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Article

2022

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How to cite

BENHAMOU, Yaniv, FERLAND, Justine. Digitization of GLAM Collections and Copyright: Policy Paper. In: GRUR international, 2022, vol. 71, n° 5, p. 403–421. doi: 10.1093/grurint/ikac024

This publication URL: <https://archive-ouverte.unige.ch/unige:160723>

Publication DOI: [10.1093/grurint/ikac024](https://doi.org/10.1093/grurint/ikac024)

DIGITIZATION OF GLAM COLLECTIONS AND COPYRIGHT: POLICY PAPER

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with

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ABSTRACT

Copyright can be a major obstacle for cultural institutions regarding digitization and online accessibility, which leads to under-exploit collections at the expense of society ultimately and to a need to support cultural heritage institutions with legislative and/or policy changes or at least clarifications. This contribution is a policy paper that aims at clarifying the copyright law principles applicable to museum professionals dealing with digital cultural heritage worldwide and at formulating policies to facilitate their digital activities. Its version of this policy paper has been published on a dedicated website and led to an international conference held in 2020 in Geneva <www.digitizationpolicies.com>. Although it targets museums primarily, this policy paper may also serve as guidance to stakeholders in other areas dealing with digital cultural heritage, in particular Galleries, Libraries, Archives, Museums (GLAM). Part I proposes policies directed towards national and international policymakers. Parts II and III are directed towards cultural institutions with a Code of conduct that cultural institutions may follow when pursuing digitization and dissemination activities, in order to comply with the actual state of the law and minimize risks associated with these activities (Part II) and an alternative dispute resolution (ADR) procedure to help cultural institutions and rights holders identify issues and reach satisfactory solutions in cases of disputes around digital activities (Part III).

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** The views expressed in this paper do not necessarily reflect those of the peer reviewers, who provided comments on previous versions of this paper in their personal capacity.

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INTRODUCTORY REMARKS

A. Purpose of the contribution

This contribution is a policy paper that aims at clarifying the general copyright law principles applicable to museum professionals dealing with digital cultural heritage worldwide and at formulating policies to facilitate their digital activities. Its initial (pre-print) version has been published on a dedicated website and led to an international conference held in 2020 in Geneva¹.

Although it targets museums primarily, this policy paper may also serve as guidance to stakeholders in other areas dealing with digital cultural heritage, in particular Galleries, Libraries, Archives, Museums (GLAM). So references to “museum” may be construed as encompassing GLAM as well and the scope has been expanded to other GLAMs or cultural institutions where appropriate. This explains why the initial title of “Digitization of museum collections and “copyright” has been expanded to “Digitization of GLAM Collections and Copyright”.

Updates to this policy paper may be needed in the future. Indeed this policy paper does not pretend to be carved out in stone but rather represents a work-in-progress that can be updated into a 2.0 version. Such version could take into account feedbacks of all stakeholders and add certain considerations (e.g. adjustments to GLAM, extension to other topics, such as cultural institutions as creators of their own copyrighted works, model contracts and/or national laws on limitations and exceptions, use of indigenous content).

The reason for this policy paper is that copyright seems to be a major obstacle for cultural institutions regarding digitization and online accessibility², which leads to under-exploit collections at the expense of GLAM and the society ultimately³. So there is a need to support cultural heritage institutions when dealing with digitization, in particular with legislative and/or policy changes or at least clarifications. It must be however stressed out that copyright is only relevant to copyrighted works (i.e. works that fall within the scope of protection), but not to public domain works (i.e. copyrighted work for which the protection has expired) or non-copyrighted works (i.e. material that has no copyright protection due to the lack of originality, such as data, specimen or items)⁴. It must be also emphasised that the policy paper follows preexisting initiatives and reports that addressed the interface between GLAM and copyright and/or intellectual property extensively⁵.

For ease of reference, this policy paper is divided into three parts. After some introductory remarks, Part I is directed towards legislators and policymakers especially, mostly at national level but also at international level where appropriate. It addresses different issues raised by the

¹ Main page of the website <<https://www.digitizationpolicies.com>> accessed 11 February 2022, conference and recordings of the talks and panels <<https://www.digitizationpolicies.com/when-museums-go-online/>> accessed 11 February 2022.

² See the Network of European Museum Organisations (NEMO) report on digitisation and copyright (July 2020), 10, identifying copyright as the second biggest obstacle after financial and human resources.

³ See the NEMO report on digitisation and copyright (July 2020), 7, concluding that 10% of the overall collection of the responded museums is available online.

⁴ This being said, even public domain or non-copyrighted works (e.g. a specimen in a history or science museum) may raise copyright or other exclusive rights considerations, for instance the copyright status of a digital copy, see proposal 5.

⁵ Particularly noteworthy are (in chronological order): Rina Elster Pantalony, *Managing Intellectual Property for Museums*, WIPO guide (2013); Jean-François Canat, Lucie Guibault and Elisabeth Logeais, ‘Study on Copyright Limitations and Exceptions for Museums’ SCCR/30/2 (2015); Kenneth Crews, ‘Copyright Limitations and Exceptions for Libraries and Archives: Updated and Revised (2017 Edition)’ SCCR/35/6 (2017); Monica Torres and Raquel Xalabarder, ‘Interim Report on Practices and Challenges in Relation to Online Distance Education and Research Activities’ SCCR/38/9 (2019); David Sutton, ‘Background Paper on Archives and Copyright’ SCCR/38/7 (2019); Yaniv Benhamou, ‘Revised Report on copyright challenges of museums’ SCCR/38/5 (2019).

digitization of copyrighted works found in GLAM collections, e.g. the creation of a digital copy of a work, for internal purposes, such as conservation or archival purposes, or for making it available to the public on-site (section 1). It also addresses issues raised by the *dissemination* of such digitized copyrighted works, e.g. making the digitized copies available to the public (section 2).

Parts II and III are directed towards cultural institutions especially. In Part II, we propose a Code of conduct that cultural institutions may follow when pursuing digitization and dissemination activities, in order to comply with the actual state of the law and minimize risks associated with these activities. In Part III, we address the relevance of alternative dispute resolution (ADR) means and propose an ADR procedure to help cultural institutions and rights holders identify issues and reach satisfactory solutions in cases of disputes pertaining to the copyright status of a work digitized or disseminated (or projected to be) by a cultural institution.

B. Museums and copyrighted assets

Museums and other cultural institutions hold a plethora of works of artistic, cultural, historical or scientific importance whose nature varies greatly. These works may have various copyright status, ranging from copyrighted works⁶ (including orphan works and out-of-print/out-of-commerce works)⁷, to public domain works⁸ and non-copyrighted works⁹.

Museums may be both users and creators of copyrighted works. Users when they use copyrights pertinent to copyrighted works (e.g. reproduction of works for preservation, exhibition or communication purposes). Creators when they produce themselves copyrighted works (e.g. publications, merchandizing products, images of works held in their collections, online collections and databases)¹⁰.

Against this backdrop, museums have to consider copyright, as copyright applies in principle to any act of digitization and dissemination of copyrighted works and governs whether a given work can be used and if so, how¹¹.

⁶ “Copyrighted works” is understood here as any production, whatever the mode or form of expression, whether born-digital or digital materials, whether printed or not, digitized or not (e.g. paintings, drawings, sculpture, sound-recordings, video, 3D media and images of them, books, articles or archival material) subject to copyright, including performances, phonograms and broadcasts protected by related rights, under the applicable national law in accordance with international treaties (including the Berne Convention, the TRIPS Agreement, and WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT).

⁷ “Orphan works” are copyrighted work for which the rights holder is either unknown, cannot be located or cannot be contacted. “Out-of-print/out-of-commerce works” are copyrighted works that are no longer commercially available because the authors and publishers have decided neither to publish new editions nor to sell copies through the customary channels of commerce, regardless of the existence of copies in libraries and among the public. The method for the determination of commercial availability of a work is defined in the country of first publication of the work. European Commission, ‘Memorandum of Understanding – Key Principles on the Digitisation and making Available of Out-of-Commerce Works’ (20 September 2011) <<https://www.iipitec.eu/issues/iipitec-2-3-2011/3180/mou.pdf>> accessed 11 February 2022.

⁸ “Public domain works” is understood as works which the protection in any jurisdictions has expired after a certain time (which varies from one country to another but is generally at least 50 years after the author’s death). See Berne Convention, art. 7.

⁹ “Non-copyrighted materials” is understood here as any document, data or information which are not subject to copyright protection due to the lack of originality (e.g. factual or metadata, specimen).

¹⁰ In some jurisdictions, generated works based on pre-existing public domain works or non-copyrighted works may be protected as a derivative work (e.g. images of an ancient painting or a specimen, depending on its originality) or sometimes by a *sui generis* database right (e.g. online collection or archival databases, depending on the legislation). To our knowledge, few case-law deal with the protection of generated works based on pre-existing public domain works. See proposal 5. In China, a court decision granted copyright protection for images based on a 3D object (porcelain collections), *The Palace Museum v China Commercial Press*, 21 November 2001. In the US, two court decisions held that two-dimensional digital reproductions of pre-existing public domain works are not sufficiently original to confer copyright protection as a derivative work: *Bridgeman Art Library, Ltd. v Corel Corp* 36 F Supp 2d 191 (SDNY 1999) (“no copyright for photographic transparencies of public domain works of art in an art museum where the “creator” merely intended to replicate, as faithfully as possible, the original artwork”); *Meshwerks, Inc. v Toyota Motor Sales* 528 F 3d 1258 (10th Cir. 2008).

¹¹ Museums face a number of other legal issues, such as privacy, data protection and traditional knowledge. These questions are beyond the scope of this report but may be worth further analysis on due time.

The present Policy Paper concerns only the digitization and dissemination of copyrighted works (including orphan works), since non-copyrighted or public domain works can be freely digitized and disseminated (subject, of course, to other restrictions, such as ethics, privacy and data protection potentially applicable, which are not discussed in this Policy Paper)¹².

C. Museums and the digital shift

a) The changing environment of museums

Traditionally, museums preserve, interpret and promote the natural and cultural heritage of humanity.¹³ With respect to cultural heritage, museums have engaged for centuries in its preservation, interpretation and promotion mostly on their own institutional premises and in relation to the tangible artefacts contained in their collection. While these functions still constitute the core of a museum's mission, digital technology has had a profound impact on all levels of a museum's conventional activities, which may ultimately require an adaptation of its institutional role. Major developments brought about by digital technology manifest themselves in at least four ways. As we shall see, these changes put the copyright regime under serious strain:

- 1) museum collections contain more diversified works than ever before, ranging from new forms of works, to digitized analogue works and digital born multimedia works;
- 2) museums disseminate the works to the public in many different ways and for different purposes, including through social media, on their premises or at a distance, for scientific, educational and entertainment purposes;
- 3) mirrored by the change in the museum offer, visitors are adapting their behaviour towards the works presented to them, by taking a more “hands-on” and interactive approach to their experience with cultural heritage; and
- 4) there is strong demand by the research community and the economy, especially technology small and medium-sized enterprises (SMEs) and large telecommunication companies, for more digital content to be made available online by, amongst others, large museums, in order for them to enable more research and build new and innovative products and services around their content.¹⁴ Increasing demand from users to be able to “visit” museums online and, for many institutions, a lack of physical space to display all objects in their possession, make the use of technology and digitization attractive for museums.

b) The changing nature of the collection

A variety of new forms of art make their way into museum collections, including interactive, live performances (and the video recordings thereof), as well as digital born multimedia works. Museums typically negotiate license agreements with the artist or rights holder upon acquiring these new forms of artworks. In the absence of such a license, however, because of the non-physical nature of these new forms of art, it can become quite challenging for museums to fulfil

¹² For example, when a traditional cultural expression or an individual's image is used. Also the digital copy of non-copyrighted works (e.g. a specimen in a history or science museum) may raise copyright considerations, for instance the copyright status of a digital copy.

¹³ ICOM, *Code of Ethics for Museums*, adopted on November 4, 1986 (last revision on October 8, 2004) <<https://icom.museum/wp-content/uploads/2018/07/ICOM-code-En-web.pdf>> accessed 11 February 2022.

¹⁴ This is also a foundational goal of open data movements, which have led to the adoption of many laws on the freedom of information or the access to works created by public institutions, such as the Open Data Directive. See also Ian Hargreaves, 'Digital Opportunity: A Review of Intellectual Property and Growth' (May 2011), 37 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf> accessed 11 February 2022.

their core functions with respect to these works, i.e. indexing, cataloguing, preserving, and communicating to the public, as it may be unclear whether the museums have the necessary copyright permission to do so.

The advent of digital technology technically enables museums to digitize the analogue works contained in their collection. Digitization is done for various reasons, including preservation and communication (i.e. to broaden public access to those works). However, in most jurisdictions the copyright legislation does not legally allow wide scale digitization and communication of copyrighted works without the prior authorisation of the rights holder. Obtaining permission becomes particularly problematic in relation to orphan works or works for which rightholders are difficult to identify or to contact (e.g. with archival material). Chances are that the older the work gets, the more difficult it is to identify or trace the rights holder.

