

# TOWARDS BETTER SHARING OF CULTURAL HERITAGE *AN AGENDA FOR COPYRIGHT REFORM*

*A Creative Commons Policy Paper*



View towards Damascus by Frederic Edwin Church; Public Domain

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# EXECUTIVE SUMMARY

## **Policy at Creative Commons**

Creative Commons (CC) influences global policy to bring down the copyright barriers to universal access and reuse of knowledge and culture, including the cultural heritage held in galleries, libraries, archives, and museums (GLAMs). As part of its Open GLAM Program, CC works to ensure that the interests, concerns and needs of the public and GLAMs in fulfilling their public-interest mission are balanced with those of rights holders in a fair manner.

## **Aim and Outline of This Policy Paper**

This paper is intended to act as a pillar and reference point for CC's advocacy work in copyright reform in the cultural heritage context, with a focus on issues arising in the digital environment. It may serve to support members of the CC community in their own advocacy efforts, guide policymakers in their legislative processes, and inform anyone interested in the policy issues gravitating around access and reuse of culture and cultural heritage. It will likely be adapted into a GLAM Guide for Policymakers and will be augmented with real-life examples, case studies and practical advice.

It starts with an overview of copyright challenges to the legitimate activities of GLAMs, notably preservation (largely through digitization) and sharing of digital and digitized content images and data for access, use and reuse. It also notes copyright's chilling effects in the face of the GLAM sector's general risk aversion. The paper then offers insights towards effective copyright reform addressing those challenges, with a focus on the opportunities related to the digital environment. The proposals for reform aim to create legal certainty and international harmonization as well as to facilitate cross-border transactions.

The paper encourages policymakers to recognize and support the pivotal roles of GLAMs in preserving and providing access to knowledge and culture to all members of society. It urges policymakers to engage with stakeholders to ensure there are clear, simple, and effective policies in place to support better sharing of cultural heritage in the public interest.

The paper provides a high-level overview of the policy issues and, as a whole, it does not necessarily reflect the current situation in any specific jurisdiction.

# TABLE OF CONTENTS

<b>EXECUTIVE SUMMARY</b>	<b>1</b>
<b>TABLE OF CONTENTS</b>	<b>2</b>
<b>INTRODUCTION: How Copyright Is Failing Cultural Heritage Institutions and the Public</b>	<b>3</b>
GLAMs Play a Fundamental Role in Society	3
Unbalanced Copyright Laws Prevent GLAMs From Fully Playing Their Role in the Digital Environment	5
The Solution Is to Recalibrate and Reform Copyright	7
<b>A Need for Clear Exceptions and Limitations in the Public Interest</b>	<b>8</b>
Exceptions and Limitations Play an Essential Role in Enabling GLAMs To Fulfill Their Mission	8
GLAMs As Direct Beneficiaries of Exceptions	10
Preservation in the Sine qua Non of Access of Cultural Heritage	10
Digital Display and Exhibition of Works Are the Means To Ensure Remote Access to Collections	10
GLAMs Must Be Allowed To Preserve and Give Access to Orphan Works and Out-of-Commerce Works	11
GLAMs Must Be Allowed To Engage in Public Speech and News Reporting	11
GLAMs Must Be Able To Conduct eLending and Controlled Digital Lending	11
GLAMs Must Be Allowed To Use Works for Purposes of Quotation, Criticism, Review and Parody, Caricature, and Pastiche	11
GLAM Users As Direct Beneficiaries of Exceptions	12
GLAMs Must Be Allowed To Enable Activities for Education, Teaching, Study and Research Purposes	12
GLAMs Must Be Allowed To Carry Out 3D Printing and Allow Uses in Makerspaces	12
GLAM Collections Must Be Available for Text and Data Mining	12
GLAMs and the Public Must Benefit From a Freedom of Panorama Exception	14
GLAMs Must Be Legally Able To Provide Access to Users With Disabilities	14
Remixes and User Generated Content	14
The Effective Operability of Exceptions Must Be Guaranteed	16
GLAMs Must Be Able To Benefit From Exceptions Across-Borders	16
Contracts Must Not Override Exceptions	16
Technological Protection Measures Must Not Override Exceptions	16
Licensing Is Not a Substitute for Exceptions	17
<b>Protecting the Public Domain From Additional Copyright Layers</b>	<b>18</b>
<b>Reducing (Not Extending) the Term of Protection</b>	<b>20</b>
<b>Limiting Sanctions and Remedies Against GLAMs Acting in Good Faith</b>	<b>21</b>
<b>Legal and Ethical Issues Related to Cultural Rights, Traditional Cultural Expressions, Indigenous Cultural Heritage and Restitution</b>	<b>22</b>
<b>Artificial Intelligence and Cultural Heritage</b>	<b>25</b>
<b>CONCLUSION</b>	<b>26</b>
Selected Sources, Images, Abbreviations	27

# INTRODUCTION: How Copyright Is Failing Cultural Heritage Institutions and the Public

## GLAMs PLAY A FUNDAMENTAL ROLE IN SOCIETY

### **Access to culture and knowledge is essential to sustain vibrant and thriving societies.**

Galleries, libraries, archives and museums (GLAMs) have been the gate openers to the world's culture and knowledge for centuries, and play a fundamental role for the communities that they serve. They provide resources and services for enjoyment, education, research and the advancement of knowledge and stimulate creativity and innovation in the service of global, sustainable development. GLAMs are the institutions where the public can enjoy universal, maximal and equal access to the full diversity of cultures and knowledge.<sup>1</sup> This access is a means of activating the right to culture,<sup>2</sup> the right to education,<sup>3</sup> as well as the principles enshrined in UNESCO Conventions related to culture.<sup>4</sup> Furthermore, “cultural experiences help shape reflective individuals, produce engaged citizens, impact cities and urban life, improve health and well-being and have distinctive economic benefits.”<sup>5</sup>

We must not underestimate the **powerful engine of social progress** that broad access to knowledge and culture represents. GLAMs educate, entertain, inspire, and bring joy to visitors. By making their collections available to the public, disseminating information, and serving as public forums to hold society-wide debates (both on-site and online), they empower people, generation after generation, in offering them the resources to engage and participate in civic life and build a future for themselves and their communities.<sup>6</sup> GLAMs are instrumental to achieving the Sustainable Development Goals.<sup>7</sup>

GLAMs also carry out their public interest missions of keeping a reliable record of our heritage and **preserving our collective memory for future generations**. GLAMs acquire, collect, preserve, research, communicate, exhibit, and promote access to the artifacts and histories that make up that heritage. Libraries — all GLAMs for that matter — are “rich repositories of historically and culturally significant collections, many of which are not available anywhere else in the world.”<sup>8</sup>

In addition, while GLAMs are leaders in providing access to culture in physical spaces, **digital sharing spaces** are predominantly run by commercial entities whose priorities do not necessarily align with the needs of GLAMs, making it difficult for GLAMs and their users to establish a sustainable, equitable and meaningful digital presence. As with other public interest uses, there is a need for change towards building digital societies over and above markets and industries.<sup>9</sup> The COVID-19 pandemic, which has forced GLAMs around the world to close their physical spaces, has magnified this need and demonstrated the vital importance of copyright frameworks that facilitate GLAMs' digital presence.



Crowd Blur by Jose Nicdao; CC BY 2.0

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<sup>1</sup>See CC's Open Culture webpage: <https://creativecommons.org/about/program-areas/arts-culture/>.

<sup>2</sup>Article 27 of the Universal Declaration of Human Rights and Article 15 of the International Covenant on Economic, Social and Cultural Rights.

<sup>3</sup>Article 26 of the Universal Declaration of Human Rights.

<sup>4</sup>Convention Concerning the Protection of the World Cultural and Natural Heritage (1972); Convention for the Safeguarding of the Intangible Cultural Heritage (2003); Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005)

<sup>5</sup>Terras M, Coleman S, Drost S, et al. The value of mass-digitized cultural heritage content in creative contexts. *Big Data & Society*. January 2021. doi:10.1177/20539517211006165, citing Geoffrey, C, Kaszynska, P (2016) Understanding the value of arts and culture. The AHRC Cultural Value Project. Arts and Humanities Research Council. Available at: <https://ahrc.ukri.org/documents/publications/cultural-value-project-final-report/>.

<sup>6</sup> On the connection between social purpose and meaning of digital cultural heritage, see Malde, S, Kennedy, A (eds) (2018) Connecting digital practice with social purpose: Let's get Real 6. Culture24, Brighton, UK. Available at: <https://www.keepandshare.com/doc/8226734/let-s-get-real-6-culture-24-rgb-single-page-pdf-10-5-meg?da=y>.

