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. 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 to museums.[1] 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. This is the case even in the context of ongoing copyright reforms in the European Union, Australia and elsewhere. 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 (very) 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 sound 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 public interest 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, etc.), and irrespective of whether the work is in analogue or digital form.

- In light of the above, new exceptions to the right of reproduction shall be defined. These exceptions shall provide that museums are able to make reproductions, in any format or medium, of works contained in their permanent collection (including works owned or in the

[1] 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 article 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 **Error! Bookmark not defined.**). See also Jean-François CANAT, Lucie GUIBAULT and Elisabeth LOGEAIS, *WIPO Study on Exceptions and Limitations for Museums*, 2015, p. 30-36, available at : http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=302596; and Yaniv BENHAMOU, *Revised Report on Museums Copyright Practices and Challenges*, WIPO Standing Committee on Copyright and Related Rights, SCCR/38/5, 29 March 2019, available at: https://www.wipo.int/edocs/mdocs/copyright/en/sccr_38/sccr_38_5.pdf

museum's possession as long-term loans, whether in copyright, unpublished,[2] out-of-commerce or orphan) as part of their public interest mission:

- for the purpose of digitization for preservation and/or restoration of works, namely digital born multimedia works;
- for the purpose of education, private research or study (provided that such purposes are not pursued for commercial advantage); [3]
- for text and data mining purposes;
- for the purpose of creating digital inventories of works contained in the permanent collection, indexing, cataloguing and creating corresponding databases for the management of rights (including for the organization of exhibitions); [4]
- for insurance, rights clearance, and inter-museum loan purposes.

- For more certainty, acts carried out for the purposes listed above should be deemed not to pursue direct or indirect commercial advantage; they should therefore be deemed not to conflict with the normal exploitation of the works or to unreasonably prejudice the legitimate interests of the rights holder.[5]

- However, these exceptions shall be subject to the following conditions:
  - They shall be limited to the museum's core public interest mission (which generally includes collection, preservation, exhibition and dissemination)[6], thus be in accordance with applicable international treaties[7] (e.g. these new exceptions should apply in certain special cases that do not conflict with a normal exploitation of the work and that do not unreasonably prejudice the legitimate interests of the rights holder).
    - If not already done[8], the definition of what constitutes a core public interest mission should be agreed upon per jurisdiction after consultation of the relevant stakeholders, including representatives of the copyright holders (i.e. individuals or collective management organisations), of the users (i.e. museums, general public) and of the competent public authorities.

[2] Under reserve of potentially applicable moral rights.

[3] This could be the case, for instance, when hugely profitable, privately owned academic publishers digitize works in order to commercialize the copies.

[4] 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, United States Court of Appeals, 9th Circuit, 2003.

[5] 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 *United States – Section 110(5) of the U.S. Copyright Act*, WT/DS160/R (June 15, 2000). 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, at 48).

[6] See notably art. 3 of the ICOM Internal Rules and Regulations (2007), available at: http://archives.icom.museum/download/InternalRulesandRegulations.pdf: "*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.

[7] Those may include the Berne Convention, TRIPS Agreement, WCT and WPPT.

[8] 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**").

        - For the sake of harmonization, it is advisable that multi-stakeholder international organizations, such as WIPO or UNESCO, propose a unified definition of the notion of a museum's core public interest mission.
    - They shall be free of charge, but museums and stakeholders should be able to generate revenues in the course of uses beyond the exceptions.
    - Compensation should be paid by the museums to right holders who put an end to the orphan or out-of-commerce status of their works, but only if museums generate revenues with the digitized materials that go beyond the purpose of covering digitization costs.

PROPOSAL 2. <u>Statutory exceptions and limitations for the benefit of museums should be given a mandatory character</u>

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 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.

b) Clarifications

- To ensure equal treatment of museums and their users between countries, the exceptions and limitations for the benefit of museums should be harmonized at the international and regional levels;

- Technological protection measures ("**TPMs**") that have as objective or effect to take away the privilege granted by a statutory exception or limitation to the benefit of a museum[9] should not be enforceable;
    - More specifically, rights owners (including assignees, like CMOs and intermediaries) should not be able to block the legitimate exercise of a statutory exception for the benefit of museums through the application of TPMs. The law 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.

[9] 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.

- Unilateral, e.g. non-negotiated or "take-it-or-leave-it," contractual 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. <u>Facilitate effective collective licensing of rights, including where possible, through extended collective licensing systems</u>

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 like entities – as assignees 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/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.[10] 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 that would normally allow museums to use a work are not applicable in case of unpublished works.

- 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.[11] 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 opt 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.[12]

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[10] See notably NEMO Survey on Museums and Copyright (n **Error! Bookmark not defined.**), p. 31 and 34.

