a status update, a video, a picture, etc.). But what about copyright on a profile as a whole, including the backend information available to the OSN provider, such as the machine readable behavioural data it captures (van Dijk 2010)? The answer to this question will largely depend on whether the profile (either the individual profile or a data model) can be qualified as an intellectual creation that bears a spark of originality of a human author. In some cases there are multiple human authors (this can be both the OSN and the OSN user)

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[19] Unless such copies could be exempted under the exception of "temporary reproduction", but the list of conditions is rather strict: see Article 5 of the Copyright ("InfoSoc") Directive. Exceptions and limitations
1. Temporary acts of reproduction […], which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:
(a) a transmission in a network between third parties by an intermediary, or
(b) a lawful use
of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.
[20] Online available at : <https://www.facebook.com/legal/terms>.
[21] On the DLA see extensively D3.1.



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resulting in several rights on the same content (see section 2.3 on this). A profile that has been composed purely in an automated manner will not be protected by copyright (cf. Roosendaal, 2013). The profile 'as a whole' may, however be protected under the copyright on databases, to the extent that it is a specific compilation.

## 2.2. The copyright of OSN end-users and granularity of licensing

When a service involves some form of data processing, users are often asked to sign a consent form which provides a lawful ground for the processing (Art. 7(a) DPD 95/46[22]). These consent forms often follow an "all-or-nothing" logic: either you consent, or the service is denied to you. When data are not simply data (e.g. behaviorial data, such as the time you logged-in to Facebook, or volunteered factual data, such as your name and gender) but copyrightable works, which can also cover photographs, including selfies or visual accounts of various meals and foodstuffs, or a status update which is not a mere statement of fact but an "intellectual creation", a simple consent form allowing processing of "personal data" will not suffice to cover the IP rights involved in the use of the copyright work.

As explained above in section 2.1, the author alone has the right to authorise (license) or prohibit the reproduction of her works. Because processing of data will often involve that some (temporary) copy is made, copyright is also important when a profiler is "merely" processing them. In order to process copyright protected material, the profiler needs to have a license from the author to do so. No wonder then that Facebook asks its users to grant the OSN "a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post on or in connection with Facebook".

As mentioned above, such a general copyright licence clause is not valid under all national copyright laws. The rules on copyright contracts have not been harmonised at the European level, hence national legislators are free to impose specific requirements for copyright contracts, especially when the author/natural person is involved[23].Yet Facebook offers only this all-or-nothing approach to its users. Admittedly, Facebook users have immediate control over the use of their "content": they can control who has access to their profiles, status updates, photos, images and all other matters they wish to share with their friends or the public in general. Also, Facebook allows the users to delete content or their account and

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[22] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Official Journal L 281, 23/11/1995, p. 31-50. The DPD 95/46/EC is currently the main legal instrument regarding general data protection, but is in the proces of being replaced by the proposed General Data Protection Regulation, which will probably enter into force in 2016.

[23] Under some national copyright laws, the author/natural person is particularly protected when she contracts with a legal entity such as a publisher or a record label, since she is considered the "weaker" party to the contract. Some very prudent initiatives have been taken to examine whether it is feasible to regulate copyright licensing at the EU level (by means of a Directive). Studies have been undertaken, such as the study by S. DUSOLLIER, C. KER, M. IGLESIAS, Y. SMITS, *Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States*, study for the European Parliament, 2014, available at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493041/IPOL-JURI_ET%282014%29493041_EN.pdf. Contract law, however, is closely linked with the identity of the Member States so a European harmonisation will be difficult to achieve. No further legislative initiatives have been taken so far, so we do not expect such regulation any time soon.



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according to Facebook its IP licence the authorisation ends at that time. Nevertheless, it is hard for the user to check whether Facebook effectively deleted the content,[24] legally speaking Facebook can no longer claim the copyright, due to its own stipulations. However, during the entire period that the user keeps her account and posts copyright protected creations, Facebook benefits from its large IP licence. Consequently, it is not possible for the user to distinguish between the types of use or the purpose of the use that could be imagined.