<sup>7</sup> Notably: United Nations Sustainable Development Goals 16.10 on public access to information and fundamental freedoms and 11.4 on protection and safeguarding of cultural heritage.

<sup>8</sup> Ben White, "Guaranteeing Access to Knowledge: The Role of Libraries," *WIPO Magazine*, August 2012, [https://www.wipo.int/wipo\\_magazine/en/2012/04/article\\_0004.html](https://www.wipo.int/wipo_magazine/en/2012/04/article_0004.html).

<sup>9</sup> See InDICES, "An Insight into Critical Concerns for the Cultural Sector in the Course of Digital Transitions," 2021, <https://indices-culture.eu/an-insight-into-critical-concerns-for-the-cultural-sector-in-the-course-of-digital-transitions/>.

## UNBALANCED COPYRIGHT LAWS PREVENT GLAMs FROM FULLY PLAYING THEIR ROLE IN THE DIGITAL ENVIRONMENT

Around the world, GLAMs are increasingly making use of new digital technologies to preserve and enhance global, inclusive and equitable access to heritage collections.<sup>10</sup> However, they are regularly confronted with copyright challenges that prevent them from taking advantage of those technologies. Core GLAM functions like making (digital) copies of works for preservation or making such works available for purposes of education, research, or enjoyment are largely hampered by unbalanced copyright and access frameworks that fail to keep up with technological advancements and are unfit for the digital age.<sup>11</sup>

For example, GLAMs must often engage in time-consuming and costly processes to determine the copyright status of works and clear any subsisting rights before they can (1) digitize those works to preserve them and (2) share them online.<sup>12</sup> This is especially true where collections are made up of works that are not actively managed by their right holders or works that are not in commercial circulation (also referred to as out-of-commerce and/or “orphan” works). The fact that most preservation and sharing activities involve uses across borders within a patchwork of copyright regimes certainly amplifies uncertainty and ambiguity.

As a result, many legitimate activities are not undertaken or are substantially reduced or modified to comply with complex and burdensome legal requirements in the face of undue risks of infringement.<sup>13</sup> This “distracts from their public mission of preserving and disseminating cultural heritage as a means for achieving educational goals, supporting democratic processes, and fostering creativity and entrepreneurial skills.”<sup>14</sup> These challenges severely undermine GLAMs’ effort to provide universal access to knowledge and culture, with the potential consequences of slowing society’s economic development, exacerbating knowledge inequalities,<sup>15</sup> curtailing social welfare, and carving “the 20th century black hole” into the world’s digital cultural heritage.<sup>16</sup>

The complexity of copyright management in the absence of clear exceptions is compounded by the particularly acute risk-averse, traditional and conservative nature of GLAMs and their management. This manifests itself through the phenomenon of copyright anxiety and chill, which serve to defeat the intent of the legislation, as users do not exercise their rights or take advantage of exceptions in situations of legal chill.<sup>17</sup> In other words, in addition to the laws themselves raising barriers, widespread risk aversion towards any perceived threat of legal action for infringement constrains GLAMs in achieving their purpose. GLAMs hence limit their “open” offering to the “safe,” low-hanging fruit of low-risk or public domain materials, thereby sketching an incomplete picture of the cultural heritage commons online.<sup>18</sup>



The Gold Rush by Charlie Chaplin; Public Domain

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<sup>10</sup> This is supported by policymakers, e.g. in the EU, see Creative Commons welcomes EC recommendation on common European data space for cultural heritage - Creative Commons.

<sup>11</sup> See Theresa Hackett, Time for a single global copyright framework for libraries and archives, WIPO Magazine, December 2015; Jean Dryden, Copyright in the Real World: Making Archival Material Available on the Internet, PhD thesis, University of Toronto, 2008.

<sup>12</sup> On online sharing, see, for instance, the 2016 Europeana report What rights clearance looks like for Cultural Heritage Organizations - 10 case studies. Bartolomeo Meletti in his blog post 21 for 2021: Exceptions highlights “the excessive complexity and costs of rights clearance for GLAMs,” citing, inter alia, Cave, Deegan and Heinink (2000) and Dickson (2010).

<sup>13</sup> Convention Concerning the Protection of the World Cultural and Natural Heritage (1972); Convention for the Safeguarding of the Intangible Cultural Heritage (2003); Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005)

<sup>14</sup> Risk management is essential to carry out mass digitization projects; see, Stobo, V., Deazley, R. and Anderson, I., 2013. Copyright & Risk: Scoping the Wellcome Digital Library Project (Vol. 10, pp. 17-23). CREATE Working Paper.

<sup>15</sup> Kristina Petrasova, “An insight into critical concerns for the cultural sector in the course of digital transitions,” September 27, 2021, INDICES

<sup>16</sup> Bodó, Balázs and Antal, Daniel and Puha, Zoltan, Open Access is not a Panacea, even if it’s Radical – an Empirical Study on the Role of Shadow Libraries in Closing the Inequality of Knowledge Access. (June 16, 2020). Amsterdam Law School Research Paper No. 2020-39, Institute for Information Law Research Paper No. 2020-05, Bodó B, Antal D, Puha Z (2020) Can scholarly pirate libraries bridge the knowledge access gap? An empirical study on the structural conditions of book piracy in global and European academia. PLoS ONE 15(12): e0242509. <https://doi.org/10.1371/journal.pone.0242509>, available at SSRN: <https://ssrn.com/abstract=3628326> or <http://dx.doi.org/10.2139/ssrn.3628326>

<sup>17</sup> See, Europeana, “The missing decades: the 20th century black hole in Europeana,” 2019, <https://pro.europeana.eu/post/the-missing-decades-the-20th-century-black-hole-in-europeana>.

<sup>18</sup> See Wakaruk, A., Gareau-Brennan, C., & Pietrosanu, M. (2021). Introducing the Copyright Anxiety Scale. Journal of Copyright in Education & Librarianship, 5(1). <https://doi.org/10.17161/jcel.v5i1.15212>.

<sup>19</sup> On copyright risk aversion as a filter, see: Andrea Wallace, “21 for 2021: Digital heritage and the public domain”, CREATE, 2022, <https://www.create.ac.uk/blog/2022/01/07/21-for-2021-digital-heritage-and-the-public-domain/>.

## THE SOLUTION IS TO RECALIBRATE AND REFORM COPYRIGHT

As mentioned, GLAMs often need to comply with outdated or unbalanced copyright laws. Balance is at the core of copyright, at least in theory: on the one hand, rights are afforded to creators as an incentive and a reward for creativity for the benefit of society in general; on the other hand, members of the public and society as a whole have the right to access knowledge and culture and to enjoy a rich, robust and thriving public domain. A 2019 World Intellectual Property Organization (WIPO) International Conference on Copyright Limitations and Exceptions for Libraries, Archives, Museums, and Educational & Research Institutions<sup>19</sup> highlighted copyright's unacceptably skewed balance against GLAMs, those institutions that curate, care for, preserve and help interpret, understand, and share cultural heritage. An unbalanced copyright system leads to deepening inequalities in access to knowledge, punctures holes in humanity's vast and diverse bodies of knowledge and prevents knowledge created today from being available tomorrow.

GLAMs deserve a copyright regime that allows them to fully embrace the opportunities offered by digital technologies to fulfill their public interest mission and establish themselves in the public digital space. If the copyright system continues to erode the public interest, policymakers will have missed their chance to upend the disadvantage at which current copyright law puts millions of citizens who lack the minimum legal safeguards to guarantee their fundamental rights to access to culture and knowledge in the digital environment. Everyone has a lot to gain from a more modern and fairer copyright framework.

In this paper, we chart the copyright issues affecting the public interest activities and services provided by GLAMs and consider these seven main areas:

1. a need for clear exceptions and limitations in the public interest,
2. protecting the public domain from additional copyright layers,
3. reduction and no extension of the term of protection,
4. limiting sanctions and remedies against GLAMs acting in good faith,
5. legal and ethical issues related to traditional cultural expressions, Indigenous cultural heritage and restitution,
6. artificial intelligence and cultural heritage,
7. and interrelationship between copyright and cultural rights and cultural heritage laws.

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<sup>19</sup> WIPO, International Conference on Copyright Limitations and Exceptions for Libraries, Archives, Museums and Educational & Research Institutions, October 2019, [https://www.wipo.int/meetings/en/2019/international\\_conference\\_copyright.html](https://www.wipo.int/meetings/en/2019/international_conference_copyright.html).



