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Copyright

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Open GLAM

Copyright

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How this area overlaps with open GLAM: Copyright is intended to incentivize the production of new creative works and protect authors' connection to them. In return, the author receives exclusive rights over the creative work and can commercialize or release them for various uses. Once the copyright expires, these works pass into the public domain and can be used by anyone to produce *new* creative works and knowledge.

GLAMs protect, preserve, and extend access to these works (and many other materials) for the appreciation of current and future generations. This is often facilitated today by digitizing collections and making them available online. But new questions arise during this process. What is the reproduction's theoretical or legal relationship to the work that it captures? Is the reproduction a *new* work? In fact, is it a new *creative* work worthy of its own copyright? If so, what is the effect of claiming and enforcing a copyright in the reproduction, especially considering the vast amount of rare or unique public domain materials in heritage collections? What options are available to users seeking to access and reuse those public domain works?

2. Copyright

Copyright has a number of specific conditions that lead to its ubiquity in reproductions of public domain works. These conditions and their effects are explored below.

- **Copyright arises automatically in original works.** As soon as an original idea is expressed, copyright will automatically arise and protect the new creative work. For us, the question is whether a faithful reproduction of a public domain work is sufficiently "original" to attract a new copyright. We'll explore what this means below and the many moving parts to this question.
- **Copyright lasts a long time.** Copyright (generally) lasts during the author's lifetime and for 70 years after their death. For an author who dies in 2020, this means their *oeuvre* of works will officially pass into the public domain in 2091. This is a crucial detail when discussing the impact of a copyright claim to digital surrogates of public domain works.
- **Copyright has economic benefits.** A (valid) copyright entitles the rights holder to commercialize a work, such as through licensing a digital surrogate to a user for a fee. In theory, this can bring in revenue for the rights holder. But copyright-based business models also cost money to run. The economic incentives underlying copyright are important to consider below. ***Barriers to Open Access*** discusses whether they hold up in practice.
- **Moral rights may accompany and complicate copyright.** Moral rights protect the author's personal attachment to the work and can differ significantly from one jurisdiction to the next. In some countries, moral rights never expire. This may be relevant for any moral rights in a material work, as well as any *new* moral rights arising in a digital surrogate.

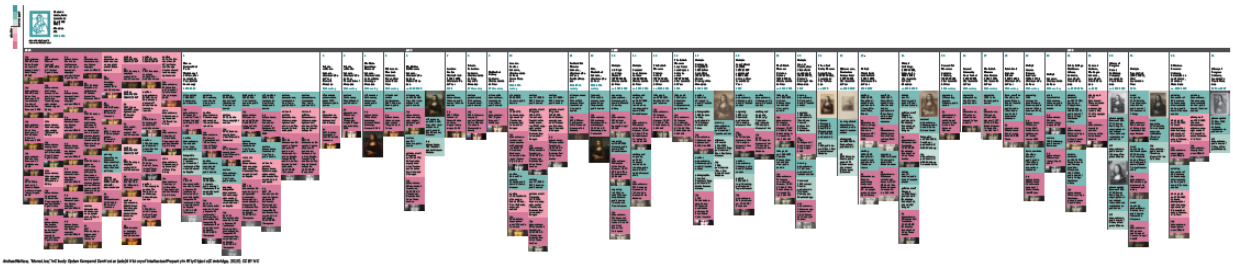
- **Cross-border differences among national laws increase risk.** Where copyright or moral rights differ from one country to the next, these differences may require GLAMs to consider multiple legal frameworks when digitizing and making public domain collections available online.
- **Copyright in reproduction media is a contested but unsettled area of law.** Whether copyright or other IPR arises in reproduction media of public domain works is an unsettled legal question in most jurisdictions, even where case law or new legislation suggests a copyright is not warranted. Even so, other areas of law provide creative workarounds for releasing materials to the public domain, so long as there is a desire to do so.
- **Legal uncertainties cause risk-averse habits to form and be normalized.** All of the above open questions (along with many others that GLAMs encounter on a daily basis) can lead to risk-averse approaches being taken and normalized within cultural heritage management. The more common these practices become, the more normal they seem and the harder they become to change, for both practical and legal reasons.

These conditions can have a detrimental effect on GLAMs' willingness or ability to take on risk or release public domain materials for public reuse. To aid this discussion, the illustration below clarifies exactly *which* layer of rights we are focusing on: the rights associated with the reproduction of a public domain work (and other media, like metadata).

2.1. The Ubiquity of ~~Art~~ Copyright

Almost a century ago, Paul Valéry wrote: "Works of art will acquire a kind of ubiquity. We shall only have to summon them and there they will be, either in their living actuality or restored from the past. They will not merely exist in themselves but will exist wherever someone with a certain apparatus happens to be."[1] With the range of technologies available today for reproduction and access, we may

be well on our way to realizing Valéry's prediction. The advent of mass digitization, the internet, and a vibrant public domain furnish us with the tools necessary for the at-home delivery of the cultural heritage held in GLAM collections. Yet copyright claims far outpace public domain reproductions in terms of ubiquity. In fact, the multiplicity of claims to nearly identical digital surrogates —let alone among the potential *layers* of reproduction in a single surrogate— obstructs Valéry's notion, even for a work as ubiquitous as the *Mona Lisa*.[2]



A data visualization of the various digital surrogates found in GLAM digital collections and photo licensing libraries of the Mona Lisa and various reproductions made over the past 500 years. Download the pdf below to view in greater detail.

pdf Mona Lisa Data Visualization.pdf 1 MB

To understand this phenomenon, we must first define the components that have induced it. There is almost an impossibility to scoping copyright, even for a narrow topic such as this one. But other resources exist for that.[3] Here, we'll outline only the circumstances that have spawned copyright's ubiquity in GLAM digital reproduction media.