[11] See notably UK GOVERNMENT, *Consultation outcome: Extending the benefits of collective licensing*, November 2013, available at: https://www.gov.uk/government/consultations/extending-the-benefits-of-collective-licensing. See however Jean Dryden, Extended Collective Licensing and Archives, Journal of Archival Organization, 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.

[12] 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?" in *Columbia Journal of Law and the Arts*, Vol. 33, Issue IV, January 2010, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1535230), 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*

- So far, however, the ECL model has not yet been endorsed clearly in the laws of a majority of EU member States yet. Art 12 of the EU Copyright Directive of 2019/790 of 17 April 2019 sets a framework to encourage the development of ECL.[13] Besides, non-EU countries are not familiar with ECLs. [14] Having said that, Switzerland is about to adopt a new liberal ECL model that even allows the use of unpublished works.[15]

b) Clarifications

- Legislators should work towards creating and/or encouraging the development of ECLs.

- Museums should take the initiative to design and promote ECLs for selected categories of works and uses by drafting templates.[16] Such templates should notably take into account the following elements:
    - Scope of covered works (out-of-commerce/in-commerce works, complex works containing non represented works, born-digital works, unpublished works) and the licensed uses (non-commercial/commercial);
    - Forms of access of end-users (remote access, general public versus certain categories such as affiliates or members of the rights holders authorising the CMO's ECL, related security and dispute resolution issues);
    - Royalty distribution requirements (approved tariffs, pay-per-use, dealing with small amounts; fair allocation; effective payment, etc.);
    - Criteria for CMOs eligibility and control.

- For out of commerce or collaborative works with both known/unknown authors: out-of-commerce artworks in possession of museums should be promoted by museums, public culture 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.

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online dissemination of Europe's cultural heritage ? Final Report prepared for EuropeanaConnect, Instituut Voor Informatierecht, University of Amsterdam, August 2011, pp 44-55, available at: https://www.ivir.nl/publicaties/download/292

[13] The EU Copyright Directive (n 1) 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.

[14] 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*, available at: https://copyright.gov/policy/massdigitization/. See Jean Dryden, Extended Collective Licensing and Archives, Journal of Archival Organization, 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*".

[15] Draft art. 43a of the revised Swiss Federal Act on Copyright and Related Rights, see the Swiss Federal Council Dispatch of 22 November 2017, FF 2018, p. 614, available at: https://www.admin.ch/opc/fr/federal-gazette/2018/559.pdf.

[16] The UK Intellectual Property Office (UKIPO) worked on a draft template of ECL, but the initial client for an ECL did not follow through.

- 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 and maintain accessibility to digitized materials

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.[17]

- 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 law[18], 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.[19] This right is however limited in that the copyright in such a database "extends only to the selection, coordination, and arrangement of the materials [and does] not affect the public's right to access and use the individual images"[20] not otherwise copyrighted. Many limitations and exceptions (in the EU)[21] or arguments in favor of fair use (in the 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 database maker a strong monopoly[22], 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 content[23], as long as it made a substantial investment to obtain, verify and/or present

[17] 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 *Fixtures Marketing Ltd v. Organismos prognostikon agonon podosfairou AE (OPAP)*, CJEC, C-444/02, 9 November 2004, par. 32.

[18] Christophe CARON, *Droit d'auteur et droits voisins,* Lexis Nexis, Paris, 2015, p. 591.

[19] 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 U.S. 340 (1991).

[20] Robert C. MATZ, "Bridgeman Art Library Ltd. V Corel Corp." in *Berkeley Technology Law Journal*, Vol. 15, Issue 1, January 2000, p. 21.

[21] See notably Art. 6(1) and 6(2)(a)-(c) of the EU Database Directive (n 17).

[22] EU Database Directive (n 17); CARON (n 18), pp. 593-594.

[23] EU Database Directive (n 17), art. 7(1)-(2).

the data collected.[24] 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.[25]

- 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.[26] 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

- Museums who benefit from the *sui generis* database right (as creators of databases) should generously license it to allow free access and, when possible, re-use of its contents for non-commercial purposes by third parties.

- Museums should not unreasonably prevent access to and re-use of their databases for commercial purposes by third parties. However, they may request payment of a compulsory license in that regard.

- The *sui generis* database right itself should be reviewed by legislators in order to avoid unduly restrictions on access and re-use of works that have fallen in the public domain.

PROPOSAL 5. <u>No additional copyright protection granted to digitized materials</u>

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, potentially necessitating the rights holder's consent for future uses).

- Most digitization operations imply taking photographs of artworks. As such, whether a new copyright is conferred to the digitized image varies largely depending on the copyright situations for photographs in a particular jurisdiction.

