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Copyright and Cultural Memory

Digital Conference Proceedings

9 June, 2016 – The Lighthouse, Glasgow

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COPYRIGHT AND CULTURAL MEMORY
Digital Conference Proceedings

9 June 2016, The Lighthouse

Copyright and Cultural Memory: Digital Conference Proceedings

How does copyright impact the access to and use of our shared cultural heritage across borders, and online?

This document presents an edited transcript of a one-day conference designed to explore this essential question. 'Copyright and Cultural Memory', organised by CREATE and held at The Lighthouse on 9 June 2016, addressed a number of copyright-related issues in the heritage sector. CREATE researchers Ronan Deazley (Queen's University Belfast), Megan Blakely, Kerry Patterson, Victoria Stobo, and Andrea Wallace (all Postgraduate Researchers at the University of Glasgow) addressed the challenges of digitisation, intangible cultural heritage, risk-based models of copyright compliance for archive collections, and surrogate intellectual property rights.

The conference featured presentations by CREATE Postgraduate Researchers followed by a discussion with a panel of experts. Afterwards, keynote speaker Simon Tanner (King's College London) responded to the research. The day concluded with a question and answer session reflecting on the research presented and the role of copyright law and policy in the heritage domain. This document captures those presentations, along with the panel discussion and question and answer session that followed, in a citable format.

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#CaCM2016

This publication is issued in conjunction with the Copyright and Cultural Memory Conference held at The Lighthouse in Glasgow on 9 June 2016 and made available online as a resource at <http://www.create.ac.uk/cacm2016>.

Video presentations from the event can be viewed at: <http://www.create.ac.uk/cacm2016/videos>

Graphic design by Andrea Wallace

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COPYRIGHT AND CULTURAL MEMORY

The Lighthouse, Glasgow // 9 June 2016

Megan Rae Blakely

Signposts

- Intangible Cultural Heritage (ICH) and Intellectual Property (IP)
- Definitions and legal challenges
- TRIPs, the CDPA, and the EU Directives
- 2003 Convention for the Safeguarding of ICH
- Penumbras: Developed countries (WTO), unions, and intangible cultural heritage
- Tangification: Where are GLAM institutions situated?
- Case Studies: IP systems and Norms in Celtic-derived Developed Countries
- Concluding Thoughts: What does this mean for GLAM?

Figure 1

Signposts

- Intangible Cultural Heritage (ICH) and Intellectual Property (IP)
 - » Definitions and legal challenges
 - » TRIPs, the CDPA, and the EU Directives
 - » 2003 Convention for the Safeguarding of ICH
 - » Penumbras: Developed countries (WTO), unions, and intangible cultural heritage
- Tangification: Where are GLAM institutions situated?
- Case Studies: IP systems and Norms in Celtic-derived Developed Countries
- Concluding Thoughts: What does this mean for GLAM?

GLAMourising Intangible Cultural Heritage

Good morning. I'm Megan Blakely, and I am going to start off the programme today by talking about intangible cultural heritage and intellectual property. Since we are in this gallery setting, I wanted to focus on the GLAM sector, and sometimes it helps to start our morning with a pun, so we will be talking 'GLAMourising' intangible cultural heritage.

The way we're going to proceed this morning is by starting with definitions and challenges (Fig. 1). The law functions by defining and making boundaries, and intangible cultural heritage by its nature needs to expand, to be living, to evolve and to reflect the identity of the practising community. That will be the first thing that I will start to take a look at.

Then I will talk a little bit about the process that happens when intangible cultural heritage changes form in order to be proper-tised as it does with intellectual property, where exclusionary ownership can impose limits on this type of heritage, and look at a few case studies in the UK. I focus specifically on Celtic-derived countries just to narrow the focus, in particular, on the developed countries of Ireland, Scotland, Northern Ireland, and Wales. These are jurisdictions that are generally more focused on intellectual property development and less on cultural policy. I'll talk a little bit about that as well.

Then I will wrap up with just a few concluding thoughts about what this means for GLAM.

‘Knowledge-producing’ v ‘culture-producing’: the false dichotomy

Intellectual Property Law

- The Berne Convention for the Protection of Artistic and Literary Works (Berne) (1886)
- Copyright, Designs and Patents Act (CDPA) (1988)
- Trade Related Aspects of Intellectual Property Rights (TRIPs) (1995)
- European Copyright Directive (2001/29/EC)

Cultural Heritage Law

- Hague Convention for the Protection of Cultural Property (1954)
- The World Heritage Convention (1972)
- The Convention for the Safeguarding of Intangible Cultural Heritage (2003)
- Faro Convention on the Value of Cultural Heritage for Society (2005)

Figure 2

‘Knowledge-producing’ v ‘culture-producing’: the false dichotomy

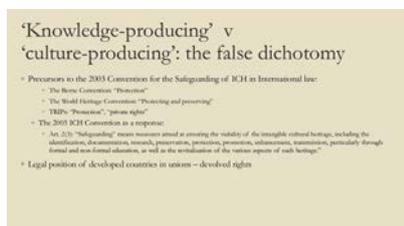


Figure 3

- Precursors to the 2003 Convention for the Safeguarding of ICH in International Law:
 - » The Berne Convention: “Protection”
 - » The World Heritage Convention: “Protecting and preserving”
 - » TRIPs: “Protection”, “private rights”
- The 2003 ICH Convention as a response:
 - » Art. 2(3): “Safeguarding”
- Legal position of developed countries in unions – devolved rights

So, culture-producing versus knowledge-producing: we are divided between the global north and south (Fig. 2). The global north seems to be more focused on knowledge producing in the law. This slide is not meant to be an exhaustive list of the international instruments that have been put into place in the field of intellectual property and culture, but it is meant to illustrate chronologically how these two legal systems have developed independently of each other. Even from 1886 with the Berne Convention for Artistic and Literary Works, you have the Hague Convention for Cultural Property, and they sort of develop in two different streams and don't cross over much as far as international instruments go.

The main Convention that deals with intangible cultural heritage was put together in 2003, came into force in 2006: the Convention for Safeguarding Intangible Cultural Heritage (Fig. 3). And you'll notice that there was an intentional word choice here with this Convention using ‘safeguarding’ as opposed to the language that you see with the Berne Convention using ‘protection.’ The World Heritage Convention, which focuses on monuments or non-moveable heritage such as landmarks or symphony theatres, these sorts of things, uses the terminology ‘protecting and conserving,’ and TRIPs, which is the strongest intellectual property convention, also uses the terminology ‘protecting.’ So there is literature about how ‘safeguarding’ was meant to reflect the different nature of what the Convention addressed.

What is Intangible Cultural Heritage (ICH)?

The 2003 Convention for the Safeguarding of ICH, Art. 2

- For the purposes of this Convention,
 1. The “intangible cultural heritage” means the **practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage**. This intangible cultural heritage, transmitted from generation to generation, is **constantly recreated by communities and groups** in response to their environment, their interaction with nature and their history, and provides them with **a sense of identity and continuity**, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.
 2. The “intangible cultural heritage”, as defined in paragraph 1 above, is manifested inter alia in the following domains:
 - (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
 - (b) performing arts;
 - (c) social practices, rituals and festive events;
 - (d) knowledge and practices concerning nature and the universe;
 - (e) traditional craftsmanship.

Figure 4

Intangible Cultural Heritage and the 2003 Convention for the Safeguarding of ICH

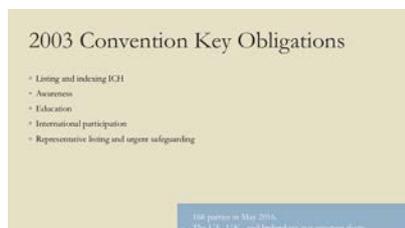


Figure 5

2003 Convention Key Obligations

- Listing and indexing ICH
- Awareness
- Education
- International participation
- Representative listing and urgent safeguarding

Since we have people here from a law background and also from a culture background, I'll try to touch just a little bit on the definitions of each (Fig. 4). Intangible cultural heritage is defined by the Convention as ‘the practices, representations, expressions, knowledge, skills of communities, groups including the objects, artefacts and cultural spaces that individuals recognise as a part of their cultural heritage.’ It also provides a sense of community and identity. If any of you are lawyers, you can see how this might be problematic if you were trying to write some kind of statute or law surrounding this because it's very vague. To identify what ICH might be, the Convention also provides some illustrations. ICH might be oral traditions and expressions, performing arts, craftsmanship and all these sorts of things. You can see how some of it might cross over into artistic and literary works that would be protected by copyright, and some of it doesn't. The protection could overlap.

If you do join the 2003 Convention on Safeguarding Intangible Cultural Heritage, your obligations involve listing and indexing ICH, and promoting awareness and education about intangible cultural heritage and international participation (Fig. 5). I was recently at a conference on the 10-year anniversary of this measure being in force, and it seems the countries that have not signed up to the Convention feel very strongly that they should, and the countries that have signed onto the Convention feel that perhaps the definition isn't sufficient to represent and safeguard all of the types of intangible cultural heritage that they practice. But they all agree that it is important to be at the table, have the conversation, and to be a part of the international discussion about this type of heritage.

Criticisms and non-ratification justifications

- Could be more narrowly (human rights compatibility) or broadly (outside 'traditional' culture) interpreted;
 - Could create another form of exclusionary listing;
 - Community participation, minority rights, and consultation barriers to state obligations;
 - Actual value of listing as safeguarding;
 - Ossification and stagnation (acknowledged by drafters); and
- “It is just difficult to see how you could apply a convention of that sort in the UK context ... it is not relevant... it just does not fit with the UK approach...I think it would be very difficult to bring in a convention that says we are actually going to list this sort of stuff and protect it. What are the obvious examples you come up with? Morris Dancing? As intangible heritage and so on? The UK has no intangible heritage.”

(Smith and Waterton, 2009, interviews with UK heritage practitioners on non-ratification)

Figure 6

Criticisms and non-ratification justifications

Notably, the United States, the United Kingdom – and I did used to have Ireland on here – are not signatories. Ireland has now signed up. They're one of the newest signatories, one of the newest parties to the Convention. I'll talk about a few examples from each of these jurisdictions and why it might make a difference if they are involved or not.

As far as joining or not joining, for the UK specifically, some of the criticisms of the Convention have been that it could be construed too narrowly or too broadly as a form of protection; it could create just another exclusionary listing and not really reflect cultural practices (Fig. 6). It might simply replicate mechanisms we already have: protections that are just listed, without any real effect on the culture. And also, the danger of ossification and stagnation, which is discussed in the literature on intangible cultural heritage, because ICH is something that is a living reflection of identity, and if you list it, then you limit the protection to that current manifestation. These are just some of the criticisms about the convention or reasons to not ratify.

You see here there was a study done of English UK heritage practitioners from English Heritage, by Smith and Waterton. The practitioners were talking about why they didn't think it was a good idea to ratify the Convention. They said 'It was just difficult to see how you could apply a Convention of that sort in the UK context. It's not relevant. It does not fit with the UK approach. I think it will be very difficult to bring in a Convention that says we are actually going to list this sort of stuff and protect it, what obvious examples could you come up with, Morris dancing as intangible heritage,' and so on. The UK has no intangible heritage, right? So, this was a big impetus for why I started looking at some of these examples because even some heritage practitioners have said that they don't think the UK has any intangible cultural heritage.

Intellectual Property rights

- EU Copyright Directive (2001)
- **Trade-Related Aspect of Intellectual Property (TRIPs) (1995) – trade sanction-backed**
- UK Copyright, Designs, and Patents Act (1988)
- Generally: Original, fixed artistic or literary work granted certain exclusionary property rights for a limited time.
- Make, use, copy, sell/assign, distribute, reproduce, derive, perform/display, transmit.
 - Moral rights (jurisdiction dependent): attribution, integrity, withdrawal, divulgation
- Exceptions and limitations: parody, fair use/fair dealing, research (sometimes), e.g.

ICH Related to IP...

- IP Buckets
- Copyright(able)
 - Subject matter
 - Authorship
 - Duration
 - Originality
- Technological advancement
- Globalisation



Figure 7

Intellectual Property Rights

- EU Copyright Directive (2001)
- Trade-Related Aspect of Intellectual Property (TRIPs) (1995) – trade sanction-backed
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Figure 8

ICH Related to IP

- IP Buckets
- Copyright(able)
 - » Subject matter
 - » Authorship
 - » Duration
 - » Originality
- Technological advancement
- Globalisation

One Convention that the UK has signed up to, though, is TRIPs, the Trade-Related Aspects of Intellectual Property: so, anything to do with knowledge protection or economic exploitation is endorsed. Copyright is just one part of that regime, as many of you know, is set out in the CDPA [the Copyright Designs and Patents Act 1988] (Fig. 7). Generally, copyright protects original fixed, artistic or literary works, granting exclusionary property rights for a limited time to the creator. And these rights are to make, sell, use, reproduce, derive, and perform the work. Of course, this is not a comprehensive overview, simply a summary of the general rights you might get when you enjoy copyright protection. And there are also exceptions and limitations to these rights, such as fair dealing for the purpose of parody or research.

How do these two things relate together (Fig. 8)? In countries that have strong IP regimes, if you are a creator or an author, you might be encouraged to transform the shape of your work to fit IP protection, to best protect your work either from other people exploiting it or protect your own rights to exploit your work the way that you want. Therefore, you might be encouraged to take something that is only an oral story and write it down to secure protection. Alternatively, you might register something as a trade mark. In short, creative and cultural output can be shaped by intellectual property treaties and national legislation.

With what we've talked about so far regarding intangible cultural heritage, you can see how it can overlap with protection for artistic and literary works, making ICH copyright-able. Some of this happens when libraries, archives or museums are capturing ICH in some way in order to display and convey it to a new audience, for instance with oral history. Oral history might gain copyright protection once recorded and written down. These sorts of changes to ICH, mediated by the GLAM sector and, become increasingly prevalent in a digital, networked world. All the works on display here today were digitised are part of this phenomenon. You don't have to go to these museums or these libraries to see them. And this trend towards digital cultural heritage will only increase, bringing more and more ICH to wider audiences in new, modified forms.

Tangification in the Propertisation Chain

-necessary but not sufficient-

Where are GLAM institutions situated?

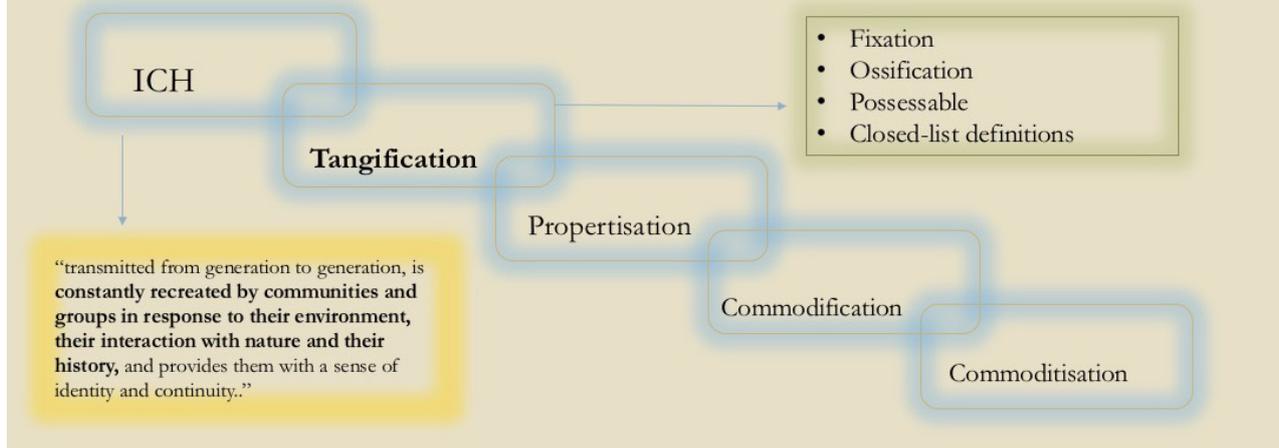


Figure 9

Tangification in the Propertisation Chain:
necessary but not sufficient

Particularly with intangible cultural heritage, there is something that has to happen to it in order for this to occur (Fig. 9). It's different if you're dealing with material that is already written down such as a book. It doesn't change form; it's written. But if you're dealing with a cultural practice or a form of craftsmanship, it needs to go through a 'tangification' process. There has to be something that happens to make it tangible so the law can protect it. If you have ICH and you look at the definition that is from the convention, it says that it's 'transmitted from generation to generation, constantly recreated by communities and groups in response to their environment'; if you make that tangible, it has to be fixed in a certain form in order to be property. This is a necessary but not a sufficient step in the chain. Some of these things happen and stop there. It might take a tangible form and not be eligible for copyright and thereby not be property; but in order to be property, it has to move into a tangible form. Once it's property there's the possibility that it can be commodified, meaning it takes a form capable of commercial exploitation. Once it's in a form that it can be sold, there's always the danger that these things get very popular. You get generic knock offs, and then you start to lose the unique identity that's associated with the ICH in the first place.

Scotland

Tartan as ICH

- Performed domestic 2008 listing in accordance with the 2003 Convention.
- How does domestic regulation affect community-led organisations when registers are subsumed?
 - National Records Service registers tartans since 2009, replacing clan-run registers.



Figure 11

Tangification in the Propertisation Chain: necessary but not sufficient

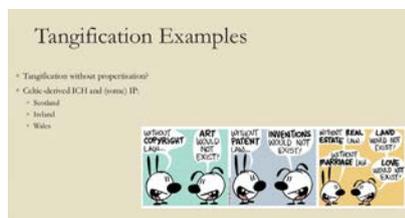


Figure 10

Tangification Examples

- Tangification without propertisation?
- Celtid-derived ICH and (some) IP
 - » Scotland
 - » Ireland
 - » Wales

For GLAM sector institutions, intellectual property is probably operating up here with where it goes into tangible form, capable of being or already property, but when you're working in the GLAM sector, you're probably working down here. How do you make something accessible to people in a tangible form without it losing its intangible identity function, right? So, this is where commodification becomes commoditisation: once it becomes a commodity it's anything like a generic pair of sunglasses, or any product that you would buy, just something that you wouldn't associate with cultural identity.

Some of the examples I'm going to talk about include Scotland, Ireland and Wales, in part to make clear that, yes, there is lots of intangible cultural heritage in the UK and in Ireland (Fig. 10).