Moreover, copyright may be a limited economic driver for certain artists or copyrighted works, such as visual artworks and other pieces exhibited on-site in museums, as they are often unique and ordinarily not meant for multiple commercial copies¹⁵. Visual artists therefore may be less inclined to have assigned their rights to a collective rights management organisation (CMO), which would make obtaining permission easier.

With digitization also comes an opportunity and a corollary need on the part of museums to develop precise metadata and indexation that will ensure traceability of copyright protection (i.e. copyright owners and usability of works). Unfortunately, it is not uncommon to see that even for indexation purposes, some copyright legislations create an obstacle to making the necessary reproductions without prior permission of the rights holder.¹⁶

c) The new ways of disseminating to the public

Digital technology has brought changes not only in terms of creating new works and preserving museum collections, but also in terms of disseminating works online to the public. Following the motto that “if you’re not online, you don’t exist”, many museums develop digital communication strategies aimed at reaching a broader public. Many museums (wish to) set up a digital inventory with internal databases and management of rights when mounting exhibitions. Several museums take advantage of digitization, websites, social media and apps for smartphones and tablets for reaching a greater public with the exhibits of the past, present and future. Depending on the circumstances, the use of social media can form an integral part of a museum’s core function of making the works in the collection available to the public, but it can also be aimed at promoting the museum’s activities.

In practice, online activities take different forms. Many museums, such as the Museum of Modern Art in New York, Art Institute of Chicago, have an all-encompassing media strategy: exhibitions and collections are promoted via multiple social media channels, such as Twitter, Facebook, YouTube, Instagram, Pinterest and Tumblr, knowing that such an approach drastically increases the potential geographical accessibility of its collection, as it attracts virtual

¹⁵ Kerry Thomas and Janet Chan, *Handbook of Research on Creativity* (Edward Elgar 2013) 472. See also, Amy Adler, ‘Why Art Does Not Need Copyright’ (2018) 86 *The George Washington Law Review* 313 ff, concluding that copyright, rather than being necessary for art’s flourishing, actually impedes it.

¹⁶ However, copyright exceptions may apply in some jurisdictions to authorize this act notwithstanding lack of permission. In the US, for instance, the ‘Guidelines for the Use of Copyrighted Materials and Works of Art by Art Museums’, released by the American Association of Art Museum Directors in 2017, classify digitization to develop metadata and index collections as an activity falling under the fair use exception; see: <<https://aamd.org/document/guidelines-for-the-use-of-copyrighted-materials-and-works-of-art-by-art-museums>> accessed 11 February 2022 (AAMD Guidelines).

and physical visitors to the museum¹⁷. The same goal lies behind the Dutch initiative of “MuseumTV”, which is a collaboration between Foundation Our Museum and participating Dutch museums. The mission of Foundation Our Museum is to introduce art and culture to the biggest audience possible and highlight the rich and diverse bandwidth of Dutch museums and cultural heritage. It does so by creating short video documentaries promoting the ongoing and upcoming exhibitions.¹⁸

However, most museums do not feel as comfortable in putting parts of their collections online; copyright law and the obligation to obtain the rights owners’ permission for such acts creates a serious obstacle to these new forms of dissemination of artistic works – as far as works protected by copyright are concerned.¹⁹ In Europe, for instance a 2015 survey showed that European museums have only about 24% of their digitally reproduced and born digital heritage collections available online for general use and a 2020 survey that European museums have about 10% of their overall collections available online.²⁰

Moreover, while a study²¹ showed that digitization is a priority for the vast majority of collections institutions (86%), copyright seems to be one of the biggest obstacles for GLAM regarding digitization and online accessibility (alongside with the lack of financial and human resources)²². Up to date, we see “that most still have a significant backlog to address, and based on their current rate of digitization most are more likely to meet their goals in decades rather than years.” Only 26% of the institutions participating in the study “could confirm they will have met their goal within the next ten years, and 16% can’t even see the completion of their digitization in their own lifetimes, predicting in excess of 50 years.” Also, the study found that “with technology and consumer expectations rapidly changing, the goal posts for digitization are constantly shifting. What constitutes good data and high quality imagery one year can easily fall below standards as new technology, higher-quality photographic equipment and 3D-imaging technology becomes available.”

d) The new forms of interaction from the public

The digital environment likewise has changed the behaviour of museum visitors in a fundamental way. Users now expect to be able to actively participate and interact with art on the premises of the museum and online. Participatory behaviour (e.g. selfies with objects, tweets, collective curating) should be encouraged as much as possible where appropriate and within the limits of the law and ethical norms. Moreover, technology opens new ways for museums to play an important role in the area of research/educational development.

¹⁷ It being recalled that the management of copyrights on social media platforms vary significantly and are inconsistent, which creates uncertainty and legal risk for users and the institutions.

¹⁸ MuseumTV, <<https://museumtv.nl/over-museumtv>> accessed 11 February 2022.

¹⁹ Of course, as we shall see below, it may sometimes be possible for museums to invoke copyright exceptions to justify online dissemination without first obtaining the rights holders’ permission. Yet, since many exceptions apply and are analyzed by courts on a case-by-case basis, legal uncertainty may remain even when an exception seems to be applicable. Also, public domain works or non-copyrighted works are usually available online without restrictions.

²⁰ Gerhard Jan Nauta and Wietske Van Den Heuvel, DEN Foundation (NL) on behalf of Europeana/ENUMERATE, ‘Survey Report on Digitisation in European Cultural Heritage Institutions 2015’, 21 <<http://enumeratedataplatfrom.digibis.com/reports/survey-report-on-digitisation-in-european-cultural-heritage-institutions-2015/detail>> accessed 11 February 2022. See as well (i) NEMO, ‘Survey on Museums and copyright’ (August 2015) <https://www.ne-mo.org/fileadmin/Dateien/public/Working_Group_1/Working_Group_IPR/NEMO_Survey_IPR_and_Museums_2015.pdf> accessed 11 February 2022 (NEMO Survey on Museums and Copyright), quoting excerpts on copyright licenses for reuse in museums contracts with creators/right holders or collective societies and (ii) NEMO, ‘Museums and Creative Industries in Progress’ (December 2017) <https://www.ne-mo.org/fileadmin/Dateien/public/NEMO_documents/NEMO_2017_Museums_Creative_Industries_progress_report.pdf> accessed 11 February 2022 (NEMO Report on Creative Industries). See the NEMO report on digitisation and copyright (July 2020), 7.

²¹ Axiell and MCN, ‘Digitising Collections: Leveraging Volunteers & Crowdsourcing to Accelerate Digitisation’ (2017), 5 and 7 <<https://www.axiell.com/app/uploads/2019/04/digitizing-collections.pdf>> accessed 11 February 2022.

²² See the NEMO report on digitisation and copyright, July 2020, 10.

The digital environment enables, via metadata and open data, scientists, scholars and students to conduct research in museum collections, either on-site or remotely. It also challenges the museums' and their curators' classic role as sole preserver and interpreter of the museum objects on-site and, consequently, encourages museums to rethink their policies (e.g. acquisition of objects and provenance research) in order to make the best use of the digital technologies (e.g. by granting access to their collections online, by interacting with their users to a greater extent).²³ Granting access online and allowing members of the public to interact with artworks may have consequences for both the public and museums in terms of copyright, for instance if derivative works are created and communicated to the public, which would require the original rights holder's permission. Moreover, in many jurisdictions, it is unclear whether mining a museum's database for scientific, or other, reason infringes copyright or other sui generis protections.²⁴

In sum, multiple copyright questions and issues arise when a museum is contemplating digitization for both internal purposes (archival, database) and dissemination to the public. Indeed, a museum's digitization process entails acts of reproduction and communication (making available online or on-site), which are both exclusively reserved to the owner of copyright in the originating artwork unless a legal exception applies. In other words, although a museum may own the physical copy of a work, it does not necessarily have the right to copy or display it digitally, unless a copyright exception applies.²⁵

Against this backdrop, this policy paper contains policy proposals that aim at improving the legal situation of museums and other cultural institutions and at bringing their digitization activities into the 21st century²⁶.

PART I – POLICY PROPOSALS

1. DIGITIZATION

PROPOSAL 1. Clarify in the law that certain acts of reproduction conducted as part of a museum's public interest mission do not infringe copyright.

a) Issue at stake

- At present, museums suffer from a serious lack of legal certainty concerning the impact of copyright protection on their core functions, especially in the digital environment, which prevents museums from fulfilling their primary mission. Indeed, in the countries that recognize limitations and exceptions for the benefit of cultural heritage institutions, most of these generally apply to libraries and archives and only a few are clearly declared applicable

²³ See also: European Policy Briefs, 'RICHES: Renewal, Innovation and Change: Heritage and European Society' in *The Cultural Heritage Institution: Transformation and Change in a Digital Age* (April 2016) <http://www.digitalmeetsculture.net/wp-content/uploads/2016/04/EUROPEAN-POLICY-BRIEF_Institutional-Change_final.pdf> accessed 11 February 2022.

²⁴ For more details on the interactions between text and data mining and copyright law in various jurisdictions, see notably Eleonora Rosati, *The Exception for Text and Data Mining (TDM) in the Proposed Directive on Copyright in the Digital Single Market – Technical Aspects* (European Parliament, Briefing requested by the JURI committee, February 2018) <[http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/604942/IPOL_BRI\(2018\)604942_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/604942/IPOL_BRI(2018)604942_EN.pdf)> accessed 11 February 2022.

²⁵ Yaniv Benhamou, 'Copyright and Museums in the Digital Age' (2016) 3 WIPO Magazine 25 ff <http://www.wipo.int/wipo_magazine/en/2016/03/article_0005.html> accessed 11 February 2022.

²⁶ Of course in addition to legal solutions, lawmakers and public authorities shall adequately fund public heritage institutions and the creative sectors, in order to ensure the preservation and dissemination of cultural heritage, and enable them to make the best use of digital technologies.

to museums.²⁷ Moreover those that do apply to museums are generally very narrow in scope and are limited to acts of reproduction for preservation and restoration purposes. Where statutory limitations and exceptions are not applicable, permission must be obtained from the rights owners prior to engaging in a reserved activity with respect to the work. The process of securing authorization can entail high transaction and staffing costs for the museum, in terms of locating the relevant rights owner and negotiating an acceptable license. This actual situation is not viable in an increasingly digital world.

b) Clarifications

- Museums should be able to take full advantage of the technological developments for the management of their own permanent collections. Acts of reproduction and digitization are an integral and essential part of collection management procedures with respect to works contained in museums' collections. Without the possibility to make reproductions of works, museums are not able to preserve, index, or replace works in their collection or to make inventories of these works. In other words, museums are not able to fulfil their core public mission in a satisfactory manner. The possibility to make reproductions should be available irrespective of the category of work involved (literary and artistic works, sound or audio-visual works, published or not published), and irrespective of whether the work is in analogue or digital form.
- *National legislators and policymakers* should adopt, or reaffirm limitations and exceptions to the right of reproduction, according to which museums are able to make reproductions of works contained in their collection:²⁸
 - o for the purpose of preservation and/or restoration of works;
 - o for text and data mining purposes;
 - o for the purpose of creating digital inventories of works, indexing, cataloguing and corresponding databases for the management of rights;²⁹
 - o for insurance, rights clearance, and inter-museum loan purposes.
- However, these exceptions shall be subject to the following conditions:
 - o They shall be limited to the museum's core public interest mission (which generally includes collection, preservation, exhibition and dissemination)³⁰, thus be in

²⁷ In the EU, see article 6 of the recent EU Copyright Directive 2019/790 of 17 April 2019 (EU Copyright Directive) providing that "Member States shall provide for an exception to the rights (of the copyright owner) in order to allow cultural heritage institutions to make copies of any works or other subject matter that are permanently in their collections, in any format or medium, for purposes of preservation of such works or other subject matter and to the extent necessary for such preservation", and art. 8 facilitating use of out of commerce works and other subject matter by cultural heritage institutions. In the United States, see the AAMD Guidelines (n 16). See Yaniv Benhamou, 'Revised Report on Museums Copyright Practices and Challenges' SCCR/38/5 (2019). Also Jean-François Canat, Lucie Guibault and Elisabeth Logeais, 'Study on Copyright Limitations and Exceptions for Museums' SCCR/30/2 (2015).

²⁸ In lieu of a specific exception for museums and other cultural institutions, other initiatives advocate for a global fair use exception (e.g. Lionel Bently and Tanya Aplin, *Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyright Works* (Cambridge University Press 2020)), for the general exception for research and education to apply to museums as educational institutions (e.g. NEMO report on IP) or for the recognition of an international right to research (e.g. Sean Flynn and others, 'Implementing User Rights for Research in the Field of Artificial Intelligence: A Call for International Action' (2020) 22 European Intellectual Property Review 393 ff).