The discussion below is not framed as criticism of copyright, but rather as a defense of the public domain and a call for greater vigilance and nuance with its protection and management. Copyright is important to support authors, protect authors' connections to their works, and encourage new works to be made in the public interest. Here, we are talking about a very tiny part of copyright law that is being applied to an immeasurable amount of materials stewarded by cultural institutions in a way that is not only legally questionable but also contradicts the public interest. Access and reuse of these materials is important for educating, inspiring, and providing content to *the public* to make new creative works protected by copyright. Given the dormant economic and societal value of public domain heritage collections,[4] this requires rebalancing access in consideration of user rights, particularly for reproduction of materials in which a valid copyright has expired or never existed.[5] This also requires a deep dive into copyright's conditions to appreciate how it can obstruct its own goals when misapplied.

2.2. Theories Underlying Copyright Protection

To start, a brief note on copyright theories. Copyright rewards the creator of a work with a monopoly over its use for a limited time. That copyright is envisioned to incentivize the work's creation and

protect the author's investment in its making.[6] Copyright's underlying theories advance that this personal monopoly encourages the production of new creative works, which leads to greater cultural progress and human welfare gains.[7] We all benefit from more creative works and new knowledge.

Originally designed for a material world of books and publishing, copyright has since been extended to protect films, artworks, computer programs, databases, and countless other media types.[8] IPR's growth in the digital era has challenged many of our traditional justifications and normative understandings of copyright.[9] Indeed, research shows that the economic incentive theories upon which copyright is founded increasingly diverge from broader societal patterns around creation, consumption, and welfare benefits.[10] Keep this in mind, because we'll revisit these theories later in relation to GLAMs.

2.3. The Nature of Copyright Protection: both Automatic and *Long*

Copyright protection is automatic and long. It vests the moment an original expression is fixed in a material form, triggering a bundle of exclusive rights that can last well over a century. No copyright registration or formal notification is necessary to receive the lengthy monopoly over the work's use.

For our purposes, these conditions raise at least two issues. First, it can be difficult to determine a digital surrogate's copyright status online. The rights status of reproduction media is not always clearly displayed, let alone embedded in the file in a machine-readable form. Considering the widespread practice of claiming copyright in reproduction media, users cannot rely on the rights status of the underlying work to clear copyright in the digital surrogate. This introduces uncertainty to whether the work's reproduction is in-copyright versus in the public domain.

Second, the lengthy term of protection is problematic when applied to this type of digital media. The technologies used to reproduce and extend access to a public domain work will obviously move on to new formats long before the (alleged) copyright expires in the digital surrogate. With analog media, there may be historical milestones that render a material reproduction relatively safe to engage with due to changes in copyright law, new legislation, or the overwhelming likelihood that the rights have expired. For example, users can assume that a 19th-century photograph taken more than 150 years ago is in the public domain, or at least that its reuse presents a vanishingly-small amount of risk. However, there is (and may never be) any equivalent period of time with digital reproduction media for practical reasons. By the time the digital media created today is deemed public domain or at least risk-free, its format will almost certainly be obsolete, inaccessible, or insufficient for reuse via future technologies.

Copyright's term of protection was not always so long. Over the years, international developments have strengthened protection standards and imposed compliance obligations on the states that sign them.[11] What began as a national period of protection for 14 years after publication has expanded to an

international custom measured by the author's lifetime + 70 years.[12] Many of these legislative reforms even extended the term of protection to works already created and in circulation, which seems directly at odds with copyright's incentive-to-create theories discussed above. Moreover, empirical studies increasingly demonstrate the negative impacts of copyright's long term of protection on cultural welfare goals.[13]

Studies have also shown that copyright can make older in-copyright creative works disappear, which results in less access for a significant chunk of cultural materials.[14] Generally speaking, the public domain contains all the creative works made by authors who died prior to 1950, which means the works can be digitized and made available online. In-copyright works require permission from the rights holder to do the same, which means they are available online to a much lesser degree. In fact, researchers have referred to the period of years following the public domain cut-off (*i.e.*, 1951 to present) as the "Twentieth-century black hole."[15] Research by Europeana has shown a dramatic drop in the availability of works online as soon as copyright kicks in. With digitization, different black holes will await us by the time the (allegedly) in-copyright digital surrogates of these public domain works pass into the public domain, or what some have predicted might become a digital dark age.[16]

2.4. "Originality" and the Validity of Copyright in Reproduction Media

Given that the works being reproduced are in the public domain, the question for us becomes whether the reproduction media attracts any IPR protections, but particularly copyright. The answer hinges on the legal concept and criterion of "originality," meaning whether the reproduction media is sufficiently "original" for copyright protection by national standards.[17] National originality standards are notoriously low and remain largely unharmonised.[18] But if met, copyright vests instantaneously.

This system enables the same party who would benefit from exclusive rights over the reproduction to make the pivotal assessment of "yes, original" or "no, non-original." Copyright will be valid if choices made during reproduction are sufficiently creative, rather than technical. But only the maker of the reproduction can answer this conclusively, and the outcome might depend on a number of moving parts, like whether a scanner versus a camera is used, as well as any post-production digital editing techniques. These factors render the reproduction process open to manipulation for the goal of securing copyright.

With analog methods of pre-production, development, and printing, copyright may once have been (legally) justified by a range of creative decisions potentially available, if taken. However, digital advancements have significantly reduced this scope. Best practices, industry standards, practical and technological limitations, and homogenized workflows further filter what remains. There is no question that reproduction may require significant skill, labor, time, and financial investment. But on

that basis alone, its outputs cannot be protected by copyright if the decisions made are technical rather than creative.

The crux of the issue is that in claiming copyright, a GLAM makes two assertions: first, that its reproduction is a new original work created by the GLAM; and, second, that an interpretation of the law would support that copyright and restrict use of the image. Ultimately, the public must trust GLAMs to accurately assess a complex legal question about the originality and subsequent validity of a copyright claim in reproductions of public domain works.

2.5. Copyright and Moral Rights

In addition to copyright, moral rights are important to consider.[19] The two are closely linked: a precondition of moral rights is that a copyright must first subsist in the work. However, moral rights are non-economic in nature and relate to the author's personal connection with the work. The most common examples include the author's right to paternity or attribution (*i.e.*, the right to be associated with the work) and the right to integrity (*i.e.*, the right to prevent derogatory or transformative treatment of the work).[20] There is a significant amount of variation in which moral rights are recognized and how they are defined worldwide.