[24] The aim is to encourage information processing, not data creation. Therefore, the investment related to data creation are not taken into consideration: CARON (n 37), p. 592; *The British Horseracing Board Ltd e.a. v. William Hill*, CJEU, C-203/02, 9 November 2004, par. 31.
[25] 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.
[26] CARON (n 18), p. 597.

- Some jurisdictions – such as Germany and Austria – provide for a wide protection of all photographs, notwithstanding their degree of originality (the *Lichtbildschutz* doctrine). This includes photographic reproductions of museums objects.[27]
- In other jurisdictions, such as Switzerland (currently), the United Kingdom and the United States, 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).[28]

- This distinction 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 further 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.[29]

b) Clarifications

- Museums should be encouraged to open their online collections as much as possible while respecting copyright law.
  - They should avoid placing restrictions on the access to and reuse of public domain materials such as digitized images of artworks that are clearly in the public domain (except in Germany, Austria, France and potentially Switzerland, see above). Museums

[27] See most recently Bundesgerichtshof (German High Court of Justice), Verdict of December 20, 2018 - I ZR 104/17 – Museumsfotos, http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&nr=90674&linked=pm.
Proposed amendments to the *Swiss Federal Act on Copyright and Related Rights* of 9 October 1992, CC 231.1 ("**Swiss CopA**") would also grant a similar protection to all photographs of three-dimensional real objects. 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]*, Kunst und Recht 2/2018, p. 45-56, at p. 55.

[28] Grischka PETRI, "The Public Domain vs the Museum: The Limits of Copyright and Reproductions of Two-dimensional Works of Art" in Journal of Conservation and Museum Studies, 12(1), 2014, available at: http://doi.org/10.5334/jcms.1021217 . See also for instance the U.K. case *Temple Island v. New English Teas and Nicholas John Houghton*, [2012] EWPCC 1, at s. 20, and the United States landmark case *Bridgeman Art Library Ltd. V. Corel Corp.*, 36 F. Supp. 2d 191 (S.D.N.Y. 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° 13-21001).

[29] See Kenneth CREWS, "Museum Policies and Art Images: Conflicting Objectives and Copyright Overreaching" in
Fordham Intellectual Property, Media & Entertainment Law Journal, Vol. 22, 2012, p. 795, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2120210 .

should rather encourage the public to exploit and reuse these images, and find other ways to recoup their digitization costs if needed.

- In jurisdictions where digitized copies of artworks benefit from copyright, museums should attempt to negotiate the necessary licenses with the initial rights holders (usually photographers) to allow exploitation of these images by the public.

- 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.

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

a) Issue at stake

Museums hold an important amount of data, including various types of metadata pertaining to the physical and born-digital works in their collections which, if properly structured, allows museums to analyze collections, objects, and creators in novel ways.[30] However, for data to be fully exploitable and exploited, museums must put machine-learning processes in place, e.g. allow artificial intelligence (AI) to mine through their digitized collections to "learn" from the data, process it and produce results; indeed, "AI [is] an essential tool for museums managing the massive scale of data in the 21st century [and] may be the only feasible way to make meaning of archives at this scale."[31] This allows museums to notably "unlock the potential of digital image collections by tagging, sorting, and drawing connections within and between museum databases"[32], keep track of newly generated data as archives grow, and help identify fakes and forgeries.[33] 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. [34]

[30] Brendan CIECKO, "Examining Artificial Intelligence in Museums", Cuseum, 25 February 2016, available at: https://cuseum.com/blog/exploring-artificial-intelligence-in-museums; see also Brendan CIECKO, "6 Ways that Machine Vision Can Help Museums", Cuseum, 10 March 2016, available at: https://cuseum.com/blog/6-ways-that-machine-vision-can-help-museums.

[31] Elizabeth MERRITT, "Artificial Intelligence The Rise Of The Intelligent Machine", American Alliance of Museums, Center for the Future of Museums Blog, 1 May 2017, available at: https://www.aam-us.org/2017/05/01/artificial-intelligence-the-rise-of-the-intelligent-machine/.

[32] MERRITT (n 31).

[33] Rene CHUN, "These Four Technologies May Finally Put an End to Art Forgery", Artsy, 18 July 2016, available at: https://www.artsy.net/article/artsy-editorial-these-four-technologies-may-finally-put-an-end-to-art-forgery.

[34] Ben DAVIS, "Google Sets Out to Disrupt Curating With Machine Learning", Artnet News, 14 January 2017, available at: https://news.artnet.com/art-world/google-artificial-intelligence-812147. 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, available at: https://www.digitaltrends.com/cool-tech/tate-britain-artificial-intelligence-exhibit-britain/.