²⁹ It should however be noted that in the United States, courts have already established that thumbnail images of copyrighted works can be included in a searchable database without liability; see *Kelly v Arriba Soft Corp* 336 F 3d 811 (9th Circuit 2003).

³⁰ See notably art. 3 of the ICOM Internal Rules and Regulations (2007)

<<http://archives.icom.museum/download/InternalRulesandRegulations.pdf>>, accessed 11 February 2022: "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." A new, larger definition was supposed to be submitted for vote at ICOM's extraordinary general meeting of 7 September 2019, but the vote was postponed due to strong opposition of many countries against the proposed definition. ICOM's president eventually agreed that a new definition must now be sought, although no date has been fixed for a new vote.

accordance with applicable international treaties³¹. If not already done³², the definition of what constitutes a core public interest mission should be first agreed upon per jurisdiction after consultation of the relevant stakeholders (including museums, artists, CMOs and the competent public authorities).

- o They shall be free of charge (i.e. the exceptions are not subject to remuneration, or to a compulsory license). For the avoidance of doubt, making use of the exception does not prevent museums from generating revenues in the course of their activities (e.g. charge for entry fees and/or for covering digitization costs).
- For the sake of harmonization (hence of ensuring cross-border activities, such as loan of digital copies, collection rescue or digital preservation activities across borders), it is advisable that *multi-stakeholder international organizations* propose a unified definition of the notion of a museum's core public interest mission and/or unify the above limitations and exceptions.³³

PROPOSAL 2. Statutory limitations and exceptions for the benefit of cultural institutions should be given a mandatory character

a) Issue at stake

- The recognition of the mandatory character of exceptions and limitations for the benefit of museums entails three elements: 1) mandatory on national legislatures; 2) mandatory in the context of the application of technological protection measures; and 3) mandatory in the context of the use of (non-negotiated) contracts. It is no use recognizing statutory exceptions and limitations for the benefit of museums, if legislatures are free to implement them or not in their national law. A non-harmonized international or regional, legislative framework is seen as creating significant legal uncertainty for any type of cross-border activity by museums. Moreover, a non-harmonized international or regional legislative framework puts museums located in different countries on unequal footing, advantaging some and disadvantaging others.
- At present, disparities across jurisdictions in the treatment of museums regarding the conditions of use of works contained in their collection, especially with respect to online activities, may severely impact the museums' ability to become and remain relevant in the global digital environment.

³¹ These new exceptions should be deemed not to conflict with the normal exploitation of the works or to unreasonably prejudice the legitimate interests of the rights holder. See Berne Convention, art. 9; TRIPS Agreement, art. 13; WCT, art. 10; WPPT, art. 16. The WTO had the opportunity to interpret the formulation "normal exploitation of the work" in its Panel Report WTO Panel, 15 June 2000, WTO Document WT/DS160/R, 'United States – Section 110(5) of the U.S. Copyright Act'. According to the WTO Panel, to avoid a conflict with a work's normal exploitation, the exception must not deprive right holders of "significant or tangible revenue" or constitute a form of exploitation that could acquire "considerable economic or practical importance" in the future (see para 6.180, 48).

³² For instance, many UK public bodies have already published their statements of public task as a result of Directive 2013/37/EU of 26 June 2013 on the re-use of public sector information (the Revised PSI Directive).

³³ Various solutions could be contemplated to achieve harmonization, *including recommendations, resolutions, declarations, guidelines and treaties*. See regarding rule-making processes at WIPO, Carolyn Deere Birkbeck, *The World Intellectual Property Organization (WIPO): A Reference Guide* (Edward Elgar 2016), 91.

b) Clarifications

- *National legislators and policymakers* should ensure that existing or upcoming exceptions for the benefit of museums are given a mandatory character, in the sense that technological protection measures (TPMs)³⁴ that have as objective or effect to take away the privilege granted by said statutory limitation or exception should be unenforceable. More specifically, legislators or policy-makers should clearly specify that the exceptions recognized in the law prevail over TPMs and that if rights owners do not provide museums with the means to exercise the exception, the Member State must take the necessary measures to ensure that museums may do so.
- Unilateral contractual clauses (e.g. non-negotiated or “take-it-or-leave-it” clauses) that have as objective or effect to take away the privilege granted by a statutory exception or limitation to the benefit of a museum should be unenforceable, based on the same principle of priority described above. This should leave room for the negotiation of contractual arrangements between museums and rights owners, either on an individual or collective basis, for example for the online use of works.

PROPOSAL 3. Facilitate effective collective licensing of rights, including where possible, through extended collective licensing systems

a) Issues at stake

- In the absence of clear legal exceptions permitting reproduction of copyrighted works in their collections for mass-digitization purposes, museums usually have no other choice, in order to avoid risks, than to negotiate licenses with rights holders. Apart from the artists themselves, CMOs or similar entities – as managers of the author’s copyrights – are usually the main licensors of art works in copyright, on the basis of voluntary collective licenses.
- While this situation is not ideal for any category of works under copyright in museums’ collections (see Proposal 1 above for the suggested global solution), three categories of in-copyright works are especially problematic from a management standpoint: orphan works and, to a lesser extent, out-of-print works and out-of-commerce works. Indeed, for those works, museums cannot afford the long-term and costly research of the rights holders in order to obtain a permission to digitize and to use the digitized copy.³⁵ A CMO is rarely inclined to carry out such a search because the rights holder may not be found and if found, may not mandate the CMO to license his work. Unpublished works pose an additional obstacle, since publication is one of the most important moral rights (usually referred as the right of disclosure). Therefore, in some jurisdictions limitations and exceptions or other licensing solutions such as the extended collective licensing mechanisms that would normally allow museums to use a work are not applicable in case of unpublished works. A solution to overcome this additional obstacle is to consider that works located in collections of publicly accessible GLAM are considered to be published within the meaning of proposal 3³⁶.

³⁴ This could happen, for instance, if the right holder of a born-digital work has applied a TPM on this work, thus disabling the possibility to make a reproduction of the work.

³⁵ See notably NEMO Survey on Museums and Copyright (n 20), 31 and 34.

³⁶ See the Swiss Copyright Act which provides such a legal fiction for ECL (art. 43a para 2 “Works located in collections of public and publicly accessible libraries, archives or other memory institutions are considered to be published within the meaning of paragraph 1”).

- As such, the extended collective licensing (ECL) model appears to be a convenient vehicle to ease digitization of works in collections that are out-of-print, out-of-commerce, orphan or unpublished, at least for mass-digitization operations and until clear legal exceptions and limitations permitting reproduction and communication to the public have been adopted or reaffirmed by national legislators and policymakers (see Proposals 1 and 7).³⁷ ECL allows an authorised CMO to extend an existing collective license to cover not only its members, but also non-member rights holders of the same sector, except those who have explicitly opted out. In practice, it means that a CMO may grant a license to use a work even if all rights holders in the work have not assigned their rights to it.³⁸
- Any ECL model to fully work with GLAM shall be subject to the following conditions: (i) the ECL must include all categories of copyrighted works or at least the three categories of copyrighted works (orphan works, out-of-print works and out-of-commerce works, published and unpublished), (ii) all rights relevant to mass digitization, (iii) must work internationally³⁹, and (iv) the fee must be adapted to the category user groups and materials (e.g. archival fonds shall be not subject the same remuneration as unique artworks), possibly directed to a fund to support cultural heritage projects⁴⁰.
- So far, however, the ECL model has not yet been endorsed clearly in the laws of a majority of Member States of the European Union (EU). Art 12 of the EU Copyright Directive of 2019/790 of 17 April 2019 sets a framework to allow the development of ECL.⁴¹ Besides, most non-EU countries are not familiar with ECLs.⁴²

³⁷ See notably UK Government, 'Consultation outcome: Extending the benefits of collective licensing' (November 2013) <<https://www.gov.uk/government/consultations/extending-the-benefits-of-collective-licensing>> accessed 11 February 2022. See however Jean Dryden, 'Extended Collective Licensing and Archives' (2017) 14 Journal of Archival Organization 83 ff, 87, indicating that ECL is not fit for archival holdings (in particular due to the very nature of archival holdings, which contain a vast amount of copyright-protected works, largely unpublished), which explains why, in Norway, no archive holding has yet concluded an agreement with a CMO.

³⁸ Although some authors have expressed concern that ECLs may become the standard prevailing over individual agreements and may dissolve the copyright system based on the exploitation of exclusive rights (see for instance Thomas Riis and Jens Schovsbo, 'Extended Collective Licenses and the Nordic Experience - It's a Hybrid but is It a Volvo or a Lemon?' (2010) 33 The Columbia Journal of Law and the Arts 471 ff, the general view amongst authors today appears to be that ECLs are compliant with international norms, including the Berne Convention; see notably Johan Axhamn and Lucie Guibault, 'Cross-border extended collective licensing : a solution to online dissemination of Europe's cultural heritage ? Final Report prepared for EuropeanaConnect' (Instituut Voor Informatierecht, University of Amsterdam 2011), 44-55 <<https://www.ivir.nl/publicaties/download/292>> accessed 11 February 2022.

³⁹ ECL models are seriously hampered due to the territorial nature of copyright, so that different solutions should be first implemented before ECL can work internationally. Among solutions, one can think of the "country of transmission" principle (i.e. cultural institutions should only be obliged to obtain a license in the country where the institution initiated the online dissemination, similar to the principle provided in the Directive 93/83/EEC on Cable and Satellite). This would require legislative intervention. Another solution would be to ask the CMOs to voluntarily give each other a mandate to issue multiterritory licenses (similar to the IFPI Simulcasting Model Agreement). See Johan Axhamn and Lucie Guibault, 'Solving Europeana's mass-digitization issues through Extended Collective Licensing?' (2011) Nordic Intellectual Property Law Review 509 ff.

⁴⁰ Jean Dryden, 'Extended Collective Licensing and Archives' (2017) 14 Journal of Archival Organization 83 ff, 87, indicating that the fees must be affordable for archival holdings and institutions, in particular must reflect the fact that much archival material has low market value.

⁴¹ The EU Copyright Directive (n 27) in art. 8 endorses (i) the principle of licenses between CMOs and cultural heritage institutions for the exploitation of out-of commerce works and (ii) the principle of potential "ECLs" for all types of works if Member States are willing to allow such a license, deferring possible EU legislation on ECLs after 2020. This is a cautious approach, crippled with uncertainty on the advent of ECLs in the near future, but sending a message to the stakeholders to test the mechanism.

⁴² For instance, in June 2015, the US Copyright Office proposed the creation of a pilot program to establish a legal framework for ECLs used in a context of mass digitization of collections of printed books, articles, and/or archival documents. However, in September 2017, following a public consultation on the topic, the Office had to acknowledge "the lack of stakeholder consensus on key elements of an ECL pilot program and that any proposed legislation therefore would be premature at this time". See US Copyright Office, 'Mass Digitization Pilot Program' <<https://copyright.gov/policy/massdigitization/>> accessed 11 February 2022. See Jean Dryden, 'Extended Collective Licensing and Archives' (2017) 14 Journal of Archival Organization 83 ff, 87, noting "ECL has been a part of the copyright tradition of the Nordic countries since the 1960s, but it has not been widely adopted elsewhere".

b) Clarifications

- *National legislators and policy-makers* should work towards creating the development of ECLs. To that end, legislators or policy-makers should design ECLs by drafting templates together with *the relevant stakeholders* (including CMOs, user groups, such as museums and the competent public authorities) and according to the four conditions above (include all categories of works and rights relevant to mass digitization, internationally workable and fees must be adapted).
- For orphan works and out of commerce works: orphan works and out-of-commerce works in possession of museums should be promoted by *museums, public authorities and CMOs* who are aware of the high rate of “ghost” works in museum collections. Notably, a working group of museums and experts on the author and its works could draft and suggest a referential for an ECL license as well as a promoter (CMO or *ad hoc* structure) for this ECL.
- For unpublished works: to find out if ECL is possible, the starting stage should be the creation of an online repository of unpublished works accessible to museums (namely those possessing works of same author, if known). Experts on the author could then decide if and how to allow access to and use of the work(s) in the absence of clear instructions by the latter.

