TOWARDS BETTER SHARING OF CULTURAL HERITAGE
A CALL TO ACTION TO POLICYMAKERS

A Creative Commons Policy Guide
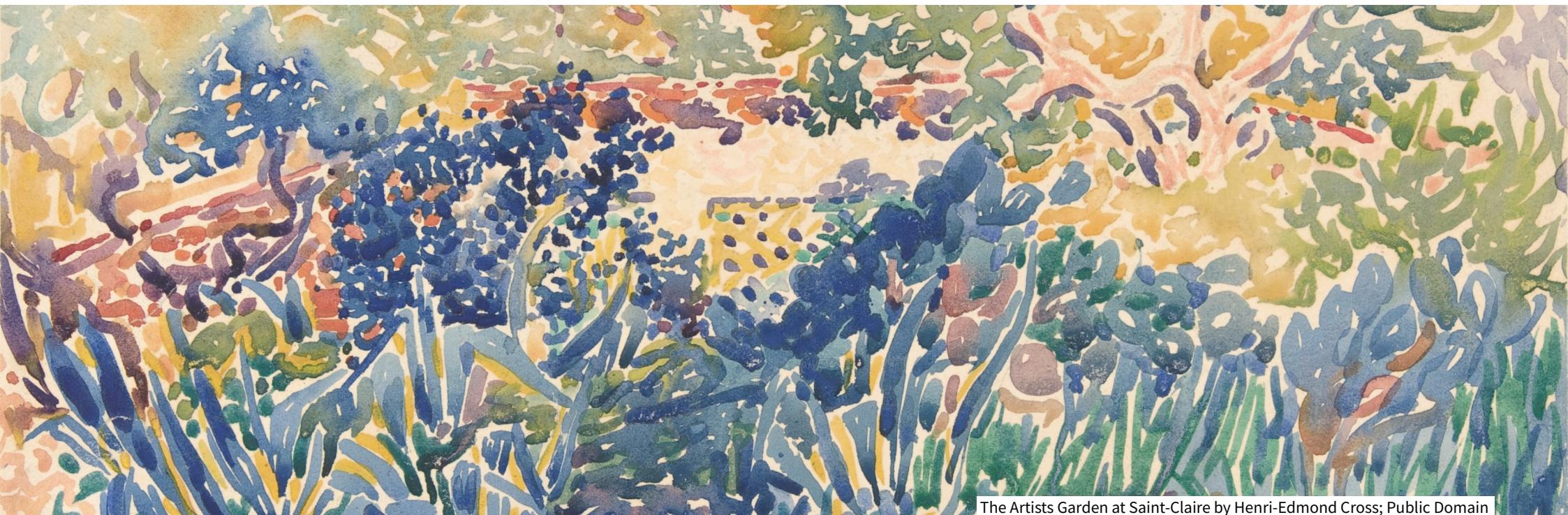
The Artists Garden at Saint-Claire by Henri-Edmond Cross; Public Domain

"Can you permit... the public to be deprived of a thing so useful and precious?... When this loss has been suffered, there will not be a man in the world... that will be able to repair it."

Gabriel Naudé (1600-1653) French Librarian and Scholar [1]

Preservation, access, sharing, use, and reuse of cultural heritage are essential ingredients of thriving and resilient societies and are demonstrated contributors to sustainable development. But inadequate, nonexistent, or unclear public policies —particularly copyright and related laws— often raise unnecessary barriers around cultural heritage.

At Creative Commons (CC), we have known this since we first launched our copyright licenses over 20 years ago to enhance the sharing of a wide variety of creative content. In fact, CC legal tools were specifically created to lift these policy barriers, and many cultural heritage institutions (CHIs) have successfully harnessed them to release nearly five million digital open images. For example, in the last few years alone, museums such as Paris Musées in France, the Smithsonian Institution, the Metropolitan Museum of Art, and Cleveland Museum of Art in the United States, the Auckland Museum in New Zealand, and the Egyptian Museum of Turin in Italy, have all released content using CC tools or licenses. Libraries such as the National and University Library of Slovenia and the National Central Library of Rome, Italy, have also made their collections available under CC tools. On the archives front, examples include the Archivo Histórico de la Provincia de Buenos Aires in Argentina, the Queensland State Archive in Australia, the Centro de Fotografía de Montevideo in Uruguay, and the Archivio fotografico Ricordi in Italy.