- Moreover, works fully created by machines and algorithms are now being sold by world-leading auction houses,[35] featured in exhibitions[36] and even dubbed as more novel and appealing than "real" works.[37] 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 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).[38] The copyright status of AI-created works is even more unclear[39] and multiple issues reaching far beyond the realm of copyright will need to be taken into consideration before we reach a final answer.[40]

- This situation 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

- Museums should be encouraged to use AI to fulfil their public interest mission.

- Policymakers and legislators 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.

[35] 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, 25 October 2018, available at: https://www.nytimes.com/2018/10/25/arts/design/ai-art-sold-christies.html .

[36] For instance, in 2017, the STATE Festival presented "Unhuman: Art in the Age of AI", an exposition comprised of AI-created works curated by Emily L. Spratt. See STATE FESTIVAL, https://www.statefestival.org/program/2017/unhuman-art-in-the-age-of-ai.

[37] 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, available at: https://www.artsy.net/article/artsy-editorial-hard-painting-made-computer-human.

[38] Daniel SHÖNBERGER, "Deep Copyright : Up – and Downstream Questions Related to Artificial Intelligence (AI) and Machine Learning (ML)" in *Droit d'auteur 4.0/Copyright 4.0*, DE WERRA Jacques (ed.), Schulthess Editions Romandes, Geneva / Zurich, 2018, pp. 145-173, available at: https://ssrn.com/abstract=3098315, at p. 13-17.

[39] 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 BOYDEN, "Emergent Works" in *Columbia Journal of Law and the Arts*, 2016, available at: https://doi.org/10.7916/D8NC61NX, p.391; Ana RAMALHO, "Will Robots Rule the (Artistic) World? A Proposed Model for the Legal Status of Creations by Artificial Intelligence Systems" in *Journal of Internet Law*, Vol. 21, No.1, 2017, p. 12-25, available at: https://ssrn.com/abstract=2987757, p. 15; and SHÖNBERGER (n 38). This is a beneficial position that allows museums and their visitors to exploit these works, notably for study, research and creation purposes.

[40] RAMALHO (n 39), p. 13, 18.

- Furthermore, priority should be given to research pertaining to the copyright status of AI-created works. Policymakers and legislators should specify that those works are out-of-copyright, which will facilitate their dissemination and re-use by museums and the public.

2. DISSEMINATION

PROPOSAL 7. <u>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</u>

a) Issue at stake

- As explained under Proposal 1, the lack of exceptions and limitations applicable to a 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 the 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 world[41] unless clear and worldwide unified exceptions or limitations can be invoked.

- 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.[42] Brexit may throw this issue into further disarray. 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

- New exceptions to the right of communication to the public[43] shall be defined. These exceptions shall provide that museums may communicate works contained in their collections to the public

[41] CANAT et als. (n 1), p. 28.

[42] Rita MATULIONYTE, "Enforcing Copyright Infringements Online: In Search of Balanced Private International Law Rules" in *Journal of Intellectual Property, Information Technology and E-Commerce Law*, 6 (2015) JIPITEC 132, available at: https://www.jipitec.eu/issues/jipitec-6-2-2015/4274.

[43] 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.

or make them available to the public as part of their core public interest mission by executing the following specific acts (carried out by the museums themselves)[44]:

- exhibiting or displaying the works in public in any format, including a digital reproduction, on the premises of the museum;
- making available digital reproductions of analogue works contained in their collections on the website of the institution;
- making available digital inventories of works contained in the collection to the public for purposes of education, private research or study[45] (provided that such purposes are not pursued for commercial advantage[46]).

- For more certainty, the acts carried out for the purposes listed above should be deemed not to pursue direct or indirect commercial advantage and not to conflict with the normal exploitation of the works or to unreasonably prejudice the legitimate interests of the rights holder.[47]
    - They shall be limited to the museum's core public interest mission (which generally includes collection, preservation, exhibition and dissemination)[48], thus be in accordance with applicable international treaties[49].
        - If not already done[50], the definition of what constitutes a core public interest mission should be agreed upon per jurisdiction after consultation of the relevant stakeholders, including representatives of the copyright holders (i.e. individuals or collective management organisations), of the users (i.e. museums, general public) and of the competent public authorities.
        - For the sake of harmonization, it is advisable that multi-stakeholder international organizations, such as WIPO or UNESCO, propose a unified definition of the notion of a museum's core public interest mission.

- With regard to making available out of commerce works contained in the permanent 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. Acts which would otherwise be permitted under an exception shall not be permitted if valid ECL solutions are available authorizing the acts in question and the museum responsible for those acts knew or ought to have been aware of that fact. When a CMO, on behalf of its members, concludes a non-exclusive license for non-commercial purposes with a museum for the making available of out-of-commerce works permanently in the collection of the

[44] These exceptions may already exist in some jurisdictions. In the United States, for instance, the AAMD Guidelines (n **Error! Bookmark not defined.**) take the position that some of these activities are already covered by fair use.