Moral rights also have their own term of protection, which can differ from copyright's term of protection. Some countries tie the term to the author's lifetime,[21] with the rights expiring upon death. Others tie the term of moral rights to the term of copyright, with all the rights expiring at the same moment.[22] Several countries define moral rights to be perpetual, inalienable, and imprescriptible.[23] Depending on the jurisdiction, this means moral rights might survive copyright and continue to apply to public domain works – and be enforceable during cross-border litigation.[24]

Moral rights issues for open GLAM manifest in various ways. First, with material cultural heritage, the act of digitizing a public domain work may require the author's or heir's consent (if they can be found). This obligation may arise via the legislation of the country in which the digitization occurs *or* the country in which the work was created.

Second, new moral rights for a second author will arise if the digital materials attract copyright. Depending on the jurisdiction, the term of moral rights tied to a reproduction may complicate things further. In some cases, although the copyright can be transferred to the GLAM, the moral rights and their date of expiration remain tied to the author of the reproduction.[25] Moral rights can therefore exacerbate risk when *layers* of rights apply to both the underlying public domain work(s) and the digital surrogate. It can also be difficult to determine *who* holds the copyright and moral right given the nature of collaborative workflows and the scope of contributions made during digitization and post-production.[26] Where valid, the creator(s) will enjoy the right to be identified as the author(s) of the

digital reproduction and prevent any distortion, mutilation, modifications, or derogatory actions that would be prejudicial to their reputation. Finally, these rights and how they are defined also differ by jurisdiction. For example, when it comes to the right of integrity, what is or is not "derogatory" may differ from one country to the next. Simple acts like cropping or photo editing could infringe moral rights as distortion or be protected by a copyright exception, such as if it parodies or critiques the work (But *which* work is parodied? The underlying work or its reproduction?).

The outcomes to these and other questions are highly contextual. They depend on each use and applicable law(s), and reveal the impracticability of enforcing moral rights in the reproduction layer of digital surrogates. There is also a unique tension between the freedom of expression (*i.e.*, the ability to remix) and the moral right of integrity in a reproduction, something inextricably linked to the integrity of the underlying work. How might a user critique or parody a material work if the (alleged) author of its digital reproduction objects to its treatment? So far, there is no clarity around how these cases should be treated when it comes to open access and GLAM digital collections.

2.6. Differences among National Laws

Despite copyright's globalization, the term of protection(s), the scope of rights arising, and the works eligible can vary by country.[27] These differences can frustrate or problematize the cross-border nature of digital engagement and cultural exchange in a networked information society. This is because the location of the *physical* media when digitized will trigger which legal frameworks apply and accompany the *digital* media online.

National laws also might recognize lesser forms of protection, like related rights in photographs[28] or *sui generis* rights in databases,[29] traditional cultural expressions,[30] or genetic materials.[31] But they can also grant national exceptions around reuse for personal, educational, or other purposes. These differences impact whether and *where* the rights holder can bring an infringement claim. A diligent end-user should consider IPR frameworks in (at least) two jurisdictions: the country of the rights holder and the country where the use occurs, if different.

By contrast, the public domain provides certainty on many levels (in theory). Once the copyright expires and the work passes into the public domain, infringement concerns melt away. GLAMs may safely reproduce and disseminate the work so that users may safely harvest its creative and derivative potential. However, a new copyright in reproduction media obstructs that creative process *and* potential, and revives liability questions due to cross-border differences among national laws.

2.7. The Danger of Risk-Averse Practices to Collections Management, Licensing, and Law

To be fair, copyright law is complicated and confusing, even for the legal professionals who practice or teach it. With the consequences of infringement and the need for case-by-case assessments, the most

consistent, accurate, and reliable advice is always, frustratingly, "it depends."

For GLAMs, ambiguities in law, variations across different countries, and fears of liability lead to risk-averse approaches being taken and normalized during the management of public domain materials. Protocols developed to navigate the complex legal and social factors of rights management with living artists, rights holders, collecting societies, or donors can be transplanted when making rights determinations relevant to owners, reproduction photographers, and digitization teams. Emerging technologies, advanced imaging techniques, and sophisticated editing software now introduce new novel and complicated questions to those assessments. This is especially true for jurisdictions with strong authors' rights regimes, and/or without work-for-hire doctrines or recognition of similar employment-based agreements.[32] Consequently, risk averse habits creep into new areas of engagement, particularly those that involve public outreach, data collection, and the management of user-generated content.[33] The more unchartered the territory, the denser the legalese often is in a given policy. In the end, this tendency to insulate against risk by claiming or overstating rights through overbroad contractual terms corrodes our understanding of how copyright does, and should, work.

Research shows the real risk is in legitimizing the aversion-based policies, practices, and licensing markets encroaching and expanding in this digital era. Left unchallenged, such customs become commonplace and gain validity among practitioners, which then creep into legal doctrine when taken as proof that the entitlement exists.[34] James Gibson describes this entitlement creep as "doctrinal feedback," which ultimately prevents courts from clarifying IPR's appropriate boundaries.[35] Indeed, the ubiquity of IPR's gray areas leads to the ubiquity of questionable licensing practices, which are then called upon to justify their legality and inform new legislation. As Gibson argues, rather than top-down positive legal developments through legislation and jurisprudence, this results in bottom-up legitimization through practitioners' use of longstanding conventions.[36] The effect is to ingrain a self-referential practice into law, further widening IPR's gray areas as public privilege recedes.[37]

In our case, GLAMs contribute to this legitimization by interpreting IPR's gray areas to avoid perceived risk, to secure an economic advantage through copyright and licensing, or even as a measure to protect the underlying work. Users also contribute to legitimization due to the legal ambiguities that produce this phenomenon in the first place: despite whether the copyright is valid, licensing the reproduction results in quicker access, is usually preferred to the risk of infringement, and is cheaper than getting a second opinion.[38] (Plus, you know, "it depends.") But for everyone unable to pay licensing fees, the copyright claim can chill user engagement, including many *legal* forms of reuse.[39]