While the CC legal tools advance global sharing, they are not designed to be a panacea to all the difficulties of sharing cultural heritage digitally. They are the simplest way for creators and rightsholders to opt into a more flexible model of sharing, but they do not establish a general sharing framework for everyone. Approaches like fostering a "voluntary public domain" through standard waivers like the CC public domain dedication (CC0) go a long way, but they can never fully substitute for suitable laws and for an actual public domain of content freely usable by law. Thus, many people are still facing tremendous challenges in the digital environment in accessing, sharing, and (re)using the content held in CHIs, despite growing use of CC legal tools as global standards for sharing.

Policy reform is therefore needed to fill any gaps left by an open licensing "patch" to a universal, multidimensional problem. It is needed to achieve better sharing of cultural heritage globally, i.e.:

- Sharing that is **inclusive, just and equitable** — where everyone has a wide opportunity to access content, contribute their own creativity, and receive recognition and rewards for their contributions.

- Sharing that is **reciprocal** — where we rebalance the skewed world we live in now, in which a few produce and profit from works that the many consume.

- Sharing that is **sustainable** — where open participation in the public commons is the default, rather than the exception.

To address this need, this Call to Action gives a clear diagnosis of challenges and offers practical, actionable recommendations to bring about positive policy change, so that we can leverage the transformational power of better sharing of cultural heritage for the benefit of institutions, individuals, communities, and society at large.

I wish to express my deep gratitude to everyone who contributed to this important resource. For your knowledge, expertise, enthusiasm and dedication to better sharing, thank you
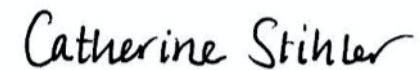
Catherine Stihler

Catherine Stihler, CEO, Creative Commons

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EXECUTIVE SUMMARY

For over two decades, **Creative Commons (CC)** has been active in the cultural sphere, promoting open sharing of information, ideas, and artifacts to build a more equitable, accessible, and innovative world. Guided by our vision to achieve better sharing of cultural heritage, CC is driving policy reform on a global scale.

By proposing **five concrete actions**, our objective is to **support policymakers** around the world in reforming policy — in particular copyright laws — within and across their respective jurisdictions **to achieve better sharing of cultural heritage in the public interest.** These actions offer a basis for a shared vision on better sharing, emphasizing that any policy framework is meant to serve multiple stakeholders in a balanced way: from creators to (re)users of cultural heritage through to Cultural Heritage Institutions, among many other actors.

Policy makers should:

Protect the Public Domain from Erosion

- **Adopt** clear and strong policy that unambiguously states that faithful reproductions of public domain materials must not be encumbered by technical, financial, legal or contractual restrictions.

- **Offer** a mechanism to challenge a copyright claim or contest an object's status as rightfully in the public domain.

Reduce the Term of Copyright Protection

- **Reduce** the term of protection.
- **Render** protection dependent on registration (or other formality).
- **Resist** proposals to extend the terms of copyright any further than they currently are.
- **Make** it as easy as possible to determine works as orphaned.

Shield Cultural Heritage Institutions from Liability

- **Remove liability** for cultural heritage institutions acting in good faith.
- **Where liability cannot be removed, limit sanctions** and remedies for cultural heritage institutions.
- **Create a safe harbor** to allow cultural heritage institutions to legally carry out their activities, including making collections available online to their users, and to encourage them to comply with notice and take down mechanisms in case of infringement claims brought by rightholders.

Legally Allow Necessary Activities of Cultural Heritage Institutions

- **Enable** cultural heritage institutions to reproduce and make copyright-protected heritage available for use and reuse by the public for non-commercial purposes.
- **Permit** all necessary activities that allow users to make use of heritage for non-commercial purposes and to use heritage to participate in public discourse.

Ensure Respect, Equity, Diversity and Inclusivity

- **consider**, in addition to the public domain status of a cultural element, additional legal, ethical or contractual restrictions that may govern the conditions of access, use and reuse;
- **acknowledge** that access and reuse restrictions might be justified for ethical reasons;
- **engage** and liaise with source communities to determine a framework for digitization and making collections available; and
- **clearly communicate** and educate their users about the terms of use and reuse, and any conditions thus established to make sharing more equitable.