# A Need for Clear Exceptions and Limitations in the Public Interest

## EXCEPTIONS AND LIMITATIONS PLAY AN ESSENTIAL ROLE IN ENABLING GLAMs TO FULFILL THEIR MISSION

Public-interest and socially-legitimate uses of copyrighted works need to be enabled to foster equitable access to culture, cultural diversity, cultural and creative production, and democratization of culture. These include uses for purposes of education, research, library services, access for people with disabilities, preservation of cultural heritage. Exceptions and limitations (or “user rights”) allow such uses to be lawfully conducted without permission from the copyright holder, most often without payment. They serve to “empower new creativity, enhance rewards to authors, increase educational opportunities, preserve space for non-commercial culture and promote inclusion and access to cultural works.”<sup>20</sup> Both users and creators alike stand to gain from the application of exceptions and limitations.<sup>21</sup> They are essential to achieving proper balance of the copyright system.<sup>23</sup> In countries of common law tradition, they often take the form of “fair use” or “fair dealing,” and in countries of civil law tradition, they are usually specific and precisely defined in the law. There are exceptions to economic rights and/or moral rights (right of attribution and of integrity).<sup>24</sup>

Few national copyright laws fully recognize the legitimate, public-interest activities of GLAMs and their millions of users by means of exceptions or limitations. Where they exist, exceptions are all too narrow, unclear, and unevenly applied. According to a 2019 WIPO Revised Report on Copyright Practices and Challenges of Museums, exceptions and limitations are not frequently well understood or used due to legal uncertainty and to the high costs associated with copyright dispute and litigation.<sup>24</sup>

Therefore, there is an **urgent global need to guarantee exceptions and limitations** applicable in both the analog and digital spaces for the benefit of GLAMs and their users, enabling them to lawfully:

### **GLAMs as direct beneficiaries:**

- reproduce works for preservation purposes, including with the help of digital technologies,
- display and exhibit works online digitally, thereby ensuring access to the works by the public,
- reproduce and provide access to works that are not actively managed by their right holders or works that are not in commercial circulation (also known as orphan works and out-of-commerce works),
- Lend born-digital e-works and digitized works from their collections,
- use works in the contexts of public speech and news reporting,
- and use works for purposes of quotation, criticism, review and parody, caricature, and pastiche.

## **Users/members of the public as direct beneficiaries:**

- access and use works for educational, teaching or private purposes, such as research and private study,
- carry out 3D printing and allow uses in makerspaces,
- perform text and data mining for any purpose,
- exercise freedom of panorama,
- provide access to works in accessible formats for people with disabilities,
- and make transformative uses such as remixes and other forms of user-generated content.

Furthermore, the effective operability of exceptions must be guaranteed, which means that exceptions must be protected from contract override and technological protection measures (TPMs) and that they should apply in cross-border settings. In addition, licensing and private contracting, which is often only practical for the largest and most legally sophisticated entities, is not a substitute for exceptions and limitations guaranteed to everyone by law.

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<sup>20</sup> As mentioned in the, Report of the Special Rapporteur in the field of cultural rights, Farida Shaheed, Copyright policy and the right to science and culture, 2014, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/249/51/PDF/G1424951.pdf?OpenElement>, p.1.

<sup>21</sup> See, e.g. “Authors Alliance Supports Limitations and Exceptions for Education at WIPO SCCR/37,” 2018, <https://www.authorsalliance.org/2018/12/03/authors-alliance-supports-limitations-and-exceptions-for-education-at-wipo-sccr-37/>

<sup>22</sup> See “Creative Commons Copyright Platform Working Group on User Rights’ Position Paper,” <https://medium.com/creative-commons-we-like-to-share/working-group-on-user-rights-position-paper-9c5e589f1c9b>. See also Society of Composers, Authors and Music Publishers of Canada v. Bell Canada, 2012 SCC 36 at para. 11 (the Supreme Court of Canada describing user rights and fair dealing as “tools employed to achieve the proper balance between protection and access” and “an essential part of furthering the public interest objectives of the Copyright Act.”)

<sup>23</sup> For example, Australia has an open-ended defense of reasonableness to a violation of moral rights.

<sup>24</sup> WIPO, SCCR, Revised Report on Copyright Practices and Challenges of Museums, prepared by Dr. Yaniv Benhamou, 2019, [https://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_38/sccr\\_38\\_5.pdf](https://www.wipo.int/edocs/mdocs/copyright/en/sccr_38/sccr_38_5.pdf). See also: WIPO, Study on Copyright Limitations and Exceptions for Libraries and Archives: Updated and Revised, prepared by Kenneth D. Crews, 2015, [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=306216](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=306216).

## GLAM AS DIRECT BENEFICIARIES OF EXCEPTIONS

### Preservation in the Sine qua Non of Access of Cultural Heritage

GLAMs have a core function, often mandated by law, to preserve heritage for the benefit of current and future generations. Important collections are at risk of loss or degradation for a range of reasons, such as theft, intentional or unintentional destruction, discard or deletion, obsolescence of storage media (including digital formats), inadequate storage conditions or extreme events such as fire and flooding from rising sea-levels due to climate change.<sup>25</sup> GLAMs thus often need to make a preservation copy of heritage collections to replace damaged works and to ensure survival and accessibility.

In those jurisdictions without an adequate exception to the reproduction right, GLAMs cannot lawfully copy (digitize) works to make a preservation copy.<sup>26</sup> They may need to secure multiple right holders' permissions and/or to provide them with remuneration (often from public funds).<sup>27</sup> Needless to say this is costly, cumbersome, often unfeasible or, in a large majority of cases, materially impossible. It also runs counter to copyright's bedrock principle of supporting the public interest in access to culture.

The highest priority is thus to ensure that copyright law allows GLAMs to **lawfully make and store copies of cultural heritage material for preservation purposes**.<sup>28</sup> This must include making preservation copies of works to which they have access on third-party servers (e.g. works on open-ended lend), as well as other internal uses (e.g. cataloging) and web harvesting.<sup>29</sup> Reproduction needs to be allowed for all types of copyright subject matter for purposes of preservation (e.g. for reconstruction of works, replacement of lost works, etc.) and to the extent necessary for such preservation, without any restriction as to medium, format, or number of copies. In addition, GLAMs should be able to work with others (other GLAMs or other third parties); there should be no limitation as to what entity might carry out preservation reproduction on behalf of GLAMs.

### Digital Display and Exhibition of Works Are the Means To Ensure Remote Access to Collections

With regard to display, exhibition, and communication to the public, GLAMs may wish to carry out online activities, such as to provide databases accessible to all, virtual tours, etc. This encourages the dissemination of knowledge and supports outreach and connections with remote audiences, e.g. teachers and researchers who cannot travel to access heritage. There should be no limitations about the type of platform used, i.e. institutional website, third-party online space (e.g., Europeana, Sketchfab, Flickr Commons); social media, etc. This exception must include the right to make reproductions of works in exhibition catalogs (in both analog and digital formats).

## **GLAMs Must Be Allowed To Preserve and Give Access to Orphan Works and Out-of-Commerce Works**

Orphan works are copyright-protected works whose author or rights holder is impossible to identify or locate. Out-of-commerce works (OOCWs) are works that are still protected by copyright but are no longer available commercially.

A lot of cultural heritage materials that GLAMs steward are out of commerce and/or orphaned. For these materials, the copyright system proves inflexible and a great hindrance to digitization and making available online while conferring no benefit upon authors and/or rights holders.<sup>31</sup> An exception must be in place to facilitate the large-scale digitization and cross-border accessibility of OOCWs (or other subject matter).<sup>32</sup> This exception must allow use and reuse, preferably without restriction but at a minimum for non-commercial purposes. One appropriate condition is that the name of the author or any other identifiable right holder should be indicated (unless this turns out to be impossible).

Collective licensing of orphan works by collective management societies to GLAMs and other users should be strongly discouraged as an alternative to a mandatory exception for the following reasons: licensing increases transaction costs, causes delays and risks impeding GLAMs' efforts to preserve and make available OOCWs and orphan works by moving any limited available funds away from such core activities. Licensing is a tremendous hindrance for the vast majority of GLAMs, which are typically underfunded and under-resourced public institutions.

## **GLAMs Must Be Able To Conduct eLending and Controlled Digital Lending**

eLending is the practice of lending an ebook to a borrower for a limited period of time. As eLending involves the reproduction and communication of materials, copyright law might be triggered, calling for the need for clear exceptions for GLAMs, in particular libraries, to be able to make ebooks available to their users.

Controlled digital lending (CDL) is the mechanism by which libraries can lend one copy of digitized material from their collection to one borrower at a time, just like they would a physical book. Unlike eLending, CDL is about digitized works, not born-digital material. CDL maximizes a library's ability to loan works, thereby making the entire lending system more efficient and equitable. GLAMs should be empowered to serve as a meaningful access point for publicly funded collections. Copyright law should encourage the practice of CDL and ensure that legal mechanisms are in place to allow this lawful practice.<sup>33</sup>

## **GLAMs Must Be Allowed To Engage in Public Speech and News Reporting**

Exceptions regarding public speech and the reporting of current events are important to GLAMs, considering their practices — contents they may display, including public speeches or news material, but also events they may host, and the related communication material they may produce or feature in.