PROPOSAL 4. Minimize database rights to favour access to and use of digital works

a) Issue at stake

- Museums undertaking mass-digitization operations usually disseminate the artworks internally or online in the form of digital inventories, catalogues or galleries. Such inventories may be qualified as databases under law, which can also be protected by copyright law or sui generis database rights.⁴³
- In addition to issues of copyright applying to the individual items in the collection, the question of copyright protection of the database *itself* arises. Not every compilation of data is protected by law⁴⁴, and the protection of databases varies greatly depending on jurisdictions.
- It is generally accepted that databases (or the similar concept of “compilations” in the United States) may be protected by copyright if they constitute an intellectual creation, that is, if some originality lies in the selection, arrangement or coordination of the content.⁴⁵ This right is however limited in that the copyright in such a database “extends only to the

⁴³ Databases are comprised of the following four elements: (1) a collection of data; (2) containing works or other material; (3) that are independent or separable from each other; and (4) that are arranged in a systematic or methodical way, thus allowing the data to be retrieved. See for instance Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (EU Database Directive), article 1(2); and Case C-444/02 *Fixtures Marketing Ltd v Organismos prognostikon agonon podosfairou AE (OPAP)* ECLI:EU:C:2004:697, para 32. The EU Database Directive is under revision following its evaluation in 2018, the EU Data Strategy, the 2021 Work Program and action plan on intellectual property. For an overview of database protection from a comparative law standpoint, see Yaniv Benhamou, ‘Big Data and the Law: a holistic analysis based on a three-step approach - Mapping property-like rights, their exceptions and licensing practices’ (2020) *Revue suisse de droit des affaires et du marché financier* 393 ff.

⁴⁴ Christophe Caron, *Droit d’auteur et droits voisins* (4th edn, Lexisnexis 2015), 591.

⁴⁵ See art. 3(1) of the EU Database Directive; art. 5 of the WCT; art. 1(5) of the Berne Convention, which reads almost the same; art. 10(1) of the TRIPS Agreement; for the United States, art. 17 U.S.C. § 101 and the landmark decision *Feist Pubs., Inc. v Rural Tel. Svc. Co., Inc.* 499 US 340 (1991).

selection, coordination, and arrangement of the materials [and does] not affect the public's right to access and use the individual images"⁴⁶ not otherwise copyrighted. Many limitations and exceptions (in the EU)⁴⁷ or arguments in favor of fair use (in the United States (US)) also allow lawful users to exploit databases and their contents.

- In addition, there exists in Europe a *sui generis* "database right" which gives the non-original database maker an exclusivity⁴⁸, allowing it to prohibit the extraction (transfer of data to another medium) and/or reuse (making available to the public) of the whole or of a substantial part of the database's content⁴⁹, as long as it made a substantial investment to obtain, verify and/or present the data collected.⁵⁰ This prohibition applies to all contents in the database, irrespectively of their individual copyright protection (or absence thereof).
- This database protection is controversial. Notably, a recent consultation has shown that views are split regarding whether the EU Database Directive achieves a good balance between the rights and interests of rights holders and users, allows sufficient re-use of data, and allows to achieve an adequate balance between database owners' rights and users' needs.⁵¹
- For museums and users of content digitized by museums specifically, this *sui generis* right may, according to some authors, prohibit the free reuse of works that are in the public domain or otherwise out of copyright just because they have been included in a database.⁵² In light of this arguable theory, this *sui generis* right clearly hampers access to digital copies of artworks and puts unnecessary barriers on all types of uses of databases, including in relation to innovative techniques like text and data mining. It is therefore not desirable with regard to the accessibility of digital copies.

b) Clarifications

- *National legislators* should review existing *sui generis* database rights, when they exist, in order to avoid unduly restrictions on access and re-use of works that have fallen in the public domain⁵³.
- *Museums*, who benefit from *sui generis* database rights where they exist (as creators of databases) or other similar rights, should be encouraged to generously license them to allow free access and re-use of its contents by third parties⁵⁴.

⁴⁶ Robert C. Matz, 'Bridgeman Art Library, Ltd.v. Corel Corp.' (2000) 15 Berkeley Technology Law Journal 3 ff, 21.

⁴⁷ See notably art. 6(1) and 6(2)(a)-(c) of the EU Database Directive (n 43).

⁴⁸ EU Database Directive (n 43); Caron (n 44), 593-594.

⁴⁹ EU Database Directive (n 43), art. 7(1)-(2).

⁵⁰ The aim is to encourage information processing, not data creation. Therefore, the investment related to data creation are not taken into consideration: Caron (n 44), 592; Case C-203/02 *The British Horseracing Board Ltd and Others v William Hill Organization Ltd* ECLI:EU:C:2004:695, para 31.

⁵¹ European Commission, 'Summary report of the public consultation on the evaluation of Directive 96/9/EC on the legal protection of databases' (6 October 2017) <<https://ec.europa.eu/digital-single-market/en/news/summary-report-public-consultation-legal-protection-databases>> accessed 11 February 2022.

⁵² Caron (n 44), 597.

⁵³ This is for instance the case in Europe with the EU Database Directive, see n 43.

⁵⁴ It should be left to museums to decide to offer liberal terms of access and re-use by third parties or to subject the commercial use to a licence fee, all subject to privacy protection and open data regulations, according to which public institutions could be obliged to make their works freely available.

PROPOSAL 5. No additional copyright protection granted to digitized materials

a) Issue at stake

- While undertaking digitization operations, museums must not only analyse the copyright law regarding the objects to be digitized, but also the copyright law applying to the digital copy of the artwork (which may benefit from a separate copyright or related rights, potentially necessitating the new rights holder's consent for future uses).
- Once the digitization operation has been conducted on a given work (e.g. via photograph, scan or other techniques), whether a separate copyright is conferred to the digitized image varies largely from one jurisdiction to another.
 - o In most jurisdictions, a photograph enjoys copyright protection only if it is "original" or "individual". Determining whether a particular photographic reproduction of a museum object meets those criteria will require a case-by-case analysis. It appears however that in many cases, photographs of three-dimensional objects (e.g. a sculpture) have a greater chance of being qualified as original – and thus copyrighted – than photographs of two-dimensional objects (e.g. a photograph or drawing).⁵⁵
 - o Some jurisdictions though provide for a wide protection of all photographs, notwithstanding their degree of originality (the *Lichtbildschutz* doctrine). This includes photographic reproductions of museum objects.⁵⁶
- This distinction between the copyright status of the underlying object and its digital surrogate is not productive and should not be maintained. Indeed, while the artist may have decided to create a two-dimensional *image*, the resulting *object* is always three-dimensional (at least for non-digital works): every paper, every print, photographic paper or canvas has a spatial extent, and it is easy to allege that the "3-D"-requirement for new copyright is met by photographing not only the artistic image, but its medium. This results in undesirable legal uncertainty for museums.
- This legal uncertainty - combined with a desire to control the images or even to generate revenues - encourages some museums and private companies to attempt to exert tight control over the images published on their websites through restrictions on photography or contractual restrictions upon access and use of the digitized images, a practice that should be avoided.⁵⁷

⁵⁵ Grischka Petri, 'The Public Domain vs the Museum: The Limits of Copyright and Reproductions of Two-dimensional Works of Art' (2014) *Journal of Conservation and Museum Studies* 12(1) 1 ff <<http://doi.org/10.5334/jcms.1021217>> accessed 11 February 2022. See also for instance the UK case *Temple Island v New English Teas and Nicholas John Houghton* [2012] EWPCC 1, [20], and the US landmark case *Bridgeman Art Library Ltd. v Corel Corp* 36 F Supp 2d 191 (SDNY 1999), establishing that digital copies of two-dimensional works are not sufficiently original to have copyright protection. See as well the French High Court decision of 2018 holding, after analyzing thousands of photographs, that a large portion of auction catalogs' photographs were protected by copyright due to the photograph's choices of context, frame, angles of views, and the post-production process used (Cour de cassation, 5 April 2018, n° 13-21.001).

⁵⁶ This is the case of Switzerland with the protection of non-original photographs of three-dimensional objects, which are protected by copyright during 50 years after their production (art. 2 para 3bis Swiss Copyright Act). See Sandra Sykora, '„Lichtbildschutz reloaded“: Der „Schutz der nicht individuellen Fotografie“ im neuen Entwurf für die Modernisierung des Schweizer Urheberrechts [*Lichtbildschutz reloaded: The "Protection of non-individual photography" in the new draft for the modernization of Swiss copyright*]' (2018) 20 *Kunst und Recht* 45 ff, 55. See also Yaniv Benhamou, 'Originale und Kopien' in Peter Mosimann, Marc-André Renold and Andrea F. G. Raschèr (eds), *Kultur Kunst Recht* (Helbing & Lichtenhahn 2020), 73 ff. This was also the case in Germany and Austria under the *Lichtbildschutz* doctrine (see most recently Bundesgerichtshof (German High Court of Justice), 20 December 2018, Case No I ZR 104/17 *Museumsfotos*), which is no longer the case with Article 14 of the Directive on Copyright in the Digital Single Market and its national implementation (which is also retroactive).

⁵⁷ See Kenneth Crews, 'Museum Policies and Art Images: Conflicting Objectives and Copyright Overreaching' (2012) 22 *Fordham Intellectual Property, Media & Entertainment Law Journal* 795 ff.

b) Clarifications

- *National legislators* should work towards eliminating the differences, discussed above, in copyright protection (or lack thereof) granted to digitized images of two-dimensional artworks versus digitized images of three-dimensional artworks.
- *Museums* should be encouraged to open their online collections as widely as possible while respecting copyright law, by avoiding placing restrictions on the access to and reusing of public domain works such as digitized images of artworks and by encouraging the public to exploit and reuse these images. In jurisdictions where digitized copies of artworks benefit from copyright, museums should attempt to negotiate the necessary licenses with the initial rights holders to allow exploitation of these images by the public.

PROPOSAL 6. Encourage museums to use digitized contents for machine-learning purposes, but do not grant copyrights to machine-created content

a) Issue at stake

- Museums hold an important amount of data, including various types of metadata pertaining to digitized and born-digital works in their collections which allows museums and third parties to analyze collections, objects, and creators in novel ways.⁵⁸ This can be the case when machine-learning processes are in place, e.g. when artificial intelligence (AI) techniques mine through digitized collections and “learn” from the data, process it and produce results; indeed, AI can be used as a tool for museums and third parties to manage massive scale of data and to make meaning of archives.⁵⁹ This allows museums to notably “unlock the potential of digital image collections by tagging, sorting, and drawing connections within and between museum databases”⁶⁰, keep track of newly generated data as archives grow, and help identify fakes and forgeries.⁶¹ AI may even act as a curator and put together new collections with the help of algorithms based on image metadata, creating unexpected and surprising combinations that would not be perceived by a human mind.⁶²

⁵⁸ Brendan Ciecko, ‘Examining Artificial Intelligence in Museums’ (*Cuseum*, 25 February 2016) <<https://cuseum.com/blog/exploring-artificial-intelligence-in-museums>> accessed 11 February 2022; see also Brendan Ciecko, ‘6 Ways that Machine Vision Can Help Museums’ (*Cuseum*, 10 March 2016) <<https://cuseum.com/blog/6-ways-that-machine-vision-can-help-museums>> accessed 11 February 2022.

⁵⁹ This is subject to semantic, technological and ethical considerations (e.g. when bias exist in the input or output data). For the interface between AI and museums, see Elizabeth Merritt, ‘Artificial Intelligence The Rise Of The Intelligent Machine’ (*American Alliance of Museums, Center for the Future of Museums Blog*, 1 May 2017) <<https://www.aam-us.org/2017/05/01/artificial-intelligence-the-rise-of-the-intelligent-machine/>> accessed 11 February 2022.

⁶⁰ Merritt (n 59).

⁶¹ Rene Chun, ‘These Four Technologies May Finally Put an End to Art Forgery’ (*Artsy*, 18 July 2016) <<https://www.artsy.net/article/artsy-editorial-these-four-technologies-may-finally-put-an-end-to-art-forgery>> accessed 11 February 2022.

⁶² Again subject to bias and other ethical considerations, as this use has potential to do as much harm as good at the moment. Ben Davis, ‘Google Sets Out to Disrupt Curating With ‘Machine Learning’ (Artnet News, 14 January 2017) <<https://news.artnet.com/art-world/google-artificial-intelligence-812147>> accessed 11 February 2022. For instance, Tate Britain’s “Recognition” exhibit combines images from Tate’s archives with up-to-the-minute Reuters news photography based on various pattern-recognition tools; see Luke Dormehl, ‘Museum’s AI exhibit compares art masterpieces to latest news photography’ (*Digital Trends*, 7 September 2016) <<https://www.digitaltrends.com/cool-tech/tate-britain-artificial-intelligence-exhibit-britain/>> accessed 11 February 2022.