[45] As explained by CANAT et als. (n 1), at p. 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 is covered by fair use; see *Kelly v. Arriba Soft Corp.* (n 4).

[46] This could be the case, for instance, when hugely profitable, privately owned academic publishers digitize works in order to commercialize the copies.

[47] See comments made under footnote 5.

[48] See footnote 6 (proposal 1).

[49] Those may include the Berne Convention, TRIPS Agreement, WCT and WPPT.

[50] For instance, many UK public bodies have already published their statements of public task as a result of the Revised PSI Directive (n 8).

museum, such a non-exclusive license may be extended or presumed to apply to rights holders of the same category as those covered by the license who are not represented by the CMO, provided that:

- the CMO is, on the basis of mandates from rights holders, broadly representative of rights holders in the category of works or other subject-matter and of the rights which are the subject of the license;
- equal treatment is guaranteed to all rights holders in relation to the terms of the license; and
- all rights holders may at any time object to the application of the license to their works or other subject-matter.

- 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).[51] The acts that the members of the public might accomplish with respect to the works made available via the museum's website would need to fall under another statutory exception or be subject to the rights owner's prior permission.

- Similarly, the statutory exception described above in relation to the making available to the public of works should 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.

PROPOSAL 8. <u>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")</u>

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).

- 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

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

museums. "Copyright undetermined"[52] is too broad and does not reflect the museum's efforts in researching.

b) Clarifications

- A Code of Conduct needs to be established, which 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.
    - These items would need to include all exceptions and limitations applicable to museums if they intend to use protected works.
    - It would also need to 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.

- See our proposed *Code of Conduct for a "Safe Harbor Right Statement"* in Part II of this Policy Paper as a model.

- The existing right statements (rightsstatements.org) should be amended to reflect the due diligence steps taken by the museum.
    - 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.

- Because the Code of Conduct would reflect the international, globally-accepted standards pertaining to the use of protected works in the context of museums' mass-digitization and dissemination operations, museum professionals following it, and therefore completing a due diligence process, should 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 on their rights.

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

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 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

[52] RIGHTS STATEMENTS, "Copyright Undetermined", http://rightsstatements.org/page/UND/1.0/?language=en. "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».

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 enterprises. 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 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.[53]

- 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 even wait until copyright protection ceases before they organize a retrospective on order to forego license payments and author's or author's successor's approval.[54] 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.

b) Clarifications

- A common understanding among all stakeholders – including multi-stakeholder international organizations, such as WIPO or UNESCO – 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:
    - 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;
    - They could include precise technical requirements (for example, file size);
    - They need to be compatible with the generally accepted ICOM Code of Ethics.[55]

[53] 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.
[54] That was the case for German Bauhaus artist Oskar Schlemmer; see Adrienne BRAUN, "Oskar Schlemmers Erbe: Wie ein Künstler verschwindet" in *Süddeutschen Zeitung*, 17 May 2010, https://www.sueddeutsche.de/kultur/oskar-schlemmers-erbe-wie-ein-kuenstler-verschwindet-1.591908
[55] *ICOM Code of Ethics* (n **Error! Bookmark not defined.**) (see for example Sect. 4.1 and 4.7)

- 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. <u>Reaffirm the targeting test for online museums to avoid the applicability of unexpected foreign laws</u>

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 domicile[56], 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.[57] 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.[58] Under this approach, the courts 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.[59]

b) Clarifications

- The "access approach" in online copyright infringement cases should be rejected 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 CJEU cases[60] and is found in the CLIP[61] and ALI[62] soft law Principles. A similar test is also recommended by the WIPO regarding online trade mark infringement.[63]

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[56] 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 od judgments in civil and commercial matters*, RS 0.275.12 ("**Lugano Convention**").

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

[58] See notably *Pinckney v. Mediatech*, CJEU, C-170/12, 3 October 2013, and *Pez Hejduk v EnergieAgentur NRW GmbH,* CJEU, C-441/13, 22 January 2015.

[59] For more information on those criticisms as well as favourable arguments, see MATULIONYTE (n 42).

[60] See notably the cases cited by MATULIONYTE (n 42) at her footnote 48.

[61] Principles on Conflict of Laws in Intellectual Property ("**CLIP**") by the European Max Planck Group on Conflict of Laws in Intellectual Property; see art. 2:202.

- Such a targeting test should also clearly be adopted for online museums 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).

- 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.[64]

PROPOSAL 11. <u>Develop an "open data" policy framework for museums</u>

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 data[65] policies, that allow data to 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.

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[62] Principles of American Law Institute ("**ALI**") governing jurisdiction, choice of law and judgments in transnational disputes in the field of intellectual property; see art. 204(1) ALI Principles.