## GLAMs Must Be Allowed To Use Works for Purposes of Quotation, Criticism, Review and Parody, Caricature, and Pastiche

Exceptions for purposes of quotation, criticism, review and parody, caricature and pastiche are of particular interest to GLAMs for both works they make available as well as for works they create themselves. One appropriate condition is that the source, including the author's name, should be indicated, unless this turns out to be impossible. Another appropriate condition is that the use must be in accordance with fair practice and permitted only to the extent required by the purpose (e.g. criticism, review, etc.).

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<sup>25</sup> Creative Commons, "Using CC Licenses and Tools to Share and Preserve Cultural Heritage in the Face of Climate Change," 2020, <https://creativecommons.org/2020/04/26/cc-licenses-tools-share-and-preserve-cultural-heritage-in-the-face-of-climate-change/>

<sup>26</sup> According to a 2017 WIPO SCCR study, only 102 Member states (ca. 53%) have an explicit preservation provision. Since then, Article 6 of the CDSM, which should have been transposed into the national law of EU Member States by June 2021, provides a mandatory exception in order to allow GLAMs to make copies of works in their collection for preservation purposes.

<sup>27</sup> Such authorization can be obtained by means of direct, individual negotiations with rights holders or through a collecting management organization representing right holders.

<sup>28</sup> For example, Australia has a specific exception to moral rights for the restoration or preservation of a work in good faith (195AT Copyright Act 1968 (Cth)).

<sup>29</sup> See, e.g., Luna Schumacher, Stefan van Kolschooten & Daniël Soons, "Web harvesting by cultural heritage institutions Towards adequate facilitation and regulation of web harvesting digital content in order to preserve national cultural heritage," ILP, 2020, <https://ilplab.nl/wp-content/uploads/sites/2/2020/08/ILP-Lab-Policy-Paper-Web-Harvesting-final.pdf>.

<sup>30</sup> According to White, Several works are "born digital" and are not available in print format, e.g. websites, e-journals, etc. GLAMs need to perform preservation acts including format shifting and migrating electronic content from obsolete storage formats. See, Ben White, "Guaranteeing Access to Knowledge: The Role of Libraries," WIPO Magazine, August 2012,

<sup>31</sup> See e.g., Martinez, M. & Terras, M., (2019) "'Not Adopted': The UK Orphan Works Licensing Scheme and How the Crisis of Copyright in the Cultural Heritage Sector Restricts Access to Digital Content," Open Library of Humanities 5(1), p.36. doi: <https://doi.org/10.16995/olh.335>. In the EU, the convoluted and ineffective Orphan Works Directive should be revised (Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012L0028>). Maintaining this directive reduces clarity and increases complexity in an already overly complex environment. On this point, see Maarten Zeinstra, The trainwreck that is the Orphan Works Directive, Kennisland, 2017, and several Endow resources on the topic of diligent searches under the Directive. See also the EC impact assessment on cross-border online access to orphan works (2011). In the US, a study found "clear evidence that the orphan works problem stifles libraries and archives' efforts to effectively use their collections" (Hansen, David R. and Hashimoto, Kathryn and Hinze, G. A. and Samuelson, Pamela and Urban, Jennifer M., Solving the Orphan Works Problem for the United States (September 10, 2013). Columbia Journal of Law & the Arts, Vol. 37, No. 1, 2013, UNC Legal Studies Research Paper No. 2323945, Available at SSRN: <https://ssrn.com/abstract=2323945>).

<sup>32</sup> For an overview of the issues in the context of Articles 8-11 of the CDSM Directive, see Communia, "Implementing the new EU provisions that allow the use of out-of-commerce works," 2019, <https://www.communia-association.org/2019/12/10/implementing-new-eu-provisions-allow-use-commerce-works/> and Europeana, "Explainer: What will the new EU copyright rules change for Europe's Cultural Heritage Institutions," 2019, <https://pro.europeana.eu/post/explainer-what-will-the-new-eu-copyright-rules-change-for-europe-s-cultural-heritage-institutions>

<sup>33</sup> The paragraph is adapted from: Library Futures, Controlled Digital Lending: Unlocking the Library's Full Potential, August 2021, (<https://www.libraryfutures.net/post/controlled-digital-lending-unlocking-the-libraries-full-potential>).

## GLAM USERS AS DIRECT BENEFICIARIES OF EXCEPTIONS

### **GLAMs Must Be Allowed To Enable Activities for Education, Teaching, Study and Research Purposes**

Many GLAMs provide their users (individuals, institutions or organizations) with opportunities to conduct research, education, and other non-commercial activities that should not be subject to copyright restrictions, as they are conducted in the public interest. Exceptions and limitations for education that aim to leverage copyright for education make it possible to use works for educational purposes without authorization from the rights holder (with or without payment).<sup>34</sup> Education-related exceptions vary across jurisdictions and generally permit certain specific uses linked to study, teaching, private or personal use, and quotation.<sup>35</sup> In some countries, these uses are allowed under the doctrine of fair dealing or fair use.<sup>36</sup> They usually apply in relation to the rights of reproduction, publication, performance, and communication (including online communication). Certain laws provide for compulsory licenses (use always permitted upon payment of license fee set by law) for reproduction and adaptation for educational purposes.

Exceptions and limitations for education, teaching, scholarship and research purposes are relevant in a variety of cases, since the cultural heritage materials that GLAMs hold represent critical resources for personal development and school training, education, study, as well as scientific and academic research. For example, they allow GLAMs to provide copies or translations of works to students and researchers who cannot access them directly.<sup>37</sup> GLAMs also make inter-institutional loans possible and provide local access to materials that normally reside in institutions faraway.<sup>38</sup>

### **GLAMs Must Be Allowed To Carry Out 3D Printing and Allow Uses in Makerspaces**

Increasingly, GLAMs are hosting makerspaces and other innovation spaces (such as fab labs, hackerspaces, and tech shops) for the benefit of both their staff and users, both for preservation or creativity purposes.<sup>39</sup> 3D printing has been used by GLAMs to make copies and reproductions of cultural heritage works (sometimes such works are in the public domain; on other occasions, they are still subject to copyright protection). Such activities have highlighted some of the deficiencies in copyright exceptions, especially in terms of defenses for GLAMs. The use of 3D printing by GLAMs has highlighted the need for a modernization of copyright exceptions.

### **GLAM Collections Must Be Available for Text and Data Mining**

Text and data mining (TDM) is the process of deriving information from machine-readable text.<sup>40</sup> It should be noted that TDM activities do not always implicate the exercise of a copyright exclusive right. Because there are many different methods for conducting TDM, whether it implicates the exercise of an exclusive right of the right holder will depend on the jurisdiction, the specific type of mining activity, and whether the underlying data is subject to copyright at all. For example, some jurisdictions might consider that TDM is an act of reproduction, therefore permission from the right holder might be required. In other jurisdictions, TDM might fall under an exception, such as fair use, in which case permission is not required. In those jurisdictions where TDM implicates an exclusive right of the right holder, an exception must be in place to allow anyone to undertake data analytics for any purpose, commercial or not, without permission from rights holders.<sup>41</sup>

## **GLAMs and the Public Must Benefit From a Freedom of Panorama Exception**

Freedom of panorama refers to the ability to take and publish photographs, videos, or films of works, mainly works of architecture or sculpture (but sometimes also other types of works such as literary or artistic works), located permanently in public places, as an exception to the rights of reproduction and communication to the public. This exception is of major importance for GLAMs, since it targets public spaces where cultural heritage is displayed or present. Were there no exception, visitors and the public would need to take exceedingly cumbersome care in ensuring the art in public spaces is not protected by copyright before publishing pictures of such art, placing an undue burden on the public and contradicting the function of art in the public sphere. The exception should not be limited to outside spaces but also include closed spaces, so long as they are accessible to the public, as a broad interpretation of what constitutes a public space serves the public interest.<sup>42</sup> It should cover all types of uses, commercial or not.

## **GLAMs Must Be Legally Able To Provide Access to Users With Disabilities**

The 2013 WIPO Marrakesh Treaty's provisions for mandatory exceptions to ensure accessibility of works for people with disabilities are a great step forward in the right direction, but are unfortunately limited to textbooks and printed materials.<sup>43</sup> Policymakers should take a bolder step in pushing for exceptions that allow for GLAMs as authorized entities to make reproductions in accessible formats and provide access to more types of works (e.g., artistic, musical, and audiovisual works), ensuring true accessibility to many more types of works. For example, Australia has a copyright exception for GLAMs providing access to those with a disability.<sup>44</sup> Moreover, it has a fair dealing defense designed to provide access to copyright works for those with disabilities. Some GLAMs have been creating tactile exhibits to make their work more accessible for attendees with visual impairments.