Image from "Amérique du Sud. Trois ans chez les Argentins … Illustrations de Riou, etc" by Romain d'Aurignac; Public Domain

ABOUT THIS GUIDE

Origins

For over two decades, Creative Commons (CC) has been active in the cultural sphere, promoting open sharing of information, ideas, and artifacts to build a more equitable, accessible, and innovative world. CC's legacy imbues our open culture program2 and offers a solid scaffolding to our current efforts to promote better sharing of cultural heritage.

In April 2022, we released a policy paper titled "Towards Better Sharing of Cultural Heritage — An Agenda for Copyright Reform,"3 developed by members of the Creative Commons Copyright Platform4 and CC friends from around the world. The paper addresses the key high-level policy issues in support of better sharing, with a focus on heritage held in cultural heritage institutions (CHIs), such as galleries, libraries, archives and museums (GLAMs). While it is a celebrated reference document, it is not meant to serve as a simple, concise, accessible resource. The latter is the purpose of the present guide.

Objective and Target Audience

This document aims to support policymakers in reforming policy — in particular copyright laws — within and across their respective jurisdictions to achieve better sharing of cultural heritage in the public interest. It offers a basis for a shared vision on better sharing, emphasizing that any policy framework is meant to serve multiple stakeholders in a balanced way: from creators to (re)users of cultural heritage through to CHIs, among many other actors.

This guide is intended for policymakers around the world: people working in government departments, ministries, legislature, or other public bodies, and who are responsible for devising and making decisions around public policies or rules (e.g., laws, regulations, etc.) at national, regional, or international levels.

It may also be of interest to professionals and practitioners working in institutional settings in the cultural heritage or other sectors, notably the creative, education or research sectors, as well as anyone interested in bringing about positive change to access, sharing, using and reusing cultural heritage in the public interest.

AN URGENT NEED TO REALIZE OPEN CULTURE FOR ALL

What challenges does cultural heritage face? Climate change, health crises, armed conflicts… and copyright?

The world has always known crises, conflict, and great threats to its very existence, and policymakers have been quick to act in order to preserve the lives and property of those afflicted. One crisis that is often overlooked, though no less important, is the irremediable loss of cultural heritage — the local history, art and artifacts, and knowledge of a region, which are often deeply linked to people's identities and cannot easily be accessed and shared, let alone replaced. In the last few years alone, the world has been going through a heightened number of challenges.

Health crises, such as the COVID-19 pandemic, can have an acute impact for the cultural heritage sector. For instance, many libraries were forced to close their doors during lockdowns and faced barriers to continue providing access to materials and services to their users in the digital environment, such as digital lending and online storytelling.[5]

Humanitarian and armed conflicts, such as the wars in Ukraine and in parts of the Middle East and Africa, to name a few, have necessitated efforts to preserve centuries-old cultural heritage before it is lost forever, such as in the digitization and reconstruction efforts underway in Syria after the destruction of the ancient city of Palmyra.[6]

Rising sea levels due to **climate change** threaten objects, sites, monuments, entire cities and even whole nations.[7] We have seen that wildfires—whether caused by climate change, human neglect, or conflict—have critically endangered cultural heritage sites and institutions in recent years, in places such as Brazil,[8] South Africa,[9] and Easter Island (Chile),[10] among others.[11]

AN URGENT NEED TO REALIZE OPEN CULTURE FOR ALL

It is difficult enough to preserve, access and share cultural heritage in the face of wars, famine, and natural disasters. A compounding, often little known challenge is copyright law. Copyright laws that do not allow for the full use of the public domain, that do not allow for exceptions and limitations for educational[12] and other legitimate uses, and that do not allow institutions to make use of modern technology to digitize, preserve and give access to their collections, make it all the more difficult for people to access and enjoy cultural heritage and for cultural heritage[13] institutions (CHIs) to fulfill their crucial missions.

This is particularly true in the digital environment, where with the advent of the internet, public expectations have radically changed around access to information, knowledge, and culture held in CHIs. Factors such as limited resources play a role, but the policy framework is often to blame: unable to keep up with technological advancements, it is nowadays still inapt for the digital age, with negative impacts on our shared mission to increase the universal sum of knowledge, enhance collaborative knowledge generation, and foster participation in cultural creativity. Inappropriate copyright laws put our world's entire cultural heritage ecosystem in peril. This must change. Organizations like Open Knowledge and Creative Commons (CC) have built standardized tools to make it easier for individuals and institutions alike to set content as free as possible. Those tools are waivers of rights that are meant to put content into what is sometimes called a "voluntary public domain" status.