So tartan is ICH (Fig. 11). Many of you are probably familiar with this, but tartan was banned by the Dress Act of 1746 and, as a method of social integration, was reintroduced into the Highlands in the later part of the century. The Highland Society in London contacted clans to inquire about their clan tartan. The clan chiefs said, essentially, we don't really have one, but pick us a good one, and we're happy to be a part of this. So it was a way to re-integrate people through craftsmanship and through tradition and through community identity. That's how the clan tartan assignments happened, and the Dress Act was repealed in 1782.

Throughout the next century, tartan came into commercial use. This is a postcard from 1920, which was the first recorded commercial use of tartan, and this is the controversial, I would say, Commonwealth Games tartan for Scotland. It's been re-adopted, but very much with awareness in Scotland that it's a second wave of adoption and a re-adoption of cultural identity.

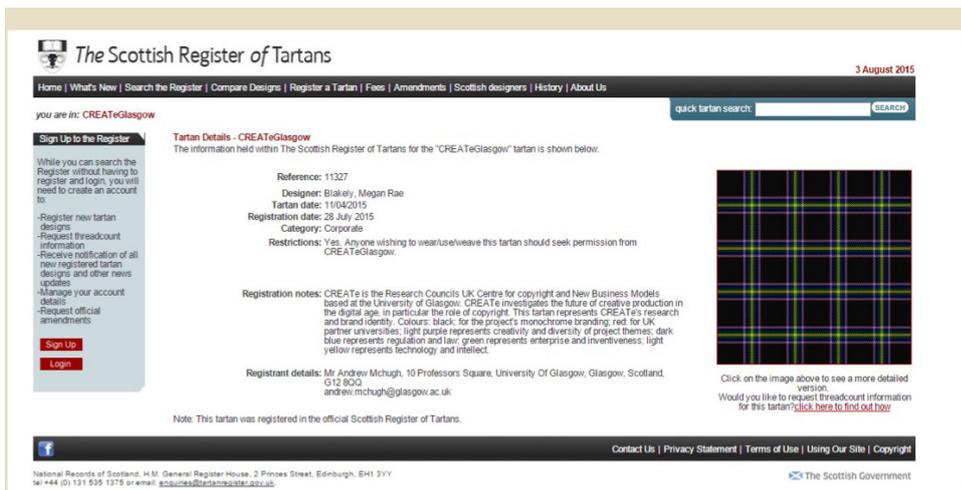


Figure 12
The CREATE tartan

We actually have a CREATE tartan. The clan registration system was moved in 2009 from community management to the NRS [National Records of Scotland], so there are also social activities and cultural work that goes along with managing these sorts of things (Fig. 12). It will be interesting to see over the next few years what happens with the centralised government registration of tartan given the social function this used to play for the clans.



Figure 13
Wales
Language and festivals as ICH

For Wales, you are probably all familiar with the Eisteddfod; but Welsh as a language was banned in schools and from use in government as a way to facilitate integration with England. It was taken out of public discourse, and was banned in public administration and the courts (Fig. 13). You could not use Welsh as a language in any official capacity. In 1967, the Welsh Language Act lifted the ban, which just meant that it wasn't illegal anymore; but it was not until 1993 that the language was afforded equal treatment. A lot of the pressure for this change came through social movements, through intangible cultural heritage practices at language festivals and the like. This is from the 1940s. This is one of the first renewed Eisteddfods, and this is a more recent picture. A lot of this was also done by guerrilla re-labelling of signs (Fig. 14); people would go out in the '60s and change the street signs. So, it was a little bit of sheer cultural force to make these statutory changes.



Figure 14
The Welsh Language Society

Ireland

Culture and Identity as ICH

- When does tourism promotion become commercial cultural branding?
 - Terms and conditions that transfer available IP rights to domestic government.



The Gathering: Ireland's Cynical Play For Irish-Americans Money

-Huffington Post, 16/03/2013

“The Grabbing”

-H, Ryan Air CEO,

Gabriel Byrne: The Gathering Ireland 'seen as scam' by Irish Americans

-Former Ambassador Gabriel Byrne, 6/11/2013

Figure 15

Ireland: Culture and Identity as ICH

Ireland put on a fairly well-financed effort for the Gathering in 2013, which again was controversial (Fig 15). Some people were quite enthused about it, had a large amount of social participation; but it did create a brand of what it means to be Irish. Money was offered to people who could demonstrate that they brought relatives over during the year 2013 to participate in the Gathering, who otherwise would not have visited. This in the middle is a postcard that was handed out to schoolchildren so that they could write to invite the people that left, which is problematic in a way because many people had to leave Ireland because of the social and economic situation there. Now they're invited back. Some people, like the now-former now Ambassador Gabriel Byrne, were not pleased. Byrne stated it was a “scam to shake down the diaspora for money.” ‘The Grabbing,’ it was also called by the Ryanair CEO. When tourism promotion becomes cultural branding: where is the line on that?

The Gathering: select terms and conditions

- Various types of Gatherings will be considered for funding – it can include **school reunions, sports clubs hosting overseas teams, music, cultural or business Gatherings** involving overseas visitors. This list is by no means exhaustive. The key criterion is the ability of the proposed Gathering to attract overseas visitors to the county/locality.
- What evidence can you provide of the **actual number of overseas visitors who attended the event?** (e.g. photograph; registration form; visitor book records; copy of flight boarding cards etc)
- On receipt of funding the Gathering organiser must ensure that the Gathering is promoted as a Gathering Ireland 2013 activity. This will include using the **logo in line with brand guidelines** (available on the Gathering website at <http://brand.thegatheringireland.com/login.php>). It is also requested that successful applicants be willing to participate in **promotional opportunities**.

What Fund amounts are available?

Fund amounts will be for a minimum of €500 and a maximum of €2,500 and will be directly related to the number of overseas visitors that will be delivered. Overseas visitors are those who travel from outside of the island of Ireland.

The Fund awards scale will be as follows:

Fund Amount €	Minimum Number of Overseas Visitors Required
€500	10
€1000	20
€1500	30
€2000	40
€2500	50

Figure 16
The Gathering: select terms and conditions

This chart sets out the minimum number of visitors that you can prove visited, either by photographic evidence or boarding passes, and providing this data to the government. The government offered to pay, for example, 500 Euros if you met this minimum number of overseas visitors (Fig. 16). The amounts vary according to the number of properly reported visitors. This could be for things like your family gathering or a gathering of pipers who are from the south of Cork or something: anything that was already happening you could plug into this form, brand it as part of ‘the Gathering,’ and get money for providing this data.

The Gathering: IP terms and conditions

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• <http://www.thegatheringireland.com/Terms-conditions.aspx>

Figure 17
Intellectual Property:All rights in the intellectual property contained in this Site including copyright, trade marks, trade secret and patent rights are reserved. The editorial content of the site and all text, graphics, logos, icons, images, audio clips and software is copyright of the Company and/or of the authors, photographers and illustrators who contribute to the Site, and the user shall not alter or remove any copyright, symbol, or any other identification or information, Concerning the authorship or ownership of any of the content of the Site. . . .

On the intellectual property side, the first clause looks fairly typical; but in the submissions, they go ahead claim IP rights in anything that is submitted. That is, they requested photos and all these sorts of things that would become property of the company, at the free disposal and use of the company. Unless otherwise specified in writing, all materials will be public, and the ownership to present and future existing rights and information without compensation will belong to the company (Fig. 17). There is this small print. There's nothing nefarious going on right now, I suppose, but then you have this legal precedent, this trend that you make these records of cultural happenings that are already occurring and can compensate people for that but also claim all the associated intellectual property rights.

continued on next page

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Figure 18

Punk London: 40 years of subversive culture

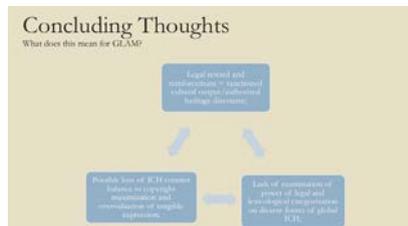


Figure 19

What does this mean for GLAM?

This is my final example, one that is currently in the news, and which I've just started to explore – and I know there are people in the room that are at least familiar with, if not participating in this project (Fig. 18). It's the celebration of the 40th anniversary of punk culture in London, and there are many sponsors. In the Financial Times, some of the members that are close to the movement and bands have criticised it and called it things like 'tourism' or just 'tribute bands', whereas there's lots of enthusiastic participation as well. So, this is one example of something that has a lot of ICH attached to it, where people have very different perspectives on how it should be handled. The son of the late manager [Joe Corr ] has gone public and has said that in November he will burn £5 million of memorabilia related to the punk scene. So not everyone is pleased, but this is still in progress and it poses important questions about cultural heritage: does it belong to the practising community or does it belong to the common heritage of humankind? And if we take the position that it belongs to everyone then perhaps this is the right way to go, that we have an anniversary; we celebrate it in different ways. If it belongs to the practising community and it no longer has that value to the community, or if one of those values is anti-institutionalism, is it right to institutionalise it? I'll just leave that as an open question that will hopefully provoke some discussion.

My concluding thoughts: I don't know that a circle is really the right way to put this, but I wanted to convey an interaction between legal reward and reinforcement (Fig. 19). When you have heavy intellectual property regimes, that's going to create an 'authorised heritage discourse,' as Laura Jane Smith called it, that can sanction and encourage the types of output – cultural output – that will fit into intellectual property. If we don't examine this process and we don't acknowledge the intellectual property and intangible cultural heritage that is inherent in the GLAM sector practices as keepers of cultural heritage, there's always the danger that you lose some of this ICH just in the face of documenting. Also there's a general over-valuation of tangible expression as documented in the conventions that have been put forth in culture going forward from the World Heritage Convention; the 2003 Convention is really one of the first to address ICH. This is just part of the symbiotic relationship that I'm looking at in my work.

Thank you.

Image Credits

Figure 8: Cartoon ID: fam36, Glasbergen, R., In Copyright (2004), <http://www.glasbergen.com/>.

Figure 10(1): Science Museum Group. Princess Helena and Princess Louise. Science Museum Group Collection Online (1856), Creative Commons Zero, <http://collection.sciencemuseum.org.uk/objects/co8225045>.

Figure 10(2): Comic Postcard, NRS reference: GD1/1295/5, National Records of Scotland, <https://www.tartanregister.gov.uk/nrsSources.aspx>.

Figure 10(3): Commonwealth Games Tartan, SNS Group, In Copyright (2014).

Figure 11: Mimi & Eunice, Paley, N., CC BY-SA 3.0, mimiandue-unice.com.

Figure 13(1): Llandudno Eisteddfod, July 5, 1946, BBC Wales, In Copyright (2014), http://www.bbc.co.uk/wales/history/archive/?theme_group=society_and_culture&theme=events&set=eisteddfod.

Figure 13(2): <http://decktheholidays.blogspot.co.uk/2015/09/national-eisteddfod-of-wales.html>.

Figure 14(1): 'Protest Disrupts Welsh Language Trial', BBC News, In Copyright (1971), http://news.bbc.co.uk/onthisday/hi/dates/stories/april/27/newsid_2953000/2953265.stm.

Figure 14(2): Morgan, J. <http://www.alamy.com/stock-photo-wheres-the-welsh-poster-protest-by-welsh-language-society-on-street-11714811.html>.

Figure 15: The Gathering Branded Materials, In Copyright (2013), <http://www.thegatheringireland.com/>.

Figure 16: The Gathering Branded Materials, In Copyright (2013), <http://www.thegatheringireland.com/>.

Figure 18: Punk London Logo, In Copyright (2015), <http://punk.london/>.

COPYRIGHT AND CULTURAL MEMORY

The Lighthouse, Glasgow // 9 June 2016

Kerry Patterson

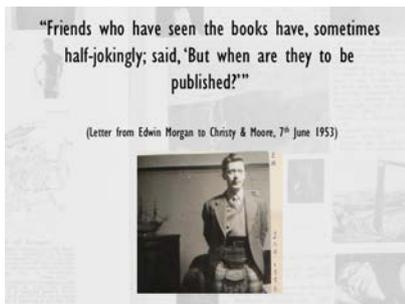


Figure 1

"Friends who have seen the books have, sometimes half-jokingly; said, 'But when are they to be published?'"

Letter from Edwin Morgan to Christy & Moore, 7th June 1953

'But when are they to be published?' Digitising the Edwin Morgan Scrapbooks

I'm Kerry Patterson, the project officer for the Digitising the Edwin Morgan Scrapbooks project. This is a joint venture between today's organisers, CREATE, and Special Collections in the University of Glasgow Library. The project centres around a set of scrapbooks created by the poet Edwin Morgan between the 1930s and the 1960s.

Morgan was born in Glasgow in 1920. Known internationally as a poet and a translator, he was also a professor at Glasgow University. In his teens he was very interested in pursuing a career in art and design, though he later decided on a literary route. So the scrapbooks are actually really important as an early creative outlet, and that continued until he was in his 40s.

Morgan had a great desire to have his scrapbooks published and this began in the 1950s, before he'd even finished completing the 16 volumes of scrapbooks that now exist. He wanted them published and he really put a great value on them.

This quote is from a letter that he sent to his literary agent in 1953 as the agent had been enquiring if Morgan had any longer works on a larger scale suitable for publication (Fig. 1). Morgan wrote quite a long letter, gently proposing that these scrapbooks could be published. What happened after this? Nothing - no reply is recorded. They didn't take him up on his offer and he continued with his career, teaching, writing and continued making the scrapbooks for about another decade.



“partly documentary/historical, partly aesthetic, partly satirical and partly personal... a Whitmanian reflecting glass of ‘the world.’” Edwin Morgan

Fig. 2

“partly documentary/historical, partly aesthetic, partly satirical and partly personal . . . a Whitmanian reflecting glass of ‘the world.’”

Edwin Morgan

So what are the scrapbooks? This is an example of a page from scrapbook 12 (Fig. 2). It does look like you would expect a scrapbook to look but it goes beyond that. It’s very highly and specifically organised, it reflects his interests and his life. This double page has got 61 individual cuttings. These are from a range of different types of material. A lot of it’s contemporary with the production or the creation of the books, so this was made from 1954 to around 1960. The cuttings could be very small, they could be an individual word from an article, a really tiny image or a corner of an image and they’re all put together and shaped and layered, and he completely fills the pages of the books. If he can’t find an image, he’ll put a little squiggle or a doodle in the corner. So it’s quite an obsessive, thorough way in which he created these books.

The project is looking at how EU and UK copyright policy impact the digitisation of the collections like the scrapbooks, looking at what the costs are in clearing rights and how onerous the current requirements of diligent search are. Essentially, it’s about how we can legally digitise this set of scrapbooks and other works like the scrapbooks.

Figure 3 (to right)

The Project

Exploring the impact of EU and UK copyright policy on the digitisation of unique and distinctive artistic collections

What are the costs involved in clearing rights to make available mixed-media archive collections?

How onerous are diligent search requirements?

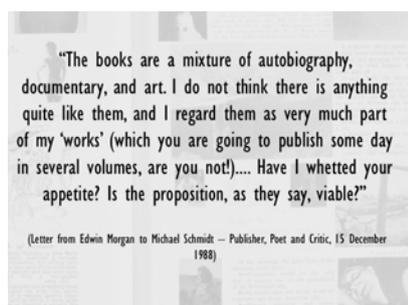


Figure 4

"The books are a mixture of autobiography, documentary, and art. I do not think there is anything quite like them, and I regard them as very much part of my 'works' (which you are going to publish some day in several volumes, are you not!)... Have I whetted your appetite? Is the proposition, as they say, viable?"

Letter from Edwin Morgan to Michael Schmidt - Publisher, Poet and Critic, 15 December 1988



Figure 5

"The project looks astonishingly fascinating. It also looks hugely expensive. When you mention that there are 3,600 pages, it looks particularly expensive!"

Letter from Michael Schmidt to Edwin Morgan - 21 December 1988

The Project

Exploring the impact of EU and UK copyright policy on the digitisation of unique and distinctive artistic collections

What are the costs involved in clearing rights to make available mixed-media archive collections?

How onerous are diligent search requirements ?



Moving forward from Morgan’s first efforts in 1953, 35 years on to 1988. This is a quote from a letter that Morgan wrote to his publisher, Michael Schmidt at Carcanet, in 1988, in which he’s trying to pique his publisher’s interest in publishing the books (Fig. 3). Morgan was by now a retired professor, an established poet and a translator with a long standing relationship with his publisher. He didn’t actually have the scrapbooks in his possession any more because he gave them to Special Collections in 1980, but even in spite of that, he was still so determined to achieve publication. I think this is really what the project is about, along with the academic outputs, it’s about trying to do this thing that Morgan had been trying to achieve since 1953, which was publishing the scrapbooks.

This was the reply from his publisher, which was interested but cautious and again, unfortunately at this time in 1988, nothing came of it (Fig. 4). The publisher didn’t take him up on the offer, so the scrapbooks remained unpublished. Note that it says the project “looks particularly expensive”, which is certainly something that we’ve continued to discover (Fig. 5).