This is not due to the "nature" of copyright: copyright licensing offers an excellent possibility to be very specific about what one's data can be used for, by whom, for which period of time. One could easily imagine – in analogy to the various types of creative commons licenses[25] – how a user of a browser or social network would benefit from the option to license her copyrightable work through a (a possibily standardized yet refined) licensing agreement in which it is specified exactly for what period, what kind of copyrighted works ("data") could be used for what purpose. Here the author could, for example, state that Facebook can only sub-license her work in relation to – say – cancer research or that she does not want her data mined (including her protected works) for the purpose of commercial consumer research. Licensing could as such be a very effective tool to offer users of social networks and browsers a possibility for some granularity (and thus user-empowerment) in deciding what is allowed with their creative productions. We should take into account that, due to the business model that currently informs most commercial OSNs, such empowerment assumes that users have a bargaining position in relation to the OSN. If an OSN simply refuses such granularity the empowerment remains a dead end. We note, however, that the pGDPR – discussed in D3.1 – contains a new stipulation for consent in the proposed art. 7.4, which entails that service providers cannot require consent for the processing of personal data that are not necessary for the service provided; such consent must be freely given and this means that the service providers cannot deny the service to those who decline consent for data processing beyond what is necessary for the service. This provision could be leveraged for negotiations regarding the copyright on content processed for purposes other than the provision of the service.

The fact that a service is rendered for 'free', that is without direct financial remuneration from the user, does not change the fact that the business model of OSNs is commercial and money is being made. As argued by Wauters e.a. (2014), this commerciality of the OSN brings along that the terms and conditions under which this service is rendered should be as

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[24] One of our technical partners notes that the user could never actually check on deletion unless FB could offer tangible assurance and proof of deletion. The latter is pretty difficult, because it is next to impossible to assure and prove deletion. This is primarily due to redundancy and resilience built into enterprise systems (e.g. RAID arrays, log files, etc). Cf. e.g. http://www.bbc.com/news/uk-politics-11719764. In the EnCoRe project the term 'putting data out of use' was employed, which is about the best an enterprise could achieve (encrypt and throw away the keys). However forensics can likely still recover the original data unless the encrypted data overwrites the original. Deeper forensics can still recover from overwritten magnetic media unless military grade techniques have been used.

[25] A conflict between licences cannot be excluded. Imagine a creator who has made her work available under a creative commons licence that allows further distribution in identical form but only for non-commercial purposes. The creator thus explicitly reserves the rights of adaptation and commercial exploitation. When this work, published under such non-commercial creative commons licence, is shared on Facebook's platform – where Facebook's terms and conditions apply – there is a conflict between Facebook's large IP Licence (including commercial use) and the creative commons licence chosen by the author.



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fair in terms of data protection and compliant with consumer regulation as any other commercial service. Complying with data protection law and consumer regulation does not make it impossible to pursue a commercial interest. Nevertheless, the fact that the service is 'free' is of interest in a different respect, namely how this affects licensing conditions. Thus, it is an interesting question, which will be further explored in the next version of deliverable 3.2 (D3.7), how the fact that OSN providers have a different business model than "traditional" exploiters of copyright works (such as publishers, music or film producers) and offer their OSN to the user/author "for free", i.e. not for a fee, should affect the particular licensing conditions. The question has been raised whether a far-reaching non-exclusive licence can be granted on the basis of a non-specific clause in the general terms and conditions of a OSN (without defined object, scope of rights, duration). Under many European copyright laws, copyright licences with the author have to meet certain requirements (as a matter of substance or for evidence purposes). The ratio for such specific copyright contract rules is generally to offer more protection of the author, who is considered the weak party in a negotiation with a professional party that will commercially exploit the work. Because OSN providers exploit IP-protected content in a way which differs from "traditional" exploiters (they exploit the content on an aggregated level) and offer their OSN to the user/author without requesting not for a fee, one question to be examined in D3.8 is whether this data-based business model changes the equation in favour of the OSN provider, resulting in a lesser protection for the user/author.

Up until now we discussed the IP-rights of the OSN user towards IP-protected content and the possibility to license the exploitation of this content in a granular way. But what about granularity with regard to *all* your personal data, that is, also those factual data which miss the creative spark of a personal expression? This option has been explored by, for instance, the *Common Data Project.*[26] From a legal perspective the conceptual problem with *licensing* personal data which lack any form of "intellectual creation" is that these data are (probably[27]) neither your property (they are not material) nor your intellectual property. However, even if personal data cannot be licensed within a "true" intellectual property regime, one could mimic the IP logic in a contract like the USEMP data license agreement (Seethe DLA in D3.1) which specifies the use of the personal data. There are no laws which would forbid such a contract. This DLA which is signed between the USEMP consortium and the users of the DataBait tool is a first step and basis for a more granular licensing approach. This entails that a later, modular version of the DLA should include licensing of copyrighted material posted on the OSN. This will be explored in D3.8.