But this approach has clear limits, the most prominent being jurisdictions where a complete waiver of copyright is not possible under national copyright law. To still have an effect for/in such jurisdictions, the waiver tools contain unconditional fallback licenses, assertions of non-enforcement, and more. The many scenarios where such complex constructs can fail, general contract law providing the most obvious ones, make it obvious that standard tools can only be a patch, not a fix to problems of the copyright system.[14]

What is cultural heritage and what does it mean to "enjoy" it?

"Cultural heritage is, in its broadest sense, both a product and a process, which provides societies with a wealth of resources that are inherited from the past, created in the present and bestowed for the benefit of future generations."[15] – UNESCO

Participation in cultural life is a human right, and access to and enjoyment of cultural heritage are necessary conditions to participate in cultural life.[16] Access to and sharing cultural heritage are a universal fundamental right and must be upheld as such.

Inappropriate copyright laws put our world's entire cultural heritage ecosystem in peril.

This must change.

AN URGENT NEED TO REALIZE OPEN CULTURE FOR ALL

Why is it important to maintain access and better sharing of cultural heritage?

Cultural heritage plays a critical role in our societies. Being able to access, study, and reuse heritage, as well as related information and knowledge, allows us to learn from our mistakes and build upon the creativity of our ancestors. Access to cultural heritage is essential for societies to build upon the learnings from their pasts in order to find purpose for their futures.

This becomes more important as heritage is increasingly accessed online, where the possibilities for sharing and collaboration are immense, but the laws, restrictive. When people face such challenges accessing their heritage, how are they to understand their present and sustainably build their future? How are they to learn from the mistakes of history, participate in generative creativity cycles, and enjoy their fundamental right to access to culture? If we want to build a sustainable future for all, we need to unlock the possibilities of the digital age for the benefit of CHIs and their users, and open up cultural heritage to free it from undue restrictions.

What are the SDGs and how do they relate to open culture?

As the United Nations Sustainable Development Goals (SDGs)[17] and the Mondiacult 2022 Declaration for Culture[18] emphasize, culture is a global public good. Public goods are meant to be free to be shared and enjoyed by everyone, everywhere. In UNESCO's words, "culture is the bridge between peoples and countries... and the key to unlocking mutual understanding and reinforcing global action based human rights and respect for diversity."[19]

Culture underpins all 17 of the SDGs — particularly relevant goals include Goals 16.10[20] on public access to information and fundamental freedoms, and 11.4[21] on protection and safeguarding of cultural heritage. Calls are being made to make culture a sustainable development goal in itself, and CHIs are recognized agents of sustainable development that can help achieve these goals.

When people face such challenges accessing their past heritage, how are they to understand their present and sustainably build their future?

AN URGENT NEED TO REALIZE OPEN CULTURE FOR ALL

What are the benefits of better sharing of cultural heritage?

Sharing cultural heritage openly is not only essential for solving the world's biggest problems and achieving sustainable development,[22] it is also a positive means to enhance and enrich our cultural lives and make collections relevant in the digital age, especially on major sharing platforms. For example, in 2018, the Metropolitan Museum of Art saw a 385% increase in visibility on Wikipedia, reaching 10 million people per month thanks to its open access policy.[23] In 2021, the Wellcome Collection in the UK announced its images had passed 1.5 billion views on Wikipedia.[24]

Open Culture can help CHIs and civil society:

- **foster** universal access to cultural heritage, as widely and equitably as possible,

- **enable** creators and artists to discover, share, and remix cultural heritage materials,

- **support** contemporary creativity in the digital space,

- **act** as an engine for sustainable cultural and social development, through fair remuneration and open, financially sustainable models,

- be a **catalyst** for the dissemination and revitalization of culture,

- **facilitate** preservation of the world's memory,

- **promote** intercultural dialogue and understanding,

- positively **impact** contemporary culture and creativity within and outside institutional contexts,

- **create**, **adopt** and **implement** open culture policies that support all of these goals.

Notably, celebrating cultural heritage through better sharing can reduce barriers to collaborative knowledge building, help enhance intercultural understanding, and enable everyone to immediately participate in a positive creativity cycle.[25]

What happens if we do not take action?