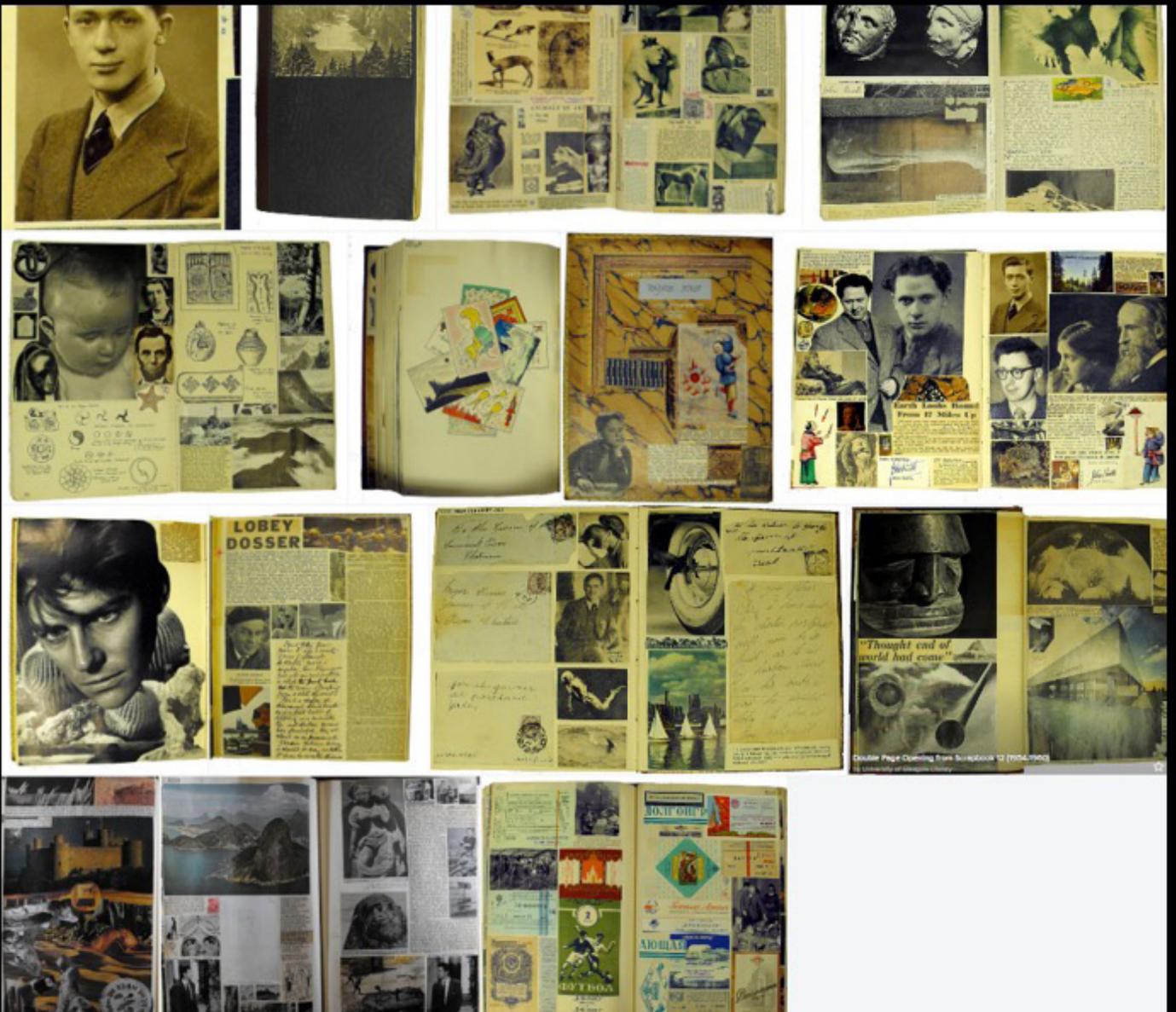


Figure 6

Flickr set of 15 images

A first step to publication was made in April 2010. A Flickr set of 15 images was made available to celebrate Morgan's 90th birthday by the University of Glasgow Library with Morgan's biographer James McGonigal supplying commentaries on the pages (Fig. 6). These pages were made available on a risk-managed basis, so choosing pages which had quite abstracted images, ephemera and Morgan's own artwork. This risk-managed approach is really used quite widely by many institutions, but obviously some organisations are more risk averse than others.

But how can we make the scrapbooks available in a more widespread way? The main barriers for that would be the cost of colour reproduction and copyright costs. In 2016 because we're able to reproduce material online, reproduction costs need not necessarily be an issue, but the cost of rights clearance and those associated costs still remain. The crux of the issue with this scrapbook is really the vast number of creators and the vast number of works which are uncredited.



Figure 7 (top left)

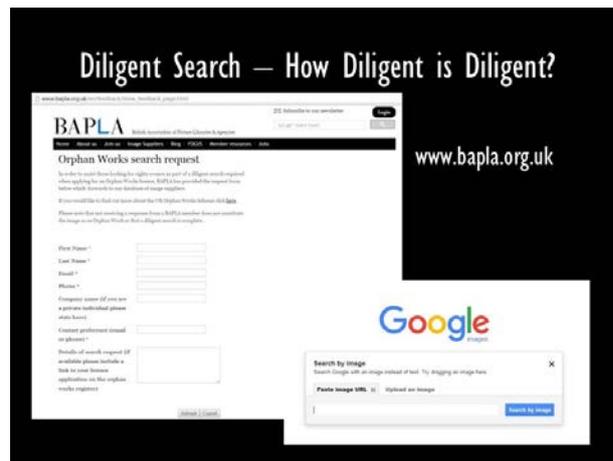
Figure About The Scrapbooks

- 3,600 pages over 16 volumes
- Estimated 54,000 individual items
- Estimated 72% Orphan Works

Figure 8 (top right)

Diligent Search – How Diligent is Diligent?

BAPLA.org.uk
Google.co.uk



Some figures about the scrapbooks. Over 16 volumes, there are 3,600 pages. There are an estimated 54,000 individual items and an estimated 72% of orphan works (Fig. 7).

There are two aspects to look at in terms of digitisation: rights clearance for works that have known copyright holder; and also diligent search for works without known copyright holders. These are the orphan works. So the definition of an orphan work is any work which is still in copyright, but the rights holders are not known or can't be found following a diligent search.

I'm going to focus today on diligent search under the UK Orphan Works Licensing Scheme. With the orphan works, the type of works in the scrapbook, what kind of diligent search can actually be performed? What is really difficult is that so much of the material is de-contextualised and there is so much of it. As you've seen from the earlier image, a lot of the material is images and these are cut out from the original source, without any note of where they came from.

My initial diligent searches were carried out for these images and I used image search engines such as Google image search (Fig. 8). This allows you to upload an image and search for it that way. The IPO's diligent search guidelines recognise this type of diligent search. They include a couple of suggestions for search engines, which are TinEye and PicScout, as ways of looking for your images. I did a little bit of work with Google, TinEye and PicScout and I really found that Google had the greatest chance of success because they actually have access to the most images. Another source suggested by the IPO is BAPLA which is the British Association of Picture Libraries and Agencies. They have an orphan works search request form on their website so you can go and put your details in and this goes off to a number of picture libraries who can then get back to you if they're able to match up your query with anything held by their members.

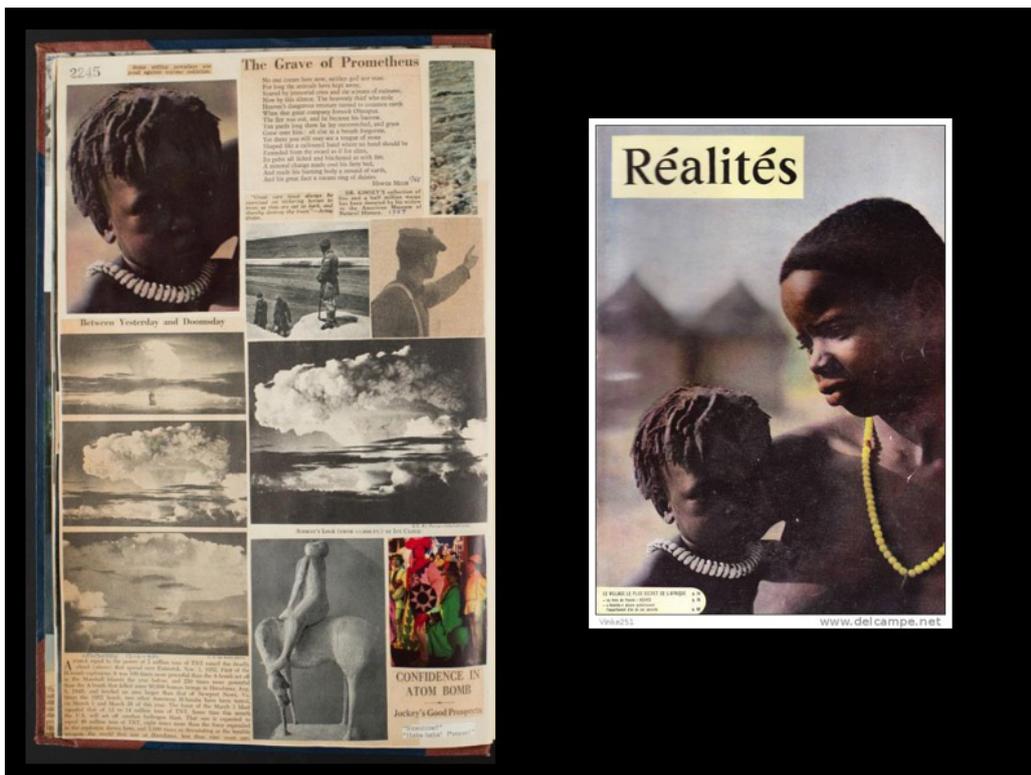


Figure 9

Figure About The Scrapbooks

- 3,600 pages over 16 volumes
- Estimated 54,000 individual items
- Estimated 72% Orphan Works

I actually experimented with using some of these image search tools for my brochure essay that accompanies the exhibition, so if you want to read a little bit more about that, you can read it in there.

What I found really helpful for the scrapbooks about these image search engines was that they can help identify partial images. You might be able to see at the top left of the scrapbook page here (Fig. 9): there's a photograph of a child. This has been cut from a larger image. When I ran this through Google, I found out that it came from the cover of this magazine (Fig. 7), a French magazine, again from around the 1950s. This was great, it confirmed my suspicions that it was probably in copyright, by a significant photographer who was a professional. I passed this magazine cover image on to the BAPLA picture agency, but unfortunately nobody was able to identify it there. So we did get a partial result, but I think it just shows that even identifying some images or making that first step doesn't necessarily mean that you're going to be able to go forward and complete your rights clearance.



Figure 8 (to right)

Diligent Search – How Diligent is Diligent?

BAPLA.org.uk
Google.co.uk

But also another thing to think about is the image that was used in the scrapbook is a partial image, so even if we were able to get in contact with the photographer, would they be concerned about this small portion of their image being used in this way? Possibly not. Other contact I've had with some photographers as individuals and their estates have shown that they're actually quite happy for images to be used in this project, although that's certainly not universally the case. But it can really depend on the individual.

Luck vs. Diligent Search



Bernard Poinsett (1922-1965)

2 hours 40 minutes

Figure 10

Luck vs. Diligent Search

Kerry Patterson: Hi, can u tell me where the photo of a boy in ur profile pic is from? Odd question, but I'm searching for copyright details

James Finch: Glad you like! By Bernard Poinsett - recently reproduced in James Hyman, 'The Battle for Realism' (Yale) so sure he could tell you

Kerry Patterson: Cheers, such a weird coincidence it's used in scrapbook made by poet Edwin Morgan but doesn't show up on Google Image search

James Finch: ok well it was in Encounter mag in 1954 acc. this article: (link) so good chance he got it there

Twitter conversation between Kerry Patterson and James Finch on 8 June 2015

So this brings me on to the element of luck in diligent search. This is an image, black and white portrait image of a boy which comes from the scrapbook (Fig. 10). Again, this sets up a bit of a red flag for me; a professionally taken photograph, it's from a glossy magazine but there's absolutely no context with it at all. I did some image searches and didn't have any luck, but then by sheer chance I managed to find on Twitter that somebody was using this same image as their avatar, so I got in touch with them and found out that they had taken it from a book and it had originally come from a magazine from the 1950s. It's by a French photographer called Bernard Poinsett. I was able to get in touch with his son after some emails in French using Google translate and the help of a colleague. He was not sure if it actually was by his father but once we'd sorted that out and he agreed that it was, we could use it for free in the book but we do have to put a disclaimer because he was not happy with how it's appeared in the scrapbook, as it didn't represent his father's work very well. This was an example of sheer chance because I hadn't been able to find this out using any of the normal diligent search sources. If I'd had access to a bunch of contemporary photography magazines I might have found it, but that would really be going beyond what would be the reasonable bounds of diligent search.



Figure 11

Orphan Works Application Statistics

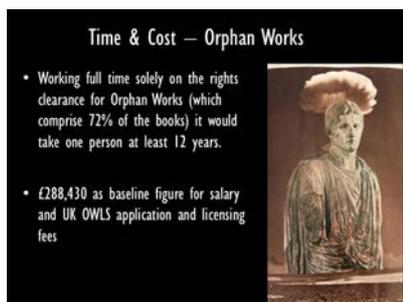


Figure 12

Time & Cost – Orphan Works

- Working full time solely on the rights clearance for Orphan Works (which comprise 72% of the books) it would take one person at least 12 years
- £288,430 as baseline figure for salary and UK OWLS application and licensing fees

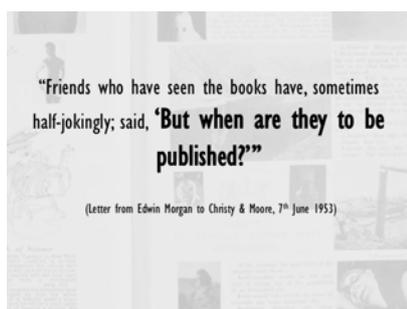


Figure 13

Where are we now?

"Friends who have seen the books have, sometimes half-jokingly, said 'But when are they to be published?'"

Letter from Edwin Morgan to Christy & Moore, 7th June 1953

As part of the project I made an orphan works application to the Orphan Works Licensing Scheme (Fig. 11). I picked five works from the scrapbook: a poem; an original photographic work; a magazine cutting; and two cartoons. These are the times that were taken for [searching for] the works. The longest time, which is just over 3 ½ hours, is for a magazine that appears frequently in the scrapbooks, but even though it is named, ownership of the publication is quite unclear. The shortest time spent was 35 minutes on this black and white photograph and the longest time was 3 hours 35, and that includes diligent search and also completing the licensing application.

For the 35 minute search – again this is a completely de-contextualised photographic image. Before submitting the application I just did diligent search through the three image search tools, Google Images, TinEye and PicScout and submitted it with that as my only form of diligent search because there was no other information available. The IPO came back and they recommended that I search BAPLA and contact two other photographic agencies. Once I'd done that and had no result, they were satisfied that it could be considered as an orphan work. So, the amount of time spent on search really varies quite dramatically, and what it says about the definition of diligence is that the IPO regard it as very much dependent on the work. I felt that it might even be very much less than an archivist might normally consider to be necessary, such as in the case of the photograph. 35 minutes seems like quite a short time, but with such de-contextualised work, there are no other sources.

Looking at the time and cost: if 72% of the 54,000 are orphan works, it would take one person nearly 12 years to clear rights just for those items and a baseline figure for that is £288,430 (Fig. 12). Obviously this is a significant amount of money and time and this is also just for the orphan works, so doesn't include the cost of works in copyright, which may or may not incur a cost but would certainly at least take time, which is arguably the most significant factor.

So returning back to Edwin Morgan, where are we now? From his original letter that he wrote on 7th June 1953, it's nearly 63 years to the day from his first approach to a publisher and when are the books to be published (Fig. 13)?

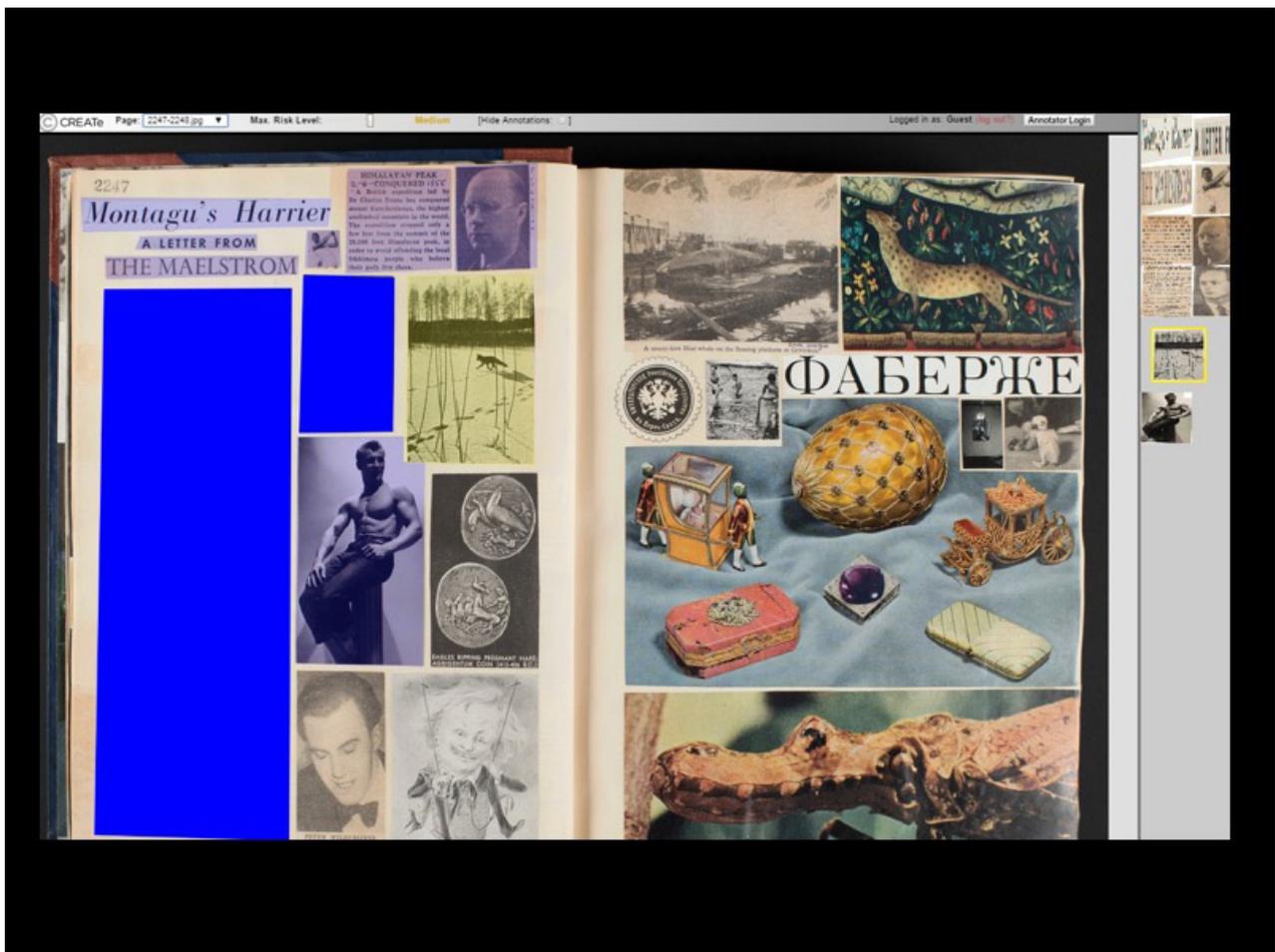


Figure 14
Web resource example

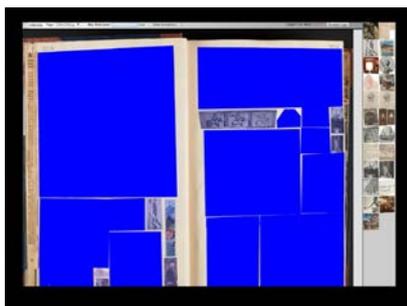


Figure 15
Web resource example, double page view

What we're in the process of working on is creating a digital edition of part of the scrapbooks (Fig. 14). It's actually 10% of scrapbook 12 which is only a 30 page sample. This is going to be embedded in a web resource that includes information on copyright and for organisations who wish to work with similar materials, for example newspaper cuttings or photographs, and providing briefing notes and information notes to inform people about the relevant laws that they need to consider and what kind of risks that they may be incurring.