While the application of copyright and licensing models to reproduction media may be longstanding, it has not been without controversy.[40] Like many things, the onset of digital brought greater transparency to and awareness of the existing legal, ethical, and social impacts of this tradition. Still,

few consequences await those who claim rights without justification, a practice Jason Mazzone has called "copyfraud."[41]

Despite making a claim to copyright, GLAMs typically lack any intention to pursue the matter in court and risk a negative outcome, especially when a cease-and-desist letter is sufficient and cheaper.[42] In most countries, the loser also pays the court and attorneys fees – a second financial risk. These conditions produce strong disincentives to litigation, which is both necessary and instrumental to outlining the scope of IPR entitlements.[43]

In any case, the claim – even if false – can be bolstered through restrictive website terms rooted in contract law.[44] Put another way, legal conditions and risk averse practices have supported, entrenched, sustained, and even incentivized the practice of claiming copyright in non-original reproduction media.[45]

2.8. Perpetual Copyright in Digital Cultural Heritage

Copyright as a cog both accelerates and jams the machine of cultural creation. Within this, GLAMs present a special kind of paradox to the public domain. To illustrate, with works that already exist in copies, like books, evidence shows reprints and derivative uses rise when copyright expires.[46] The book (itself a copy) is already in the *physical* public domain when the work falls into the *intellectual* public domain. But many GLAMs steward works that are rare or unique, especially by the time copyright expires. Some are so old that they predate copyright entirely. The public is therefore reliant on GLAMs to facilitate reuse of these unique or rare public domain works through reproduction and open licensing.

This particular scenario can defeat the IPR system's aim of promoting the creation and distribution of new cultural works by making reuse of public domain works subject to the reproduction and approval of the object's possessor. Even with rare material works existing in copies, nearly identical digital surrogates appear online under various claims, at different qualities, sizes, formats, and so on.[47] Throw in copyright's excessively long term of protection with the need to make new reproductions to keep up with technological advancements, and that exclusionary effect can live on in perpetuity.

Licensing the copy or circumventing that licensing market to access the underlying work is simply not feasible for the average person.[48] As James Boyle argues, this amounts to a "second enclosure" of heritage, wherein the cultural commons is subjected to a vicious cycle of propertization.[49] To revisit the rare book example, once copyright expires, the text becomes fair game for the public to reuse, in theory. In reality, there are three legal grounds upon which access may remain restricted: (1) by property-based ownership of the rare material object; (2) copyright-based claims in the digital

surrogate(s) and expensive licensing models; and (3) contract-based prohibitions around visitor photography onsite *and* terms of use online.

Collectively, this system thwarts competition, putting the owner in a strong market position to commercialize the out-of-copyright work's value and control its reuse for as long as ownership lasts. Peter Hirtle has argued "[owners] that seek perpetual control over the use of a work are in effect saying that stewardship of a work is more important than the act of creation."[50] While there will be sensitive or cultural materials for which the importance of stewardship outweighs the act of creation, that is not the case for the vast majority in which *copyright* is claimed during reproduction.[51]

2.9. The Irony of Perpetual Copyright for Future GLAMs

The impact of this system and the practices sheltered by IPRs gray areas have particularly ironic consequences for future GLAMs.

For the public, copyright claims in digital surrogates reduce the vast potential of collections in the public domain to a superficial value for the perfunctory purpose of viewing online. Depending on the type of work, that claim can also monopolize reuse of the knowledge it contains.[52] This long-standing practice stunts creativity, knowledge generation, and innovation around the public domain – even by GLAMs themselves, who might otherwise be incentivized to *truly* innovate and use public domain collections for purposes beyond basic reproduction. All in all, this system negatively impacts the public's ability to produce new creative works, as well as GLAMs' abilities to collect them.[53]

But it also presents significant IPR clearance issues for *future* GLAM staff. As digital technologies advance and authors create new works that compile and embed various media sources, like GLAM reproduction media of public domain works, rights clearance will become increasingly complicated and the number of orphan works in these compilations will rise.[54] This is one significant area where GLAMs can reduce risk for future staff and increase efficiency when collecting and extending access to these works. Yet, in the interest of generating short-term revenue, GLAMs end up generating long-term costs for future rights clearance and collections management. All of this leads to disaster for future GLAM staff and open access.

2.10. Creative Solutions to Copyright Confusion

For all the problems it poses, the system does come equipped with a solution: copyright can be transferred or waived – or at least not enforced. As IPR gray areas become even more ubiquitous with digital media, GLAMs are in a position to resolve public uncertainty by waiving copyright or declining its enforcement at least in more basic outputs, should any rights arise.[55] This requires a shift in thinking around copyright and its relationship to public and educational missions.[56] Indeed, these

missions provide different incentives for the work's digitization, rather than IPR's traditional incentive-to-create theories that reward authors with exclusive monopolies over the work's use.[57]

Waiver can be perceived to carry additional risk in jurisdictions with strong authors' rights (rather than copyright) regimes, which are rooted in natural rights and personality theories of copyright.[58] Even so, many of these jurisdictions provide for waiver of moral rights and support contractual negotiations around waiver (assuming the work is sufficiently original and protected by copyright in the first place).

So long as the desire is there to release the reproduction media to the public domain, a combination of legal mechanisms may enable a GLAM to do so, and with minimal risk. Indeed, these legal mechanisms are currently shifting in support of protecting the public domain.

2.11. Legal Developments and Support for Protecting the Public Domain

Open GLAM is gaining exciting new ground daily. Key legal developments, cultural politics, and governmental support have helped to spark the necessary momentum.[59] But the crucial work undertaken by adventurous GLAMs, open access advocates, curious volunteers and users, and cultural organizations has been the real driving force behind the movement.

Over the past two decades, a number of legal developments have increased support to the notion that a public domain work should remain in the public domain following reproduction. In the US, the 1998 and 1999 *Bridgeman Art Library* cases provided a catalyst when the Southern District of New York held that a photographic reproduction of a public domain painting failed to attract copyright under US (and UK) law.[60] A decade later the Tenth Circuit in *Meshwerks* relied on *Bridgeman* in finding "the putative creator who merely shifts the medium in which another's creation is expressed has not necessarily added anything beyond the expression contained in the original."[61] A 2016 District Court case from New Mexico extended this logic to 2D reproductions of 3D works when the photographer's choices are "utilitarian" and "made to best copy the three dimensional artifact."[62] Given the jurisdictional nature of US court systems, these judgments had limited binding effect outside of (and even within) their own jurisdictions.[63] Instead, GLAMs voluntarily signed on to these doctrines to better serve public missions.