- Moreover, works fully created by machines and algorithms (“machine-created content”) are now being sold by world-leading auction houses,⁶³ featured in exhibitions⁶⁴ and even dubbed as more novel and appealing than works entirely created by humans.⁶⁵ It is only a matter of time until such works integrate museum collections.
- This advent of AI in museum activities however raises important copyright questions that have not yet been clearly answered. For instance, there is still uncertainty as to whether certain copyright limitations and exceptions allow the use of existing digital content by machines for learning purposes (although a majority of authors seem to believe that they do).⁶⁶ The copyright status of AI-created works is even more unclear⁶⁷. Finally, multiple issues reaching far beyond the realm of copyright will need to be taken into consideration before we reach a final answer.⁶⁸ Among the multiples issues, one can think of semantic, technological and ethical considerations (e.g. when the system uses or produces bias).
- This legal uncertainty, combined with the other issues, may deter museums from exploiting AI to its full potential and prevents them from fulfilling their public interest mission in accordance with the 21st-century technological developments.

b) Clarifications

- *Legislators and policymakers* should take a clearer stance regarding the use of existing digital content by machines for learning purposes, by specifying in legislation or official policies that it does not constitute an infraction to copyright law.
- *Legislators and policymakers* should also specify that machine-generated works are out-of-copyright, which will facilitate their dissemination and re-use by museums and the public.
- Finally, more awareness raising and support should be given to the museum community (in terms of financial and technical resources as well as training programs), so that museums would better understand the potential benefits and risks of these technologies and decide whether or not make us of them (e.g. only until certain considerations are clarified).

⁶³ For instance, a Paris-based art collective has created a form of AI that generates portraits based on a set of 15,000 portraits painted between the 14th and 20th centuries, one of which was auctioned by Christie’s New York on October 25, 2018. “Edmond de Belamy, from La Famille de Belamy” by the French art collective Obvious, sold for \$432,500 including fees, over 40 times Christie’s initial estimate of \$7,000-\$10,000. The buyer was an anonymous phone bidder. See Gabe Cohn, ‘AI Art at Christie’s Sells for \$432,500’ *The New York Times* (New York, 25 October 2018) <<https://www.nytimes.com/2018/10/25/arts/design/ai-art-sold-christies.html>> accessed 11 February 2022.

⁶⁴ For instance, in 2017, the STATE Studio presented “Unhuman: Art in the Age of AI”, an exposition comprised of AI-created works curated by Emily L. Spratt. See STATE Studio, <<https://state-studio.com/program/2017/unhuman-art-in-the-age-of-ai>> accessed 11 February 2022.

⁶⁵ The Art and Artificial Intelligence Laboratory at Rutgers has created an Art-generating algorithm (AICAN) that produces original images dubbed more novel and appealing than “real” paintings by human subjects who participated in a blind test. See Rene Chun, ‘It’s Getting Hard to Tell If a Painting Was Made by a Computer or a Human’ (*Artsy*, 21 September 2017) <<https://www.artsy.net/article/artsy-editorial-hard-painting-made-computer-human>> accessed 11 February 2022.

⁶⁶ Daniel Schönberger, ‘Deep Copyright: Up- and Downstream Questions Related to Artificial Intelligence (AI) and Machine Learning (ML)’ in Jacques de Werra (ed), *Droit d’auteur 4.0/Copyright 4.0* (Schulthess 2018) 145 ff, 13-17 <<https://ssrn.com/abstract=3098315>> accessed 11 February 2022.

⁶⁷ Some authors have argued that there is no justification for granting copyright protection to works fully created by machines (e.g. without direct involvement from the programmer after creation of the algorithm); see for instance Bruce E. Boyden, ‘Emergent Works’ (2016) 39 *The Columbia Journal of Law and the Arts* 377 ff, 391; Ana Ramalho, ‘Will Robots Rule the (Artistic) World? A Proposed Model for the Legal Status of Creations by Artificial Intelligence Systems’ (2017) 21 *Journal of Internet Law* 12 ff, 15; Schönberger (n 66). This is a beneficial position that allows museums and their visitors to exploit these works, notably for study, research and creation purposes. In Swiss law, see Jacques de Werra and Yaniv Benhamou, ‘Kunst und geistiges Eigentum’ in Peter Mosimann, Marc-André Renold and Andrea F. G. Raschèr (eds), *Kultur Kunst Recht* (Helbing & Lichtenhahn 2020), Nos. 123–125. In the EU, see Ryan Abbott, in Tanya Aplin (ed), *Research Handbook on Intellectual Property and Digital Technologies* (Edward Elgard 2018) 338 ff.

⁶⁸ Ramalho (n 67), 13, 18.

2. DISSEMINATION

PROPOSAL 7. Clarify in the law that certain acts of communication or making available to the public that are conducted as part of a museum's public interest mission do not infringe copyright

a) Issue at stake

- As explained under Proposal 1, the lack of exceptions and limitations applicable to museum's digitization operations (and, in jurisdictions where some exceptions and limitations do apply, their limited scope) constitutes an important obstacle for museums to fulfil their public interest mission in an increasingly digital world. The issue is even greater when it comes to online dissemination of digitized works.
- Indeed, museums generally need permission from the rights holder to make in-copyright works available online. Because of the territorial nature of copyright and the international nature of websites, this means that museums need – at least in theory, even though they might choose not to do it in practice – to clear the rights for every country in the world⁶⁹ unless clear and worldwide unified exceptions or limitations can be invoked.⁷⁰ Therefore, should museums wish to rely on an exception to put digital content online, they will technically need to ensure that the exception exists in every country where the content can be accessed. This state of the law is clearly unsuited to the 21st century; museums should be able to take full advantage of the technological developments for a wider dissemination among the general public of the works contained in their collections, in furtherance of their public mission.

b) Clarifications

- *National legislators and policymakers* should adopt, or reaffirm limitations and exceptions to the right of communication to the public⁷¹, according to which museums are able to communicate to the public works contained in their collections:⁷²
 - o for the purpose of making available digital reproductions of works contained in their collections on the website of the institution and on the premises of the museum;
 - o for the purpose of making available digital inventories⁷³ of works contained in the collection to the public for purposes of education, private research or study⁷⁴.

⁶⁹ Canat and others (n 27), 28.

⁷⁰ In the European Union, even though national copyright laws are harmonized to a certain extent due to a number of directives, many issues remain non-harmonized including, to some extent, the question of copyright exceptions. See Rita Matulionyte, 'Enforcing Copyright Infringements Online: In Search of Balanced Private International Law Rules' (2015) 6 Journal of Intellectual Property, Information Technology and E-Commerce Law (JIPITEC) 132 ff <<https://www.jipitec.eu/issues/jipitec-6-2-2015/4274>> accessed 11 February 2022.

⁷¹ Art. 8 WCT: "(...) authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them". Although the scope of this right varies from one jurisdiction to another, it generally includes making works available on the Internet.

⁷² These exceptions may already exist in some jurisdictions. In the United States, for instance, the AAMD Guidelines (n 16) take the position that some of these activities are already covered by fair use.

⁷³ "Digital inventories" are also so-called "collections data" which are mostly open and subject to Creative Commons license CC0. As explained by Canat and others (n 27), at 44, in Europe, many museums make (or wish to make) "thumbnail versions of digitized works for purposes of inclusion in an inventory database for internal managerial uses, which would not require on its face the rights holder's permission. But the need of the rights holder's permission for other uses of thumbnails, including for reference data for search engines and for posting on the museums websites is not a matter clearly solved by law or in practice." The situation is however clearer in the United States, where this activity may be covered by fair use; see *Kelly v Arriba Soft Corp.* (n 29).

⁷⁴ In lieu of a specific exception for museums and other cultural institutions, other initiatives advocate for a global fair use exception (e.g. Lionel Bently and Tanya Aplin, *Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyright Works* (Cambridge

- However, these exceptions shall be subject to the following conditions:
 - o They shall be limited to the museum's core public interest mission (which generally includes collection, preservation, exhibition and dissemination)⁷⁵. If not already done⁷⁶, the definition of what constitutes a core public interest mission should be first agreed upon per jurisdiction after consultation of the *relevant stakeholders* (including CMOs, user groups, such as museums and the competent public authorities).
 - o With regard to out-of-commerce works contained in the collection on a museum's website, when applying the exception, due account should be taken of remuneration schemes set up to compensate for any unreasonable actions contrary to the legitimate interests of rights holders, and ensure that all rights holders may at any time object to the use of any of their works that are deemed to be out of commerce and be able to exclude the use of their works.
- This statutory exception should not extend to activities carried out by members of the public (e.g. it would not cover the analysis, reuse, sharing, and creation of derivative works by members of the public)⁷⁷, which would need to fall under another statutory exception or be subject to the rights owner's prior permission.
- The statutory exception described above should similarly not extend to acts carried out by the museum that go beyond the non-commercial purposes specified. For example, online communication via social media (which can be used for both non-profit/educational and commercial purposes) or merchandising activities via the museum shop would demand the prior authorisation of the rights owner.
- For the sake of harmonization (hence of making in-copyright works available online without the need to clear the rights for every country in the world), it is advisable that *multi-stakeholder international organizations* propose a unified definition of the notion of a museum's core public interest mission and/or unify the above limitations and exceptions⁷⁸.

PROPOSAL 8. No liability of museums if they comply with certain due diligence steps and a correct right statement (promote a kind of “safe harbor right statement”)

a) Issue at stake

- Museums face a myriad of problems if they decide to make orphan works available to the public. If the author of a work cannot be located, museums either have to forego the digitization of the works - risking that millions of works in their collections will sink into oblivion and cannot be used by society; or else, face liability for copyright breaches (possibly in the thousands).

University Press 2020)), that the general exception for research and education shall apply to museums as educational institutions (e.g. NEMO report on IP), or for an international right to research (e.g. US AUWCL).

⁷⁵ See comments made under n 26.

⁷⁶ For instance, many UK public bodies have already published their statements of public task as a result of the Revised PSI Directive (n 32).

⁷⁷ To minimize risks of litigation, museums should clearly specify these restrictions on their websites.

⁷⁸ Various solutions could be contemplated to achieve harmonization, *including recommendations, resolutions, declarations, guidelines and treaties*. See regarding rule-making processes at WIPO, Carolyn Deere Birkbeck, *The World Intellectual Property Organization (WIPO): A Reference Guide* (Edward Elgar 2016), 91.

- Museum professionals, even when they act diligently and do extensive research, may face private law claims or even risk criminal prosecution, since under almost all copyright laws regulating the use of orphan works, research is obligatory. The extent of such research or the sources which have to be consulted, however, are not codified. Legal insecurity therefore remains.
- A new, easy-to-operate legal framework is needed to give museums the leeway needed to be able to use orphan works and make the whole of their collection accessible. A generally accepted Code of Conduct would provide assistance, orientation and a reliable due diligence process to follow-up.
- The website <<https://rightsstatements.org>> provides cultural heritage institutions with simple and standardized terms to summarize the copyright status of works in their collection. However, to date, no statement reflects the specific due diligence steps that should be/have been taken by museums. “Copyright undetermined”⁷⁹ is too broad and does not reflect the museum’s efforts in researching.

b) Clarifications

- *Legislators or policy-makers* should encourage museums to establish a Code of Conduct.
- - o The Code of Conduct should be easy-to-follow and would steer museum professionals, who want to use a protected work, through a step-by-step list of items to check (see our proposed model of a *Code of Conduct for a Safe Harbor Right Statement* in Part II);
 - o These items would need to include all exceptions and limitations applicable to museums;
 - o These items would also include the relevant databases which museum professionals need to check for authors of each respective work category if they intend to use works but are unsure of the author. This list should be mandatory and exclusive: other databases need not be checked.
- In order to incentivize such Codes of Conduct, *legislators or policy-makers* should clearly specify that the Code of Conduct reflect the international, globally-accepted standards pertaining to the use of protected works in the context of museums’ mass-digitization and dissemination operations. As a consequence, museum professionals following the Code of Conduct, and therefore completing a due diligence process, benefit from a safe harbor protecting against abusive litigation. Right holders would however keep the right to request injunctive relief (without damages) if/when they allege that these operations infringe their rights.
- Existing right statements initiatives should be adjusted to reflect the due diligence steps taken by the museum.⁸⁰ Indeed, the museums should have an easy and generally accepted way to demonstrate to possible rights holders and the public in general that it followed the due diligence process as set out in the Code of Conduct.

⁷⁹ RightsStatements.org, ‘Copyright Undetermined’ <<http://rightsstatements.org/page/UND/1.0/?language=en>> accessed 11 February 2022. “Copyright undetermined” signals that the “copyright and related rights status of this Item has been reviewed by the organization that has made the Item available, but the organization was unable to make a conclusive determination as to the copyright status of the Item”.

⁸⁰ An example of initiatives is “rightsstatements.org”.