This is an example of a double page view (Fig. 15). This is filtered – we have set it up so you can filter it to see all of the pages as they are or you can also filter it according to your risk appetite. If you have a low appetite for risk, this is what you can see of the pages, this hides all the medium risk and high risk items. All that's left are things which are out of copyright or made by Edwin Morgan or things which are really so abstracted from their original source that they don't meet the definition of substantiality under copyright law. Not really very much to look at!



Figure 16

Web resource example, with a medium risk filter applied

This is if you are looking at the scrapbooks under a medium risk filter, just taking out the really high risk, red flag items (Fig. 16). You can see a lot of what's there but you can't see everything. But really, Morgan's own vision of how he wanted the scrapbooks to be is that they're kind of an overall work, and to blank things out in this way means that you can't see the work as Morgan would have originally intended.

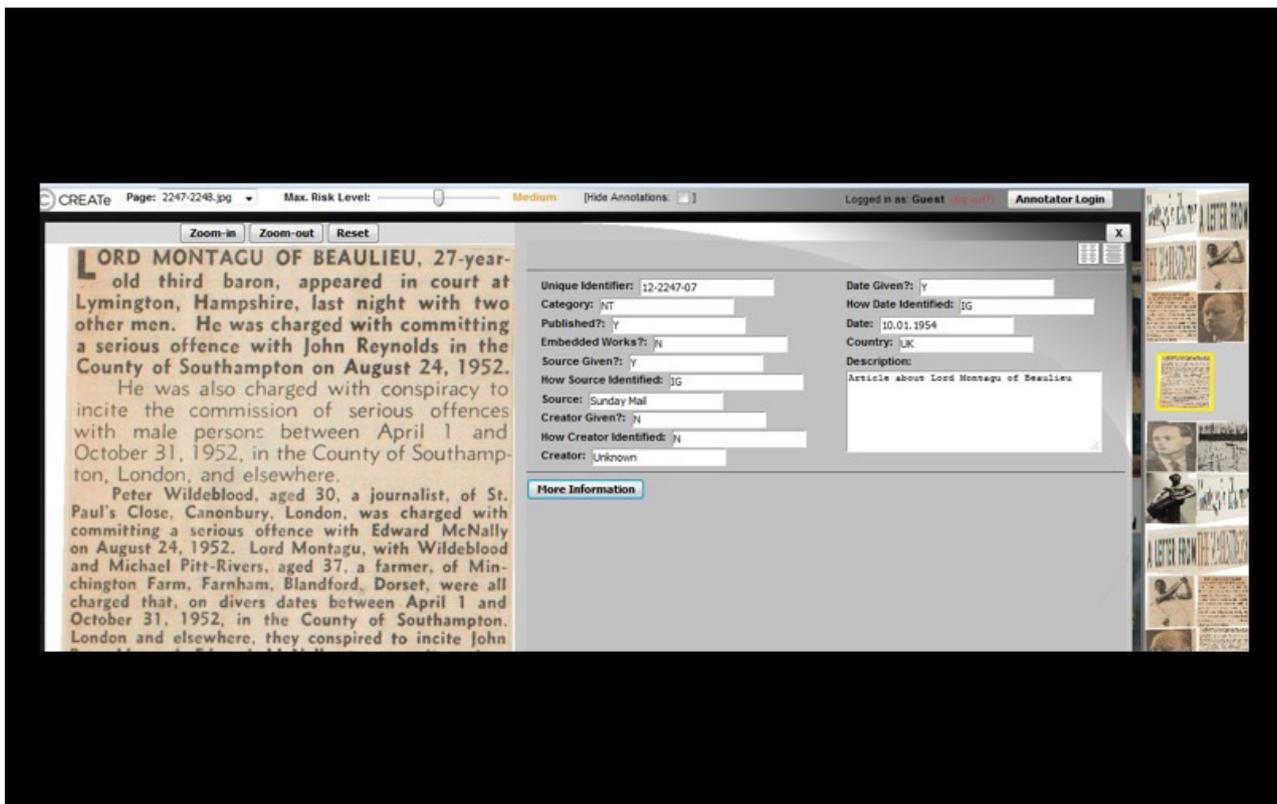
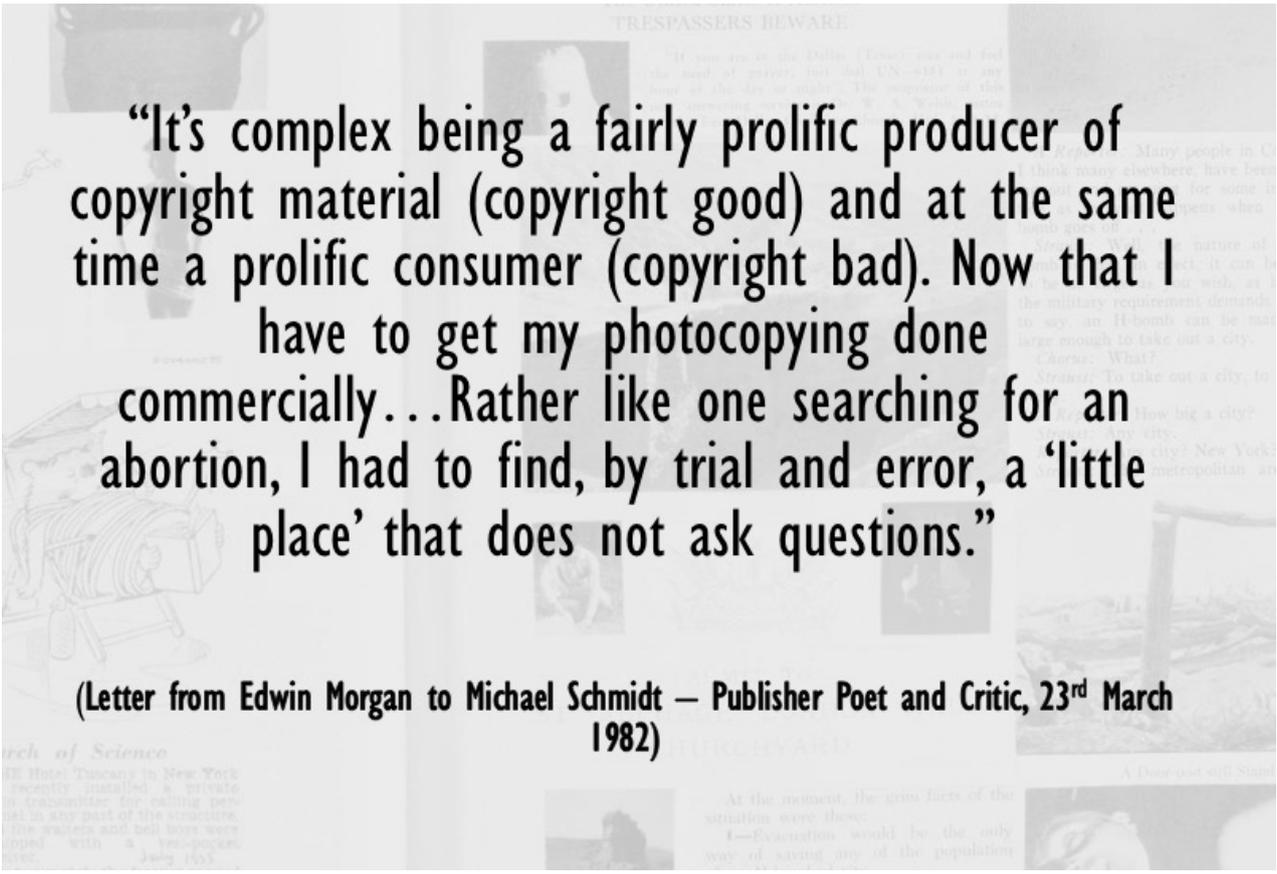


Figure 17

Web resource example, with a medium risk filter applied

The site will also have a view of each individual cutting – you can click on it to see information (Fig. 17). You'll be able to look at the information about where it came from, some of the risk judgments that have been made and also if there's any credit lines. The idea is that we're going to make everything available to see and so if people have asked us for costs, that information will also be included. This is going to be displayed with a very thorough disclaimer as it's part of a research project, and it's really partly under those auspices that we're able to make it available in this way.

Some conclusions. How diligent is diligent? It's dependent on the item and this is recognised by the IPO and also reflected in the Orphan Works Licensing to the effect that the bar is set much lower for items without context, although the application procedure takes just the same amount of time. So the requirements of the IPO for diligent search may also be much lower than you may expect, and maybe even lower than your own instincts as an archivist. If you work for an organisation that's quite risk averse – this may not actually be the same as you would expect, but the monetary and time costs are still enormous for a mass digitisation project such as this.



“It’s complex being a fairly prolific producer of copyright material (copyright good) and at the same time a prolific consumer (copyright bad). Now that I have to get my photocopying done commercially... Rather like one searching for an abortion, I had to find, by trial and error, a ‘little place’ that does not ask questions.”

(Letter from Edwin Morgan to Michael Schmidt — Publisher Poet and Critic, 23rd March 1982)

Figure 18

“It’s complex being a fairly prolific producer of copyright material (copyright good) and at the same time a prolific consumer (copyright bad). Now that I have to get my photocopying done commercially . . . Rather like one searching for an abortion, I had to find, by trail and error, a ‘little place’ that does not ask questions.”

Letter from Edwin Morgan to Michael Schmidt – Publisher Poet and Critic, 23rd March 1982

As I mentioned, we are making part of the scrapbooks available under the auspices of this research project and the fact that web visitors will be able to see everything, even items which we would potentially have to pay money to use, this is obviously not an approach that institutions would be willing to take themselves. We’ve drafted a very thorough disclaimer with the input of a number of experts in archives and copyright law. But again, this is not help that most organisations have access to and digitising the scrapbooks is certainly not an act that a cultural heritage institution would take lightly. Even with a high appetite of risk in terms of diligent search, digitising these large numbers of items where the rights holders are known will also be costly.

In 2016 physical reproduction costs don’t have to be a cost issue, but rights clearance very much remains an issue, and for me, time is the crucial thing here. Morgan spent 30 years working on the scrapbooks and it could really take half of that time again to clear the rights for the thousands of individual tiny items.

I’ll just end by reflecting on a quote from Edwin Morgan (Fig. 18), describing the dual nature of being a copyright producer and a copyright consumer, as copyright good versus copyright bad and even though we’re still striving to obtain this publication that he desired, I know that he would certainly sympathise with our struggle.

Thank you.

Image Credits

Figure 1: Photograph of Edwin Morgan from Scrapbook 12, Unknown, © The Edwin Morgan Trust, Courtesy The University of Glasgow Library, MS Morgan C12

Figure 2: Double page from Scrapbook 12, Edwin Morgan, © The Edwin Morgan Trust, Courtesy The University of Glasgow Library, MS Morgan C12

Figure 3: Double page from Scrapbook 12, Edwin Morgan, © The Edwin Morgan Trust, Courtesy The University of Glasgow Library, MS Morgan C12

Figure 4: Quote from letter from Edwin Morgan, Edwin Morgan, © The Edwin Morgan Trust, Courtesy The University of Glasgow Library, MS Morgan

Figure 5: Quote from letter from Michael Schmidt, Michael Schmidt, © Michael Schmidt, Courtesy The University of Glasgow Library, MS Morgan

Figure 6: Page from Scrapbooks, Edwin Morgan, © The Edwin Morgan Trust, Courtesy The University of Glasgow Library, MS Morgan

Figure 7: Double page from Scrapbook 12, Edwin Morgan, © The Edwin Morgan Trust, Courtesy The University of Glasgow Library, MS Morgan C12

Figure 9(1): Double page from Scrapbook 12, Edwin Morgan, © The Edwin Morgan Trust, Courtesy The University of Glasgow Library, MS Morgan C12

Figure 9(2): Cover from Realities Magazine, Photographer unknown, © Unknown

Figure 10: Photograph of boy, Bernard Poinssot, © The Estate of Bernard Poinssot, MS Morgan C12

Figure 12: Collage from Scrapbook 12, Edwin Morgan, © The Edwin Morgan Trust, Courtesy The University of Glasgow Library, MS Morgan C12

Figure 13: Quote from letter from Edwin Morgan, Edwin Morgan, © The Edwin Morgan Trust, Courtesy The University of Glasgow Library, MS Morgan

Figure 18: Quote from letter from Edwin Morgan, Edwin Morgan, © The Edwin Morgan Trust, Courtesy The University of Glasgow Library, MS Morgan



COPYRIGHT AND CULTURAL MEMORY

The Lighthouse, Glasgow // 9 June 2016

Victoria Stobo

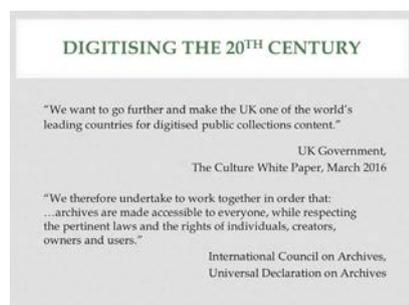


Figure 1

Digitising the 20th Century

"We want to go further and make the UK one of the world's leading countries for digitised public collections content."

UK Government, The Culture White Paper, March 2016

"We therefore undertake to work together in order that: . . . archives are made accessible to everyone, while respecting the pertinent laws and the rights of individuals, creators, owners and users."

International Council on Archives, Universal Declaration on Archives

Copyright, Digitisation and Risk: Taking risks with archive collections

Hi everyone. I'm going to present some of the results of my PhD research, which examines how archivists manage and mitigate risks when making material which is still protected by copyright available online.

So I thought I'd start with a couple of quotes (Fig. 1). Most of the collections that I'm going to look at today date from the early to late 20th century, and I want to start with this quote from the UK Cultural White Paper, which was published in March. 'The government wants to make the UK one of the leading countries for digitised public collections content.' I thought I would pair this quote with the Universal Declaration on Archives. 'We therefore undertake to work together in order that archives are made accessible to everyone while respecting the pertinent laws and the rights of individuals, creators, owners and users.' I wanted to put these quotes together because I feel like archivists are being pulled in two directions. We want to make our collections accessible to everyone and the government wants us to make more of that material available online, but even with recent changes to UK copyright law in 2014, the legislation falls far short of delivering the exceptions required to make collections available online at scale. Additionally, our own professional standards highlight the importance of respecting both the rights of creators and owners, but also those of users.

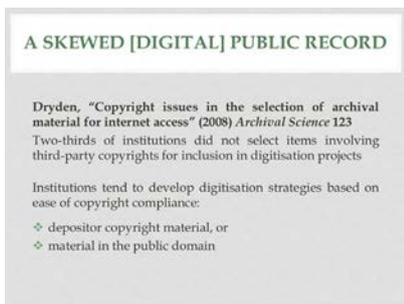


Figure 2

Dryden, "Copyright issues in the selection of archival material for internet access" (2008) *Archival Science* 123

Two thirds of institutions did not select items involving third-party copyrights for inclusion in digitisation projects

Institutions tend to develop digitisation strategies based on ease of copyright compliance:

- depositor copyright material, or
- material in the public domain



Figure 3

Churchill Papers commercial digitisation project with Churchill Archive Centre at Cambridge University

Being pulled in these different directions could potentially lead to a very skewed digital public record. Of course this is accepting the fact that there will always be other factors influencing the decision to make particular collections available to others and that's not just an issue of copyright. But copyright certainly contributes to the fact that material created in previous centuries has been digitised and made available, while the 20th century is strangely absent online.

We know that the cost of rights clearance outstrips both the cost of digitisation and the monetary value of most archive collections and we also know that rights clearance processes are unsatisfactory. So we've seen from Kerry's presentation today, rightsholders cannot be found or they do not respond to permission requests and the burden tends to be greater for archives because our collections are larger, they contain more orphan works and because they're subject to absurdities like the 2039 rule. As a result, archive institutions are very selective about what they digitise and make available online. Jean Dryden's Survey of Canadian Archive Institutions has shown that two-thirds do not select items involving third party copyrights for inclusion in digitisation projects (Fig. 2). We tend to develop digitisation strategies based on ease of copyright compliance. So we pick material where the depositor has assigned copyright to us or we know that our parent institution has some claim on the copyright or we look for material in the public domain, although we do know that the public domain in the UK has been reduced by the 2039 rule.

The projects that I'm going to look at today involve those institutions who have decided to digitise third party copyright material. These are some case study examples taken from my PhD, and these are to illustrate the rights clearance process for different types of archive institutions and different types of collections. The first is the Churchill Papers (Fig. 3). They were purchased for the nation using Heritage Lottery funding and they're held at Churchill College Archive Centre at Cambridge University. They were originally microfilmed between 2000 and 2005 and then they were digitised in 2010. They were digitised by a commercial publisher each time. The archivist provided rights holder names from the catalogue and they developed an appropriate rights clearance process, but the clearance itself was actually managed centrally by the publishers for both projects. This was a comprehensive digitisation project, but subject to sensitivity review; the entire collection was digitised. Rightsholders were contacted three times, either by letter or email, with follow up attempts and non-responders were advertised in *The Times Literary Supplement*.