If we do not act to reform the policy framework, we collectively risk:

- **undermining** institutions' public-interest activities in the digital environment,

- realizing a **poor return** on investment to the extent that CHIs are publicly funded,

- **exacerbating** inequalities by curtailing efforts to provide universal access to knowledge and culture,

- **carving** a black hole[26] into the world's digital cultural heritage,

- creating a **disconnect** between data sovereignty, data access, and cultural heritage;

- **alienating** members of society from their histories,

- **contributing** to societies' shorter memory and attention span,

- the worst of our history **repeating** itself.,

- fewer people **engaging** in cultural discussions, thus forgoing the opportunity to create spaces for mutual learning and knowledge-building,

- **leaving** access and sharing in the exclusive hands of private, profit-minded actors, **reducing** the diversity of what is available and making our heritage vulnerable to the whims of the rich and powerful.

The time to act is now.

Ballet Dancers by Henri de Toulouse-Lautrec; CC0

FIVE ACTIONS TO ADVANCE OPEN CULTURE AND BETTER SHARING OF CULTURAL HERITAGE

To achieve better sharing, cultural heritage institutions (CHIs) need to be able to freely ingest, harvest, digitize, transpose and make cultural heritage available to the people that they serve within their institutions and on the internet. This is part of their public interest duty. Of course, it is not sufficient for CHIs to preserve and make heritage available, if people cannot use it for private study, parody, research or criticism, and other activities that enable the exercise of fundamental rights. CHIs must hence gain increased ability to enable every member of the public to enjoy unlimited, broad access and ability to share and (re)use cultural heritage as much as possible. Hence, the need for a clear supportive policy on heritage extends to users and the entire heritage sharing ecosystem.

To accomplish these goals, copyright laws, social norms, as well as practices and behaviors (which may all form part of or relate to the "policy framework") need to change, much of which can be directly influenced by policymakers.

What do we mean by "policy framework" and "rules"?

In this document, a policy framework is the set of rules that govern institutions and people's access and use of cultural heritage in general — whether local, national, regional or international. To achieve a common, lasting solution, many policy areas need to be considered, including: copyright and related rights, data protection, privacy, traditional knowledge, ethics, cultural rights, cultural heritage, and public sector information, among others. Because copyright is so fundamental to the way cultural heritage is being produced, shared and used, it is a good place to begin to drive positive change towards better sharing.

Here are five concrete actions to achieve this necessary change:

1. **Protect** the public domain from erosion

2. **Reduce** the term of copyright protection

3. **Legally allow** necessary activities of cultural heritage institutions

4. **Shield** cultural heritage institutions from liability

5. **Ensure** respect, equity, diversity and inclusivity

ACTION 1: PROTECT THE PUBLIC DOMAIN FROM EROSION

Problem: External Threats are Eroding the Public Domain and Erecting Barriers Around Non-Original Reproductions of Public Domain Materials

Digital reproductions of public domain materials — which all belong in the public domain — are being locked up behind several barriers and limitations, thereby eroding the public domain. Erosion occurs due to various threats.

Technical: institution, platform or software uses digital rights management (DRM), such as watermarks, over digital objects;[27]

Financial: institution charges fees to download images or collections are only available behind paywalls;

Legal:

- **Copyright law** — institution claims a secondary layer of copyright over non-original digital reproductions;[28]

- **Cultural heritage law** — In some countries (e.g. France, Italy, Bulgaria, Greece, among others), digital copies of public domain works held in institutions cannot be freely reused for commercial purposes on the basis of cultural heritage protection law;

- **Trademark law** — institution uses trademark protection over public domain cultural heritage to prevent free reuse (or attempt to do so);[29]

Contractual: institution applies contractual restrictions to limit reuse through terms of service.

It's a fact!

→ The British Museum charges a £179 fee to download a reproduction of a public domain painting by 19th century artist Hawing Hogarth.[30]

→ In 2019, the Neues Museum in Berlin released a 3D scan of the 3000-year-old Nefertiti bust from ancient Egypt on display at the museum under a CC BY-NC-SA license.[31]

→ In 2022, the Uffizi Museum in Florence took legal action against French designer Jean Paul Gaultier for his use of the public domain painting Birth of Venus by Renaissance artist Boticelli.[32]

→ The Van Gogh Museum's terms of service restricts reuse of the Dutch artist's public domain works to non-commercial cases only.[33]

→ In 2016, the National Institute of Fryderyk Chopin issued an ordinance protecting his name and public image and filed an application to register two trademarks for the word "Chopin."[34]

RECOMMENDATIONS

The public domain must be specifically and explicitly protected by law. While recognizing that there are occasionally cultural or ethical considerations to be made when sharing and reusing public domain works (see Action 5), the law must make it clear that public domain materials can be legally reused freely, including for commercial purposes. Digital copies of public domain works should be freely reusable by anyone for any purpose, and must not be restricted by the application of other laws, contracts or financial or technical barriers. Policymakers should:

- **Adopt clear and strong policy** that unambiguously states that faithful reproductions of public domain materials must not be encumbered by technical, financial, legal or contractual restrictions.