Often the licensing of personal data is related to some monetization structure:

> BlueKai[28] and KindClicks[29], while collecting personal information for market research, provide individuals with a way of stating their preferences and monetizing their data. KindClicks, for example, allows individuals who contribute data to then donate the money they make off their data to the charity of their choice. BlueKai collects data through cookies, but provides a link on their site by which users can see what information has been gathered about them. Those who want to opt out can. Those

[26] http://www.commondataproject.org/paper-licenses-challenges
[27] However : Purtova 2011.
[28] http://www.bluekai.com/index.html
[29] https://kindclicks.com/



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> that choose to participate in BlueKai's registry can then choose to donate a portion of their "earnings" to charity.[30]

Making money (very small amounts: nanopayments) through licensing systems, often – but not necessarily – based on the idea that one would have some kind of property right in one's data, has gained quite a lot of attention after Lanier (2013) promoted the idea in *Who Owns the Future* - a book which made it to many best-seller listings. In this book Lanier argues that creating systems which allow users to sell their data will empower and protect them more than any data protection or privacy laws ever could. We agree with, for example, Morozov (2013) that Laniers argument is both too utopic in economic terms and too problematic in terms of civil rights:

> "To account for this lucrative wardrobe, Lanier proposes a system of ubiquitous surveillance, with cameras, databases and all. Since we can't get any privacy, we might at least get paid. […] Following Lanier's logic, any correction in the market system — say, price adjustments based on changing demand — would require that extra profits be transferred to consumers. But should you expect a supermarket to send you a check simply because you chose to buy one brand of milk over another? Probably not. Why treat Amazon differently?" (Morozov 2013)

Next to these concerns about the desirability of nanopayments for one's data, there is also an empirical difficulty in how to put a price to a piece of data (Scholze, 2014). Thus we support the fact that the information in the DataBait graphic user interface (GUI) about the possible value of one's data (the Usemp "Economic Value Awareness tool") is not meant to result in actual payments, but in a concise shorthand providing insight in the commercial value of a piece of information. After all, once everybody starts publishing data merely to collect micro payments, the network may rapidly turn into a very uninteresting platform. However, attaching a price to a piece of data is a way of visualizing otherwise complex information, and even though we do not intend to use it in direct conjuction with a granular licensing system insight in the so-called value of one's data might help the user to decide in which granularity of licensing she would like to use. It would be interesting if the user research with regard to the USEMP tools could explore how users react to monetary information and what they think of granular licensing of data. As pointed out in D3.2 the DataBait GUI could also be used to inform users about legal issues such as the license they provide to Facebook.

## 2.3. Conflicts between copyrights of OSN end-users and of OSN providers?

There is no doubt that the author of original posts on a profile has a copyright to those posts – but what about the profile as a whole? In order to answer this question we have to make a distinction between two meanings of the word "profile" (van Dijk 2010) (see D3.2 for a more detailed discussion):

- An individual profile (e.g. the Facebook profile as it is created and maintained by the end-user)

[30] http://www.commondataproject.org/paper-licenses-challenges.



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- A data model or algorithm which was based (e.g., trained and/or tested) on data aggregated from many individual profiles to distinguish certain classes or clusters of individuals.

In both cases the copyright claims of an individual end-user will be far from obvious. With regard to an individual profile much will depend on the factual assessment of how much end-user and OSN provider each have contributed to the composition of the profile as a whole. Is the profile a very streamlined form leaving little space for creative composition by the end-user? In this case it will be unlikely that the user can claim copyright on the profile as a whole. Moreover, the profile might reflect the underlying database structure on which the OSN holds database rigths (in particular copyright). This might limit the freedom of the user to export the profile and reproduce it elsewhere. Another possibility is that the OSN provider and the user are co-owners of intellectual rights on the profile. It cannot be excluded that a profile is indeed a collection (similar to an anthology – cf. art. 2 BC) or even a database protected under copyright due to the contributions of several actors i.e. the OSN provider and the end-user. If filling out the generic data (name, gender, date of birth,…) cannot lead to copyright protection, the user does have a wide margin for self-expression through an ever more personal selection of data (pictures, status updates, videos, notes, newspaper articles,…) – and therefore meeting the originality criterion (*supra sub* 3.1). This protection is independent of the circumstance that the posted content may be protected under copyright (and related rights) and that the user or a third party may hold these rights. In addition, the OSN provider may hold copyrights to the structure of the database or *sui generis* rights to the data (provided that a substantial investment in the obtaining, verification or presentation of the contents can be demonstrated). This situation results (in theory) in a relation of co-dependence of the rights holders. In this case, this co-ownership is dealt with under the Facebook IP licence – which covers all type of intellectual property rights[31]. Here it is worthwhile to mention once more that the biggest difference between the issues following from the copyrights/database rights of the OSN (D3.2) and copyrights/database rights of the users (D3.3) is that the latter is mostly a contractual matter (the Facebook IP license).