In addition, measures need to be in place to prevent versions of public domain works created for accessibility purposes from being subject to copyright protection and from individuals or entities making accessible versions claiming rights. At a minimum, new versions of works created for accessibility purposes by authorized entities should be subject to the same limitations and exceptions as the underlying works.<sup>45</sup>

## **Remixes and User Generated Content**

GLAMs users must be allowed to create remixes and user-generated content (UGC) and to enable others to do so. UGC refers to content (images, text, videos, audio, etc.) created by fans and other users, often through adapting or remixing existing content and sharing it online. UGC could include, e.g., catalogs and advertising materials, collective works and creative remixes of materials from the collection, etc. While the creation of content by users may implicate exclusive rights, the creative process and end result are usually highly transformative and their creation is culturally and socially beneficial to the extent that uses that lead to UGC should be covered by an exception or limitation.



Cut and Paste by Laura d'Alessandro; CC BY 2.0

<sup>34</sup> Communia, “Policy paper #11 on leveraging copyright in support of education,” 2016, <https://www.communia-association.org/policy-papers/leveraging-copyright-in-support-of-education/>.

<sup>35</sup> WIPO, Study on Copyright Limitations and Exceptions for Educational Activities, 2016, prepared by Daniel Seng, [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=357756](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=357756).

<sup>36</sup> For example, “education” is on the list of fair dealing purposes in Canada’s Copyright Act, R.S.C. 1985, c. C-42, ss. 29. See also *York University v. Canadian Copyright Licensing Agency (Access Copyright)*, 2021 SCC 32, paras. 96 et seq.

<sup>37</sup> See, e.g. section 108 of the U.S. Copyright Act (1976).

<sup>38</sup> On these points, see Ben White, “Guaranteeing Access to Knowledge: The Role of Libraries,” WIPO Magazine, August 2012, [https://www.wipo.int/wipo\\_magazine/en/2012/04/article\\_0004.html](https://www.wipo.int/wipo_magazine/en/2012/04/article_0004.html).

<sup>39</sup> On 3D scanning for preservation purposes, see e.g., the New Palmyra Project, which aims to reconstruct the ancient city of Palmyra as an immersive virtual environment: <https://newpalmyra.org/>.

<sup>40</sup> For example, Art 3 and 4 CDSM contain an exception for purposes of data analytics. See, Creative Commons’ statement on CC licenses and the text and data mining exception under Article 4 EU CDSM Directive, 2021, <https://creativecommons.org/2021/12/17/creative-commons-statement-on-cc-licenses-and-the-ext-and-data-mining-exception-under-article-4-eu-cdsm-directive>; Communia, Implementing the new EU exceptions for text and data mining, 2019, <https://www.communia-association.org/2019/12/03/implementing-new-eu-exceptions-text-data-mining/>.

<sup>41</sup> See Margoni, Thomas, & Kretschmer, Martin. (2021). A deeper look into the EU Text and Data Mining exceptions: Harmonisation, data ownership, and the future of technology. Zenodo. <https://doi.org/10.5281/zenodo.5082012>.

<sup>42</sup> For an analysis of the freedom of panorama in Europe, see Dulong de Rosnay, M. & Langlais, P.-C. (2017). Public artworks and the freedom of panorama controversy: a case of Wikimedia influence. *Internet Policy Review*, 6(1). <https://doi.org/10.14763/2017.1.447>. See also: WikimediaCommons:Freedom of panorama.

<sup>43</sup> WIPO, Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (Marrakesh Treaty), 2013, [https://www.wipo.int/marrakesh\\_treaty/en/](https://www.wipo.int/marrakesh_treaty/en/).

<sup>44</sup> See Australian Libraries Copyright Committee, “New disability provisions in the Australian Copyright Act,” 2017, <https://alacc.org.au/wp-content/uploads/mp/files/posts/files/new-disability-provisions-in-the-copyright-act.pdf>.

<sup>45</sup> On this point, see Wallace, Andrea, Accessibility and Open GLAM (January 1, 2020). Forthcoming, Jani McCutcheon and Ana Ramalho (eds), *International Perspectives on Disability Exceptions in Copyright and the Visual Arts: Feeling Art* (Routledge 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3615749](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3615749).



## **THE EFFECTIVE OPERABILITY OF EXCEPTIONS MUST BE GUARANTEED**

To operate effectively, exceptions must be mandatory and (1) apply in cross-border settings, (2) be protected from contract override, and (3) not be encroached on by technological protection measures (TPMs). It is also important to note that the ability to license a work is not a substitute for mandatory exceptions.

### **GLAMs Must Be Able To Benefit From Exceptions Across-Borders**

The cultural documents and artifacts of GLAM collections are sometimes dispersed across country borders due to various patterns of history: armed conflicts, colonialism, migration, etc. This makes it difficult for users to lawfully access and use those collection elements for research or other purposes, since copyright laws are territorial. Furthermore, digitization projects are expensive and often involve the collaboration of multiple partners in different countries.

A lack of global harmonization on exceptions presents unjustified challenges to these cross-border uses and projects. Drawing inspiration from Art. 5 of the WIPO Marrakesh Treaty, there should be a general copyright provision allowing for cross-border uses.

### **Contracts Must Not Override Exceptions**

Nowadays, many GLAMs get locked into contracts (especially licensing agreements) that explicitly remove their ability to rely on exceptions in conducting their normal activities; for example, the exceptions guaranteed under the WIPO Marrakesh Treaty are sometimes unduly restricted by contractual terms.<sup>46</sup> This runs counter to the letter and spirit of copyright law. All exceptions and limitations must be protected from contractual override. In other words, no contractual terms may have the effect of minimizing or canceling the uses that can be made by relying on exceptions.<sup>47</sup>

### **Technological Protection Measures Must Not Override Exceptions**

GLAMs are sometimes prevented from using works for legitimate purposes because of technological protection measures (TPMs), such as a password-protected, watermarked, or otherwise technologically-locked digital work. For example, they may not be able to make reproductions, for preservation purposes, of works that are locked by TPMs. This could be because of both technical restrictions —no tool to break it, or no way to get the tool for those who have it — and legal, as the activity itself may be unlawful even if the use is covered by an exception or limitation. The Communia Association noted a 2016 European study that found that a third of users in the education community could not access copyrighted material, which they were allowed to use by virtue of an exception, because of TPMs.<sup>48</sup>

The use of TPMs, digital rights management (DRM) or other technical restrictions to override exceptions and limitations goes against copyright's public interest values<sup>49</sup> and irremediably undermines the goal of a coherent copyright framework.<sup>50</sup>

TPMs must not be used to control, limit, prevent or otherwise affect activities and uses allowed under exceptions or limitations. Therefore, the law must provide that circumvention of TPMs must be allowed for lawful uses of works, to enable the exercise of exceptions and limitations, including, for example, reproduction for preservation purposes, as well to counter the adverse effects of locking up public domain materials behind technological measures. It must also be lawful for GLAMs to provide tools and services that enable the circumvention of TPMs for the purpose of non-infringing uses of works. Where copyright exceptions and DRM or TPM clash, the former should prevail. TPM and DRM that would prevent the enjoyment of an exception should be deemed unenforceable.

### **Licensing Is Not a Substitute for Exceptions**

Many exceptions safeguard fundamental rights and as such should be considered in a relation of right-to-right, not right to exception, with copyright rights. Hence, exceptions are user rights or usage rights;<sup>51</sup> they set the mandatory baseline for what users can do at a minimum, often to serve fundamental rights and core values of society. Licensing gives parties certainty when used in the context of acts beyond the minimum protected by user rights. As such, the two are part of the same system and one cannot substitute for the other. A system that would rely only on licensing would deny fundamental rights and important social values, particularly to those already least advantaged. A system that relied only on exceptions would deny many culturally and economically valuable uses beyond those that all members of the public are freely entitled to make. The two must work together.<sup>52</sup> Yet it is important to understand that non-infringing uses that are beyond the scope of the copyright holders' rights require no license. Licensing arrangements can therefore be used to expand the scope of what users may lawfully do with protected works; they cannot be used to limit the ability of users to make otherwise lawful uses of such works.