RIGHTS CLEARANCE

CHURCHILL: MICROFILM & ONLINE

NAMES IN COPYRIGHT DATABASE	20,482	2000-2005	NAMES IN COPYRIGHT DATABASE	20,482	2010 <1 Year
Contact details: Letters Sent	12,573	61% of those identified	Contact details: Letters Sent	10,537	51% of those identified
Total replies	4209	33% of those contacted	Total replies	2104	20% of those contacted
Permission granted	4195	99.7% of respondents	Permission granted	2035	97% of respondents
Permission refused	14	0.3% of respondents	Permission refused	69	3% of respondents
Did not respond	8364	67% of those contacted	Did not respond	8433	80% of those contacted
Orphan Works	7909	39% of those identified	Orphan Works	9945	49% of those identified

Figure 4

Rights Clearance of Churchill Papers micro-film and online catalogue content

I have the results of both rights clearance attempts here (Fig. 4). There are two sets of results from two projects. The archivists identified roughly 20,500 names in the catalogue and they attempted to trace all of those rightsholders. They found roughly 12,500 addresses and letters were sent to them. Only a third of those contacted replied, which is very low, but 99% of those who responded said yes, which is a very positive result. Two thirds did not respond and 39% of the rightsholders could not be identified or contacted, so a huge amount of the collection is actually orphaned.

In the second round of clearance in 2010 it was much simpler because the previous clearance database had been kept and the process was completed a second time. It's interesting to note that even though only five years have passed between the two clearance projects, there is a 10% rise in orphan rightsholders and the response rate falls by over 10%. There's also a slight rise in those refusing permission and this may have something to do with the fact that the microfilm was only made available in university libraries, whereas in the second round they were being made available online, although it was behind a paywall.



Figure 5

Bloodaxe Books with the Bloodaxe Archive at the University of Newcastle Special Collections

Figure 6 (to right)

Rights Clearance results for the Bloodaxe case study

RIGHTS CLEARANCE BLOODAXE: THE RESULTS SO FAR		
NAMES IN COPYRIGHT DATABASE	360	
Reliable contact details: total letters sent	327	91% of all rightsholders
Total replies	173	53% of those contacted
Permission granted	125	72% of respondents
Permission refused	23	13% of respondents
Did not respond	154	47% of those contacted
Orphan Works	33	9% of those identified
In Progress	25	15% of those identified

The second example I have is the archive of Bloodaxe Books (Fig. 5). The Bloodaxe Archive is an internationally significant resource for contemporary poetry, it's held at University of Newcastle Special Collections, and it includes files and material relating to the poetry that Bloodaxe Books has published since 1978. The archive is to be made available for scholarly research through a standard web-based catalogue, but it also benefits from a generous open-ended and playful design to encourage greater creative interactions with it. This screenshot is a search function based on the shape of the text on a page. The project team decided to complete some selective digitisation to illustrate the visual catalogue interface, so no full books or correspondence was digitised because of the rights implications. In contrast to the Churchill Papers, this is a very selective project and given the age of the material and the relationship with the writers, the archivists decided to contact all the identified rightsholders, so it was a comprehensive clearance exercise. The archivists have benefited from a close working relationship with Bloodaxe and they have been able to work with their rights manager throughout.

Having identified 360 rightsholders in the material selected to make available online, the archivists were able to contact 91%, which is a very high rate but not surprising given that they were working with the rights manager from Bloodaxe (Fig. 6). Again, the response rate at 53% isn't great. The permission of 72% isn't as high as we've seen with other projects, probably because of the commercial nature of the material and because it's contemporary, so a lot of the poets featured in the archive are still alive, they're still producing work, so they might not necessarily want to make it available in another format. Non-responders are still a problem; 47% is practically half. There are less orphan rightsholders than we've seen previously; 9% is quite low. The archives have only made material available where permission has been granted, so non-responders' material has not been made available.



Figure 7

Glasgow School of Art Archives and Collections

Figure 8 (to right)

Rights Clearance results for the Glasgow School of Art case study

RIGHTS CLEARANCE GSA: THE RESULTS SO FAR		
NAMES IN COPYRIGHT DATABASE	263	
Total permission requests sent	195	74% of those identified
Contact details found: emails sent	75	38% of those contacted
Contact details found: letters sent	120	62% of those contacted
Total replies	83	43% of those contacted
Permission granted	83	100% of respondents
Permission refused	0	0% of respondents
Did not respond	112	57% of those contacted
Orphan Works	68	26% of those identified

A further example is Glasgow School of Art Archives and Collections (Fig. 7). They'd been developing their first standalone, online catalogue when I first spoke to them. They hold visual collections and want to be able to attach images to the catalogue entries, which is a simple way of making their catalogue more visual. The ability to offer online access to their holdings has become important since the fire in May 2014. So while they didn't have the facilities to offer physical access to the collections, they really wanted to make as much of that material available online as possible. And again, it's not a mass digitisation project like Churchill. It's been quite selective. Over the years they've digitised a couple of collections. They've received funding for some small scale digitisation and they've also completed some piecemeal work over the years; but again, like Bloodaxe, it's not comprehensive, it's very selective. They have carried out a small amount of risk assessment and decided to make any material pre-1939 without clearing because they consider older material to be less of a risk. Aside from this, they have attempted to contact all of identified rightsholders. So the rights clearance is comprehensive.

Archivists surveyed the digitised material and 263 rightsholders (Fig. 8). They found contact details for 195 and got in touch to ask for permission, with follow up requests where needed. 43% of those responded. Again, not a great response rate, but 100% of respondents granted permission which again is very positive. Again, we have a significant amount of non response at 57% of those contacted; 26% of rightsholders material has turned out to be orphaned. Glasgow School of Art are still in the process of making these works available online and they are considering their options regarding the Orphan Works Licensing Scheme, because as they were going through this process, that's when the Licensing Scheme was just getting started. They will make non-respondents' material available online, but still considering their options with orphan works.



Figure 9

Codebreakers: Makers of Modern Genetics with the Wellcome Library

Figure 10 (to right)

Wellcome Library Risk Management Strategy case study

In-copyright material

- Risk criteria for identifying rightsholders likely to object to publication
- Diligent search methods to trace and contact those rightsholders

Sensitive material

Wellcome Library follows *Access to Personal Data* policy to determine access to sensitive personal data within collections

Takedown Policy

Applies to ALL material published on the Wellcome Library website



In contrast to the examples I've given so far, the next project took quite a different approach to rights clearance: Codebreakers: Makers of Modern Genetics (Fig. 9). In 2013 I spent nine months working on a scoping study called Copyright and Risk, which looked at this project in more detail. The Wellcome Library are engaging in strategic digitisation designed to complement their research themes, so genetics was the first round, and they've since digitised public health records and they're currently working on mental health records. Codebreakers was really their first, pilot, mass digitisation project. The Wellcome Library currently has over five million images available online and they aim to have 20 million available online by 2020. Codebreakers, again, was a comprehensive digitisation project, similar to Churchill and they also worked with five partner archive institutions, so they ended digitising over 20 collections across their own institution and the other archives.

The collections are mainly composed of geneticists' personal papers, so there's lots of correspondence series, and the Wellcome knew that they were going to be dealing with thousands and thousands of third party rightsholders, quite similar to Churchill in that respect, but they decided that contacting all of them would be impossible. They developed a risk management strategy and it consists of risk criteria to identify high-risk rightsholders in the collections, and a diligent search methodology to locate them (Fig. 10). All personal data is covered by the Wellcome Library access to personal data policy and they have a take-down policy which covers everything posted on their website. In terms of diligent search sources, they highlighted Who's Who, the Watch File, Google, their own internal databases and the third party archives that were involved, Dictionary of National Biography, obituaries and Wikipedia as being the most useful sources during Codebreakers.

RISK CRITERIA CODEBREAKERS	
HIGH RISK	MEDIUM RISK
Author is a well-known literary figure, broadcaster, artist	Author has (or had) a high public profile
The author/estate/publisher is known to actively defend their copyright	Author is alive and known to have a literary estate as recorded in the WATCH file
The relationship between the institution and the author/estate/publisher is awkward	The material appears to have been published or broadcast and/or prepared for commercial gain rather than to advance academic knowledge or in a not-for-profit context

Figure 11 (top left)

Risk criteria for Codebreakers

Figure 12 (top right)

The results for risk-managed rights clearance for the Codebreakers project

RISK-MANAGED RIGHTS CLEARANCE CODEBREAKERS: THE RESULTS		
NAMES IN COPYRIGHT DATABASE	160	
Reliable contact details: total letters sent	134	84% of all rightsholders
Total replies	103	77% of those contacted
Permission granted	101	98% of respondents
Permission refused	2	2% of respondents
Did not respond	26	19% of those contacted
Low risk: put online after suitable delay	23	89% of non-respondents
High risk: do not put online	3	11% of non-respondents
Orphan Works	22	14% of those identified
In Progress	4	4% of those identified

This is what the risk criteria looked like (Fig. 11). We can debate the value judgements that these criteria make about rightsholders, but there's an obvious focus on commercial material created for profit, published authors, the well known, the elite, the established, protected publishers or estates.

Using these risk criteria, they had a long list of rightsholders that they'd pulled from their own collections and from the partner archives and they used these criteria to weed out rightsholders, essentially (Fig. 12). So through an iterative, negotiated process, the list was eventually reduced to 160 rightsholders. 134 were contacted with a 77% response rate which is fairly reasonable, but it is quite a concentrated clearance effort. 98% of respondents granted permission, which again is very encouraging, but again we can see the problem caused by orphan works and non-responding rightsholders.

Essentially, what the Wellcome have decided to do is they're going to make the orphan works available online and they did that. This project was pre-orphan works legislation coming in, but they've decided that the way they approached Codebreakers is how they want to approach rights clearance in the future. So even though the Orphan Works Licensing Scheme is there, the exception is there, they're going to continue making material available on this basis and not use the exception or the licensing scheme. They've also made the non-responders available, but they've done this in batches. So they've started re-classifying them again into low, medium and high risk and those are being made available in tranches based on how old the material is. The older material is made available first and the most recent material has just been made available in the last year or so.

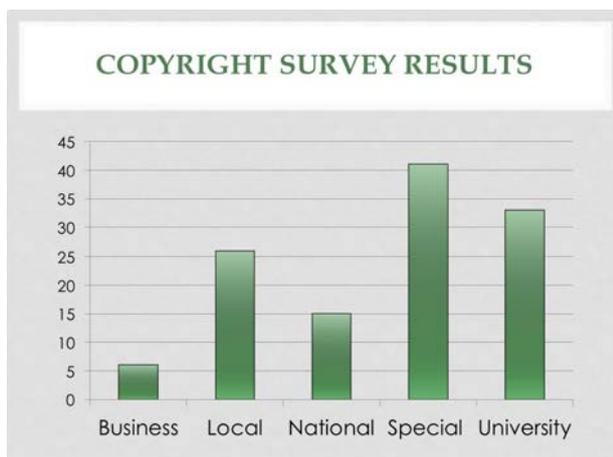


Figure 13 (top left)

Copyright survey results

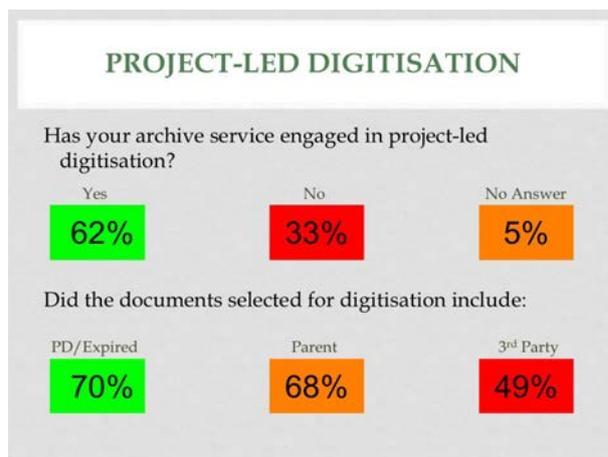


Figure 14 (top right)

Project-led Digitisation

In addition to the case studies, I also had some survey results which I thought you might find interesting (Fig. 13). These figures are taken from a survey of the UK archive sector on copyright and digitisation that I conducted as part of my PhD research in late 2014 and the survey received 121 responses. This gives an idea of the type of archive services that responded and these classifications are based on the National Register of Archives.

One of the questions I asked is ‘had they engaged in project-led digitisation?’, which I differentiated from digitisation for preservation purposes or for fulfilling individual copy order requests (Fig. 14). This result shows that 62% of responding institutions have engaged in project led digitisation, but there is still a substantial number of institutions who haven’t yet engaged in this kind of digitisation, so that’s 33%.

In answer to the second question, ‘did the documents selected for digitisation include public domain or copyright expired works, works where the copyright is owned by a parent institution or depositor and works where the copyright is owned by third party?’ 69 out of 121 institutions responded, or 57% of the entire survey population. We can see from this that public domain, and depositor/parent copyright works are still the most popular, with results of 70% and 68% from respondents each. But 34 institutions (49%) did say that they had digitised some third party copyright material in the past, which I think is quite an interesting result.

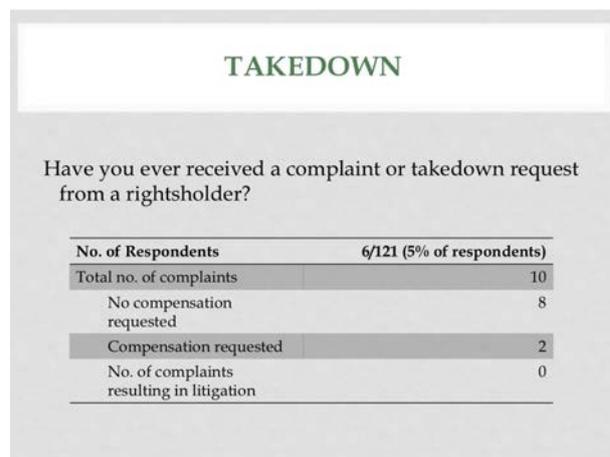
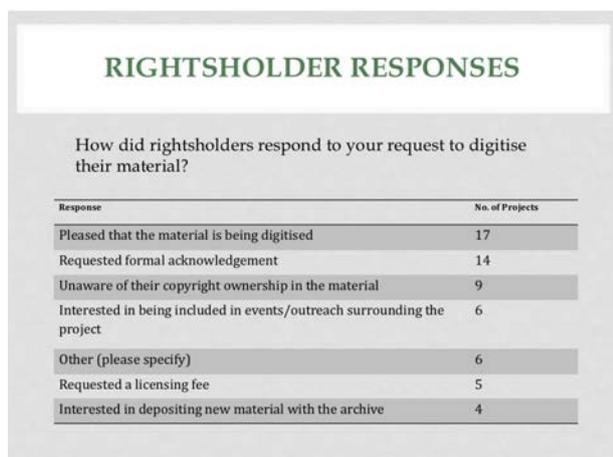


Figure 13 (top left)

Rightsholder responses

Figure 14 (top right)

Takedown

I also thought it would be interesting to look in more detail at how rightsholders feel about being contacted for permission to digitise (Fig. 15). Even though only a small proportion of the respondents to the survey had actually engaged in rights clearance of third party copyright material, i.e., 34 institutions, they reported that rightsholders that they had contacted were overwhelmingly positive about digitisation. They wanted formal acknowledgement in many cases, quite a few were actually unaware that they held rights in the material selected for digitisation and a very small number wanted to be included in events in the outreach surrounding the project in question.

Another element of digitisation that I thought would be interesting to look at in more detail is how often archive services receive complaints and take down requests from rightsholders, relating to third party copyright material that they've made available online (Fig. 16). Only 5% of respondents, i.e., six institutions reported that they had received a complaint or take down request and we can see here that most of them are resolved simply by taking the material down from the website without paying compensation, although compensation has been paid in a very small number of cases. None of those complaints or take down requests resulted in litigation, and in relation to the Codebreakers project, all of the archivists involved said that damaging their reputations as trusted repositories was the main risk associated with taking part in the project. They weren't worried about being sued, essentially, and every case study interview I've conducted since the Wellcome project, reputation has always been mentioned as the main risk factor. So, no one's worried about being sued, but they are concerned that they'll get a spate of take down requests or they'll get lots of complaints from rightsholders and that could damage their reputation. But I think what we can see from the survey is that that's actually quite rare.



Figure 17 (top left)

Some Lessons Learned

Respondents tend to grant permission

- *GSA*: 100%
- *Codebreakers*: 98%
- *Churchill*: 97%
- *Bloodaxe*: 77%

And they often do so without seeking a fee

- *Codebreakers*: 1 respondent requested a charitable donation be made, but this related to library, not archival material
- *GSA and Bloodaxe*: No respondents have asked for a fee
- *Churchill*: Some respondents requested fees

Figure 18 (top right)

Rightsholders Concerns

- Not always about copyright
- Content and sensitivity of material is important
- Age of material: particularly for artists/writers/creators
- Type of material: some writers are uncomfortable with drafts being made available
- Take this into consideration when you contact rightsholders
- Give detailed descriptions of the material you want to digitise; and be prepared for follow-up enquiries
- Explain why you want to digitise their material
- Offer them extra acknowledgement; a link to their website or a description of their current work to make the feel comfortable

Just to finish up: some lessons learned (Fig. 17). Respondents tend to grant permission if you can get hold of them. The exception to this is *Bloodaxe*, but I think that can be explained by the nature and age of the material; it’s contemporary material – still living writers – and they probably have a commercial interest in some of this material, so I would expect a lower permission rate for that. The other lesson is that rightsholders often grant permission without seeking a fee. There have been instances in the survey and some of the case studies where rightsholders have requested licence fees, but this really doesn’t appear to happen very often and such offers can always be negotiated.

Rightsholders’ main concerns about granting permission for use of archive material often don’t involve copyright per se, although copyright might be used as a reason (Fig. 18). They’re actually often concerned about the content and sensitivity of the material, and artists and writers can feel uncomfortable about their early work being made available, especially if their practice has evolved significantly over the years. Writers can also feel uncomfortable about unpublished drafts of the work being made available. I think there’s ways of thinking about how you communicate with particular type of rightsholders and how you can make them feel comfortable with the digitisation that you want to do.

