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# Legal framework of facial recognition in cultural heritage projects

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# Relevant (Belgian/EU) legal frameworks

- Property right
- Intellectual property right:
  - copyright (author's rights)
  - database right
- Privacy right
  - data protection (GDPR)
  - right to image (Belgium: copyright legislation)



# Property right

- Property law: confers rights to the owner of (physical) things
- Do we need permission from the owner of the physical and/or digital copy in the collection of a CHI to apply facial recognition tools?
- items in the collection of CHIs
  - > if CHI is the owner (e.g. purchase, donation) : question not relevant
  - > If a third party is owner: analysis of the contractual framework (e.g. loan for use); which actions are forbidden?
- reference sets also include online photos from a wide range of sources
  - > again analysis of the contractual framework (e.g. general conditions of an online database concerning scraping tools - CEU 15.01.2015 - *Ryanair*)

# Copyright

- Photos + videos = copyrightable works if original (free and creative choices: CEU 11.06.2020, C-833/18)
- Photos : In the preparation phase, 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 (CEU 01.11.2011 - *Painer*)

# Copyright

- Protected by default upon creation until 70 years p.m.a. (anno 2022 - author died in 1951 (e.g. Arnold Schönberg) or before)
- No registration required (forbidden by the Berner Convention)

Copyright status of photos in scope:

- collection items of CHIs -> mainly created after 1951 -> copyrighted
- online photos from a wide range of sources in reference sets -> mainly created after 1951 -> copyrighted (some under CC BY, CC BY-SA or CC0)

# Copyright

- Who is/are the copyright holder(s)?
- Do we need permission from the copyright holder(s) to make use of copyrighted digital archival material in facial recognition projects?
  - analogue photos are digitized by CHiS
  - digitized and digital born photos are transferred/copied to store space (Meemoo)
  - digital photos are transferred/copied to IDLAB (FAME)
  - digital photos are analysed by algorithms (FAME: IDLab)
  - Digital photos are displayed in a validation tool (FAME:IDlab)

# Copyright: relevant economic rights

- right of reproduction : permission of the rightholder is needed
  - Digitizing and/or digital copying and storing of a photo is a reproduction
  - making vector profiles of faces on photographs: no relevance to copyright if no original elements of a photographic work are reproduced.
- right of public communication: permission of the rightholder is needed
  - Public (online) displaying of photo's is a public communication
  - validation tool? is this a "public"?
  - Public : an indeterminate number of potential recipients
  - Not the case with a clearly defined and closed group of persons (CEU 28.10.2020, C-637/19)

# Copyright: relevant exceptions

- On which exceptions can CHIs and meemoo rely?
  - preservation exception?
    - reproductions are allowed for preservation purposes by CHI's (digitizing, storing, format-shifting)
  - research and education exception?
    - reproductions are allowed for scientific purposes (digitizing, storing)
  - temporary/technical reproductions exception?
    - reproductions are allowed if they are part of a technical process and are temporary (seconds/minutes)
  - future (DSM-Directive 2019/790): text and data mining exception?

# Database rights

- Sui generis database right : EU legislation
- a right for the maker of a database to prevent extraction and/or re-utilization of a substantial part of the content of that database
- reference sets with photos from online database? Infringement?
  - lawful user can extract/re-utilize insubstantial parts
  - Exception for extraction for scientific research

# Data protection (GDPR)

Applies to “personal data” such as photos or videos of identifiable persons

Applies to the “processing” of personal data, such as:

- making the photograph of a person
- storing the photograph
- using the photograph (sharing, publishing,...)
- annotating the photograph

Applies only to personal data of living persons

# Data protection (GDPR)

Legal ground for processing data required, e.g.:

- permission of the data subject (art. 6.1a GDPR)
- for the performance of a task carried out in the public interest (art. 6.1e GDPR): meemoo (Flemish decree)

Specific derogations relating to processing for “*archiving purposes in the public interest, scientific or historical research purposes*” (art. 89 GDPR: rights of access, correction and erasure are limited) (Belgian data protection law 30.07.2018: requirements regarding anonymization and pseudonymization in research projects + possibilities of distribution/communication for archiving in public interest and research )

# Data Protection (GDPR)- biometric data (1)

- “biometric data” means personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data;
- Vector profiles = biometric data

# Data Protection (GDPR)-biometric data (2)

- Biometric data : a special category of personal data (art. 9 GDPR)
- Processing of biometric data is forbidden as a general rule and only allowed if certain criteria are fulfilled, e.g.
  - with permission of the data subject
  - if the data is manifestly made public by the data subject
  - if necessary for archiving purposes in the public interest, scientific or historical research purposes
- appropriate measures and safeguards e.g. DPIA
- How long can biometric data be stored? Art. 5.e GDPR : storage limitation, but deviation for archiving in the public interest and research)

# Right to image (Art. XI.174 CEL)

- explicit permission of the portrayed person needed for every reproduction and public communication of a portrait (if copyright protected)
  - pictures of public persons made in the course of their public activity (conflict between privacyright and freedom of expression/information)
- until 20 years after the death of the portrayed person
- Potential issues:
  - gray zone: who is a public figure? e.g.: a child on stage for one production
  - photos may show non-public figures, e.g.: spectators in a cycling race (although they will never be identified in the applied workflow)
  - photos of public figures in a private context?
  - reference sets also contain photos from various online sources -> context and (lack of) permissions unknown

**Time for**  
**questions**