[63] MATULIONYTE (n 42) 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 WICHARD, "The Joint Recommendation Concerning Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet", in Drexl and Kur, *Intellectual Property and Private International Law: Heading for the Future* 257-264 (Hart Publishing 2005)."

[64] See notably, for inspiration, the guidelines found at p. 6-7 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) and MATULIONYTE (n 42).

[65] As explained by Mia RIDGE, "Unlocking Potential: Where Next for Open Cultural Data in Museums?" in Museum ID, vol.13, available at: http://www.miaridge.com/paper-where-next-for-open-cultural-data-in-museums: "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 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, available at: http://opendefinition.org/od/2.1/en/.

- Some projects, such as OpenGLAM, have already submitted principles and guidelines to help museums open up their collections and metadata.[66] Yet, given the legal issues and uncertainties that exist in terms of making cultural resources available as open data, to date only the larger institutions[67] have been willing to implement open data policies in respect of works already in the public domain.

- If digitized cultural material is to be made available as open data several issues still need to be resolved, including:

    - Lack of co-ordinated international framework: Whilst the European Union has attempted to harmonize national laws and policies to encourage the re-use of digitized cultural material in open data format[68], similar initiatives at an international level are lacking.

    - No obligation for public museums, libraries and archives to provide digitized cultural resources as open data: At the European level, despite the harmonising provisions of the Revised PSI Directive, 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 charge. Re-use and/or the free-of-charge is not mandatory.

    - Disparity between public and private institutions: Existing legislation concerning open data, such as the Revised PSI Directive, applies only to museums and cultural institutions in the public sector[69] 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.

    - 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. Whilst the international standard is the Creative Commons (CC) licensing framework[70], different countries have established their own open licenses.[71]

    - Unresolved challenges of intellectual property rights: National laws and policies approach differently the question of whether digitization creates a new copyright work or simply results in an un-original work not qualifying for protection (see Proposal 5). The scope of exceptions granted to cultural institutions for certain acts and uses also varies between countries (see Proposal 1 and Proposal 7). In addition, intellectual property

[66] See https://openglam.org/principles/.
[67] Examples include the Rijksmuseum (Netherlands) (https://www.rijksmuseum.nl/en/rijksstudio) and the Metropolitan Museum of Art (New York) (https://www.metmuseum.org/about-the-met/policies-and-documents/image-resources).
[68] See Revised PSI Directive (n 8).
[69] The Revised PSI Directive applies to publicly funded, governed or managed museums, libraries and archives (Revised PSI Directive, article 2(1)(f) *a contrario*).
[70] 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/.
[71] 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).

rights may conflict with the attempt of open access policy framework (in particular copyrights of a digitized work owned by the artist or a third party).[72]

- Legal uncertainty in the treatment of orphan and out-of-commerce works: Uncertainty regarding the rights underpinning orphan and out-of-commerce works make cultural institutions reluctant to include such works in their digitization projects and make them freely available as open data for re-use.

b) Clarifications

- Measures which should be adopted to facilitate making cultural resources available as open data include:

  - 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.

  - Resolving intellectual property challenges: Reaffirming that the treatment of orphan and out-of-commerce works and that the act of digitization do not create a separate copyright, in order to help museums identify and include these works in their open data policies. Clearer exceptions for museums engaging in certain acts of digitization and communication and the development of "safe-harbour" rights statements could also assist (see Proposal 14)[73], as would improving rights information databases and collective licensing systems for granting open licenses (see Proposals 1, 3, 7 and 10).

  - Creating sector specific inter-operable open licenses: Developing 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

[72] 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*").

[73] The website www.rightsstatments.org provides cultural heritage institutions with simple and standardized terms to summarize the copyright status of works in their collection. It identifies the rights status of works, including content that has no rights associated with it and is therefore eligible for open access treatment.

member states to provide legal protection for two specific moral rights: the right of attribution and the right of integrity.[74] However, the Berne Convention does not provide for a harmonized regime on potential waivers, which is subject to national statutory law.[75]

  - With regard to the right of attribution, Creative Commons licenses do not create an issue, since they all require attribution.[76] Likewise, the French *Licence Ouverte* requires attribution.[77]
  - However, with regard to the right of integrity, some countries such as France provide that these rights are non-assignable under statutory law.[78] 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,"[79] which is very unlikely in the context of standardized open content licenses.[80] 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; by using such a license, an author waives specific rights, but not in their entirety.[81] 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.[82]

- Second, various licencing models exist and many more are likely to emerge in the future, raising concerns of interoperability. For instance, the question arises as to how a specific licencing model translates into another. 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 subject of controversy.