Similar developments in Europe have led to more than 150 GLAMs today releasing all eligible public domain reproduction media via open licenses and tools. In 2019, the European Commission passed legislation in direct response to a 2018 German case that recognized a lesser, related right for technical (rather than creative) skill in analog photographic reproductions of public domain paintings made by the Reiss Engelhorn Museum *and* held that a visitor's personal photographic reproductions uploaded to

Wikimedia Commons violated the Museum's onsite policy banning photography.[64] As of June 2021, Article 14 of the *Copyright and Related Rights in the Digital Single Market Directive* prevents *anyone* in the EU from claiming copyright or related rights in *any* non-original reproduction media, including metadata, software, photography, 3D scans, and other various (and future) outputs.[65] Article 14 formalizes almost two decades of open GLAM efforts to protect the public domain status of digital collections.[66] Indeed, the data produced on human welfare gains and new innovations through expanded access to the public domain has been crucial to both legislative and individual GLAM policy reform.[67]

Given the impact of EU and US laws, similar developments are likely to continue materializing among other jurisdictions. In 2017, the Indoneisan government implemented Law No.5/2017 on Cultural Advancement, with Article 15 establishing plans for a government portal for integrated cultural data. In her article on open GLAM Indonesia, Annayu Maharani highlights the need for greater awareness and understanding of open access frameworks and digital capacity-building to facilitate participation.[68] So far, the preferred license of choice seems to be CC BY-SA.[69] But this raises an important point: many of the larger and well-resourced GLAMs under pressure to release collections have been able to commercialize their reproductions for decades (and even centuries). With the onset of open GLAM, smaller and less well-resourced GLAMs are now expected to make an even greater leap, and not only to create and prepare digital collections for release but also to conform to the open access expectations shaped by an increasingly globalized copyright system.

In later Pubs, we'll discuss how the legacy of colonization contributes to IPR globalization and copyright transplantation. Here, it's worth highlighting the importance of documenting spread and judicial interpretations among these jurisdictions to generate important data that can be fed back into more inclusive approaches to digital collections management for cross-border access and reuse. This is revisited in ***Benefits to Open GLAM***.

2.12. Growing Divide(s) among (Open) GLAMs

There are growing divides among GLAMs with online and/or open access collections, some of which is due to the inability to participate for various reasons discussed throughout this resource. This is especially the case for smaller and less well-resourced GLAMs and community organizations that lack copyright knowledge and capacity to digitize and release collections as open access. The digital divide among these GLAMs causes one significant imbalance among the types of collections and geographic regions represented online. Without support, many of these collections will remain inaccessible and underexplored.[70]

Another divide is growing *within* GLAMs that digitize and release collections as open access. Financial decisions, funding schemes, or private partnerships can impact which materials are prioritized for

digitization and open access programmes, as well as which materials are prioritized for commercialization over open access. Less well-resourced GLAMs may rely almost entirely on external funding or partnerships to support digitization.

For those with capacity and digitized collections, the pressure is on to embrace open access. The Smithsonian Institution's February 2020 release of 2.8 million digital surrogates via a CC0 public domain dedication is likely a *huge* tipping point for the cultural sector, as it spans across collections held by galleries, libraries, archives, museums, *and* other cultural institutions and research centers. As more GLAMs follow the lead of others, these divides will continue to increase.

At the same time, the *open access* divide seems to be generating new imbalances. Open access collections made available by copyright-knowing GLAMs are more visible online. The openly-licensed status is now shaping which types of cultural materials are selected for research and creative reuse. This generates new tensions around what remains (or should remain) part of our living cultural memory, receive representation and visibility, and even the type of data used to inform the various algorithms, machine learning, and computational research that increasingly mediates society.

Having a greater awareness and understanding of these divides, their causes, and effects may help the open GLAM ecosystem to design innovative and (more) sustainable solutions to digitization, representation, and participation with cultural collections online. These tensions are explored further in ***Power Inequities***.

Right now, copyright (and other IPR) may be the primary stumbling block to open access and digitally-enabled participation. Sharing evidence of digitization workflows, processes, and management is also crucial to enabling wider and more efficient participation.[71] But other areas can also conflict with or resemble copyright protections that need addressing.

Continue to Human Rights

Footnotes

1. Paul Valéry, 'The Concept of Ubiquity' (1928). Valéry could never have anticipated the extension of copyright to its excessive length under current international treaties. ↩
2. Andrea Wallace, 'Mona Lisa', in *A History of Intellectual Property in 50 Objects*, ed. Claudy Op den Kamp and Dan Hunter (Cambridge University Press, 2019), 25–39. ↩
3. One example is 'Copyright 101,' which has been written for librarians, archivists and museum curators. Ronan Deazley, *Copyright 101 · Copyright Cortex*, 2017. Others include: Peter B. Hirtle, Emily

Hudson, and Andrew T. Kenyon, *Copyright and Cultural Institutions: Guidelines for Digitization for U.S. Libraries, Archives, and Museums* (Cornell University Library, 2009); Anne Young, ed., *Rights and Reproductions: The Handbook for Cultural Institutions, Second Edition* (Rowman & Littlefield, 2019). ↩

4. See Paul J. Heald, Kris Erickson, and Martin Kretschmer, 'The Valuation of Unprotected Works: A Case Study of Public Domain Photographs on Wikipedia', SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 4 February 2015), 4; Jacob Flynn, Rebecca Giblin, and Francois Petitjean, 'What Happens When Books Enter the Public Domain? Testing Copyright's Underuse Hypothesis Across Australia, New Zealand, the United States and Canada', *University of New South Wales Law Journal* 42, no. 4 (2019): 1215–53; Rick Prelinger, 'On the Virtues of Preexisting Material', *Contents Magazine*, 2013; Pamela Samuelson, 'Challenges in Mapping the Public Domain', in *The Future of the Public Domain*, ed. Lucie Guibault (Kluwer Law International, 2006), 22. ↩