PROPOSAL 9. Promote the development of national copyright guidelines or codes of professional practices for various uses of works by museums

a) Issue at stake

- Currently, whether a copyrighted work may be used or not is up to the rights holder's decision (unless an exception applies), and therefore may be negotiated between rights holder and potential user. However, countries regulate many aspects by compulsory law, to ensure both the rights holder's rights and society's interest in the use of works. This balance is often precarious, and when copyright law is being revised, such a process often ends up being a very public and controversial process with both sides trying to assert themselves.
- Museums find themselves in the middle and are important links and mediators between artists on the one hand and the general public on the other. As explained above, while it is generally accepted that museums may use protected works for some causes due to mandatory exceptions and limitations (for instance, they may be allowed to use reproductions for exhibition catalogues without licensing them or under certain jurisdictions for archival purposes), many routine activities of museums are not covered by exceptions.
- This is especially true for museums' commercial activities. If museums want to use protected works for these purposes, they need the rights holder's approval and have to pay license fees. These fees may be negotiated between museums and rights holders. If rights holders are represented by a CMO, prices for the use of protected works are normally determined by general tariffs.
- Whereas this situation is logical in cases of commercial and merchandizing uses falling outside of the scope of a museum's core functions as generally defined by International Council of Museums (ICOM) (for example producing items for the museum shops or for promoting an exhibition), museums and rights holders could benefit from a "Code of professional practices" regulating commercial aspects attached to museums' public interest missions, such as compensation for exhibition rights and preservation costs of digitized works. This would help both sides in that museums would be able to budget more clearly, and artists – especially newer ones with less negotiating experience and those not represented by CMOs – would benefit from some guidance while exchanging with museums.⁸¹
- Because of financial shortage, museums may have to cut down on uses of protected works, especially works of visual art. As a consequence, living artists and artists whose works are still protected are also underrepresented in some museum exhibitions. Museums may restrict access to digital surrogates of public domain works, or sometimes even wait until copyright protection expires before they organize a retrospective in order to forego the author's successor's approval.⁸² This is misrepresentative for artists' significance in art history and, given the importance of a digital presence nowadays, detrimental to their reputation, their scientific exploration, their reception by the general public and their earning potential.

⁸¹ In Switzerland, for instance, the Federal Office of Culture recently announced that it intends to prepare national guidelines for artists' remuneration for exhibitions in museums.

⁸² That was the case for German Bauhaus artist Oskar Schlemmer; see Adrienne Braun, 'Oskar Schlemmers Erbe: Wie ein Künstler verschwindet' *Süddeutschen Zeitung* (Munich, 17 May 2010) <<https://www.sueddeutsche.de/kultur/oskar-schlemmers-erbe-wie-ein-kuenstler-verschwindet-1.591908>> accessed 11 February 2022.

b) Clarifications

- A common understanding among *all stakeholders, including multi-stakeholder international organizations*, of acceptable terms of use by museums should be developed.
- Such common understanding may be drafted as guidelines and should cover non-commercial purposes as well as commercial aspects attached to museums' public interest missions, such as compensation for exhibition rights and preservation costs of digitized works. In addition:
 - - o They should be drafted in an easy-to follow-manner and need to take into account every stage of use, i.e. digitization as well as dissemination;
 - o They could include precise technical requirements (for example, file size);
 - o They need to be compatible with the generally accepted ICOM Code of Ethics.⁸³
- They should also provide legal security for museums and their personnel: if the guidelines are followed diligently by museum personnel, they should benefit from a safe harbour protecting against abusive litigation and/or alleviating liability (see for example the due diligence steps proposed for the research of copyright, Proposal 8).
- Commonly adopted guidelines and good practices are easier to live up to and implement than imposed norms: they may be more easily adapted progressively as technologies develop than codified law and they offer greater transparency and clarity to the museums (as long as such guidelines are not contrary to the law). All parties involved should take into account that museums play a unique role as intermediaries between rights holders and users.

PROPOSAL 10. Reaffirm the targeting test for online museums to avoid the applicability of unexpected foreign laws

a) Issue at stake

- There is no global regulatory framework for private international law and intellectual property. As such, various private international law issues are posed by museums' dissemination of copyrighted content on the Internet (e.g. invoking potential exceptions that would likely apply in their home jurisdiction).
- Notably, it is not always simple to identify which court(s), apart from those of the defendant's domicile⁸⁴, have jurisdiction in such "worldwide" online copyright infringement cases. The law generally provides that courts of the state where the infringement took place are competent.⁸⁵ However, it does not specify where this is when copyright infringement takes place online.
- Currently, the "access approach" is usually applied to determine whether a court has jurisdiction over an online copyright infringement claim.⁸⁶ Under this approach, the courts

⁸³ ICOM Code of Ethics (n 13) (see for example Sect. 4.1 and 4.7).

⁸⁴ Art. 4.1 of the EU Regulation No 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Brussels I Bis Regulation) and art. 2 of the Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, RS 0.275.12 (Lugano Convention).

⁸⁵ In private international law, see art. 7 of the Brussels I Bis Regulation and art. 5(3) of the Lugano Convention.

⁸⁶ See notably Case C-170/12 *Pinckney v Mediatech* ECLI:EU:C:2013:635 and Case C-441/13 *Pez Hejduk v EnergieAgentur NRW GmbH* ECLI:EU:C:2015:28.

of any place where the infringing content is accessible have jurisdiction. This encourages forum shopping and creates uncertainty as to the applicable jurisdiction(s) and substantive law(s) because defendants may basically choose any jurisdiction in the world.⁸⁷

b) Clarifications

- *Policy-makers and/or Courts* should expressly reject the “access approach” in online copyright infringement cases in favour of a “targeting approach”, meaning an analysis of whether or not a website directs or targets its activities towards a specific country (irrespective of the fact that a website may be merely accessible in such country). The targeting doctrine has already been applied in a number of Court of Justice of the European Union (CJEU) cases⁸⁸ and is found in the Conflict of Laws in Intellectual Property (CLIP)⁸⁹ and American Law Institute (ALI)⁹⁰ soft law Principles. A similar test is also recommended by the World Intellectual Property Organization (WIPO) regarding online trade mark infringement⁹¹.
- In order for Courts to develop a cohesive and predictable reasoning regarding whether a museum “targets” its activities towards a specific state through online dissemination of digitized copies of artworks, additional guidelines should be developed.⁹²
- *Museums* should adopt a targeting approach for their online collections to avoid the applicability of unexpected jurisdiction or unexpected foreign laws. Indeed, this targeting test could help limit both the number of available fora for a claimant at the level of jurisdiction analysis (thus limit forum shopping), and the amount of national copyright laws that need to be reviewed by the chosen Court at the level of applicable law analysis (by allowing courts to quickly dismiss claims of copyright infringement in countries where the website can merely be accessed without indication of targeting).

PROPOSAL 11. Develop an “open data” policy framework for museums

a) Issue at stake

- The technological revolution of recent years has led to a rapid and exponential growth of data, including in museum environments. Open cultural data⁹³ policies, that allow data to

⁸⁷ For more information on those criticisms as well as favourable arguments, see Matulionyte (n 70).

⁸⁸ See notably the cases cited by Matulionyte (n 70) at her footnote 48.

⁸⁹ Principles on CLIP by the European Max Planck Group on Conflict of Laws in Intellectual Property; see art. 2:202.

⁹⁰ Principles of ALI governing jurisdiction, choice of law and judgments in transnational disputes in the field of intellectual property; see art. 204(1) ALI Principles.

⁹¹ Matulionyte (n 70) at her footnote 50: “Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet, adopted by the Paris Union for the Protection of Industrial Property and WIPO, between 24 September and 3 October, 2001 (2001 WIPO Recommendation)”. For more on this instrument see Johannes Christian Wichard, ‘The Joint Recommendation Concerning Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet’ in Josef Drexl and Annette Kur (eds), *Intellectual Property and Private International Law: Heading for the Future* (Hart Publishing 2005) 257-264.

⁹² See notably, for inspiration, the guidelines of the Geneva Internet Disputes Resolutions Policies <<https://geneva-internet-disputes.ch/medias/2016/11/gidrp-1-0-geneva-internet-dispute-resolution-policies-final.pdf>> accessed 11 February 2022, 6-7 and Matulionyte (n 70).

⁹³ As explained by Mia Ridge, ‘Unlocking Potential: Where Next for Open Cultural Data in Museums?’ (2013) 13 Museum ID <<http://www.miaridge.com/paper-where-next-for-open-cultural-data-in-museums>> accessed 11 February 2022: “To define ‘open cultural data’, it is best to look at each term in turn. While the degree of openness required to be ‘open’ data can be contentious, at its simplest, ‘open’ refers to content that is available for use outside the institution that created it, whether for school homework projects, academic monographs or mobile phone apps. ‘Open’ may further refer to licenses that clarify the permissions and restrictions placed on data, or to the use of non-proprietary digital technologies, or ideally, to a combination of both open licenses and technologies. Cultural data is data about objects, publications (such as books, pamphlets, posters or musical scores), archival material, etc, created and distributed by museums, libraries, archives and other organisations. Data can refer to different types of content, from metadata or tombstone records (the basic titles, names, dates, places, materials, etc of a catalogue record), to entire collection records (including data such as researched

be combined in novel ways to develop new products and services, play an important role in furthering research, learning and stimulating economic growth. National laws and practices on the re-use of public cultural resources, however, vary considerably. These differences and the absence of clarity they generate present a barrier to realizing the economic potential of cultural resources.

- Some projects have already submitted principles and guidelines to help museums open up their collections and metadata⁹⁴ and institutions seem to progressively implement open data policies in respect of works already in the public domain⁹⁵.
- If digitized cultural material is to be made available as open data several issues still need to be resolved, including:
 - o Lack of coordinated international framework: Whilst the European Union has attempted to harmonize national laws and policies to encourage access and re-use of digitized cultural material⁹⁶, similar initiatives at an international level are lacking.
 - o No obligation for public museums, libraries and archives to provide digitized cultural resources as open data: despite some harmonisation efforts, public museums, libraries and archives have considerable discretion in deciding what information to make available as open data and whether the accessibility and/or re-use shall be free of charge⁹⁷.
 - o Disparity between public and private institutions: Existing legislation concerning open data, such as the Recast PSI Directive, applies only to museums and cultural institutions in the public sector⁹⁸ and not to independent or privately funded cultural institutions (including certain university museums). This results in a two-tier system. The position of museum trading companies, which are often independent of the museum and wholly commercial in nature, should also be addressed.
 - o Absence of harmonized or inter-operable open licenses: In the cultural sector, there is no coherence in the type of “open” licenses, used as part of open data policies. Different countries have established their own open licenses⁹⁹, it being precised that Creative Commons have been widely adopted in many countries though¹⁰⁰.

and interpretive descriptions of objects, bibliographic data, related themes and narratives) to full digital surrogates of an object, document or book as images or transcribed text. To put that all together, ‘open cultural data’ is data from cultural institutions that is made available for use in a machine-readable format under an open license.” See also Open Definition 2.1 <<http://opendefinition.org/od/2.1/en/>> accessed 11 February 2022.

⁹⁴ For an example, see OpenGLAM, an initiative that supports exchange and collaboration between cultural institutions that support open access to their collections. The initiative has led (among others) to OpenGLAM principles (2013) and is currently working towards an OpenGLAM declaration. See <<https://openglam.org>> accessed 11 February 2022.

⁹⁵ Examples of larger institutions include the Rijksmuseum (Netherlands) <<https://www.rijksmuseum.nl/en/rijksstudio>> accessed 11 February 2022 and the Metropolitan Museum of Art (New York) <<https://www.metmuseum.org/about-the-met/policies-and-documents/image-resources>> accessed 11 February 2022. Further examples are listed in the survey of GLAM open access policy and practice, by Douglas McCarthy and Dr. Andrea Wallace, CC BY 4.0, 2018, which more than thousand of institutions that have implemented open data policies worldwide <https://docs.google.com/spreadsheets/u/1/d/1WPS-KJptUJ-o8Sxtg00l1cxq0IKJu8eO6Ege_GrLaNc/htmlview> accessed 11 February 2022.

⁹⁶ See Revised PSI Directive (n 32).

⁹⁷ Example of harmonisation efforts may be found at the EU level with the Recast PSI Directive (i.e. Open Data and the Re-use of Public Sector Information Directive (Recast PSI Directive)). See Andrea Wallace and Ellen Euler, ‘Revisiting Access to Cultural Heritage in the Public Domain: EU and International Developments’ (2020) 51 International Review of Intellectual Property and Competition Law (IRIC) 823 ff.

⁹⁸ The Revised PSI Directive applies to publicly funded, governed or managed museums, libraries and archives (Revised PSI Directive, article 2(1)(f) *a contrario*).

⁹⁹ For example, France has two licenses; (1) “La licence ouverte” – created in 2011 authorises reproduction, redistribution, adaptation and commercial exploitation and requires attribution of the original author but lacks “share-alike” provisions and (2) the “Open Database Licence (ODbL)” which includes “share-alike” provisions requiring re-users to open their data in turn. In the UK, the National Archives has developed a number of licensing models, including the Open Government Licence (OGL).

¹⁰⁰ The Creative Commons (CC) license framework was created in the 2000 and combines 6 types of license with 5 different uses. See Creative Commons <<https://creativecommons.org/>> accessed 11 February 2022.