- Several national licencing models have addressed the issue of compatibility and expressly refer to well-known licenses.[83] However, since most licenses do not define the used terminology, or make

[74] Article 6*bis* of the Berne Convention.
[75] Michel JACCARD and Eva CELLINA, "Les Creative Commons, avenir du droit d'auteur ?" in *La Semaine Judiciaire II*, Vol. 139 (2017), no. 8, p. 229-257, at p. 240-241.
[76] Catharina MARACKE, "Creative Commons International: The International License Porting Project – Origins, Experiences and Challenges", in *Journal of Intellectual Property, Information Technology and Electronic Commerce Law,* 1 (2010) JIPITEC 4, p.7, available at: https://www.jipitec.eu/issues/jipitec-1-1-2010/2417/dippadm1268743811.97.pdf.
[77] ETALAB, LICENCE OUVERTE/OPEN LICENCE, VERSION 2.0, https://www.etalab.gouv.fr/wp-content/uploads/2017/04/ETALAB-Licence-Ouverte-v2.0.pdf.
[78] See articles L. 121-1 and following of the French Intellectual Property Code.
[79] MARACKE (n 76), p. 7-8. See also JACCARD and CELLINA (n 75), p. 241.
[80] The threshold under Swiss law is an author's protection against excessive commitments (art. 27 para. 2 Civil Code); see JACCARD and CELLINA (n 75), p. 241.
[81] JACCARD and CELLINA (n 75), p. 240-241.
[82] 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.
[83] 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 90). 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;

up their own definition, it is necessary to draft a harmonized terminology. In the event of restrictive licenses, multi-licencing may be desirable for compatibility with the licencing scheme of other models.

b) Clarifications

- All licencing models should require attribution. Also, national legislation shall be adapted 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. <u>Obligation to maintain the digitized objects records / platforms updates (and avoiding obsolescence)</u>

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.[84] However, this is currently not easy due to the vulnerability of digital media to deterioration and the obsolescence of digital platforms and technologies.[85] Failure to address those problems may lead to the loss of all 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 international[86] and European[87] levels, mention that digital preservation should be a development priority. The ReACH (Reproduction of Art and

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SEE THE NATIONAL ARCHIVES, OPEN GOVERNMENT LICENCE, GUIDANCE FOR USERS, http://nationalarchives.gov.uk/documents/information-management/ogl-user-guidance.pdf and DATA NORGE, NORWEGIAN LICENCE FOR OPEN GOVERNMENT DATA (NLOD) 2.0, https://data.norge.no/nlod/en/2.0.

[84] See notably U.S. LIBRARY OF CONGRESS, *DigitalPreservationEurope*, http://www.digitalpreservation.gov/series/edge/dpe.html; Kalina SOTIROVA, Juliana PENEVA, Stanislaw IVANOV, Rositza DONEVA and Milena DOBREVA, "Chapter 1: Digitization of Cultural Heritage – Standards, Institutions, Initiatives" in *Access to Digital Cultural Heritage*, Plovdlv, 2012, available at: http://www.math.bas.bg/infres/book-ADCH/ADCH-ch1.pdf, p. 29.

[85] SOTIROVA et als. (n 84), p. 30.

[86] 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*.

[87] 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, available at: https://eur-lex.europa.eu/eli/reco/2006/585/oj; and the *European Commission Recommendation of 27 October 2011 on the digitization and online accessibility of cultural material and digital preservation*, 2011/711/EU, available at: http://data.europa.eu/eli/reco/2011/711/oj.

Cultural Heritage) initiative also specifically targets this issue.[88] 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.

b) Clarifications

- An obligation to preserve digitized cultural heritage should be declared as part of the existing international conventions, to ensure long-term accessibility to digital information for future generations.

- At the national level, legislators should attach an obligation to maintain up-to-date digital tools and object records to the copyright exception to digitize for conservation purposes.

- Because technology continually evolves, and because multiple methods may be used to reach the goal of effective preservation, the precise method through which digitized content is to be preserved should not be defined by law. Rather, legislators should impose a general obligation on cultural heritage institutions and/or other parties participating in the digitization process, as the case may be, to maintain or preserve this content. 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.[89] Museums should then create more detailed obligations pertaining to those 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.

- The 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. To solve those issues, different models of certification for repositories of digital materials and monitoring of digital preservation processes should be introduced.[90]

[88] VICTORIA AND ALBERT MUSEUM, *ReACH (Reproduction of Art and Cultural Heritage)*, available at: https://www.vam.ac.uk/research/projects/reach-reproduction-of-art-and-cultural-heritage.

[89] 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.

[90] Zinaida MANŽUCH, "Ethical Issues In Digitization Of Cultural Heritage" in *Journal of Contemporary Archival Studies*, 2017, Vol. 4 , Article 4, p. 9, available at : https://elischolar.library.yale.edu/cgi/viewcontent.cgi?article=1036&context=jcas

LEXICON

For ease of reference, this section provides brief definitions for some of the legal and technical terms found in this Policy Paper.