  - Determine that no copyright (or related rights) arises in non-original, faithful reproductions of public domain cultural heritage materials, so that works in the public domain remain in the public domain.[35]

  - Prohibit the use of contracts, technical measures or financial means to restrict access to and use of public domain materials.

- Offer **a mechanism to challenge a copyright claim** or contest an object's status as rightfully in the public domain.

  - Create a claim of action (i.e. a user-based right to challenge an abusive or incorrect copyright claim) and an administrative agency charged with reviewing such challenges.[36]

ACTION 2: REDUCE THE TERM OF COPYRIGHT PROTECTION

Problem: Copyright Lasts for Too Long

Heritage is locked up behind a copyright wall for a very long period. And it keeps getting longer. According to current international law, copyright protection must last until at least 50 years after the death of the creator, but laws greatly vary from country to country. In most jurisdictions the term is life of the author + 70 years, in some, it is even longer — life + 100 years in the case of Mexico. We are witnessing a worrying trend of ever-extending terms of protection, which risks removing cultural heritage out of the public domain.[37]

Orphan works and out of commerce works pose additional challenges, which are compounded by overly long protection.[38] CHIs are often not the rightholders of the works in their collections, and works have such a long term of protection that information about who the current rightholders are or how to contact them is often impossible to find. It is very time consuming and difficult to declare a work legally orphaned in order to take advantage of orphan work regimes. Excessively long copyright terms serve to exacerbate these issues as works' entry into the public domain is continually delayed and never clearly predictable. Continual extension of copyright terms in several jurisdictions has also made it extremely difficult to determine a work's true copyright status.[39]

Studies of the link between economic benefits and terms of protection have consistently shown that the current terms of protection are not optimal for most cultural expressions.[43] In 2016, the Australian Productivity Commission found that "[t]he scope and term of copyright protection in Australia has expanded over time, often with no transparent evidence-based analysis, and is now skewed too far in favor of copyright holders. While a single optimal copyright term is arguably elusive, it is likely to be considerably less than 70 years after death."[44]

> ### It's a fact!
>
> → Culturally important books are less available in countries with longer terms than shorter ones.[40]
>
> → Orphan works (works that are still in copyright but whose rightsholder(s) cannot be identified or located) form a considerable part of the collections of cultural institutions. In 2012, the British Library estimated that 40% of its copyrighted collections (150 million works in total) were orphaned.[41]
>
> → Copyright has created a twentieth century black hole of access to heritage; heritage materials created between 1940 and 2000 are underrepresented in Europeana's digitally accessible repositories, thereby skewing the perspective on our recent history.[42]

RECOMMENDATIONS

Policymakers should:

- **Reduce** the term of protection.
- **Render** protection dependent on registration (or other formality).
- **Resist** proposals to extend the terms of copyright any further than they currently are.
- **Make** it as easy as possible to determine works as orphaned.

ACTION 3: LEGALLY ALLOW NECESSARY ACTIVITIES OF CULTURAL HERITAGE INSTITUTIONS

Problem: CHIs Cannot Fulfill Their Mission Due to Copyright Restrictions

CHIs need to make reproductions of copyright-protected works in their collections for preservation purposes (e.g., to address the risk of deterioration). They also need to make all sorts of uses to make works available to the public, including digital display, online curational review and criticism, digital lending,[45] access and reuse,[46] etc. Additionally, the text and data mining (TDM) process, which is crucial for cultural heritage research, requires reproduction of the text or the work to be mined to reveal patterns, trends, and correlations in the text or data. Not all jurisdictions explicitly allow for TDM. Further, most jurisdictions do not explicitly allow heritage to be presented on a non-commercial website for a general audience without permission and remuneration to (a representative of) the rightsholder.