The issue of co-ownership could also be of importance for the USEMP profile transparency tools or similar tools made by others: while the user will be free to license the content of his or her profile to these tools, the user might not have the right to export the structure of the profile. Because the content of a profile is not likely to constitute a substantial part of the total Facebook database of user profiles, exporting content (both non-copyright protected data and copyrighted material authored by the user) will not be a problem.

With regard to a data model to which a user has only partly and passively contributed (for example, a model to distinguish between Democrats and Republicans is trained on the data of 10,000 user profiles – including the profile of our particular user) the user will not be able to claim copyright. However, this does not necessarily mean that the OSN can claim copyright on it instead – that all depends on whether the data model can be considered as a work which springs forth from some act of intellectual creation. Furthermore, when a mass of data is extracted, the so-called database right sui generis may be at stake, if the extracted data reflect the substantial investment that justified the protection of the database under the sui generis right in the first place (see extensively on this D3.2),. Moreover, the user might try

[31] Even though there is no sui generis database right under US law.



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to claim a portrait right in the model. Portrait rights will be discussed in the section below. In the development phase of the transparency tool, this stack of intellectual rights should be born in mind.

It should however be verified *in concreto*, in later stages of the project, which elements exactly are taken over from the individual profiles and from the profiling algorithms. If protected parts of the database are copied somehow (even temporarily or for "technical" reasons), there may be a protected reproduction, for example due to the reproduction of the original selection or arrangement of data in the database or a (qualitatively) substantive part of its content. This is done in D3.4 (and its successor – D3.9).

## 2.4. Portrait right of OSN end-users – restricting the exercise of copyright?

Portrait rights (also known as "a right to one's image and likeness") are a rather fuzzy legal notion. There is no unified or even harmonised EU legislation on portrait rights (Synodinou (2014), p. 183). Portrait rights are usually conceived as a subspecies of so-called personality rights (Brüggemeier et al, 2010) – again a rather fuzzy legal notion. Often personality rights (including portrait rights) are related to the field of the protection of privacy and private life (art. 8 ECHR). For example, in *Peck v UK* (Peck v United Kingdom, 36 EHRR 41; [2003] EMLR 287, European Court of Human Right, Judgment 28 Jan 2003) the Court in Strasbourg seemed to support this view.

In most jurisdictions portrait right give a number of actions to the holder of this right, notably the possibility to prohibit the use of the "portrait" without the consent of the one depicted in the portrait. This means that there can be a conflict between copyright and a portrait right. For example, Art. 20 of the Dutch Copyright law (*Auteurswet*) states that when…

> "…a portrait is commissioned by the person portrayed, the person who owns the copyright on the portrait is not allowed to publish that portrait without the consent of the person portrayed (or when this person has died, without the consent of his surviving relatives in the ten years after his/her death). Art. 21 Auteurswet states that if a portrait has been published by the artist who did not create that portrait under the commission of the person portrayed, the publication thereof is illegal insofar as it infringes a reasonable interest of the person portrayed." (Brüggemeier et al, 2010, p. 195.

The notion of the portrait is in many EU member states understood as a broad notion, which is not necessarily limited to actual portraits. For example, in French case from 1982 it was acknowledged that an opera singer (Maria Callas) could have a "portrait right" in her voice and that publication without the consent of the portrayed singer was not permitted if there was no important other interest for such doing so.

> "*C'est ainsi aussi que la cour reconnaîtra à l'artiste interprète un droit à la voix*".[32]

De Hert and Saelens give the following definition of a portrait right (under Belgian law):

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[32] TGI Paris, 1re ch., 19 mai 1982 (Maria Callas): D.1983.147, note Lindon: J.CP.83.II.19955, note Gobin. CA Paris, 1re ch. A, 6 juin 1984: D.1985.inf.rap.314, obs. Such protection would now be founded in the neighbouring rights a performer has to her performance.