Collective Management Organization (CMO) – Organization to which authors and other rights owners grant exclusive licenses to act on their behalf regarding their copyrights, such as granting permission for third-party use, collecting and distributing royalties, preventing and detecting infringement of rights, and seeking remedies for infringement. One of their main advantages is to provide a single, central source dealing with all kinds of copyright issues, so that rights owners do not have to negotiate licenses and remuneration for every single use of their works. [91]

Digital inventory –A museum's digital database created for internal managerial uses and containing thumbnail or full-size versions of digitized works.[92]

Economic rights – Rights of creators of copyrighted works that allow rights owners to derive financial reward from the use of their works by others, by allowing them to decide how to use the work and prevent unauthorized use by others. Most copyright laws state that rights owners have the right to authorize or prohibit the following acts: (1) reproduction of the work; (2) distribution of copies of the work; (3) public performance of the work; (4) broadcasting or other communication of the work to the public; and (5) adaptation of the work in another form.[93]

Extended Collective Licensing (ECL) – Type of licensing that allows an authorised collecting society to extend an existing collective license so that it can license on behalf of all rights holders in the sector, except those who opt out. While traditional collective licensing relies on rights holders opting in by giving the collecting society express permission to license their works, ECL assumes that rights holders want their works to be licensed, unless they opt out.[94]

Moral rights – Rights of creators of copyrighted works that recognize the interest of an author in controlling the use of a creative work. They include the right of attfribution (right to be credited as the author of a work) and the right of integrity (right to control distortion, modification and destruction of a work which would be prejudicial to the author's honour or reputation).[95] These rights are generally broadly recognized and protected in civil law jurisdictions, and are more limited in common law jurisdictions, especially in the United States. Moral rights are usually only accorded to the individual authors and in many national laws, they remain with the authors even after they have transferred their economic rights.[96] This means that even where a CMO owns the economic rights in a work, for instance, the original author continues to have moral rights.

Orphan works – Works for which the rights holder is either unknown, cannot be located or cannot be contacted.

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[91] WIPO: Understanding Copyright (n 1), p. 21; WIPO, *Collective Management of Copyright and Related Rights,* available at: http://www.wipo.int/copyright/en/management/
[92] CANAT et als. (n 1), p. 44.
[93] WIPO: Understanding Copyright (n 1), p. 9-10.
[94] UK GOVERNMENT, *Consultation outcome: Extending the benefits of collective licensing,* 28 November 2013, available at: https://www.gov.uk/government/consultations/extending-the-benefits-of-collective-licensing.
[95] THOMSON REUTERS PRACTICAL LAW, *Glossary: Moral Rights,* available at: https://uk.practicallaw.thomsonreuters.com/9-506-4493?transitionType=Default&contextData=(sc.Default)
[96] WIPO: Understanding Copyright (n 1), p. 14.

Out-of-print/out-of-commerce works – Works "that are still protected by copyright but 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"[97], 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.[98]

Technical Protection Measures (TPM) – Technological measures aimed at protecting copyrighted works against unauthorized uses. There are two main types of TPMs: access control TPMs, which are used to control access to copyrighted content (for instance by requesting a password so that only authorized persons can access it), and copy control TPMs, which prevent users from copying copyrighted content (for instance, by disabling the option to save or copy a digital image).[99]

Text and Data Mining (TDM) – "Research process using automatic technical analysis methods on large text/data collections. It allows the identification of relationships, patterns, and/or trends that cannot be detected by human means. TDM represents a more comprehensive analysis of information and thus allows the discovery of new knowledge that may subsequently be investigated in a more traditional manner."[100]

Unpublished works – Works for which copies have not been made available to the public and thus have not been distributed in any manner. The Berne Convention expressly states that the exhibition of a work of art (in a museum, for instance) shall not constitute publication[101]; on the contrary, the work of art will be considered published if displayed on a website.

[97] EUROPEAN COMMISSION, *Memorandum of Understanding (MoU) on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works – Frequently Asked Questions*, available at: http://europa.eu/rapid/press-release_MEMO-11-619_en.htm.

[98] EUROPEAN COMMISSION, *Memorandum of Understanding – Key Principles on the Digitisation and making Available of Out-of-Commerce Works*, available at: http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/20110920-mou_en.pdf

[99] IFPI, *The WIPO Treaties: Technological Measures,* March 2003, available at: http://www.ifpi.org/content/library/wipo-treaties-technical-measures.pdf

[100] EPFL LIBRARY, *Text and Data Mining,* https://library.epfl.ch/page-145943-en.html

[101] Berne Convention, article 3(3). However, the exhibition of a work of art in a commercial gallery for sale probably constitutes a publication.