Other lessons learned from the case studies include effective communication: articulating your aims for the project to rightsholders, emphasising when the project is non-commercial and especially telling the rightsholder exactly what material you want permission for and what you intend to do with it. There are two reasons for this. I know it sounds really obvious, but you’d be surprised at the number of projects that trip up over this issue. It’s mainly because rightsholders are often surprised to be contacted, and if you don’t describe the material in detail you’ll get lots of follow up requests. In order to seek permission and obtain a licence, you need to be clear about the use that will be made of the material that you’re making available online.

POSITIVES OF RIGHTS CLEARANCE

- ❖ Many archivists appreciate the chance to get back in touch with depositors
- ❖ Some depositors have become involved in outreach and fundraising as a result of contact
- ❖ Asking users and/or depositors for information about collections can lead to increased engagement
- ❖ Copyright doesn't always need to be assigned to the archive at deposit; acting as a gatekeeper or broker between users and depositors can help to establish trust
- ❖ Advertising the fact that you are looking for rights holders in a collection can boost external coverage of your project

Figure 19

Positives of rights clearance

Many of the archivists I've spoken to feel that there are positives to the overall rights clearance process, given the effort involved. (Fig. 19). It's a chance to get back in touch with depositors and some have become involved in outreach and fundraising as a result of contact. Asking users or depositors for information about collections can lead to increased engagement and advertising the fact that you're looking for rightsholders in a collection can boost external coverage of projects. Particularly acting as a go between for users and depositors when it isn't possible to have copyright assigned to the archive at the point of deposit is recognised as a good way of establishing and building trust with depositors, which can eventually lead to assignment of copyright further down the line.

I hope you found the examples I've presented useful. The case studies and survey results will be published in due course. If you're considering digitising third party copyright material, I think it's really important to have a range of examples and approaches to draw from, so that you can select and tailor the rights clearance process that's best suited to your institution, collection and budget, and which strikes the right balance between respect for the law and respect for rightsholders, but also meets some of the aims for universal access set out by the International Council on Archives amongst others.

FACTORS TO CONSIDER

- Age of material
- Purpose/type of material: created for commercial gain?
- Type of rightsholder/author/owner
- Comprehensive or selective digitisation
- Comprehensive or selective rights clearance
- Resources for diligent search
- Extent of catalogue
- Intended access: paywall, registration, social media, will you allow commercial/non-commercial re-use?
- Relevant policies/Mission statement
- Senior Management/In-house Legal Team

Figure 20

Factors to consider

I thought I'd finish with some factors to consider before you start a project that includes material which is third party copyright (Fig. 20). These risk factors have cropped up again and again during the case studies, but they should always be balanced against the benefits of making the material available online in the first place, whether that's for community engagement, research and teaching, working with schools or crowdsourcing description and transcription and things like that. You can think about the age of the material; the purpose it was originally created for; the type of rightsholder that's presented the material; whether you're engaging in comprehensive or selective digitisation and whether that will lead to comprehensive or selective rights clearance. You can think about the appropriate resources for diligent search and how you might try to put limits on that process. The extent of the catalogue is really important, so if you only have a box list compared to an item level description, that's going to affect your audit of the collection before you start, and also thinking about the intended access, whether it's going to be behind a paywall; whether your user has to register to use the website; whether it's being made available on social media; and whether you allow commercial or non-commercial re-use. I think it's important to have relevant policies and mission statements in place, and also to get senior management and in-house legal teams on side.

To finish, I thought I'd say the archive sector is often perceived as risk averse and I think in many ways it is, but I'm very optimistic that this can change in the future, slowly but surely.

Thank you.

Image Credits

Figure 3: Churchill Central Homepage, Bloomsbury Publishing, In Copyright, <https://www.churchillcentral.com/>.

Figure 4: Churchill Papers: Rights Clearance Results, Victoria Stobo, In Copyright, Copyright, Digitisation and Risk, Unpublished PhD Thesis, forthcoming 2017.

Figure 5: Bloodaxe Books Archive Homepage, Newcastle University, In Copyright, <http://bloodaxe.ncl.ac.uk/explore/index.html#/splash>.

Figure 7: Archives and Collection Homepage, Glasgow School of Art, In Copyright, <http://www.gsaarchives.net/>.

Figure 9: Codebreakers: Makers of Modern Genetics Homepage, Wellcome Library, In Copyright, <http://wellcomelibrary.org/collections/digital-collections/makers-of-modern-genetics/>.

COPYRIGHT AND CULTURAL MEMORY

The Lighthouse, Glasgow // 9 June 2016

Andrea Wallace



Figure 1

Introduction

Topics for discussion: Surrogate IP Rights, Display At Your Own Risk, and Copy That

‘Display At Your Own Risk’ & ‘Copy That’: Examining misconceptions between cultural institutions and users

Hi, my name is Andrea Wallace. I have been working on a few different projects that aggregate much of the research that I’ve done to date. One of those is Display at Your Own Risk and another is Copy That, which is a resource that I’ll talk about toward the end.

A little bit about my background. I went to the Art Institute of Chicago. I started my career as an artist before I worked for five years as a graphic designer and then went back to law school and became a lawyer. A lot of my interests lie in the intersections of these different backgrounds, how the backgrounds can reveal themselves when users are affected, how I make data visualisations using any of my various backgrounds, and in how that incorporates into cultural heritage. So I bring a very interdisciplinary approach to my research.

First, I’m going to do a bit of an introduction into Surrogate IP Rights, the theory that underpins my research (Fig. 1). Then I’m going to go into a discussion about the exhibition methodology for Display at Your Own Risk and share examples, and finally speak to CopyThat, which is a proposal for perhaps a new resource that we might need in the industry.

SURROGATE IP RIGHTS & LAYERS OF SURROGACY

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IMAGE/OBJECT



Disappointed Love, Francis Danby (1793 - 1861), 1821, England. Museum no. CIS FA.65[O]. © Victoria and Albert Museum, London

RIGHTS



COPYRIGHT-BY-CONTRACT
(INCLUDING DATA)

MORAL RIGHTS,
LICENSING, ETC.

THIRD PARTY RIGHTS
(VIA RESTRICTIONS ON
VISITOR PHOTOGRAPHY/
COPYRIGHTS)

PARTY



Figure 2

Surrogate IP Rights breakdown: the image or object, the rights, and the party

Beginning with Surrogate IP Rights: I use this term to refer to intellectual property rights that are claimed over digital surrogates, specifically digital surrogates of public domain works. This means the original copyright has expired, or never existed in the first place, and a new claim is expressed either outright through a copyright notification or through the terms and conditions of the website.

There are three layers to surrogacy: first, we have the image, which is a surrogate for the original material object (Fig. 2). In this instance it's Danby's 'Disappointed Love' at the Victoria and Albert, but you can see at the bottom the Victoria and Albert claims a copyright in this image. The image is cropped exactly to the dimensions of the material object, and the true value of the image actually lies in the underlying material object.

Second, the institution goes on to express rights in the image, so we have a surrogate copyright by notification. This extends from a copyright-by-contract to a copyright over the data, expressed in the terms and conditions of the website. It also extends to moral rights – in that the institution is asking you to credit it as the author and also include the information about the artist – to surrogate licensing. It also extends to third-party rights, such as when visitors go to the cultural institution and take their own photographs of the work. Restrictions on visitor photography may prevent people from using their images for commercial purposes, restricting use mainly to personal and research purposes. However, these third-party rights expressed through terms and conditions also act as a surrogate copyright over the visitor's work.

Display At You Own Risk

AN EXPERIMENTAL EXHIBITION

- **User**
- **Legal / Academic**
- **Cultural Institution**

Figure 3

Display At Your Own Risk: a research-led experimental exhibition of digital cultural heritage

Third, all of this is expressed through a surrogate party. In this instance it's the Victoria and Albert, but, really, this is a practice that's been happening for years. We've always taken material photographs of works, claimed copyright, and made those available, such as for transparencies or for publication – but now with digitisation it's becoming a much bigger and more transparent issue.

But it's important that we recognise the need to generate revenue and the need to make sure that digitisation is funded – and that the revenue being allocated to cultural institutions by the government is consistently shrinking.

So this is where Display at Your Own Risk emerged (Fig. 3). I started to think what would happen if I looked at the institutions as the authors themselves? Could I learn anything about the copyright claim, the legitimacy to the copyright claim, or the exercise of intellectual property rights over the digital surrogates in the process? I decided to approach the issue from three perspectives: the user perspective; the legal and academic perspective; and then the cultural institutions' perspective.

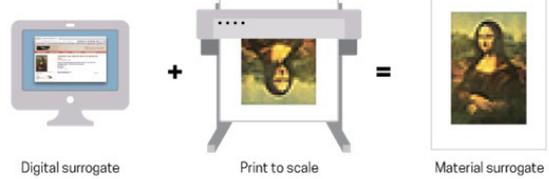
DIGITAL SURROGATES

Exhibition of digital surrogates made available by cultural institutions - Produced by cultural institutions:
National Library of Scotland, Glasgow Print Studio, Glasgow University Archives Services

STEP ONE:



STEP THREE:



STEP TWO:



STEP FOUR:



Figure 4

Digital Surrogates

An exhibition of digital surrogates made available by cultural institutions and produced by cultural institutions, including the National Library of Scotland, Glasgow Print Studio, and Glasgow University Archives Services

Step one (Artist): Creator + Expression of idea = Material object

Step two (Host institution): Material object + Digitisation = Digital surrogate

Step three (Curation and printing): Digital surrogate + Print to scale = Material surrogate

Step four (Digitisation): Material surrogate + Digitisation = DAYOR's digital exhibition image

Around us is Display at Your Own Risk, an exhibition of digital surrogates made available by cultural institutions – but it's also been produced by cultural institutions: the National Library of Scotland and the Glasgow Print Studio did all of the printing for the exhibition and we had everything digitised by the University of Glasgow Archive Services. It was very much an amalgamation of cultural institutions coming together to present this exhibition. This went into the concept, but then also the terminology that was used. So we have, of course, the artist, the expression of the idea and the material object, but then that material object is digitised by the cultural institution and made available online, which produces the digital surrogate. This digital surrogate is what I downloaded and printed, creating a material surrogate, which is on the wall. Then we took the material surrogate, digitised that and created exhibition photography that we released online. It gets pretty meta, which is why we have this infographic to help explain (Fig. 4).

To create the sample for the various images used, I started with a list from the Art Newspaper 2014 data on exhibition attendance. Wikipedia have compiled that into a list of the top 100 most attended institutions. Then of those 100 institutions, I added to the list institutions known to have open collections, institutions from the library and archive sector to balance it out, institutions from under-represented jurisdictions and especially jurisdictions that had fair use or fair dealing.

SAMPLING

A screenshot of a spreadsheet application showing a large table with many columns and rows. The columns appear to contain institutional names, locations, and other data points. The table is organized into several sections, with some rows highlighted in different colors.

Initial sample: 130 institutions – 37 countries

A screenshot of a spreadsheet application showing a table with columns for 'Institution', 'Country', 'Risk', and 'Digital Surrogate'. The rows are organized according to risk levels. The table includes various institutional names and their corresponding risk assessments.

Final sample: 56 institutions - 26 countries
100 digital surrogates
Organized according to **RISK**

Figure 5

Initial sample: 130 institutions from 37 countries

Final sample: 56 institutions from 26 countries; 100 digital surrogates total organized according to risk in reuse

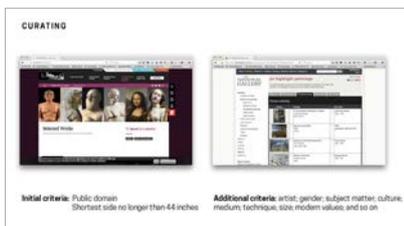


Figure 6

Initial selection criteria: must be in the public domain with the shortest side no longer than 44 inches (a printing restriction)

Additional selection criteria: cast the widest net possible to gather various artists; gender; subject matter; culture; medium; technique; size; modern values; and so on

I visited every website, starting with the home page and working my way to find the institution's policy and where the policy was located; I tracked what it was called, how many steps it took to find it; any copyright information and where that was located, whether on the home page, in the terms and conditions, or directly next to the image; if the terms and conditions were translated into any other languages, and so on. Then I organised it into a list organised by risk. Display at Your Own Risk actually speaks to the different types of risk that are experienced by whomever might be interacting with these works. There are the cultural institutions which perceive risk in putting them online, because if you put it online, then you make it available to anyone they might download it, call it their own, or use it in a derogatory manner. We have the responsibility of stewardship: to protect the work, to protect the moral rights of the author that may be perpetual in some jurisdictions. So, it's the risk that the cultural institutions perceive, but also the risk that I assessed in going through and assigning either open, low, medium, or high risk when organising them, so that the user could make an educated decision as to which pieces they would want to use in the open source exhibition and what approach to risk they're willing to take.

My initial criteria restricted selection to works in the public domain, for obvious reasons, and then to works which would print no larger than 45" on the shortest side, which was a printing restriction (Fig. 6). I then visited each institution's website and downloaded the works that they put forth as their highlights. If there were no such highlights, I looked for objectively recognisable images, things that you all might recognise. I tried to represent gender appropriately, also subject matter, culture, medium, and technique, to get as wide of a sweeping collection as possible to see what would happen when we printed these out.

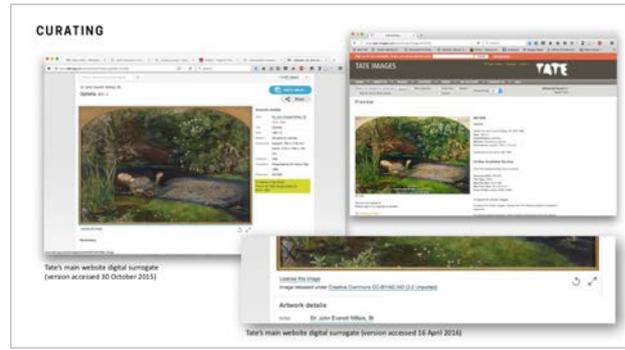


Figure 7 (top left)

Examples of different surrogates released online by Tate: on the left is the image made available via Tate's main website; on the right is the image made available on Tate's commercial website, Tate Images. Each is bound by a different set of terms and conditions.

Figure 8 (top right)

Example of policy changes and updated surrogates over time: on the left is the surrogate made available on Tate's main website on 30 October 2015, which directs users and links to Tate Images for a commercial license for reuse. The detail shows the current policy, which has made the image available under a CC-BY-NC-ND license. On the right is the current Tate Images website, which makes available an updated surrogate and crops out the



I also restricted the selection to works from the cultural institutions' main website. This is the example of the Ophelia, which I downloaded October 30th in 2015 from the main website (Fig. 7). However, the Tate also has the 'Tate Images' website, and they make a different image available there. I chose not to use anything from institutions' commercial websites, nor did I visit Wikimedia or Europeana where they might have made contributions as well and sometimes in a higher resolution, because not only should users be visiting the host cultural institution as the source for digital cultural heritage to re-use online, but also because a different set of terms and conditions will apply to images taken from the main website versus the terms and conditions that go with the commercial licensing or third-party website. Even that would become really difficult for a user to manage, as it all depends on where you get the image and at what point in time.

I tried to curate the exhibition within a three-week period because, as we all know, policies are constantly changing (Fig. 8). For example, with the Tate images I downloaded – on the bottom left hand corner you can see it says 'License this image.' When you click that, it takes you to the Tate Images website. Of course, you can also right click and download the image directly from the main website. But if you go back today, this image has been released under a Creative Commons licence. That still means that the image that I downloaded and made available in the open source exhibition is bound to the earlier and more restrictive set of terms and conditions. So, trying to track the changes in the policy and prevent policy changes from occurring during the curation period was important.

ONLINE POLICIES

- Impressum
- Copyright
- Legal Notice
- Rights and Reproduction
- Rights of Use
- Imprint
- Website Policy
- Contact
- Conditions
- FAQ
- Disclaimer Copyrights (which includes no such disclaim of copyright)
- Open Access
- Copyright and Reproductions
- Intellectual Property Rights Policy
- Terms of Use
- Terms and Conditions
- General terms of use for photo material
- Request photograph
- User Agreement
- Image Reproductions and Copyright
- Copyright, permissions and photography
- Disclaimer
- Image Usage Policy
- About this site
- Using Images

130 institutions: “Copyright” most common – 16 institutions

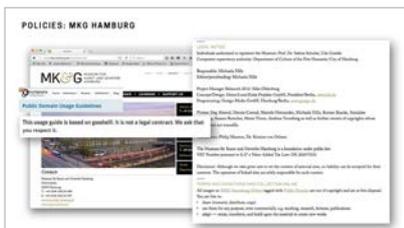


Figure 9

A sample of the various terms used to signal the institution's online copyright policy

Figure 10

MKG Hamburg's copyright policy on a page titled 'Contact,' located just beneath the museum's legal team contact information (as of 26 April 2016)

This slide includes just a sample of some of the names of the online policies (Fig. 9). I tracked where the links to policies were located – such as either on the home page or elsewhere – and how many ‘clicks’ it took to find. I found that policies were called anything from ‘Impressum’ to ‘Disclaimer Copyrights’ – which included no such disclaimer – to ‘About This Site’ to ‘Contact.’ Of the 130 institutions that I reviewed, ‘Copyright’ is the most common title, but only 16 institutions actually used the term.

One of, I think, the more interesting case studies is the MKG Hamburg (Fig. 10). It took me about six steps to find the copyright policy and it was located on the ‘Contact’ page, just underneath the museum's legal information. The terms for the MKG Hamburg policy actually mirror the Europeana's Usage Guidelines for Public Domain Works – however, it omits a key paragraph. It copies the guideline terms almost word-for-word, but omits the phrase ‘The usage guide is based on goodwill and is not a legal contract. We ask that you respect it.’ Given the context of where it's located – just underneath the legal information – someone might look at this and not necessarily understand that ‘I can really be using this for any type of use whatsoever, including commercial,’ because its location might be intimidating.

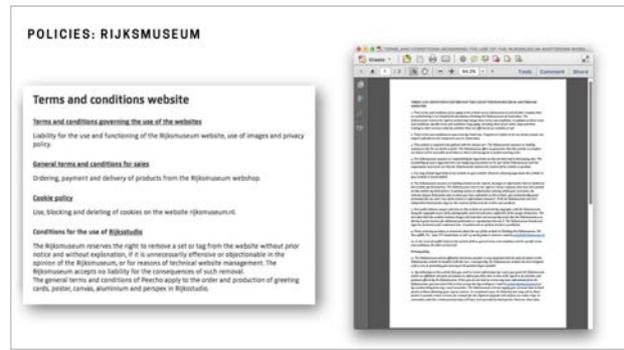


Figure 11 (top left)

SMK – National Gallery of Denmark’s policy located on two separate pages: ‘Use of Images and Text’ and ‘Free Downloads of Artworks.’