5. See Graham Greenleaf and David Lindsay, *Public Rights: Copyright's Public Domains* (Cambridge University Press, 2018). ↩

6. Incentive-based and economic theories of copyright are also complemented by theories rooted in natural rights and moral arguments, which protect the author's bond to their work. In jurisdictions like France and Germany, these received more traction among legislators and courts. Over time, these differences have been increasingly harmonised by international legal measures that focus on the economic benefits and incentives of copyright protection. ↩

7. William Fisher, 'Theories of Intellectual Property', in *New Essays in the Legal and Political Theory of Property*, ed. Stephen Munzer (Cambridge University Press, 2001). ↩

8. Ronan Deazley, 'Copyright and Digital Cultural Heritage: A Brief History of Copyright · Copyright Cortex', in *Copyright 101*, ed. Ronan Deazley, 2017. ↩

9. Ruth L. Okediji, 'Creative Markets and Copyright in the Fourth Industrial Era: Reconfiguring the Public Benefit for a Digital Trade Economy' (International Centre for Trade and Sustainable Development (ICTSD), 2018); Carys J. Craig, *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Edward Elgar, 2011). ↩

10. Madhavi Sunder, 'IP3', *Stanford Law Review* 59, no. 2 (2006): 257–332; Julie E. Cohen, 'Copyright, Commodification, and Culture: Locating the Public Domain', in *The Future of the Public Domain*, ed. Lucie Guibault and Bernt Hugenholtz (Netherlands: Kluwer Law International, 2006), 121–66; Margaret Chon, 'Intellectual Property and the Development Divide', *Cardozo Law Review* 27, no. 6 (2006): 2821–2912; Christopher Buccafusco and Christopher Jon Sprigman, 'Experiments in Intellectual Property', in *Research Handbook on the Economics of Intellectual Property Law*, ed. Peter Mennel and David Schwartz (Edward Elgar, 2019). ↩

11. Key legal measures include the Berne Convention for the Protection of Literary and Artistic Works of 1886, World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights 1994, and World Intellectual Property Organization Copyright Treaty 1996. ↩
12. The 1710 Statute of Anne, the first national copyright legislation, protected works from "fourteen years to commence from the first publishing the same and no longer" (s.1). Since then, the term has been extended to life of the author + 50 years as a condition of entry to the World Trade Organization, but the international norm in many places is even longer: life of the author + 70 years. ↩
13. Christopher J. Buccafusco and Paul J. Heald, 'Do Bad Things Happen When Works Enter the Public Domain?: Empirical Tests of Copyright Term Extension', *Berkeley Technology Law Journal* 28, no. 1 (2013): 1–43; Paul J. Heald, 'How Copyright Keeps Works Disappeared', *Journal of Empirical Legal Studies* 11, no. 4 (2014): 829–66; Flynn, Giblin, and Petitjean, 'What Happens When Books Enter the Public Domain?' ↩
14. Heald, 'How Copyright Keeps Works Disappeared'. ↩
15. 'Europeana Factsheet - The 20th Century Black Hole: How Does This Show up on Europeana?' (Europeana, 2005). ↩
16. See Brooke Gladstone and Bob Garfield, *Digital Dark Age*, accessed 2 December 2016. ↩
17. For example, in the US, the work must possess a "modicum" or "spark of originality"; in the UK, the "skill, labor, and/or judgement" of the author; in the EU, it must be the "author's own intellectual creation." While framings of national standards may vary, this essentially comes down to whether sufficient creative choices have been made in the work's production. This is a notoriously low standard to meet. ↩
18. The Berne Convention and WIPO World Copyright Treaty leave the term undefined. In the EU, the standard has been harmonized (in theory) as "the author's own intellectual creation," although in practice national courts determine what satisfies this standard according to domestic legislation. For more on this, see Thomas Margoni, 'The Digitisation of Cultural Heritage: Originality, Derivative Works and (Non) Original Photographs', Institute for Information Law (IViR), 2014. ↩
19. Berne Convention for the Protection of Literary and Artistic Works revised at Rome on 2 June 1928, Article 6*bis*. ↩
20. Others include the rights of: withdrawal (to retract authorship from a work); divulgation (to control the public disclosure or publication of the work); pseudonymity (the right to remain anonymous);] ↩

21. This is the case in the US, which also restricts the scope of works protected by limited moral rights to a "work of visual art" produced under certain circumstances. Visual Artists Rights Act (1990), 17 U.S. Code § 106A. ↩
22. For example: the UK. For a complete list of these countries, see Elizabeth Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (Oxford University Press, 2006), Appendix: Table of World Moral Rights. ↩
23. For example: France, Russia, Mali, Chad, Cameroon, Madagascar. This list is not complete. See Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis*. ↩
24. Elizabeth Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (Oxford University Press, 2006). ↩
25. This is the case in the UK. ↩
26. See, e.g., Catherine L. Fisk, 'Authors at Work: The Origins of the Work-for-Hire Doctrine', *Yale Journal of Law & the Humanities* 15 (2003): 1–70; Peter Jaszi, 'On the Author Effect: Contemporary Copyright and Collective Creativity', *Cardozo Arts & Entertainment Law Journal* 10 (1992): 293–320. ↩
27. For a detailed account of how this can differ among EU countries, see Margoni, 'The Digitisation of Cultural Heritage'. ↩
28. Examples include the Article 6 "other photographs" protection in the EU and a similar for photographs irrespective of their "individual character" was enacted in June 2019 Switzerland. Directive 2011/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights OJ L 372, Art. 6; 231.1 Federal Act on Copyright and Related Rights of 9 October 1992 (Status as of 1 April 2020), Title 2, Ch. 1, Art. 2(3*bis*). ↩
29. Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases OG L 77 (27 March 1996). But see Timothy Volmer, 'The European Commission Should Repeal Extra Rights for Databases', *Creative Commons* (blog), 30 August 2017; 'Policy Paper #12 in Reaction to the Public Consultation on the Database Directive', *International Communia Association* (blog), accessed 18 June 2020. ↩
30. Protection of Traditional Knowledge and Cultural Expressions Act, 2016 of Kenya. ↩
31. See World Intellectual Property Organization, Traditional Knowledge, Traditional Cultural Expressions & Genetic Resources Laws Database. ↩

