

When Museums Go Online



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Abstract

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The coronavirus pandemic produced much sorrow and distress, but it also provided opportunities to proceed with digitization processes that had been set aside for lack of support or that had been unimaginable in previous decades. This momentum may prove particularly beneficial to such central public bodies as courts, educational institutions and museums. The acceleration of digitization, albeit with regional differences, has revealed the limits of interactions in the digital environment while also multiplying the options available and adding value to existing institutional functions and practices without replacing them, as some had feared.

Digitization of museum collections contributes to these institutions' core missions of preserving the cultural heritage, enabling research based on their collections, and disseminating knowledge.¹ In particular, digitization facilitates preventive conservation, innovations in interactive viewing,

¹ See the 2007 ICOM definition of a museum, which is currently undergoing a revision: “A museum is a non-profit, permanent institution in the service of society and its development, open to the public, which acquires, conserves, researches, communicates and exhibits the tangible and intangible heritage of humanity and its environment for the purposes of education, study and enjoyment.” Available at: <https://icom.museum/en/resources/standards-guidelines/museum-definition/> (accessed: 12.11.2019)

supports ongoing creativity, and provides broader access for scholars and the public to collections that are not on view. However, the turmoil from the pandemic that began in 2019 emphasized the scarcity of financial and human resources for museums while also bringing to the fore issues that museums have encountered in respecting copyright and related rights.²

Museums are indeed exposed to legal uncertainty concerning how intellectual property rights apply to several aspects of their activities. On the one hand, they use works protected by copyright, for which they must either obtain authorizations or else operate within the boundaries of specific or general exceptions and limitations. On the other hand, they exploit such works through licenses, legislative arrangements or related methods, such as employing databases which may touch upon works that are already in the public domain. The lack of a coherent and harmonized legal framework not only discourages some digitization processes but also restricts transnational collaborations. This shortcoming has been criticized for many years, and several solutions have been proposed for some of the issues raised.³ Nevertheless, diverging or unclear legal rules are having a chilling effect on museums worldwide as they move toward digitization because any errors committed by these central urban institutions would be very costly for them in reputational terms, *inter alia*. This chilling effect on museums has a large impact on their operations, but it also hampers art historians and deprives the public at large.

As a contribution to global debate, these issues were recently explored by a research group that Dr. Yaniv Benhamou, Justine Ferland and Prof. Marc-André Renold headed Art Law Center of the University of Geneva (UNIGE). It resulted in a set of recommendations to policymakers and museums laid down in the Policy Paper on the Digitization of Museum Collections, which was published in December 2020⁴ and presented during an outstanding webinar organized by the Art-Law Center jointly with the International Council of Museums (ICOM).⁵

² See, for example, Network of European Museums Organisations (NEMO). Final Report: Digitisation and IPR in European Museums, July 2020; NEMO, Survey on Museums and Copyright, 2015.

³ See, for example, Canat J., Guibault L., Logeais F. Study on Copyright Limitations and Exceptions for Museums. Study prepared for the Standing Committee on Copyright and Related Rights, WIPO, SCCR/30/2/. April 2015.

⁴ Available at: <https://www.digitizationpolicies.com/> (accessed: 10.01.2020)

⁵ Available at: https://www.digitizationpolicies.com/medias/Program_Conference_WhenMuseumsGoOnline-1.pdf / <https://www.digitizationpolicies.com/when-museums-go-online/> (accessed: 10.01.2020)

The policy paper divides the most prominent issues into three categories. First, twelve proposals are directed to legislators and policymakers at large in order to enhance the legal framework and to reduce the detrimental legal insecurity which is caused by the current framework. Second, a code of conduct is provided for museum professionals who must clear authors' rights before initiating digitization. If such a code of conduct for museums were to be generally recognized as setting a standard for due diligence in digitizing collections, it would provide museums with a "safe harbor". Third, the policy paper outlines a potential resolution procedure based on a standard questionnaire for the parties involved in a dispute over intellectual property rights when museum collections are digitized.