Figure 12 (top right)

Rijksmuseum Amsterdam’s policy, which is only accessible after visiting the organization’s homepage, rather than the museum’s homepage or online collection.



Compare this to the SMK National Gallery of Denmark, which also mirrors and builds upon the Europeana guidelines (Fig. 11). It’s a gorgeous policy and uses language that encourages users to play with the images. This says ‘Images in the public domain are like tools in a toolbox. You can use them for all manners of purposes. Feel free to let your imagination run wild.’ That’s gorgeous. SMK also uses the portion of Europeana guidelines stating ‘This usage guide is based on goodwill, it’s not a legal contract, we ask that you respect it,’ but it’s modified. Here, the SMK says ‘We urge you to respect them.’ So there’s still this sense of trying to make sure that people are respecting and following the terms and conditions, even though they permit anything. Then, interestingly, this specific information isn’t on the ‘Use of Images and Text’ portion of the website. It’s on the page for ‘Free Downloads of Artworks’. So, the policies are actually split in two different places, and as a user, if you visit one to try to find policy information and other important information is elsewhere, you might think what you find is all that exists. You wouldn’t necessarily continue searching around to see if there are any other nuggets of information hidden on other pages.

Another example is the Rijksmuseum (Fig. 12). To find the policy you actually must visit the organization’s homepage, not the Rijksmuseum’s homepage. Down in the bottom corner it reads ‘Terms.’ When you click on ‘Terms’ it takes you to just this basic page with this information and this information alone. That first line that reads ‘Terms and conditions governing the use of the website’. Clicking the hyperlink downloads a PDF directly to your hard drive of the terms and conditions. As such, it’s not even located on the website, which raises the question as to whether it actually applies.



Figure 14

Detail of the Rijksmuseum's astoundingly high resolution and detailed digital surrogate for Abraham Mignon's 'Still Life with Flowers and a Watch'



Figure 13

On left: image of the Mona Lisa in the Louvre's gallery space; on right: photograph of John F. Kennedy and others standing near the Mona Lisa, which was used as a point of reference to confirm the painting's dimensions.

When looking at the material surrogates, you start to make connections that you wouldn't necessarily make when you're in the actual gallery (Fig. 13). I don't know if any of you have approached the exhibition's Mona Lisa and thought 'Oh, wow, that's huge.' That's what I thought when it was printed. I double checked the dimensions a few times, making sure that we had printed it correctly. When you go and you see it in the gallery you can't get that close. The gallery walls are huge and the work looks so much smaller by relative comparison. We ended up doing a search online before we were convinced by the proportions in this image of JFK in front of it. In fact, we stood right beside it and compared the photo to make sure the dimensions were accurate. It's also unframed in the digital surrogate, but here it's framed, so that might encroach on a bit of the information that's provided by the cultural institution's image.

Some of the material surrogates are so detailed that there's information you wouldn't be able to appreciate if you were actually in the gallery (Fig 14). In this Rijksmuseum image, you can see the cracks in the paint and you can see the brush strokes along the edge of the canvas because it's unframed. These are prints that can actually be used for legitimate and serious academic research. So, making high-resolution images available online in this manner allows people to use them not just for reference but also for research and to create new cultural goods.

METADATA

100 digital surrogates
37 had no metadata
at risk of becoming de facto orphan works
65 contained no rights information

- Information sometimes contradictory
- In total, 72 digital surrogates under ©
- Only 19 contained rights information in metadata

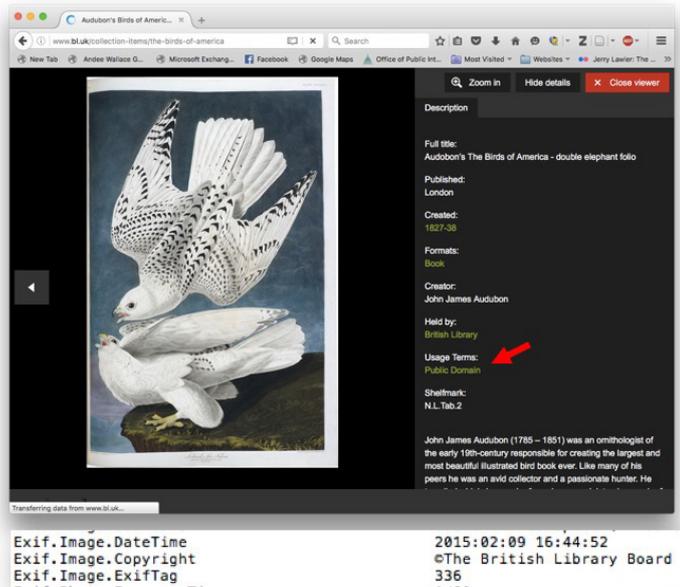


Figure 15

Of 100 digital surrogates in total, 37 had no metadata attached, which puts them at risk of becoming *de facto* orphan works once released to the internet. 65 contained no rights information at all.

In some cases, the information attached to the digital surrogate contradicted its copyright status online. In total, 72 digital surrogates were copyright-protected, but only 19 of those included rights information in the metadata.

I became a bit obsessed with metadata during this project. I don't know if anyone's ever said that out loud before. In reviewing the 100 digital surrogates and extracting all the metadata, I found that 37 had no metadata at all (Fig. 15). That puts them at risk of becoming *de facto* orphan works: once released to the internet, and once someone takes them and uses them elsewhere with no metadata attached, they become orphan works. 65 of those works contained no rights information whatsoever. So again, if the surrogate is divorced from the context of the website where there may be adequate rights information, someone could later unintentionally infringe copyright in re-using an image that appears to be unrestricted.

In addition, information about rights was often contradictory. This is a piece at the British Library, and the rights information on the page beautifully states 'Public Domain' (Fig. 15) The hyperlink sends users to the Creative Commons public domain dedication, yet a '© British Library Board' is attached in the surrogate's metadata. Discrepancies between when a policy was made versus when something was digitised that are not updated in metadata can start to create tensions during dissemination in the digital realm.

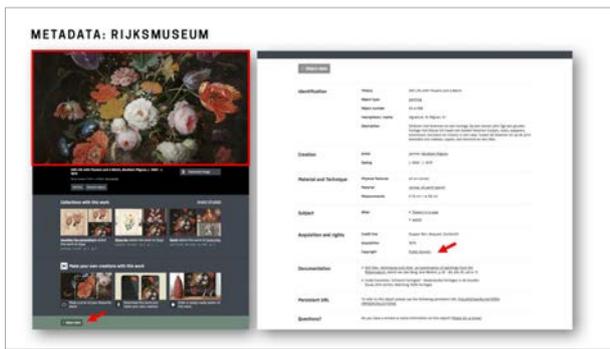
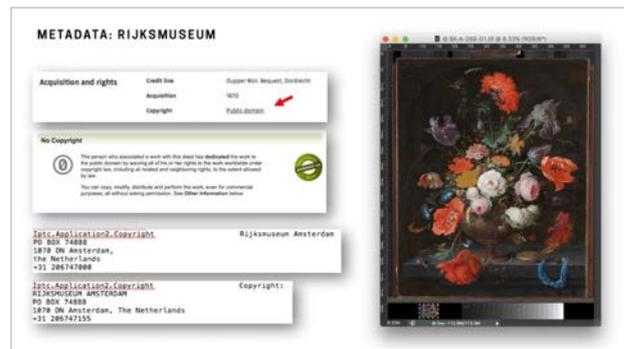


Figure 16 (top left)

Rijksstudio webpage for Abraham Mignon's work, 'Still life with Flowers and a Watch,' the object data for which pertains to the material object rather than the digital surrogate

Figure 17 (top right)

On the webpage, a line reads 'Acquisition and rights,' which states 'Copyright – Public Domain.' Clicking the hyperlink takes the user to the Creative Commons 'No Copyright' statement, which clarifies that the person attributed with the work has dedicated it to the public domain. This language would suggest that person is Abraham Mignon, who died in the 1600s, rather than the Rijksmuseum.



Another discovery I'm obsessed with is in the metadata of the Rijksmuseum (Fig. 16). Every image that I downloaded from the Rijksmuseum has a copyright in the metadata. We all know and love the Rijksmuseum and all the wonderful things that they've done to really push the sector forward and create new opportunities for people to act, react, and engage with art, but when you go to the page for a specific painting, what is outlined by the red box is all you see (this is within the Rijksstudio). If you scroll down, you can find the 'Object Data' (marked by the tiny red arrow), which reveals this panel just to the right. Included in this 'Object Data' is the category 'Acquisition and Rights', along with more information that pertains to material object.

The webpage doesn't inform you whether or not the image, rather than the material object, is copyright protected or in the public domain and neither do the terms and conditions, which if you recall aren't actually located on the website (Fig. 17). When you click the 'Public Domain', it hyperlinks to the 'No Copyright' webpage for Creative Commons. Here, it says 'The person associated with the work has dedicated it to the public domain.' Well, the person who made this work is Abraham Mignon, and he certainly didn't dedicate the work to the public domain in the 1600s – when it was painted and when he died – because copyright didn't exist then as we know it today. So, I checked the metadata, and that's where I found in the IPTC Application line the copyright information for 'Rijksmuseum, Amsterdam' in every surrogate that I downloaded of both low and high resolution. This could be because the Rijksmuseum closed for 10 years to renovate and digitize their collection, and perhaps the policy changed halfway through the digitisation process. Maybe they just didn't update the metadata. Updating metadata is a huge undertaking, especially for a collection like the Rijksmuseum. Still, it could chill use if someone opens this image and sees there is a copyright in the metadata, nor is it communicated in the terms and conditions whether such works are in the public domain.

METADATA: BRITISH LIBRARY



Figure 18

A British Library copyright-protected digital surrogate used in DAYOR along with the [‘Xmp.dc.subject’](#) line, which reads as abstract poetry.

```
Xmp.dc.subject           people by name,mad
hatter,period by decade or era,victorian
era,party,tea, discipline, humanities, classics, literature, art
genres, fiction, food, drink, celebration, entertainment
event, organism, animal, animal
categories, mammal, people, child, female, girl, style and period, Date by century
of work or scene, 19th century, social gathering, adventure, rodent, children's
literature, dormouse, alice, alice in wonderland, children's drawings,
teas, foods, drinks, celebrating, celebrations, parties, animals, children, kid, kids
, females, personalities, famous people, named
people, infant, infants, beverage, beverages, rodents, victorian, organisms, childre
ns literature, childrens stories, children's stories, children's
books, children's story, childrens books, childrens book, children's
pictures, childrens pictures, childrens picture, childrens drawing, people by
name, mad hatter, period by decade or era, victorian
era, party, tea, discipline, humanities, classics, literature, art
genres, fiction, food, drink, celebration, entertainment
event, organism, animal, animal
categories, mammal, people, child, female, girl, style and period, Date by century
of work or scene, 19th century, social gathering, adventure, rodent, children's
literature, dormouse, alice, alice in wonderland, children's
drawings, Anniversary, Anniversary 2015,
teas, foods, drinks, celebrating, celebrations, parties, animals, children, kid, kids
, females, personalities, famous people, named
people, infant, infants, beverage, beverages, rodents, victorian, organisms, childre
ns literature, childrens stories, children's stories, events, children's
books, children's story, childrens books, childrens book, children's
pictures, childrens pictures, childrens picture, childrens drawing
```



Figure 19

A public domain Yale Center for British Art digital surrogate, which includes the process by which the surrogate was made.

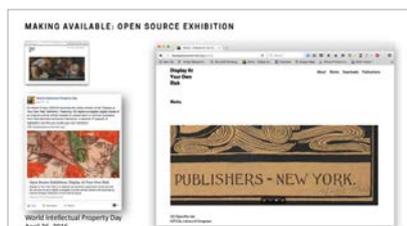


Figure 20

Launch of the Open Source Exhibition and its advertisement on the World Intellectual Property Organization's Facebook page.

Another really fun meta-discovery is with the British Library and this Alice in Wonderland illustration (Fig. 18). The subject line resembles abstract poetry. It's incredibly fun to read through this and consider why they came up with these keywords and why they're so repetitive, but it's beautiful.

Another one, the Yale Center for British Art: some of the metadata was so detailed that you could see the process by which the digital surrogate was made (Fig. 19). This is actually a scan of a 1997 photograph of a transparency, which makes it super meta in and of itself. It's a scan of a photograph of a transparency that was digitised and then made available online. I love it.

Then making it available (Fig. 20). So the next step was to put this all into an open source exhibition that users could then download and interact with. This is where we stepped in the cultural institutions' shoes to see how this process would work. We decided to make the exhibition available on World Intellectual Property Day, which was April 26th, and WIPO promoted it on their Facebook page, so that was super fun. We tried to display the exhibition online in a way that users could zoom in and see the detail of the works to decide whether they wanted to print certain ones. This is because if you step back from some of the more pixelated works, they look like they're fabulous quality, but as you get right up close to them, that's where you see that the detail starts to disappear.

OPEN SOURCE EXHIBITION

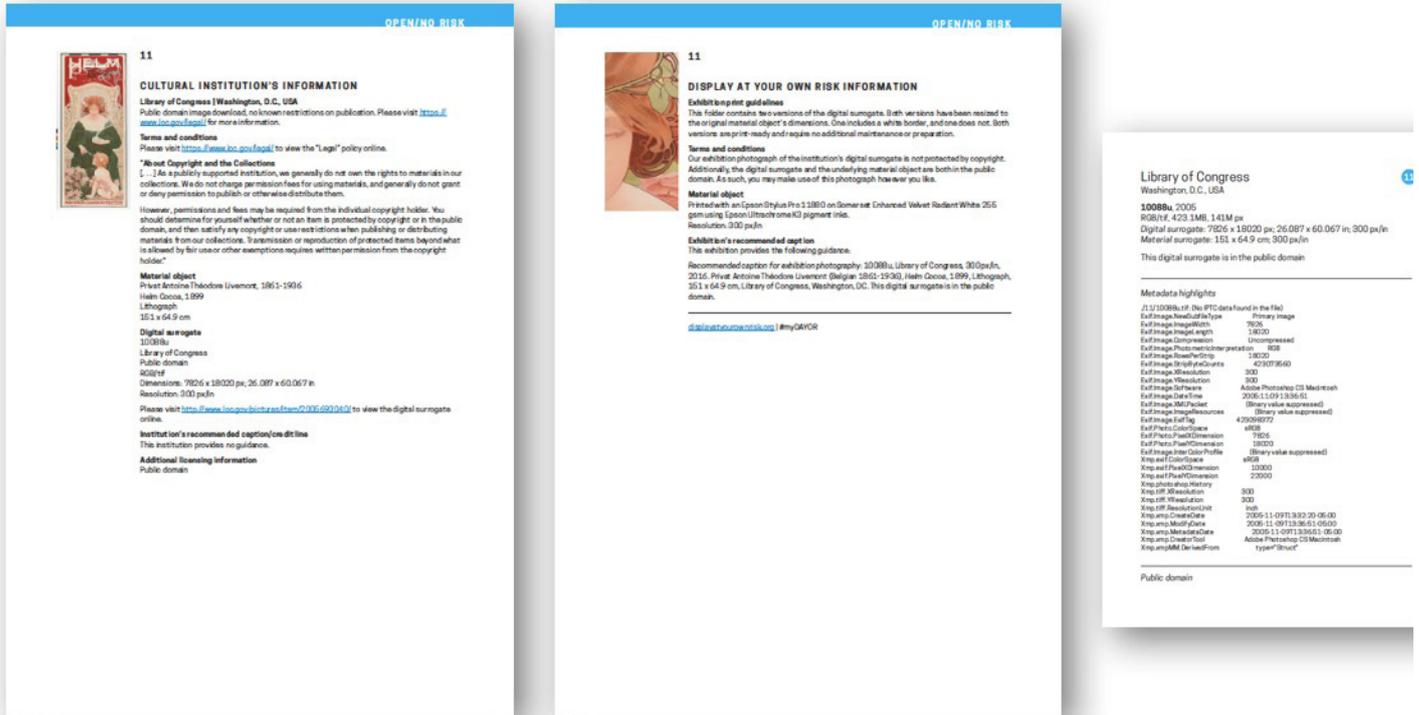


Figure 25

Each work is accompanied by information about the digital surrogate, the material object, and rights claimed, along with reproduction information and the work's title card

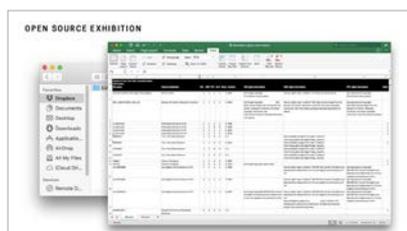


Figure 26

Screenshot of one of the spreadsheets included in the Research folder of the exhibition file, which includes all of the rights information attached in the metadata of the 100 digital surrogates selected

In organising the open source exhibition, we took note from several cultural institutions which made their works available online and packaged it in ways that were more open to the user (Fig. 25). We soon understood that it was going to take an incredible amount of information to inform users what they could and couldn't do for every individual piece, but that's what cultural institutions are going through, so it was very appropriate for us to go through that process as well. We organised it in a way that users could download just the photography file or to curate their own exhibition using the works that we downloaded. All the information was in every file organised according to risk. We put all of the research data online as well (Fig. 26). So we tried to make the collection and its data as open and available as a cultural institution might in this process.

In doing this, we started to think 'are we over-burdening users with all this information?' I'd like to think not, but this may really be the state of how crazy the issues are at the moment, which is where part of my next project comes in.

KNOW YOUR CULTURAL INSTITUTION'S RIGHTS



▼ | ALL MUSEUMS LIBRARIES ARCHIVES
 ▼ | ALL AT THE INSTITUTION THROUGH THE WEBSITE
 ▼ | ALL IMAGES DATA

Andrea Wallace | a@andewallace.com

Figure 27

Graph developed to help visualize how restrictive or open online UK institutional policies are

In gathering data to envision the ways that others could be using the data, I started to develop these interactive graphs that might help people understand what exactly they could and couldn't do (Fig. 27). So on the left-hand side of this graph we have cultural institutions, and along the top are things that you can do on-site and things that you can do online, via social media, or can I sketch, or can I use a photograph that I've taken on-site for commercial purposes. The copyright notification in that box designates whether the cultural institution claims a copyright over the digital surrogate or it releases it to the public domain. Toward the bottom is the National Library of Wales, and, currently, in the United Kingdom they're the only major institution I've come across that has released their surrogates to the public domain as a blanket policy decision.