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<sup>46</sup> See Giannoumis G.A., Beyene W.M. (2020) Cultural Inclusion and Access to Technology: Bottom-Up Perspectives on Copyright Law and Policy in Norway. In: Antona M., Stephanidis C. (eds) Universal Access in Human-Computer Interaction. Applications and Practice. HCII 2020. Lecture Notes in Computer Science, vol 12189. Springer, Cham. [https://doi.org/10.1007/978-3-030-49108-6\\_25](https://doi.org/10.1007/978-3-030-49108-6_25).

<sup>47</sup> For example, in Portugal, Montenegro, Belgium and Kuwait, copyright law states that (almost) all exceptions and limitations are protected from contract override (see IFLA, Protecting Exceptions Against Contract Override, [https://www.ifla.org/wp-content/uploads/2019/05/assets/hq/topics/exceptions-limitations/documents/contract\\_override\\_article.pdf](https://www.ifla.org/wp-content/uploads/2019/05/assets/hq/topics/exceptions-limitations/documents/contract_override_article.pdf), p. 3). See also the policy position of the American Library Association, Copyright | Advocacy, Legislation & Issues (<https://www.ala.org/advocacy/copyright>) and Communia Association, "Implementing the new EU protections against contractual and technological overrides of copyright exceptions," 2019, <https://www.communia-association.org/2019/12/09/implementing-new-eu-protections-contractual-technological-overrides-copyright-exceptions/>.

<sup>48</sup> European Union, "Assessment of the impact of the European copyright framework on digitally supported education and training practices," 2016, Creative Commons, "We're Against Digital Rights Management. Here's Why," 2020, <https://creativecommons.org/2020/12/04/were-against-digital-rights-management-heres-why/>. A freedom of information (FOI) request to the UK IPO about the number of complaints filed against illegitimate TPMs (when exceptions were available) revealed that since 2003 there have been 11, all of which failed (mainly because related to software), except for one, which regarded a private copy exception, since repealed. See data from 2015: <https://www.gov.uk/government/publications/complaints-to-secretary-of-state-under-s296zeunder-the-copyright-designs-and-patents-act-1988>, in Margoni, Thomas, & Kretschmer, Martin. (2021). A deeper look into the EU Text and Data Mining exceptions: Harmonisation, data ownership, and the future of technology. Zenodo. <https://doi.org/10.5281/zenodo.5082012>.

<sup>49</sup> See e.g. Carys J Craig, "Digital Locks and the Fate of Fair Dealing in Canada: In Pursuit of 'Prescriptive Parallelism'" 13 Journal of World Intellectual Property 503 (2010).

<sup>51</sup> Creative Commons Copyright Platform Working Group on User Rights' Position Paper, 2021, <https://medium.com/creative-commons-we-like-to-share/working-group-on-user-rights-position-paper-9c5e589f1c9b>.

<sup>52</sup> This paragraph is adapted from "Analysis of WIPO SCCRS draft report on regional seminars and international conference on limitations and exceptions (SCCR/40/2) Sean Flynn, Director, Program on Information Justice and Intellectual Property, American University Washington College of Law June 16, 2021, p. 4.

# Protecting the Public Domain From Additional Copyright Layers

Works in the public domain often constitute a significant part of GLAMs' collections. GLAMs' open sharing of public domain heritage content can unlock limitless creativity and allow generative uses leading to knowledge progress. When public domain works are widely shared by GLAMs, anyone can reuse them and build upon them to create something new and unexpected.<sup>53</sup> It is important to note that the public domain's boundaries are not the same everywhere in the world. Because the term of protection varies, and because some rights and subject matter might exist in some countries but not in others, what is or what is not protected by copyright is likely to differ from jurisdiction to jurisdiction. Unfortunately, the public domain is under severe stress due to (1) an expansion of copyright protection through law and (2) wrongful copyright claims over public domain materials.

The world over, new copyright rights are being created and existing rights extended without corresponding recalibrations to safeguard or advance the public interest. Often, legislators will argue, without evidence or justification, that stronger copyright protections will lead to more creativity and better conditions for artists. This ever-expanding reach of copyright in scope and types of rights granted to creators without any balancing mechanism to support the public interest and protect the public domain is alarming. Granting new rights raises important concerns around rights overlap leading to overprotection and overreach (especially via litigation), which can have negative impacts on creativity, innovation and the provision of public goods. Such a continuous push towards more and greater exclusive rights complicates an already complex field, negatively impacts the public domain, and severely curtails people's rights to access and reuse cultural heritage.

Furthermore, several GLAMs (as well as commercial publishers and image licensing libraries that digitize GLAM content) still engage in the mistaken and at times unlawful practice of claiming rights over faithful (non-original) digital reproductions of works in the public domain.<sup>54</sup> This is disruptive and problematic. This creates further enclosures of the public domain and hampers reuse possibilities. Regrettably, inconsistent GLAM practices relating to (the absence of) rights over digital reproductions of works affect decisions around digitization, risk locking down collections behind a second copyright wall and create confusion among users and reusers.

The situation is still under debate in the UK,<sup>55</sup> has limited binding effect in the US<sup>56</sup> and settled at the EU level with the adoption of Article 14 of the EU Directive on Copyright in the Digital Single Market (CDSM).<sup>57</sup> Article 14 stipulates that no new rights can arise in reproductions of works of visual art that are in the public domain, unless such reproductions are deemed original (i.e. represent the author's own intellectual creation). The European Commission's objective is to allow "users to share copies of ... works of art in the public domain with full legal certainty."<sup>58</sup> Recital 70 CDSM specifies that "this shall not affect practices of museums, such as the selling of postcards."<sup>59</sup>

Clarity must be achieved on a global level. It is crucial that copyright law in every jurisdiction, as well as behavioral norms and contractual agreements regarding the digitization of GLAM collections, clearly prohibit anyone from claiming copyright (or related rights) over faithful digital reproductions of public domain works. Digitized public domain works must remain in the public domain.<sup>60</sup> Further, this rule must cover all types of works or subject matter, such as artistic works (including works of visual art), musical works (including music sheets) and sound recordings, literary works (including manuscripts), audiovisual works, archeological works and remains, as well as maps.

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<sup>53</sup> Andrea Wallace, 21 for 2021: Digital heritage and the public domain, 2022, <https://www.create.ac.uk/blog/2022/01/07/21-for-2021-digital-heritage-and-the-public-domain/> (GLAMs steward “an immense volume of public domain works holding immeasurable potential for public reuse and new knowledge generation, particularly when digitized, networked and (re)connected using emerging technologies”).

<sup>54</sup> See, Andrea Wallace, 21 for 2021: Digital heritage and the public domain, 2022, <https://www.create.ac.uk/blog/2022/01/07/21-for-2021-digital-heritage-and-the-public-domain/> (“Indeed, there has long been a misconception...that it is appropriate to apply copyright to surrogates of public domain works, from glass plate negatives, to slides and transparencies, as well as to digitized and born-digital surrogates.”)

<sup>55</sup> A 2015 UKIPO copyright notice indicates that “simply creating a copy of an image won’t result in a new copyright” while noting the uncertainty around digitized copies of public domain images ([https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/481194/c-notice-201401.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/481194/c-notice-201401.pdf)). The UK House of Lords inconclusively debated the issue in 2018 (<https://hansard.parliament.uk/Lords/2018-09-12/debates/A4C8C41E-6523-4052-B141-8F260B980401/MuseumsAndGalleries>).

A US District Court decided that exact reproductions of public domain works could not be protected by copyright in *The Bridgeman Art Library, Ltd. v. Corel Corporation*, February 18, 1999, 36 F. Supp. 2d 191, 1999 U.S. Dist. LEXIS 1731, 50 U.S.P.Q.2d (BNA) 1110. See also *Meshwerks, Inc. v. Toyota Motor Sales U.S.A. - 528 F.3d 1258* (10th Cir. 2008) and *President & Fellows of Harvard Coll. v. Elmore*, No. CIV 15-00472-RB/KK (D.N.M. May. 19, 2016).

<sup>56</sup> A pre-CDSM (2014) study of EU member states looked at digitization issues and EU protection of non original photographs: Margoni, Thomas, *The Digitisation of Cultural Heritage: Originality, Derivative Works and (Non) Original Photographs* (December 3, 2014). Available at SSRN: <https://ssrn.com/abstract=2573104> or <http://dx.doi.org/10.2139/ssrn.2573104>.

<sup>57</sup> European Commission, *Digital Single Market: EU negotiators reach a breakthrough to modernize copyright rules*, 2019, [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_528](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_528).

<sup>58</sup> See Communia Association, *Implementing the Copyright Directive: Protecting the Public Domain with Article 14*.

<sup>59</sup> Creative Commons, “Reproductions of Public Domain Works Should Remain in the Public Domain,” 2019, <https://creativecommons.org/2019/11/20/reproductions-of-public-domain-works/>. See also the <sup>60</sup> Public Domain Manifesto, <https://publicdomainmanifesto.org/>.