32. Justidictions with "work-for-hire" doctrines, like the US and UK, ensure any copyright transfers to the employer or person who contracted-for the creative work. ↩
33. Discussed in *User-Generated IP*. ↩
34. James Gibson, 'Risk Aversion and Rights Accretion in Intellectual Property Law', *The Yale Law Journal* 116, no. 5 (2007): 882. ↩
35. Gibson, 'Risk Aversion and Rights Accretion in Intellectual Property Law', 940-41. ↩
36. Gibson, 'Risk Aversion and Rights Accretion in Intellectual Property Law', 885. ↩
37. Gibson, 'Risk Aversion and Rights Accretion in Intellectual Property Law', 884. ↩
38. Gibson, 'Risk Aversion and Rights Accretion in Intellectual Property Law', 885. ↩
39. See Colin T. Cameron, 'In Defiance of Bridgeman: Claiming Copyright in Photographic Reproductions of Public Domain Works', *Texas Intellectual Property Law Journal*, Texas Intellectual Property Law Journal, 15 (2006): 52. ("If a false claim to copyright can bully potential authors away from using uncopyrightable reproductions of public domain images, no museum need ever pursue an infringement action [...]. The threat alone may be enough to maintain control of the collection, as though valid copyright indeed subsisted in a museum's precise photographic reproductions of public domain paintings.") This is true even in countries with contractual override protections, like Ireland, Portugal, and the UK, that protect copyright limitations and exceptions (*i.e.*, legal forms of public reuse) from being contracted away. ↩
40. See Susan M. Bielstein, *Permissions, A Survival Guide: Blunt Talk about Art as Intellectual Property* (Chicago: University Of Chicago Press, 2006); Kenneth D. Crews and Melissa A. Brown, 'Control of Museum Art Images: The Reach and Limits of Copyright and Licensing', in *The Structure of Intellectual Property Law: Can One Size Fit All?*, ed. Annette Kur and Vytautas Mizaras (Cheltenham, UK : Northampton, MA: Edward Elgar, 2011), 269–84; Kenneth D. Crews, 'Museum Policies and Art Images: Conflicting Objectives and Copyright Overreaching', *Fordham Intellectual Property, Media and Entertainment Law Journal* 22, no. 4 (2012): 795–834; Grischka Petri, 'The Public Domain vs. the Museum: The Limits of Copyright and Reproductions of Two-Dimensional Works of Art', *Journal of Conservation and Museum Studies* 12, no. 1 (28 August 2014). ↩
41. Jason Mazzone, 'Copyfraud', *New York University Law Review* 81 (2006): 1026–1100. ↩
42. One exception is the Reiss Engelhorn Museum in Germany, which brought a wave of lawsuits against various users in 2015. See Andrea Wallace and Ellen Euler, 'Revisiting Access to Cultural

Heritage in the Public Domain: EU and International Developments', *IIC - International Review of Intellectual Property and Competition Law* 51, no. 7 (1 September 2020): 823–55. ↩

43. Mazzone, 'Copyfraud', 1032–35; Gibson, 'Risk Aversion and Rights Accretion in Intellectual Property Law', 885. ↩

44. Crews, 'Museum Policies and Art Images'; Pauline McBride, 'Cultural Institutions and Website Use Restrictions: Contract or No Contract?', in *Display At Your Own Risk: An Experimental Exhibition of Digital Cultural Heritage*, ed. Andrea Wallace and Ronan Deazley (CREATe, 2016), 307–15. ↩

45. Jason Mazzone, 'Copyfraud', *New York University Law Review* 81 (2006): 1028–30. ↩

46. Giancarlo Frosio, 'Communia and the European Public Domain Project: A Politics of the Public Domain', in *The Digital Public Domain; Foundations for an Open Culture*, ed. Melanie Dulong de Rosnay and Juan Carlos De Martin (Cambridge: Open Book Publishers, 2012), 10–11. ↩

47. Sarah Stierch, 'Yellow Milkmaid Syndrome', Tumblr, accessed 21 June 2015; Douglas McCarthy, 'The Great Wave: What Hokusai's Masterpiece Tells Us about Museums, Copyright and Online…', *Open GLAM Medium* (blog), 2019, ; Wallace, 'Mona Lisa'. ↩

48. Yafit Lev-Aretz, 'The Subtle Incentive Theory of Copyright Licensing', *Brooklyn Law Review* 80, no. 4 (2015): 1357–1418. ↩

49. James Boyle, 'The Second Enclosure Movement and the Construction of the Public Domain', *Law and Contemporary Problems* 66 (2003): 50. ↩

50. Peter Hirtle, 'Archives or Assets?', *The American Archivist* 66, no. 2 (2003): 243. ↩

51. For example, see *Kaitiakitanga License, TeHikuMedia/Corpora*, Python (2017; repr., Te Hiku Media, 2020), https://github.com/TeHikuMedia/corpora. ↩

52. For example, a copyright claim to a digital surrogate of a public domain book prevents use of the image, but the text remains in the public domain, and can be transcribed if online; however, copyright in the digital surrogate of a public domain painting or scientific specimen renders the image *and* the underlying work unusable for similar purposes. Without an image, it can be difficult to convey, for instance, the knowledge the work contains, such as brush strokes, color, composition, or cellular arrangement. ↩

53. Fiona Macmillan, 'Cultural Diversity, Copyright, and International Trade', in *Handbook of the Economics of Art and Culture*, ed. Victor A. Ginsburgh and David Throsby, vol. 2 (Elsevier, 2014), 411–

37; Frosio, 'Communia and the European Public Domain Project: A Politics of the Public Domain', 29–30; Anthony D. Williams and Don Tapscott, *Wikinomics* (London: Atlantic Books, 2008). ↩