The ICOM-UNIGE webinar offered an opportunity for Dr. Yaniv Benhamou and Justine Ferland to present this report and also prompted a discussion of the most pressing issues among legal academics, and practitioners, museum professionals and scholars in the humanities who lead projects involving digitized museum collections. The intersection of such varied backgrounds and experiences was thought-provoking, especially by showing what state-of-the-art museums and research practices involve. For instance, Prof. Sarah Kenderline described ground-breaking projects on archive remix, new participatory experiences and other ways in which technologies encourage access to the cultural heritage.

On the legal side, discussions centered on recurrent questions about the current state of copyright and expressed frustration about the lack of progress in amending copyright rules. The paucity and inadequacy of the current exceptions and limitations were pointed out by several speakers, and in particular by Prof. Florent Thouvenin. The current EU mechanism for orphan works, which requires separately clearing rights for each individual work, is quite impractical for institutions that hold massive collections, as Prof. Lucie Guibault explained. She also underlined the uncertainty that museums have about their missions in a cross-border online environment when legislative harmonization is lacking. Prof. Guibault pointed out that collective management organizations are currently unable to respond to all the needs of museum digitization simply because their repertoires do not cover all the types of works that are in the custody of museums. As one illustration, she mentioned the Victoria and Albert Museum's current exhibition entitled "Bags: Inside Out", which displays a variety of accessories that are subject to a cumulation of various IP rights in the EU. The variety of licensing practices was addressed by several speakers, and in particular by Brigitte Vezina, who described how licensing arrangements from the Creative Commons empower museums to give wider access to their collec-

tions through its licensing arrangements. She has drawn the public's attention to the need — especially in the digital realm — to clarify and reconcile the ties that link cultural heritage to an institution that “owns” it, to the author or the copyright holder of a particular work, and to the community that “holds” this cultural heritage. From a broader perspective, Dr. Elisabeth Logeais sketched the various challenges and opportunities derived from such new technologies as 3D printing and indicated how digitization may provide some answers in restitution debates. Those debates have become more public and contentious recently, especially in the countries where deaccessioning of museum collections is prohibited by law.

Dispute resolution was another topic addressed at the conference, first, in a presentation of a typology of cases that a museum may face, by Boris Wastiau, director of the Geneva Ethnography Museum. He showed the wide range of potential and actual problems involving both copyright and also image rights, for instance when a museum visitor is captured near an object from the collection and this picture is used for communication purposes. Further insights into the types of copyright cases that come to the World Intellectual Property Organization's Alternative Dispute Resolution mechanism were provided by Ignacio de Castro. Sandra Sykora stressed the need for clear dispute settlement clauses in licensing agreements between authors and the various institutions involved in digitization of museum collections. She has also highlighted the recent revision of the Swiss Copyright Act, which entered into force on 1 April 2020 and has, *inter alia*, introduced protection for all photographs, irrespective of their individual character. This is creating additional problems for museums: license agreements with photographers taking pictures of objects in museums will have to be revised. This specific issue, which is also present in other jurisdictions, was specifically addressed in the UNIGE policy paper by proposing that no additional copyright protection be extended to digitized materials.

At this stage, it seems important to raise policy-makers' attention, in the EU and beyond, to the issues addressed in the UNIGE policy paper and initiatives alike, coming from academia and from the civil society. The pandemic showed the importance of cultural institutions for our societies, other recent natural disasters, looting and destruction during armed conflict, and such other tragic events as the fire in the National Museum of Brazil show how necessary it is to fund digitization projects and provide clear and simple rules for the operation of the cultural institutions that carry them out. Legal uncertainty along with other hurdles such as under-financing has resulted a very low rate of digitization, which is currently

between 5 and 10% for museum collections worldwide. The research group that came up with that estimate describes the situation as the “tip of the iceberg”. Dr. Yaniv Benhamou, Prof. Lucie Guibault, and Prof. Béatrice Joyeux-Prunel at various points in their presentations mentioned another negative effect of the prevailing uncertainty: ill-conceived copyright rules lead to distortion and biased narratives, which are particularly detrimental in the field of history in general and art history in particular. When digital content is restricted, scholars tend to concentrate only on whatever materials are accessible and omit archives of visual and material culture for which rights could not be cleared. Modern intellectual property laws are legal instruments that originated in the Enlightenment era, and they should continue to adapt in order to avoid one-sided approaches and narrowing of critical thought.