# Reducing (Not Extending) the Term of Protection

Copyright should encourage creativity and learning, not hamper them. When well-balanced, copyright works to ensure that the rights and interests granted to creators and the public fulfill their function of stimulating creativity and fostering knowledge access and sharing. Excessive copyright terms inhibit our ability to build upon and rework creative content.<sup>61</sup> Empirical work has shown that culturally important books are less available in countries with longer terms than shorter ones.<sup>62</sup>

There is no reason for copyright protection to last as long as it already does, let alone to be further extended. Extending the duration of protection leads to an incredible loss to society given the role of the public domain as the reserve of cultural heritage as the creative trove on which contemporary creativity depends. In fact, the term of protection must be significantly reduced. A brief filed by leading economists in the 2002 *Eldred v. Ashcroft* US Supreme Court case demonstrated how the costs of a term extension outweigh the benefits.<sup>63</sup> In a 2009 paper, economist Rufus Pollock estimated the optimal copyright term to be about 15 years.<sup>64</sup>

Unreasonably long copyright terms negatively impact the GLAM sector. With copyright erecting so many unnecessary barriers preventing the free flow of knowledge and culture, extending its length flies in the face of policy efforts made to increase access to knowledge in times of crisis and of community efforts to reduce the effects of the pandemic.<sup>65</sup> Copyright should strive to promote a robust and universally accessible public domain for the encouragement of further creativity and cultural output.

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<sup>61</sup> Creative Commons, “Our Response to Canada’s Copyright Term Extension Consultation,” 2021, <https://creativecommons.org/2021/03/09/our-response-to-canadas-copyright-term-extension-consultation/>; Creative Commons, “Is Copyright Term Extension Finally Done?,” 2018, <https://creativecommons.org/2018/01/15/copyright-term-extension-finally-done/>.

<sup>62</sup> See Flynn, Jacob and Giblin, Rebecca and Petitjean, Francois, “What Happens When Books Enter the Public Domain? Testing Copyright’s Underuse Hypothesis Across Australia, New Zealand, the United States and Canada” (June 10, 2019). University of New South Wales Law Journal, Vol. 42, No. 4, 2019, U of Melbourne Legal Studies Research Paper No. 878, Available at SSRN: <https://ssrn.com/abstract=3401684>

<sup>63</sup> See <https://cyber.harvard.edu/openlaw/eldredvashcroft/supct/amici/economists.pdf>.

<sup>64</sup> Pollock, Rufus, *Forever Minus a Day? Calculating Optimal Copyright Term* (July 19, 2009). Review of Economic Research on Copyright Issues, Vol. 6, No. 1, pp. 35-60, 2009, Available at SSRN: <https://ssrn.com/abstract=1436186>.

<sup>65</sup> Creative Commons, *Education in Times of Crisis and Beyond: Maximizing Copyright Flexibilities*, 2020, <https://creativecommons.org/2020/03/31/education-in-times-of-crisis-and-beyond-maximizing-copyright-flexibilities/>; Creative Commons, *Our Community is Reducing the Impact of COVID-19 on Science, Education, and Culture*, 2020, <https://creativecommons.org/2020/06/04/our-community-is-reducing-the-impact-of-covid-19-on-science-education-and-culture/>.

# Limiting Sanctions and Remedies Against GLAMs Acting in Good Faith

It is crucial to limit the risks of liability for GLAMs as well as to mitigate any (flawed) perception of risk.<sup>66</sup> Recognizing that GLAM activities may implicate the rights of copyright holders, permissions may be difficult to secure, and that exceptions often require subjective determinations of lawfulness, GLAMs should be shielded from the risk of financially significant penalties for acts undertaken, especially where they are acting without a motive of gain and/or where it was reasonable for the person acting on behalf of the GLAM to believe that the act was lawfully made in accordance with a copyright limitation or exception. For example, the legal framework should clearly limit the remedy for an infringement to an injunction and/or place a cap on statutory damages as a way to protect GLAMs from unjustifiably harsh sanctions.



Panel from a petticoat; Public Domain

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<sup>66</sup> See, e.g. Dickson, M., 2010. Due diligence, futile effort: Copyright and the digitization of the Thomas E. Watson papers. *The American Archivist*, 73(2), pp.626-636; Stobo, V., Deazley, R. and Anderson, I., 2013. *Copyright & Risk: Scoping the Wellcome Digital Library Project* (Vol. 10, pp. 17-23). CREATE Working Paper.

# Legal and Ethical Issues Related to Cultural Rights, Traditional Cultural Expressions, Indigenous Cultural Heritage and Restitution

As the CC strategy points out, “open sharing practices can also be marred by ethical concerns... To ensure everyone can enjoy the benefits of the full open sharing cycle, we must embrace a multifrontal, coordinated, broad-based approach that transcends copyright.”<sup>67</sup> That is one of the reasons why an agenda for copyright law reform in the field of GLAMs needs to address not only legal but also ethical issues, including those related to traditional knowledge, Indigenous intellectual property, and cultural heritage. GLAMs have a range of responsibilities and duties in respect of Indigenous cultural heritage, particularly in light of questions around repatriation and restitution.<sup>68</sup>

Many GLAMs work hard to make cultural heritage collections available to the public.<sup>69</sup> For these institutions, providing access to knowledge and culture is a core aspect of their duty and public interest mission. Many institutions are digitizing and making cultural heritage collections available online in an effort to both preserve and openly share cultural heritage materials. The Open GLAM movement acknowledges this mission and actively promotes this premise, helping GLAMs make the most out of CC licenses and tools to communicate what users can do with digitized material.

Reuse freedoms associated with public domain materials, and fostered through digitization, can create tension when it comes to Indigenous cultural heritage. Existing copyright law, steeped in Western concepts and values, does not adequately protect Indigenous traditional cultural expressions, nor does it sufficiently reflect or account for Indigenous cultural values. By default, many forms of Indigenous heritage or “traditional cultural expressions” (which may include secret, sacred, or sensitive content) are inequitably deemed public domain under conventional copyright law.<sup>70</sup> One of the challenges is that the copyright system does not properly account for the ways in which traditional cultural expressions are created, collectively held, and transmitted through the generations. The copyright eligibility criteria, such as originality and authorship, are often at odds with Indigenous notions of creativity and custodianship over a community’s cultural heritage. In connection with open access to ethnographica (the tangible and intangible cultural assets preserved in ethnological museums), the question arises as to how access should be organized. Central to the decision on access is the character of any cultural asset. It may seem that such heritage is freely available for use and reuse, when in truth this may not be the case. Permitting this level of access and use raises ethical concerns which must be fully considered.<sup>71</sup>

Existing copyright law, steeped in Western concepts and values, does not adequately protect Indigenous traditional cultural expressions, nor does it sufficiently reflect or account for Indigenous cultural values. The notion of the “public domain” is relevant within the confines of the copyright system. So, while Indigenous cultural heritage may be regarded as public domain under copyright rules, and thus free to use, other rights and interests may still attach to it, stemming from various sources. These include other legal restrictions like privacy rights, other intellectual property rights (including sui generis rights to protect traditional cultural expressions), and personality rights, as well as Indigenous customary

laws and protocols. In practice, this means that access to and use of Indigenous materials may be limited, and justified, on grounds found outside of the copyright system. Because these rights and interests are not protected under copyright law, they are not licensed under CC's licenses and tools, which operate solely within the copyright system. This means that specific terms or conditions on access and use that are based on Indigenous rights, interests, or wishes are not fully addressed when applying CC licenses and tools only and that additional measures might be advisable to correctly reflect the conditions associated with access and use of traditional cultural expressions. Local Contexts, a labeling system inspired by Creative Commons, was designed to address this issue by alerting reusers to local protocols established by communities.<sup>72</sup>

GLAMs are in a pivotal position to take active steps in support of Indigenous cultural interests and values. Through thoughtful, intentional, and respectful decision making, GLAMs can enable the ethical treatment of cultural heritage materials, going beyond the application of conventional copyright law and the determination of a work's public domain status. GLAMs should take account of Indigenous peoples' rights and interests, particularly regarding digitization, access, and reuse of Indigenous cultural heritage. One way forward would be the development of mechanisms for joint curation of collections (by experts from the communities of origin and GLAM staff from the countries where such cultural property is held).