54. For an analog example of how complicated this can get, see the Edwin Morgan Scrapbooks Digitization Project. See also Ronan Deazley, Kerry Patterson, and Victoria Stobo, 'Digitising the Edwin Morgan Scrapbooks: A Research Compendium,' (CREATe, 2018). ↩

55. We acknowledge higher risk of this perceived among strong authors' rights jurisdictions. ↩

56. But it is not unprecedented, even for GLAMs with entrenched copyright licensing practices. See Ronan Deazley, 'Photography, Copyright and the South Kensington Experiment', *Intellectual Property Quarterly*, 2010. ↩

57. See Julie E. Cohen, 'Creativity and Culture in Copyright Theory', *University of California Davis Law Review* 40 (2007): 1151–1205; Margaret Chon, 'Intellectual Property "from Below": Copyright and Capability for Education', *University of California Davis Law Review* 40 (2007): 803–54; Diane Leenheer Zimmerman, 'Copyrights as Incentives: Did We Just Imagine That?', *Theoretical Inquiries in Law* 12, no. 1 (2011): 29–58. ↩

58. Over the years, copyright and authors' rights regimes have been harmonized through international legal measures and bilateral agreements, and scholars have argued they are now largely consistently applied as a result. Daniel J. Gervais, 'Feist Goes Global: A Comparative Analysis Of The Notion Of Originality In Copyright Law', *Journal of the Copyright Society of the U.S.A.* 49 (2002): 949–81; Elizabeth F. Judge and Daniel J. Gervais, 'Of Silos and Constellations: Comparing Notions of Originality in Copyright Law', *Cardozo Arts & Ent. L.J.* 27 (2010): 375–408; Okediji, 'Creative Markets and Copyright in the Fourth Industrial Era: Reconfiguring the Public Benefit for a Digital Trade Economy'. ↩

59. Discussed in *History of Open GLAM*. ↩

60. *Bridgeman Art Library, Ltd v Corel Corp*, 25 F. Supp. 2d 421, 426 (S.D.N.Y. 1998) ("copied from the underlying works without any avoidable addition, alteration or transformation."); *Bridgeman Art Library, Ltd v Corel Corp*, 36 F. Supp. 2d 191, 197 (S.D.N.Y. 1999) ("the point of the exercise was to reproduce the underlying works with absolute fidelity."). ↩

61. *Meshwerks, Inc, v Toyota Motor Sales USA, Inc*, 528 F.3d 1258 (10th Cir. 2008). ↩

62. *President and Fellows of Harvard College v Steve Elmore*, No. CIV 15-00472-RB/KK, 19 (D.N.M. 2016), available at https://www.courtlistener.com/recap/gov.uscourts.nmd.320645/gov.uscourts.nmd.320645.165.0.pdf. ↩

63. In 2016, the New York Public Library became the first major GLAM in the Southern District of New York to align with *Bridgeman*, followed by the Metropolitan Museum of Art in 2017. ↩
64. Federal Supreme Court, December 20, 2018, Case No. I ZR 104/17 - *Museumsfotos*, available at https://perma.cc/Q68G-EKPR. ↩
65. Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, Article 14. ↩
66. Key measures include: the 2002 DigiCulture Report; the initial funding of OpenGLAM.org by the European Commission; the Commission Communication of 11 August 2008; and the launch of Europeana in 2008; the 2010 Europeana Public Domain Charter; the Commission Recommendation of 27 October 2011, and the Reports on its implementation in 2014, 2016, and 2018. In 2019, the Commission announced the adoption of CC BY 4.0 for all content and CC0 (Public Domain Dedication) for all raw data, metadata, and other comparable documents. Also in 2019, the EU launched the Declaration of Cooperation on advancing digitization of cultural heritage, which refers to many of these efforts directly in the text around open access and the public domain. Salzburg Research Forschungsgesellschaft mbH, 'The DigiCULT Report | Technological Landscapes for Tomorrow's Cultural Economy: Unlocking the Value of Cultural Heritage' (European Commission, Information Society, 2002); 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Europe's Cultural Heritage at the Click of a Mouse: Progress on the Digitisation and Online Accessibility of Cultural Material and Digital Preservation across the EU [SEC(08) 2372]', EUR-Lex, 11 August 2008; Europeana, 'Public Domain Usage Guidelines', Europeana Collections, https://www.europeana.eu/portal/en/rights/public-domain.html; Publications Office of the European Union, 'Commission Recommendation of 27 October 2011 on the Digitisation and Online Accessibility of Cultural Material and Digital Preservation'; 'Progress Report (2011-2013) on the Implementation of Commission Recommendation 2011/711/EU on the Digitisation and Online Accessibility of Cultural Material and Digital Preservation' (European Commission, September 2014); 'Progress Report (2013-2015) on the Implementation of Commission Recommendation 2011/711/EU on the Digitisation and Online Accessibility of Cultural Material and Digital Preservation' (European Commission, 2016); 'Progress Report (2015-2017) on the Implementation of Commission Recommendation 2011/711/EU on the Digitisation and Online Accessibility of Cultural Material and Digital Preservation' (European Commission, 2018); 'Commission Decision of 22/02/2019 Adopting Creative Commons as an Open License under the European Commission's Reuse Policy'; 'Declaration of Cooperation on Advancing Digitisation Cultural Heritage' (European Commission, 9 April 2019). ↩

67. See e.g., Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information. ↩

68. Annayu Maharani, 'Open GLAM Indonesia: How Collaboration, Cultural Policy Reform and Museum Engagement Is Driving the Growth of Open Access', Medium, 9 October 2020, https://medium.com/open-glam/open-glam-indonesia-how-collaboration-cultural-policy-reform-and-museum-engagement-is-driving-1382189cb7b6. ↩

69. See Douglas McCarthy and Andrea Wallace, 'Survey of GLAM Open Access Policy and Practice', 2018, http://bit.ly/OpenGLAMsurvey. ↩

70. Although, *Sustainability* discusses the sustainability and environmental concerns that arise from the desire to digitize everything. ↩

71. For example, see M. Mahey et al., *Open a Glam Lab*, Digital Cultural Heritage Innovation Labs, Book Sprint (Doha, Qatar, 23-27 September). ↩