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> “Portrait right is an independent and generally accepted personality right which guarantees the inviolability of the image of a person. A portrait right has both a moral and patrimonial aspect. The image of a person is his appearance. But also a portrait of this appearance is protected. One can speak of a portrait when the image of a person is represented through techniques, mimicry, disguises or imitation recorded either in tangible or intangible ways". (p. 867, *translation ours*)

The image right becomes relevant where a OSN user uploads pictures, videos or other representations where she or other people can be identified. While depictions of the user or other users of the OSN can be dealt with in the general terms and conditions of the service, this is not necessarily the case for people who do not use the OSN service but whose image is accessible to a potentially important public.

Building on this broad understanding of the “portrait right” it becomes possible to imagine that it could be extended to an (algorithmically generated) profile: as Roosendaal (2013) argues a profile can be considered to portray the “digital persona”.

> “Images are protected by copyright. Digital personae are, in fact, ‘images’ of the individual in the form of data sets. When digital personae are recognized as images, copyright can, thus, provide legal rights concerning digital personae. However, digital personae are also essentially data sets and data sets as such can be protected by database rights. So, protection along the lines of database rights may be another option with regard to digital personae.” (p. 232)

Interestingly enough Roosendaal is rather sceptical about the practical use of portrait right with regard to profiling practices, claiming that the use of portrait law might be limited:

> “The portrayed person can object to publication of the portrait or ask for a reasonable compensation. […] Internal use by a company for the selection of targeted advertisements or any other purpose may be allowed and cannot be prevented based on portrait law.” (p. 245)

Thus, according to Roosendaal, a digital profile could be protected under the image right but the storing for internal purposes of a company (commercial purpose) is not protected under this personality right. This would entail that Facebook users (as holders of the image rights) cannot oppose extracting data from the facebook profiles based on their image rights, as long as they are not “published”.

This conclusion, however, should be further researched. Considering that image rights have developed under the impulse of new technologies (photography, audiovisual recording and broadcasting technologies), these rights allowed the portrayed person some control over uses that are considered intrusive. This concern has influenced the definition of the protected subject matter (a depiction of a recognisable person) and the scope of the protected afforded (fixation, publication, taking into account the context and the purpose of the use). Furthermore, there may be specific rules regarding consent and, in any case, the protection of the portrayed person should be balanced to fundamental rights, such as the right of freedom of expression and information.

In changing technological circumstances, it should be examined whether the definition of the protected subject matter (data profiles?) and the scope of protection (fixation, profiling, data analysis?) is still adequate to protect the values and interests of the portrayed person – as originally conceived under the image or portrait rights.



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In our opinion, we should take into account the possibility that :

(i) a profile is protected under the image right (personality right)

(ii) storage and processing for profiling is considered a "use" with relevance for the portrayed person – especially when this profile is later used for commercial purposes, even where the profiled person is not so much "published" but is targeted based on her own information;

(iii) consent is required unless exceptions apply (traditionally the right of the public to information is a restriction of the image right) ;

Another concern is that the general terms and conditions of OSNs provide general transfer or licensing clauses on the portrait or image of the person concerned, which means that there is no effective way of exercising this right. These and related questions will be further explored in the final version of this deliverable (D3.8).

However, another interesting question is to which extent profilers are interested in an individual profile as a whole – often they will only access parts of the profile which are relevant for them. Either one could argue that each of these ad hoc selections from a profile constitute a new (ad hoc) profile of the user and explore if any IP protection can be granted to these ad hoc assemblages, or one could focus on the particular elements used by the profiler and explore if these individual elements are protected by any IP rights (copyrights or portrait rights) held by the end-user.

Now, let us return to the question posed at the end of the previous section (2.3): is it possible to claim a portrait right in a data model to which a user has only partly and passively contributed? In portrait rights the “portrait” normally concerns one person. However, what happens if the “portrait” is a composite? In this respect the following recent case from Poland might be of interest, in which the Court[33] stated that:

> “When people are a mere component of a whole, permission is not required for the publication of the image”.

However, at this stage of the legal research in the USEMP project it is impossible to draw far-reaching conclusions based on this particular legal judgement. A reasoning that is valid for an “ordinary” portrait does not necessarily apply to a digital profile. There could be different legal grounds why an individual, who is depicted as part of a crowd, cannot oppose the publication of the group image: perhaps it is considered that de facto she is not recognisable as an individual in the crowd, perhaps the right of the others to have their image published was balanced against the objection of one individual. Such considerations do not necessarily apply in a digital context, where the image/digital persona in a mass of digital data is still well fitted to target the individual (even in her private sphere). The individual can experience such use as intrusive of her (virtual) personal space, which can be linked to the protection granted by Art. 8 ECHR. In the next version of this report (D3.8) we will further explore how one can distinguish traditional media and digital media. We will do this by examining the *function* of the portrait right in traditional media and ask the question how this applies by analogy in a digital world. Only by applying such a functionalist approach can we further explore the question whether it is possible to claim a portrait right in a data model or algorithm.