A number of articles of the UN Declaration on the Rights of Indigenous Peoples 2007 (UNDRIP) relate to copyright, cultural heritage, and Indigenous intellectual property.<sup>73</sup> At a national level, there have been efforts to translate the principles of UNDRIP into guidelines for GLAMs in Australia. In 2018, the law firm of Terri Janke and Company was commissioned by the Australian Museums and Galleries Association to prepare the landmark document "First Peoples: A Roadmap for enhancing Indigenous engagement in museums and galleries."<sup>74</sup>

In Australia, there has been litigation over GLAMs engaging in copyright infringement of Indigenous cultural works. In July 2000, Indigenous artists objected to the International Olympic Museum reproducing their works on its website without their permission and claimed economic and moral rights infringement. The International Olympic Museum had been exhibiting the original works as part of its Aboriginal art exhibition in Lausanne, Switzerland. The International Olympic Museum took down the works in December 2000. There has also been an action for breach of confidential information in relation to sacred Indigenous materials as well (see *Foster v Mountford* (1976) 14 ALR 7). It is often the case that an action for breach of copyright can be brought in respect of an unpublished cultural work, as well as breach of confidential information.

Relatedly, the interrelationship between copyright and international human rights and cultural rights and cultural heritage laws (whose broad definitions often include an array of copyright material) must be addressed.<sup>75</sup>





Mona Lisa with crowd by TheMarcusChance; CC BY-SA 2.0

<sup>67</sup> Creative Commons, “Announcing Our New Strategy: What’s Next for CC,” 2020, <https://creativecommons.org/2020/12/16/announcing-our-new-strategy-whats-next-for-cc/>.

<sup>68</sup> For example, there has been much controversy over GLAMs based in the United Kingdom sometimes refusing to allow for repatriation of the cultural heritage back to the original states, as explored in the series “The Stuff the British Stole,” <https://www.abc.net.au/radionational/programs/stuff-the-british-stole/>.

<sup>69</sup> This section reuses extensively “Creative Commons, Sharing Indigenous Cultural Heritage Online: An Overview of GLAM Policies,” 2020, <https://creativecommons.org/2020/08/08/sharing-indigenous-cultural-heritage-online-an-overview-of-glam-policies/>.

<sup>70</sup> Creative Commons, Traditional Knowledge and the Commons: The Open Movement, Listening, and Learning, 2018, <https://creativecommons.org/2018/09/18/traditional-knowledge-and-the-commons-the-open-movement-listening-and-learning/>.

<sup>71</sup> Creative Commons, Sharing Indigenous Cultural Heritage Online: An Overview of GLAM Policies, 2020, <https://creativecommons.org/2020/08/08/sharing-indigenous-cultural-heritage-online-an-overview-of-glam-policies/>.

<sup>72</sup> Creative Commons, Is it possible to decolonize the Commons? An interview with Jane Anderson of Local Contexts, 2019, <https://creativecommons.org/2019/01/30/jane-anderson/>.

<sup>73</sup> Notably: Article 31 (1) of UNDRIP: ‘Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts.’ Article 12 (1) of UNDRIP: ‘Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.’ Article 12 (2) of UNDRIP: ‘States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.’

<sup>74</sup> Terri Janke, AMaGA Indigenous Roadmap, 2019, <https://www.terrijanke.com.au/mga-indigenous-roadmap>. “The Roadmap is built on 5 Key Elements for Change. These key elements tap into different parts of the sector to ensure that museums and galleries are building stronger relationships with Indigenous Australians and evolving away from their Eurocentric foundations. The first key element is Reimagining Representation... The second key element is Embedding Indigenous Values into Museum and Gallery Business. This element aims to move museum and gallery values away from their Eurocentric foundations. Indigenous values need to be encouraged in museums and galleries in order to make Indigenous peoples feel welcome and safe... The third key element is Increasing Indigenous Opportunity. Indigenous opportunity looks at improving employment for Indigenous staff. Indigenous knowledge is a skill which needs to be compensated accordingly... The fourth key element is Two Way Caretaking of Cultural Material. This element aims to transition the care of Indigenous cultural material into the hands of Indigenous Australians... The fifth key element is Connecting with Indigenous Communities. This element focuses on repatriation and support. Providing Indigenous communities with the tools to properly repatriate their material is essential.”

<sup>75</sup> On cultural rights, see OHCHR | International standards, <https://www.ohchr.org/en/issues/culturalrights/pages/internationalstandards.aspx> and UN Special Rapporteur on Cultural Rights, The impact of intellectual property regimes on the enjoyment of right to science and culture, 2010, <https://www.ohchr.org/en/Issues/CulturalRights/Pages/impactofintellectualproperty.aspx>.

# Artificial Intelligence and Cultural Heritage

Developments in artificial intelligence (AI) present a host of exciting opportunities for GLAMs in the digital world.<sup>76</sup> These range from the development of models or algorithms perfected through data processing, to mining, analyzing and enriching datasets with new metadata. While these opportunities are likely to propel GLAMs forward through their digital transformation, they also raise questions in the area of copyright, especially when it comes to using GLAMs' digital collections to train AI and the treatment of AI-generated outputs under copyright law. Three key points must be addressed: the use of collections by GLAMs for AI training; the copyright/public domain status of AI-generated content; and the barriers beyond copyright to opening up and sharing GLAM collections in light of the lack of clarity surrounding AI.

GLAMs should be supported in using the data in their digital collections for AI-training purposes (including machine learning) in order to fulfill their public interest missions. Legally, there remains significant uncertainty as to whether copyright limitations and exceptions allow the use of copyrighted content for AI training. This uncertainty is likely to have a chilling effect on GLAMs wishing to take advantage of AI technologies. This is one reason why the use of copyrighted works to train AI should be considered non-infringing by default. As concerns CC-licensed content, where copyright permission is required to train AI systems, the licenses grant that permission under different terms and conditions depending on the particular CC license.<sup>77</sup> A flowchart helps visualize whether the licenses are triggered and if so, what conditions may apply.<sup>78</sup>

Furthermore, AI has been seen to generate “creative” content through AI. Such content might very well become part of GLAMs' collections as it starts to gain appreciation as a new form of “creative” expression. Likewise, the content generated by GLAMs using AI technology (like enriched datasets) is likely to become abundant as more and more institutions explore the opportunities offered by AI.

While the copyright status of such content is unclear under existing law, there should be no copyright on AI-generated content and it should be in the public domain. Public domain material can be widely accessed, used and reused by GLAMs in fulfillment of their public-interest mission as well as by the general public. Beyond copyright, several obstacles to sharing and using GLAM collections related to ethics, privacy and data protection need to be assessed to bring clarity to the rapidly evolving role that AI is playing in the GLAM sector.

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<sup>76</sup> This section is adapted from: Artificial Intelligence and copyright in the cultural heritage sector: views from Creative Commons, 2021, <https://pro.europeana.eu/post/artificial-intelligence-and-copyright-in-the-cultural-heritage-sector-views-from-creative-commons>. See, also, Europeana, Exploring AI in the cultural heritage sector, 2021, <https://pro.europeana.eu/post/exploring-ai-in-the-cultural-heritage-sector>.

<sup>77</sup> Creative Commons, Should CC-Licensed Content be Used to Train AI? It Depends, 2021, <https://creativecommons.org/2021/03/04/should-cc-licensed-content-be-used-to-train-ai-it-depends/>.

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# CONCLUSION

GLAMs' basic functions to enable access to cultural heritage is hampered by a challenging and inhospitable legal and policy environment, compounded by the risk-averse nature of GLAMs. While best practice norms in GLAMs "influence decision-making more so than legislative reforms and landmark cases,"<sup>79</sup> such norms do take time to develop and do not provide the certainty that legislative reform can offer. In the absence of certainty and adequate safeguards, GLAMs are likely to develop more risk-averse practices that unnecessarily limit their ability to fulfill their public interest functions. If we do not continue to advocate on these issues, the global legal and policy framework is likely to become less and less supportive of GLAMs' mission to make their collections openly accessible to the public for reuse. Policymakers have the responsibility to create a global policy environment conducive to GLAMs' operation that: (1) supports GLAMs' mission to share their collections with the world; (2) recognizes and upholds user rights to benefit from access to culture and knowledge; (3) sustains a robust and thriving public domain; and (4) respects and safeguards Indigenous intellectual property.

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## Abbreviations

- CC: Creative Commons
- CDL: Controlled Digital Lending
- CDSM: Copyright in the Digital Single Market
- CH: Cultural Heritage
- DRM: Digital Rights Management
- EC: European Commission
- GLAMs: Galleries, Libraries, Archives and Museums
- OOCW: Out-of-Commerce Work
- SCCR: WIPO’s Standing Committee on Copyright and Related Rights
- TDM: Text and Data Mining
- TPMs: Technological Protection Measures
- UGC: User-Generated Content
- WIPO: World Intellectual Property Organization

# QUESTIONS OR COMMENTS?

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Model of a Porch and Garden; CC0