- o Unresolved challenges of intellectual property rights: Intellectual property rights (e.g. those that may be recognized in the digital surrogate, see Proposal 5) may conflict with the objectives of open access policy framework.¹⁰¹
- o Legal uncertainty in the treatment of orphan and out-of-commerce works: Uncertainty regarding the rights underpinning orphan and out-of-commerce works can deter cultural institutions to include such works in their digitization projects and make them freely available as open data for re-use.

b) Clarifications

- Measures should be adopted to facilitate making cultural resources available as open data. Such measures include:
 - o Developing an open data policy framework for museums, libraries and archives: A co-ordinated international framework should be developed and supported by relevant *international sector specific organisations*, such as ICOM and WIPO. Such framework should operate as follows:
 - materials falling into the primary “public task” function of the museum (such as catalogues and academic texts) should be subject to the mandatory “open data” provisions.
 - materials falling into “commercial merchandising” categories should be exempt in order to preserve revenue streams on which the museum relies for its operations.
 - o Resolving intellectual property challenges: *national legislators or policy-makers* shall ensure clear exceptions for museums engaging in certain acts of digitization and communication (see Proposals 1 and 7), that the act of digitization does not create a separate copyright (see Proposal 5), the development of “safe-harbour” rights statements (see Proposal 12), in order to help museums include all works in their open data policies.
 - o Creating sector specific inter-operable open licenses: *Museums and other relevant stakeholders* should towards the development of a harmonized set of open data licenses which are specific to the needs of museums and which are free and inter-operable with Creative Commons licenses, covering both copyright and database rights, could provide a useful basis for museums to establish open data policies

PROPOSAL 12. Promote the interoperability of different licensing models

a) Issue at stake

- The issues at stake are twofold. First, licensing models may interfere with specific moral rights, raising questions of legal compatibility of their content. Indeed, the Berne Convention requires member states to provide legal protection for two specific moral rights: the right of attribution and the right of integrity.¹⁰² However, the Berne Convention does not provide for a harmonized regime on potential waivers, which is subject to national statutory law.¹⁰³

¹⁰¹ e.g. the Revised PSI Directive excludes materials protected by a copyright (see recital 9: “Documents for which third parties hold intellectual property rights should be excluded from the scope of Directive 2003/98/EC”).

¹⁰² Article 6bis of the Berne Convention.

¹⁰³ Michel Jaccard and Eva Cellina, ‘Les Creative Commons, avenir du droit d’auteur ?’ (2017) 139 La Semaine Judiciaire II 229 ff, 240-241.

- o With regard to the right of attribution, Creative Commons CC0 may create an issue, in particular in jurisdictions where moral rights cannot be waived/assigned. However, other Creative Commons licenses do not create an issue, since they all require attribution.¹⁰⁴ Likewise, the French *Licence Ouverte* requires attribution.¹⁰⁵
 - o With regard to the right of integrity, however, some countries such as France provide that these rights are non-assignable under statutory law.¹⁰⁶ There is also authority in favour of accepting assignments of moral rights under the condition that the author has “a realistic chance to foresee any changes that will be made,”¹⁰⁷ which is very unlikely in the context of standardized open content licenses.¹⁰⁸ This means that even if an author has assigned his rights to a third party under a license, he still maintains the moral rights to his work.
- As a result, Creative Commons licenses do not cover all moral rights; they just provide that, by using such a license, the author waives specific rights (i.e. the right to object to any modification), but not in their entirety (i.e. not the right of attribution).¹⁰⁹ Authors should be able to waive their moral right of integrity as they like – or otherwise agree via the Creative Commons license that their work can be altered or transformed – in order to allow the use and modification of their works.¹¹⁰
 - Second, various licensing models exist and more are likely to emerge in the future, raising concerns of interoperability. For instance, the question arises as to how a specific licensing model may be combined with another (e.g. when a digital work under a given licensing model is incorporated into another digital work subject to another licensing model). Moreover, licenses may use a different terminology as to their scope and requirements, which complicates their interoperability. Words such as “non-commercial” are ill-defined and the subject of controversy.
 - Several national licensing models have addressed the issue of compatibility and expressly refer to well-known licenses.¹¹¹ However, since most licenses do not define the used terminology, or make up their own definition, it is necessary to draft a harmonized terminology. In the event of restrictive licenses, multi-licensing may be desirable for compatibility with the licensing scheme of other models.

¹⁰⁴ Catharina Maracke, ‘Creative Commons International: The International License Porting Project – Origins, Experiences and Challenges’ (2010) 1 JIPITEC 4, 7 <<https://www.jipitec.eu/issues/jipitec-1-1-2010/2417/dippadm1268743811.97.pdf>> accessed 11 February 2022.

¹⁰⁵ Etalab, ‘LICENCE OUVERTE/OPEN LICENCE, VERSION 2.0’ <<https://www.etalab.gouv.fr/wp-content/uploads/2017/04/ETALAB-Licence-Ouverte-v2.0.pdf>> accessed 11 February 2022.

¹⁰⁶ See articles L. 121-1 and following of the French Intellectual Property Code.

¹⁰⁷ Maracke (n 104), 7-8. See also Jaccard and Cellina (n 103), 241.

¹⁰⁸ The threshold under Swiss law is an author’s protection against excessive commitments (art. 27 para 2 Civil Code); see Jaccard and Cellina (n 103), 241.

¹⁰⁹ Jaccard and Cellina (n 103), 240-241.

¹¹⁰ In many instances, even if the moral rights are waived, the author may invoke his personality rights if his work has been altered in a way that amounts to an infringement of such personality rights. Therefore, an author purposefully waiving his moral rights would still keep some form of legal protection against potential third-party abuses or any unexpected modifications that affect his personality right.

¹¹¹ For instance, the French License Ouverte 2.0 (as well as V1.0) has been drafted to be compatible with any open license which has a minima requirement of attribution. It is compatible with the “Open Government Licence” (OGL) in the United-Kingdom, the “Creative Commons Attribution 2.0” (CC-BY 2.0) and the “Open Data Commons Attribution” (ODC-BY) of the Open Knowledge Foundation; See Etalab, ‘LICENCE OUVERTE/OPEN LICENCE, VERSION 2.0’ (n 105). OGL in the United Kingdom and the Norwegian Licence for Open Government Data (NLOD) 2.0 also require attribution and are hence fully compatible with the before-mentioned licenses; see The National Archives, ‘Open Government licence, Guidance for users’ <<http://nationalarchives.gov.uk/documents/information-management/ogl-user-guidance.pdf>> accessed 11 February 2022 and Data Norge, ‘Norwegian Licence for Open Government Data (NLOD) 2.0’ <<https://data.norge.no/nlod/en/2.0>> accessed 11 February 2022.

b) Clarifications

- *National legislators* shall adapt their legislation to the era of open licenses in that authors are entitled to waive their right of integrity through standardized open licenses. Authors shall be allowed to waive such right with an explicit description as to what the waiver encompasses.
- All licensing models should explain their compatibility with other licensing models. No additional requirements other than attribution and those related to the subject matter should be implemented so as to render such licensing model interoperable to the greatest extent. The policies seek to promote the understanding and use of open licenses and encourage the use of a harmonized terminology.

PROPOSAL 13. Incentives to maintain up-to-date digital tools and object records (and to avoid obsolescence)

a) Issue at stake

- With the growing importance of digitization, museums must also ensure digital preservation, i.e. that digital objects can be located, rendered, used and understood in the future.¹¹² However, this is currently not easy due to the vulnerability of digital media to deterioration and the obsolescence of digital platforms and technologies.¹¹³ Some initiatives to overcome these vulnerabilities are worth mentioning, such as Internet Archive and Wikimedia Commons. They are however neither standardized or dedicated to museums nor systematically used by museums¹¹⁴. Failure to address these vulnerabilities may lead to the loss of digitized objects.
- Currently, no international or regional cultural heritage convention directly addresses the preservation of digitized cultural heritage in the context of museum mass-digitization activities. However, a few soft-law texts, both at the international¹¹⁵ and European¹¹⁶ levels, mention that digital preservation should be a development priority.¹¹⁷ Although these soft-law texts and initiatives are not binding on Member States and cultural heritage institutions, they clearly illustrate how preservation of digitized cultural heritage is paramount at the international, regional and national levels and provide ample justification for states to create new legislation to that effect.

¹¹² See notably U.S. Library of Congress, 'DigitalPreservationEurope' <<http://www.digitalpreservation.gov/series/edge/dpe.html>> accessed 11 February 2022; Kalina Sotirova and others, 'Chapter 1: Digitization of Cultural Heritage – Standards, Institutions, Initiatives' in Krassimira Ivanova and others (eds), *Access to Digital Cultural Heritage: Innovative Applications of Automated Metadata Generation* (Plovdiv University Publishing House "Paisii Hilendarski" 2012) <<http://www.math.bas.bg/infres/book-ADCH/ADCH-ch1.pdf>> accessed 11 February 2022, 29.

¹¹³ Sotirova and others (n 112), 30.

¹¹⁴ For this problematic, see Nanna Bonde Thylstrup, *The Politics of Mass Digitization* (MIT Press 2019).

¹¹⁵ See notably the 2003 UNESCO Charter on the Preservation of the Digital Heritage, the 2012 UNESCO/UBC Vancouver Declaration and the 2015 UNESCO Recommendation concerning the Protection and Promotion of Museums and Collections, their Diversity and their Role in Society.

¹¹⁶ See notably the European Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation 2006/585/EC <<https://eur-lex.europa.eu/eli/reco/2006/585/oj>> accessed 11 February 2022; and the European Commission Recommendation of 27 October 2011 on the digitization and online accessibility of cultural material and digital preservation 2011/711/EU <<http://data.europa.eu/eli/reco/2011/711/oj>> accessed 11 February 2022.

¹¹⁷ e.g. the ReACH (Reproduction of Art and Cultural Heritage) initiative, which relates to research and collections management, not specifically about open data. See Victoria and Albert Museum, 'ReACH (Reproduction of Art and Cultural Heritage)' <<https://www.vam.ac.uk/research/projects/reach-reproduction-of-art-and-cultural-heritage>> accessed 11 February 2022.

b) Clarifications

- ***National legislators or policymakers*** should declare an obligation to preserve digitized cultural heritage as part of the existing international conventions, to ensure long-term accessibility to digital information for future generations. This obligation should be imposed to cultural heritage institutions and/or other parties participating in the digitization process, as the case may be, and formulated on general terms¹¹⁸, while museums should specify the details pertaining to the technical standards through self-regulation.
- Because states have an important part to play in the preservation of digitized cultural heritage, the maintenance costs should be split between the state and the entity (legal entities, such as museums or foundation or individuals) benefitting from the copyright exception to digitize for conservation purposes.
- Different models of certification for repositories of digital materials and monitoring of digital preservation processes should be introduced, in particular to solve the issue that transfer of digitized content from one digital format to another (to avoid obsolescence) implies some changes to the original digitized file, which in turn raises issues of authenticity.¹¹⁹

¹¹⁸ Such an obligation could be drafted along the lines of the obligation to retain fiscal and corporate records that already exist in many countries, but without a set time frame. To name only one example, Article 958f of the Swiss Code of Obligations requires the accounting records, the accounting vouchers, the annual report and the audit report to be retained for a period of ten years from the expiry of the financial year in which they have been created.

¹¹⁹ Zinaida Manžuch, 'Ethical Issues In Digitization Of Cultural Heritage' (2017) 4 Journal of Contemporary Archival Studies, 9 <<https://elischolar.library.yale.edu/cgi/viewcontent.cgi?article=1036&context=jcas>> accessed 11 February 2022.

PART II - MUSEUM COLLECTION CODE OF CONDUCT FOR A “SAFE HARBOR”

If a museum decides to digitize and disseminate its collection, it is imperative to do a prior thorough due diligence regarding each object’s copyright status to ensure that copyright law is not violated. The due diligence steps provided in the following code of conduct are meant to aid the museums in the necessary steps they need to take. It furthermore gives guidance to ensure that museums’ various activities in caring for their collection are compatible with copyright law. As stated in Proposal 8, it should allow museums following it to benefit from a safe harbor (thus protecting against predatory licensing and enforcement practices, such as bad faith litigation).

Nota bene: This code of conduct applies to museums as users of copyrighted assets. As mentioned in the introduction, museums may also be copyright owners. Different rules will apply to artworks over which museums hold copyright or other intellectual property rights.

1. *Identify whether the work in question is a protected work.* Identify whether work in question is a literary and artistic work that may be subject to copyright protection¹²⁰ and, if so, whether the copyright protection still stands. Generally, the term of protection is at least the life of the author plus fifty years after his death¹²¹. Many countries have defined longer terms, for example a duration of 70 years after the author’s death in the EU and the US or even 100 years in Mexico. Shorter terms for specific groups of works such as photography or cinematographic works may apply.
2. *Identify the purpose of digitization.* Prior to asking for the author’s approval for the intended use, make sure that such approval is legally necessary to begin with. Many jurisdictions allow museums to benefit from exceptions, which enable them to use the work without the author’s assent and/or without remuneration. Digitization may for example be allowed to reproduce works in exhibition catalogues, for preservation purposes or for various fair uses including providing an online, searchable database in a low/medium resolution format (in the US)¹²². If an exception applies, a museum may proceed with the intended use without approval and/or payment. If no exception applies, the rights holder must be asked for authorization and may have to be remunerated.
3. *Identify the rights holder.* In general, copyrights pertaining to a specific object do not pass with the ownership of an original work, meaning that the owner of an object (museum, collector etc.) does not necessarily own the reproduction rights. However, such rights can be transferred by way of a contract. Therefore, there are several possible scenarios:
 - a. In many cases, the original author of a protected work still owns and administers the reproduction rights. The author must be approached directly for his or her approval.