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[33] Court of appeal of Wroclaw (Poland), 30 January 2014 (Portrait right / group photo). Summary in English available at : http://kluwercopyrightblog.com/2014/06/13/recently-added-copyright-cases-2/



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We will also explore the issue from a pragmatic point of view: what can an end-user gain from claiming a portrait right in a data model or algorithm? Portrait right mainly gives the right to prohibit publication. In some jurisdictions one could derive some financial compensation from one's portrait right, but the question remains if a (nano-)payment for the use of one's "portrait" will be very empowering for the user. This issue will also be explored in more detail in the final version of this deliverable (D3.8), but for the time being the question of portrait rights and their possible interaction with copyright could provide some interesting material to discuss during the user research surrounding the USEMP tools.



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# 3. Conclusion and next steps

Based on the previous analysis and the current state of DataBait tool development, we suggest the following research issues as highly relevant for the next version of this deliverable, to be completed in month 24 of the project.

(a) A further analysis of possible tensions between IP rights of the actors performing tracking and profiling practices (such as OSNs, browsers and third-parties) and the copyrights and portrait rights of the end-user.

*Possible tensions can arise between copyrighted elements (were the copyright is held by the end-user and author of these works) of individual profiles and the copyright in databases held by the OSNs, browsers and third-parties which created the "database" of which these elements are part. In addition to the intellectual right, the OSN should comply with the portrait rights of the users and possibly other persons depicted (including people who are not members of the OSN).*

*Exploring these tensions in USEMP has a triple goal: (1) exploring the IP-rights of end-users which could (partly) trump those of commercial profilers, (2) make sure that the USEMP tools do not infringe on the IP rights of end-users, (3) inform USEMP end-users through the DataBait graphic user interface about the possible tensions between IP rights of profilers and those of end-users.*

(b) A further analysis of the legal compatibility of the USEMP tools with IP rights of end-users, notably with copyright in the user generated content, and with their portrait rights,

(i) The legal compatibility with IP rights of end-users of the USEMP tools in the context of the research project, that is: processing content and developing profiles with the sole purpose of scientific research. The following questions will be verified on the basis of the actual activities of the technical partners: (i) which subject matter is protected under which regime (copyright, portrait rights); (ii) does USEMP perform any restricted act (in relation to protected elements) during the development or the operation of the DataBait tools; (iii) does any exception apply (taking into account that the tools are presently developed and used for the purpose of scientific research); (iv) have the USEMP partners acquired licences for their activities.

*Profile transparency could be a good way to make end-users aware of the possible copyrights and portrait rights that they hold in their profiles or elements of their profiles.*

(ii) The legal compatibility with IP rights of end-users of the USEMP tools as they could hypothetically be in the future, that is, when they are no longer part of a research project.

*Both in the case of commercial usage of the tools or when they are provided in a non-for-profit and/or open source context, employing the tools outside a research context will have novel implications.*



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Design implications for the USEMP OSN Presence tool and the USEMP OSN Economic Value Awareness tool :

*While avoiding overly complex legal issues, some information about the IP rights of end-users should be included in the USEMP tools. For example, in the Economic Value Awareness tool one could inform users about the royalty-free license they have given to Facebook over all their copyright protected material, after briefly explaining the notion of copyright, of portrait rights, etc.*

A further description of the purpose of the uses intended to do via the USEMP tools on users' portrait rights will be provided in the next version of this deliverable (D3.8). Because the application of portrait rights as a means to protect OSN users is very novel and highly dependent on the technical and factual particularities of an OSN we need to explore these in more detail (we do this in D3.4 and D3.8). This will require a technical description of these creation processes of the technical partners in USEMP, an evaluation of the degree in which exclusive rights are applicable, and which exceptions might be relevant. During our research for D3.4 and D3.8 we will interface closely with the other partners to see how copyright and portrait rights can be applied to the creation process and later use of the DataBait tools.

However, a preliminary observation is that the OSN Presence tool could inform users about how portrait rights following from Art. 8 ECHR can sometimes provide a broader protection than mere data protection or copyright protection, because it can be used to look at the “bigger picture” of power imbalances (also in situations which fall outside the protective scope of data protection or copyright protection).



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