These uses are often restricted by copyright and, unless an exception or limitation (E&L) applies, are often considered infringement. E&Ls exist to balance the rights of creators with the needs of society—they include concepts like user rights, open norms[47] (i.e., open approaches to copyright exceptions, such as fair use and fair dealing) as well as specific, statutory exceptions. Unfortunately, they are often insufficient, curtailed or even non-existent, making copyright inapt to be conducive to CHIs' mission.

This means that, in reality, heritage cannot be enjoyed in the most openly accessible ways and places today: digitally and online. And this is the case despite that CHIs' uses are more often than not non-commercial in nature and do not affect the normal exploitation of the works. Not only are CHIs' fundamental activities curtailed by copyright restrictions, but the general public is denied its vital use of heritage for enjoyment as well as in public discourse, such as commentary, pastiche or parody.[48]

It's a fact!

→ Archives sometimes cannot make preservation copies of the documents they hold despite severe threats of loss due to climate change.[49]

→ Libraries often can only provide access to digital copies of work onsite on dedicated terminals (not remotely).[50]

→ Most current disability copyright exceptions focus solely on visual impairments (to the exclusion of other physical, cognitive, or developmental disabilities). They thus only allow for access related to print disabilities (i.e., books and braille / large print / audio formats) rather than the wider range of creative subject matter.[51]

→ Information is restricted within state borders when copyright exceptions stop at the border.[52]

→ Technical protection measures (TPMs)[53] that cannot be legally circumvented, are used on literary works distributed electronically, such as e-books,[54] and make it impossible for individuals to use those works in ways which would otherwise be non-infringing. This hinders cultural heritage research that substantially relies on TDM.[55]

ACTION 3: LEGALLY ALLOW NECESSARY ACTIVITIES OF CULTURAL HERITAGE INSTITUTIONS

RECOMMENDATIONS

Institutions must be allowed to carry out all the activities necessary to fulfill their public-interest missions and serve their users. Policymakers should:

- **Enable** cultural heritage institutions to reproduce and make copyright-protected heritage available for use and reuse by the public for non-commercial purposes.

- **Permit** all necessary activities that allow users to make use of heritage for non-commercial purposes and to use heritage to participate in public discourse.

These actions need to be properly protected by using clear, unambiguous language in the form of E&Ls (including user rights, open norms like fair use, or statutory exceptions) that are fit for the digital age and future-proof. Such exceptions and limitations must be mandatory, not subject to remuneration (e.g., not to be implemented in a model similar to compulsory licensing), and protected from contractual override.[56] On this last point, many CHIs get locked into licensing agreements that explicitly remove their ability to rely on exceptions to conduct their normal activities, such as exceptions guaranteed under the WIPO Marrakesh Treaty.[57] No contractual terms should minimize or cancel uses allowed under exceptions.[58]

The specific activities that CHIs need to carry out at a minimum in the course of their duties and that need to be allowed under copyright law are detailed below. To ensure that such activities may legally take place, complete and unrestricted application E&Ls must be guaranteed in copyright laws.

Minimum Necessary Exceptions and Limitations for Cultural Heritage Institutions and Their Users

Cultural heritage institutions must at a minimum be able to:

1. Make reproductions of works in their collection:

CHIs must be able to make reproductions of works in their collections:

- for preservation purposes,
- to cater to the needs of users with disabilities,
- to enable text and data mining of their collection.

2. Make works available to the public:

Keeping heritage makes sense when it can be accessed, shared and enjoyed by the public. Hence, CHIs must be able to:

- display and exhibit their collection, including digitally,
- lend born-digital e-works and digitized works,
- provide access and allow use of (digitized) works for educational or private purposes, such as research and private study,
- make works available for non-commercial purposes when their commercial exploitation naturally ends.

3. Enable reuse of the works:

In addition to accessing works, CHIs' users must be able to:

- access and use works for educational or private purposes, such as research and private study,
- perform text and data mining,
- exercise freedom of panorama.

- use works in the contexts of public speech and news reporting.
- use works for purposes of quotation, criticism, review and parody, caricature, and pastiche.
- make transformative uses, such as remixes and other forms of user-generated content.