¹²⁰ Literary and artistic works, for example books, pamphlets and other writings; lectures, addresses, sermons; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works, works of applied art illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science. See definition of “protected works” in Art. 2(1) Berne Convention.

¹²¹ See Art. 7(1) Berne Convention.

¹²² See for instance the US the AAMD Guidelines (n 16).

- b. The author may have passed away. The copyright will have been passed on to a legal successor (one or more individual(s) or a legal entity), who or which must be approached for approval.
 - c. He or she or any legal successors may have assigned the copyrights to a CMO¹²³. If this is the case, the CMO has to be contacted for an authorization to use the work. Some CMOs provide for databases that allow an easy research¹²⁴ of authors represented by them. If an author can be found in a specific CMO's data base, chances are that he or she is also represented by other countries' CMOs, since many CMOs have entered into multilateral contracts to reciprocally represent their "sister" CMOs.
 - d. In rare cases, the author may have explicitly transferred copyrights to the owner of the object, for instance, if the object was donated or bequeathed to a museum. Refer to the contract for specifics.
 - e. When the (current) rights holder cannot be identified or approached, the work is orphaned and may be used in some jurisdictions that provide an exception or a specific regime of authorization following a diligent search¹²⁵. In other jurisdictions, it is not advisable to use an orphaned work and simultaneously ask any respective author to come forward, since this may be construed as intentional breach of copyright¹²⁶.
4. *Add all available copyright information* to the object's museum database. Most importantly, specify « in & no » copyright and add data when « in » copyright will expire. Always make sure to properly credit the author's and the work's name whenever it is used or exhibited. When it is a public domain work, credit also the institution (such as the archive, museum or library) that provided the work¹²⁷.
 5. *Other copyrights and other IP rights (such as trade marks) may be also be affected.* Museums, in caring for their objects, may infringe on copyrights in other respects than reproductive rights only, in particular when the work is modified. Indeed, conserving, restoring, relocating, reassembling, altering their appearance, re-dimensioning and other actions regarding an object as well as any manipulation of its reproductions such as changing of colors, clipping or enlarging of sections etc., may violate the author's moral rights as well. Therefore, when acquiring a protected work, especially a piece of contemporary art, it is advisable to:
 - a. Identify the copyright status of the work and to acquire, if possible, the economic rights¹²⁸ pertaining to the object.
 - b. Collect as much information as possible about the object, i.e. year of creation, materials used and their sources of supply, individuals involved in its creation (including studio assistants etc.), context, meanings intended by the artist, usage meant by the artist (conceptual art, performance art), interchangeability of components, storage, transport, exhibition conditions.

¹²³ See a list of CMOs <https://en.wikipedia.org/wiki/List_of_copyright_collection_societies> accessed 11 February 2022.

¹²⁴ See for example Société des auteurs dans les arts graphiques et plastiques (ADAGP, France) <<https://www.adagp.fr>> accessed 11 February 2022; Artists' Collecting Society (UK) <<http://artistscollectingsociety.org>> accessed 11 February 2022; VG Bild Kunst (Germany) <<https://www.bildkunst.de/en/service-for-users/research-of-artists>> accessed 11 February 2022; Artists Rights Society (US) <<https://www.arsny.com/searchartists>> accessed 11 February 2022; list of many other CMOs <https://en.wikipedia.org/wiki/List_of_copyright_collection_societies#United_States> accessed 11 February 2022.

¹²⁵ For a diligent search regarding orphan works in one of twenty jurisdictions of the European Union, Diligent Search offers a tool <<https://diligentsearch.eu>> accessed 11 February 2022.

¹²⁶ It must be stressed out that, even in such jurisdictions, some museums seem to use orphan works and simultaneously ask any respective author to come forward, hence take the risk with copyright law instead of avoiding using the work.

¹²⁷ See the Europeana Public Domain Usage Guidelines, indicating that "the more you credit the institution the greater the encouragement to put more public domain works online".

¹²⁸ i.e. rights of reproduction, distribution, public performance, broadcasting, translation and adaptation of the work.

- c. Make sure: Was the work actually sold by the author? Was the work already published (intentionally made accessible to the public by the author)? If not, is the museum allowed to do so? Is exhibiting or any specific use of the work contractually excluded?
- d. Closely coordinate restoration interventions, conservation measures or specific exhibition projects with the rights holder.
- e. When the work is changed, label the modified work to show you have changed it, so that other users know who made the changes¹²⁹.

¹²⁹ See the Europeana Public Domain Usage Guidelines, indicating that the changes should not be attributed “to the creator or the provider of the work. The name or logo of the creator or provider should not be used to endorse the modified work or any use of it without their consent”.

PART III - ALTERNATIVE DISPUTE RESOLUTION SYSTEM FOR DISPUTED STATEMENTS

A. Context

This Part III proposes an ADR procedure to help GLAM reach satisfactory solutions in cases of disputes pertaining to the copyright status of a work digitized or disseminated by a GLAM. In our view, such procedure may be easily implemented and administrated by one of the *multi-stakeholder international organizations, such as WIPO* which already has a longstanding and successful experience in ADR.

It appears necessary to provide a swift and inexpensive procedure in cases of disputes, as uncertainties concerning the lawfulness of museums' digitization and dissemination projects discussed in this paper have a deterrent effect on museums' activities. Except for clear cases, museums – especially those without in-house legal counsel – sometimes choose to avoid risks by avoiding digitization and dissemination of their copyrighted collections.¹³⁰

Museums need to be encouraged to undertake digitization operations. A dedicated ADR system could incentivize them to go forward, knowing that disputes arising in this context could in many cases be solved in a manner cheaper and quicker than judiciary litigation.¹³¹

As a first step, a specific, quick and free mediation/consultation platform should be created to help museums and rights holders identify the contentious issues and negotiate solutions. Under this system, the parties would first fill a standardized questionnaire concerning all aspects of the digitization and dissemination process to help them identify on which aspects they agree or disagree. Then, they could either negotiate freely on those aspects or request the help of a mediator or conciliator¹³² if the negotiation proves too difficult. A dedicated platform could also be set up for parties to submit their dispute(s) not settled through mediation before an independent third party who may be empowered to render a binding decision (e.g. arbitrator).¹³³

Such a system has multiple advantages, such as:

- Allowing the parties to reach mutually agreeable solutions, beyond the applicable law;
- Giving museums a “checklist” of all the important IP-related considerations pertaining to mass digitization and dissemination operations prior to undertaking them¹³⁴;
- Helping museums and rights holders to negotiate and draft complete licensing agreements in that regard, even without legal counsel, thereby minimizing dispute risks in the future.

¹³⁰ See for instance the NEMO survey on Museums and Copyright (n 20), 42-43.

¹³¹ For more information on the different means of ADR relevant to cultural heritage disputes and their advantages (although not necessarily related to intellectual property), see generally Alessandro Chechi, *The Settlement of International Cultural Heritage Disputes* (Oxford University Press 2014); Marc-André Renold, Alessandro Chechi and Anne Laure Bandle (eds), *Resolving Disputes in Cultural Property* (Schulthess 2012); WIPO, 'WIPO Alternative Dispute Resolution (ADR) for Art and Cultural Heritage' <<http://www.wipo.int/amc/en/center/specific-sectors/art/>> accessed 11 February 2022.

¹³² The mediation could take place under the auspices of a structured organization, such as the WIPO's Arbitration and Mediation Center <<http://www.wipo.int/amc/en/center/background.html>> accessed 11 February 2022.

¹³³ See for inspiration Proposal 2 of the *Geneva Internet Disputes Resolutions Policies 1.0*, University of Geneva <<https://geneva-internet-disputes.ch/medias/2016/11/gidrp-1-0-geneva-internet-dispute-resolution-policies-final.pdf>> accessed 11 February 2022.

¹³⁴ Beyond the IP-related considerations, the checklist helps to identify also further important considerations, such as ethics, bias and other culturally sensitive elements of some works.

Disputes concerning digitized orphan works raise a different set of issues, namely regarding the thoroughness of the museum's prior diligent search. However, nothing would prevent the parties, once identified, to attempt to negotiate an agreement using the same ADR procedure instead of resorting to litigation.

B. Proposed ADR questionnaire

Therefore, when a dispute pertaining to the copyright status of a work digitized (or projected to be digitized) by a museum arises, the following questionnaire can be filled by the museum, in order for the rights holder to have a complete portrait of the situation. The rights holder may then check "agree" (A) or "disagree" (D) for each item on the list and comment if necessary. This will allow the parties to see where they stand in a standardized way and circumscribe the questions to be negotiated between the parties directly or before a mediator.

Author/Right holder:				
Please indicate if museum intends to digitize all of this author's works in its collection or only specific works; if only one or some work(s) are concerned, specify each title:				

	Museum answer	Rights holder reply		
		A	D	Comment
DIGITIZATION				
By what means? (Photograph, other)				
For what purposes?				
Archival				
Research (specify: external and/or internal)				
Education				
Use on promotional material				
Merchandising				
Exhibition on premises				
Catalogues (specify: online and/or offline)				
Other (please specify)				
Where can the copies be stored? (specify: external and/or internal servers)				
How many copies can be made?				

How might the work be classified and/or catalogued (notably: describe associated metadata)?				
Does the museum invoke a copyright exception or limitation to digitize without a license? If yes, please specify.				
Is the museum open to negotiate a license for digitization? If yes, you may submit conditions that would be acceptable (i.e. price, permitted uses, etc.).				
DISSEMINATION				
Where will the work be disseminated?				
On terminals inside the museum				
On the museum's public website (specify if in high or low resolution and the image's projected size)				
On promotional material (specify: online and/or offline)				
In catalogues				
How will copyright be attributed? (specify for both: underlying work and digitized version)				
Is the digitized version protected against unauthorized uses? (specify notably if TPMs have been put in place)				
Does the museum wish to grant particular CC licenses to users? If yes: specify which ones and for which work, i.e. the underlying work and/or the digitized version.				
Does the museum invoke a copyright exception or limitation to disseminate the digitized image without a license? If yes, please specify.				
Is the museum open to negotiate a license for digitization? If yes, you may submit conditions that would be acceptable (i.e. price, permitted uses, etc.).				

CONCLUDING REMARKS

This Policy paper clarifies the copyright law principles applicable to professionals dealing with digital cultural heritage worldwide and aims at formulating policies to facilitate their digital activities. The reason for this is that copyright seems to be a major obstacle for cultural institutions regarding digitization and online accessibility, which leads to under-exploit collections at the expense of society ultimately.

Recommendations are formulated as general principles to follow, while they are also context dependent, many institutions already struggling with a lack of financial and human resources and requiring government support to tackle the digital shift. Each part underlines who shall take action, in particular national legislators in Part I (sometimes cultural institutions and international organizations as well) and cultural institutions with a Code of conduct and an ADR procedure in Parts II and III.

The Policy paper has been led by copyright and art-law experts, but represents a work-in-progress that can be enriched based on feedbacks received via the dedicated website [<www.digitizationpolicies.com>](http://www.digitizationpolicies.com) (*peer-to-peer dynamic*) and updated into a 2.0 version (with new considerations, such as cultural institutions as creators of their own copyrighted works, model contracts and/or national laws on limitations and exceptions, use of indigenous content). In sum, main goal of this is a call for action and cooperation, towards policy-makers and professionals, to continue the dialogue, in particular to provide feedbacks and, if possible, to coordinate their efforts and build a network that will be able to leverage action in this area.

* * *

ACKNOWLEDGMENT

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This Policy Paper is the result of a research project initiated by the University of Geneva, in particular Prof. Yaniv Benhamou (Digital Law Center) and Prof. Marc-André Renold (Art-Law Center), together with other experts, thanks to a Seed Money Grant of the University of Geneva, Faculty of law.

This Policy Paper has been drafted with the collaboration of (in the alphabetical order): Anne Laure Bandle, Sarah Burkhalter, Lucie Guibault, Mathilde Heaton, Elisabeth Logeais, Marc-André Renold, Sandra Sykora, Vanessa Vuille (as contributors) and Douglas McCarthy, Katharina Garbers-von Boehm, Lauryn Guttenplan, Evelin Heidel, Bernard Horrocks, Ariadna Matas, Florent Thouvenin, Brigitte Vézina, Andrea Wallace (as peer reviewers). The views expressed in this paper do not necessarily reflect those of the peer reviewers, who provided comments on previous versions of this paper in their personal capacity.