Effective Operability and Application Requirements

All these exceptions or limitations must be:

- **in place of** clear, easy to understand, coherent and consistent **policy**.
- Legally certain and unambiguous.
- Easy to enjoy and benefit from.
- Flexible—**to address unforeseen or edge cases.**
- **Fit for a digital age** and future proof—**e.g. they should cover born-digital and digitized works and account for advancements in technology.**
- Mandatory — **forming an essential part of copyright law, i.e., not as part of recommendations or sector-wide license agreements.**
- Not contractually waivable or overridden by contracts.
- Not subject to remuneration — **no statutory or compulsory licensing requirements.**
- Applicable and harmonized **across jurisdictions — to allow for cross-border uses and international collaboration.**
- Unhampered by digital rights management **and technological protection measures.**

ACTION 4: SHIELD CULTURAL HERITAGE INSTITUTIONS FROM LIABILITY

Problem: Copyright Puts an Unfair Liability Burden on Institutions

In order to fulfill their missions to preserve heritage and facilitate sharing, participation in and engagement with heritage, CHIs must make certain uses of the copyright-protected works in their collections. Because these uses may or may not be allowed under complex and unclear copyright laws, institutions operate under a risk (real or perceived) of copyright infringement. Sanctions and damages for copyright infringement can be steep, and in some jurisdictions, institutions can be faced with demand letters without a complaint ever going to court, where it could be legally challenged. As a consequence, institutions adopt a risk-averse approach, induced by copyright anxiety, and refrain from undertaking the necessary activities to fulfill their mission.

It's a fact!

→ For many librarians, copyright is seen as a "difficult" area that can inspire avoidance behaviors and can result in anxiety.[59]

→ Multiple court cases in the Netherlands have severely limited the enjoyment of digitized 20th century Dutch heritage. Three cases in particular resulted in massive preventive removal of digitized heritage from publicly available online platforms.[60] This had a chilling effect on institutions and curtailed the online availability of heritage. It also caused expenditure of valuable resources to locate creators and rights holders for uses of their works, even where the sharing by CHIs caused no harm to the normal exploitation of those works.

RECOMMENDATIONS

Good faith uses by institutions in the course of fulfilling their public-interest missions (especially uses for non-commercial purposes) should not be considered copyright infringement, and institutions should not be held liable. Policymakers should:

- **Remove liability** for cultural heritage institutions acting in good faith.
- **Where liability cannot be removed, limit sanctions** and remedies for cultural heritage institutions.
- **Create a safe harbor** to allow cultural heritage institutions to legally carry out their activities, including making collections available online to their users, and to encourage them to comply with notice and take down mechanisms in case of infringement claims brought by rightholders.[61]

ACTION 5: ENSURE RESPECT, EQUITY, AND INCLUSIVITY

Problem: Access to and Aharing in Cultural Heritage Is Not Always Equitable, Respectful or Inclusive

In some cases, fulfilling CHIs' mission to make collections available can be intricate when the collections contain (1) heritage materials that belong to marginalized communities who have been excluded from access and participation in the sharing of cultural heritage; (2) materials acquired in the context of colonization (3) materials of Indigenous peoples;[62] (4) materials that are considered private (especially in cases of use for facial recognition); (5) materials that represent children or other vulnerable groups; among other sensitive materials.[63] In such cases, specific and complex equity issues arise well beyond the in-copyright vs. public domain paradigm, which warrant a responsible, nuanced, equitable and respectful approach, as well the need to bring respect, equity, and inclusivity into the "open culture" equation. At Creative Commons, this forms part of our vision for better sharing of cultural heritage. Dialogue, trust and understanding are some of the key ingredients to achieve this vision for sharing that is more ethical and more equitable.[64]

> **It's a fact!**
>
> → In 1992, the song "Sweet Lullaby" (on world music album Deep Forest) remixed a recording of an age-old lullaby sung by a woman called Afunakwa, recorded by Swiss ethnomusicologist Hugo Zemp in 1970 in the Solomon Islands. Taken from the UNESCO traditional music archive, the remixed version generated large profits, but was created without authorization, compensation, or acknowledgement of Afunakwa or her community.[65]

RECOMMENDATIONS

Policymakers should encourage institutions to adopt an ethical and equitable approach to sharing their collections and develop policy that calls on institutions to:

- **consider**, in addition to the public domain status of a cultural element, additional legal, ethical or contractual restrictions that may govern the conditions of access, use and reuse;

- **acknowledge** that access and reuse restrictions might be justified for ethical reasons;

- **engage** and liaise with source communities to determine a framework for digitization and making collections available; and

- clearly **communicate** and educate their users about the terms of use and reuse, and any conditions thus established to make sharing more equitable.

12th Century Chess Set; Public Domain

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