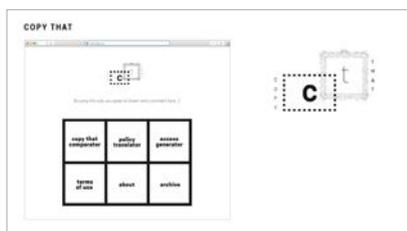


Figure 28

Homepage for 'CopyThat'

I plan to develop this into a website called CopyThat (Fig. 28). The idea is that the user – if they're going to be interacting with the cultural institution – has one place to go to find out everything that they need to know about how they can access and interact with the works.

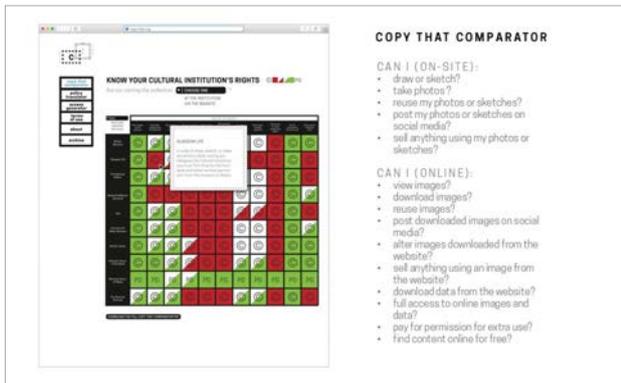


Figure 29
CopyThat Comparator

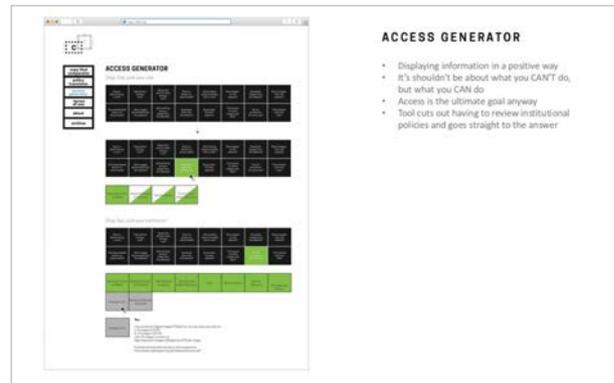


Figure 30
CopyThat Access Generator

It begins with the CopyThat Comparator, which is a version of the previous graph (Fig.29). Ideally, the user will be able to scan over the graph with the mouse and the relevant information will pop up and tell them specifically what they can and can't do. It also allows users to make their own evaluations and assessments about how open or closed a cultural institution's policy is.

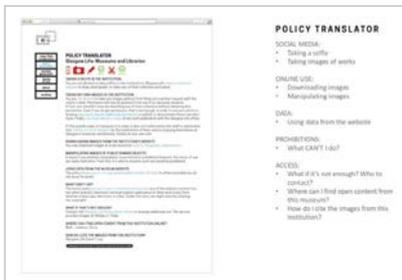


Figure 31
Policy Translator for Glasgow Life

Then an Access Generator, so we have all of the previous questions presented (Fig. 30). Here, you click on the question, 'Can I use these images commercially?' It will only pull up the institutions that allow you to use and access those works and then when you click on the institution, it will give you the exact information as well as to how you can do that.

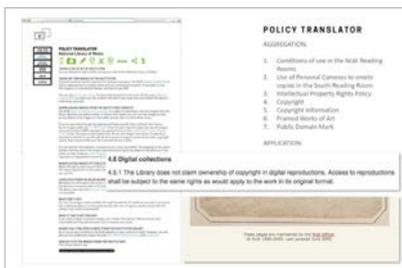


Figure 32
Policy Translator for National Library of Wales

The Policy Translator takes all of the policies that cultural institutions have among various areas of their websites and pulls the important stuff out (Fig. 31). As a lawyer, I know there are a lot of things that must go into a policy in order to make sure that the institution is protected and the user understands their obligations; but, as a user, when you see that type of information and it's phrased in a negative way – 'you can't do this' and 'you can't do that' – it's really intimidating. So what can we do? Social media, online use, using data – how do we phrase information in a way that is a little bit more comprehensive for the people who are trying to access and use the works?

It also aggregates various areas of relevant information on a website. For example, this is the National Library of Wales' policy (Fig. 32). All the information that you might need if you're going to the institution or you're going to the website is located in seven different places on the institution's website. The gem of information that tells you 'if it's a public domain work, it's a public domain digital surrogate' isn't in the 'Copyright' policy – it's actually in the 'Intellectual Property Rights Policy.' So, as a user, if you want to go find that information and then visited a page and found a copyright on the page, even though the work and its surrogate are in the public domain [according to the Intellectual Property Rights Policy], you might not understand that it's a work that you can use [due to the appearance of the copyright notification].

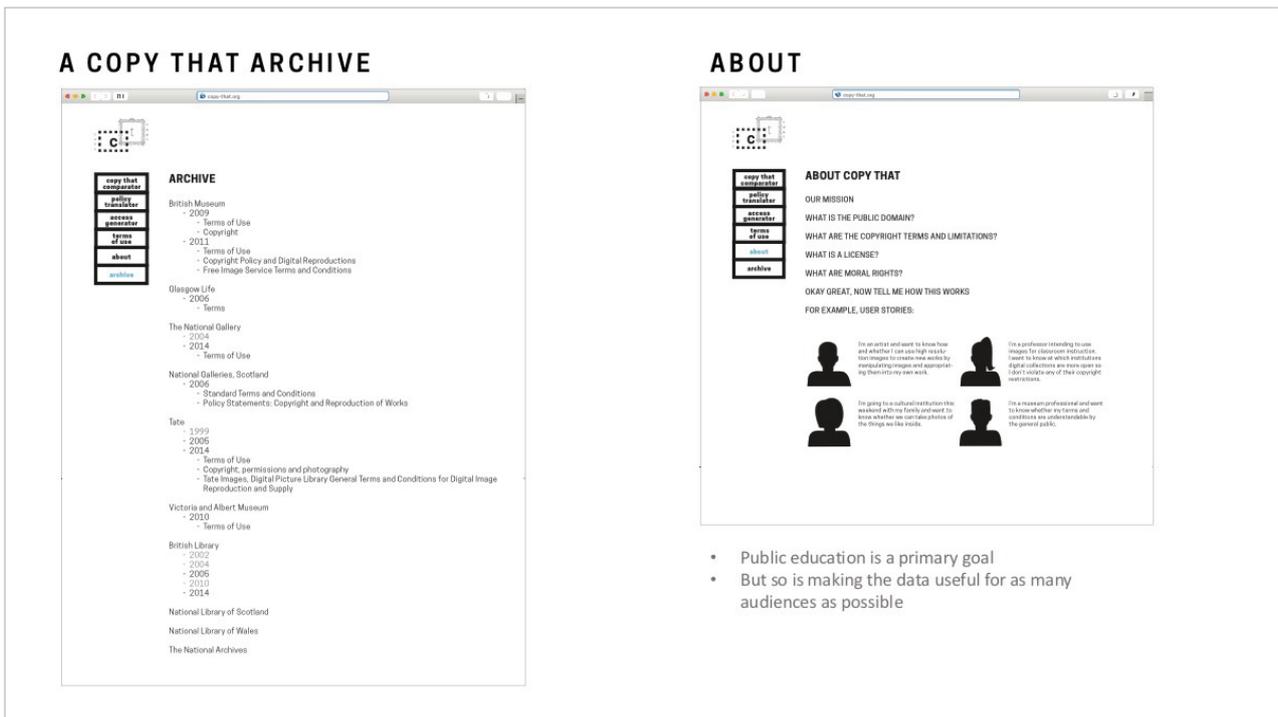


Figure 33
CopyThat Archive and the About pages



Figure 34
CopyThat's Terms and Conditions

This is another issue institutions are facing, because interfaces that have been developed for the world of 2000-plus internet are no longer adaptable for the way we need them to be for digital rights and assets management today. The Policy Translator is a way for people to be able to rely on – or at least decipher – the information that is found in various places on a website and makes it available in a way that enables meaningful access.

And then also a CopyThat Archive to take all the policies, put them in one place (Fig. 33). How can we see that they've changed over the years? If you're an institution and you're trying to come up with a new policy, what is someone else doing? It's a way to compare and contrast how restrictive or how open other policies might be, as well as an About page, because public education is the ultimate goal.

Finally, something playful: our own Terms and Conditions (Fig. 34). It explains how you use the website, how it applies to you as a user, and that it's definitely not legal advice. But it's trying to stress the 'don't plagiarise, do disseminate, respect the artwork,' [and] a lot of Europeana principles that they include in their usage guides as well.

CONCLUSION



Figure 35

Interacting with the art: on left, examples of exhibition attendees “Van Gogh Yourself” creations; on right, Megan Blakely and her top inspired by a Tate digital surrogate for Millet’s Ophelia.

Ultimately, it’s all about having fun, appreciating, and interacting with art (Fig. 35). Cultural institutions have been doing many different things to get people to interact with the works that they have in their collection. They’ve been adapting policies according to new technologies, but it’s a long process; it’s sensitive and we understand that. So we wanted to do that, too. We wanted to encourage people to interact with the works in areas that they might not actually ever be able to go see at the physical location, but to create new works as well. Today we have many people who are wearing different pieces and bits of the images. I myself have on a metadata skirt from a work at the Rijksmuseum (it says ‘Copyright Rijksmuseum’). And encouraging access – making sure that access is communicated as being key so that the works continue to be appreciated and treasured by current and future generations.

Thank you.

Image Credits

Figure 1(1): T14039, Digital Image © Tate, London 2014. Portrait of Katherine Hobby, by Peter Borseller, Tate, available at <http://www.tate-images.com/results.asp?image=T14039&wwwflag=3&imagepos=2> (accessed: 22 October 2015).

Figure 1(2): Screenshot, Display At Your Own Risk, displayatyourownrisk.org.

Figure 1(3): Logo for CopyThat, designed by Marshall Lambert of metaLAB Harvard, all rights reserved.

Figure 2(1): Disappointed Love, Francis Danby (1793-1861), 1821, England, Museum no. CIS FA.65[0]. © Victoria and Albert Museum, London, available at <https://www.vam.ac.uk/collections/paintings> (accessed: 1 June 2015).

Figure 2(2): Victoria and Albert Logo, all rights reserved.

Figure 2(3): The John Madejeski Garden, V&A, American Friends of the V&A, © AFV&A, available at <http://afvam.org/> (accessed: 1 June 2015).

Figure 3: Exhibition image of Display At Your Own Risk, © Michael Gimenez, CC-BY.

Figure 4: Digital Surrogates Infographic, © Andrea Wallace, CC-BY, available at <http://displayatyourownrisk.org/digital-surrogates/>.

Figure 5: Screenshots of DAYOR data documents, CC-BY, files available for download at <http://displayatyourownrisk.org/download/>.

Figure 6(1): Screenshot of “Selected Works”, Louvre Website, available at <http://www.louvre.fr/en/selections> (accessed: 22 October 2015).

Figure 6 (2): Screenshot of “30 ‘must-see’ paintings”, The National Gallery, London Website, available at <https://www.nationalgallery.org.uk/paintings/explore-the-paintings/30-highlight-paintings> (accessed: 22 October 2015).

Figure 7(1): Tate’s main website digital surrogate (version accessed: 30 October 2015), © Tate, London, no longer available.

Figure 7(2): Screenshot of “Copyright, permissions and photography”, available at <http://www.tate.org.uk/about/who-we-are/policies-and-procedures/website-terms-use/copyright-and-permissions> (accessed: 30 October 2015).

Figure 7(3): Tate Images commercial website digital surrogate (version accessed: 30 October 2015), © Tate, London, 2014, no longer available.

Figure 7 (4): Screenshot of “Digital Picture Library General Terms and Conditions for Digital Image Reproduction and Supply”, available at <http://www.tate-images.com/textfiles/DigitalTermsAndConditions.htm> (accessed: 30 October 2015).

Figure 8(1): Screenshot of Tate’s main webpage for “Ophelia” digital surrogate (version accessed: 30 October 2015), no longer available.

Figure 8(2): Screenshot of Tate Images webpage for “Ophelia” digital surrogate (version accessed: 16 April 2016), available at <http://www.tate-images.com/results.asp?image=N01506>.

Figure 8(3): Detail of Tate’s main webpage for “Ophelia” digital surrogate (version accessed: 16 April 2016), available at <http://www.tate.org.uk/art/artworks/millais-ophelia-n01506>.

Figure 9(1): Screenshot of “Contact”, MKG Hamburg Online Collections Website (version accessed: 18 October 2015), no longer available.

Figure 9(2): Screenshot of “Public Domain Usage Guidelines”, Europeana Collections Website, available at <http://www.europeana.eu/portal/en/rights/public-domain.html> (accessed: 12 October 2015).

Figure 11(1): Screenshot of “Use of Images and Text”, Statens Museum for Kunst Website, available at <http://www.smk.dk/en/use-of-images-and-text/> (accessed: 30 October 2015).

Figure 11(2): Screenshot of “Public Domain Usage Guidelines”, Europeana Collections Website, available at <http://www.europeana.eu/portal/en/rights/public-domain.html> (accessed: 12 October 2015).

Figure 12(1): Screenshot of “Terms and Conditions Rijksmuseum”, Rijksmuseum, Amsterdam Website, available at <https://www.rijksmuseum.nl/en/organisation/terms-and-conditions> (accessed: 22 October 2015).

Figure 12(2): Screenshot of “TERMS AND CONDITIONS GOVERNING THE USE OF THE RIJKSMUSEUM, AMSTERDAM WEBSITES”, Rijksmuseum, Amsterdam Website, available at <https://www.rijksmuseum.nl/en/organisation/terms-and-conditions> (accessed: 22 October 2015).

Figure 13(1): “Crowd looking at the Mona Lisa at the Louvre,” by Victor Grigas, CC BY-SA 4.0, available at <https://commons.wikimedia.org/w/index.php?curid=40250423>.

Figure 13(1): ‘JFK, Marie-Madeleine Lioux, André Malraux, Jackie, L.B. Johnson, unveiling Mona Lisa at Washington, D.C., National Gallery of Art, 8 Jan 1963,’ by Robert L. Knudsen. This media is available in the holdings of the National Archives and Records Administration, cataloged under the ARC Identifier (National Archives Identifier) 194219. This tag does not indicate the copyright status of the attached work. A normal copyright tag is still required. Public Domain, available at <https://commons.wikimedia.org/w/index.php?curid=3267337>.

Figure 14: Detail of SK-A-268-01, Rijksmuseum, 216.543 px/in, 2016. Abraham Mignon (German, 1640-1679), Still Life with Flowers and a Watch, c. 1660 - c. 1679, Oil on canvas, 75 x 60 cm, Rijksmuseum, Amsterdam. Rijksmuseum, Amsterdam. This digital surrogate is © Rijksmuseum, Amsterdam.

Figure 15: Screenshot of “Collection Items: Audubon’s Birds of America”, British Library Website, available at <http://www.bl.uk/collection-items/the-birds-of-america> (accessed: 22 October 2015).

Figure 16: Screenshots of Rijksstudio webpage for Abraham Mignon's work, "Still Life With Flowers and a Watch," Rijksstudio Website, Rijksmuseum, Amsterdam, available at <https://www.rijksmuseum.nl/en/rijksstudio/artists/abraham-mignon/objects#/SK-A-268,0> (accessed: 16 April 2016).

Figure 17: Screenshots of Rijksstudio webpage for Abraham Mignon's work, "Still Life With Flowers and a Watch," Rijksstudio Website, Rijksmuseum, Amsterdam, available at <https://www.rijksmuseum.nl/en/rijksstudio/artists/abraham-mignon/objects#/SK-A-268,0> (accessed: 16 April 2016).

Figure 18-19: Digital surrogates for British Library and Yale Center for British Art with corresponding metadata.

Figure 20(1): Homepage, Display At Your Own Risk, displayatyourownrisk.org.

Figure 20(2): Screenshot of the World Intellectual Property Organization Facebook post promoting Display At Your Own Risk on World Intellectual Property Day, 26 April 2016.

Figure 20(3): Screenshot of "Works", Display At Your Own Risk, displayatyourownrisk.org.

Figures 21-24: Selected spreads from Andrea Wallace and Ronan Deazley, eds, Display At Your Own Risk: An experimental exhibition of digital cultural heritage, 2016, CC BY, available at <http://displayatyourownrisk.org/publications/>.

Figure 25(1): Selected information sheets included in the exhibition file, CC BY, files available for download at <http://displayatyourownrisk.org/download/>.

Figure 25(2): Selected title card included in the exhibition file, CC BY, files available for download at <http://displayatyourownrisk.org/download/>.

Figure 26: Screenshot of spreadsheets included in the Research folder of the exhibition file, CC BY, CC BY, files available for download at <http://displayatyourownrisk.org/download/>.

Figure 27: CopyThat Comparator, CopyThat, © Andrea Wallace.

Figure 28: Mockup of CopyThat homepage and logo, designed by Marshall Lambert of metaLAB Harvard, all rights reserved.

Figure 29: CopyThat Comparator, CopyThat, © Andrea Wallace.

Figure 30: CopyThat Access Generator, CopyThat, © Andrea Wallace.

Figure 31-32: CopyThat Policy Translator, CopyThat, © Andrea Wallace. Screenshot of webpage with public domain work, featuring a © NLW 1996-2005 copyright notification, National Library of Wales Website.

Figure 33: CopyThat Archive and About pages, CopyThat, © Andrea Wallace.

Figure 34: CopyThat Terms and Conditions, CopyThat, © Andrea Wallace.

Figure 35: Various interactions with the art of Display At Your Own Risk, © Michael Gimenez, CC BY.



COPYRIGHT AND CULTURAL MEMORY

The Lighthouse, Glasgow // 9 June 2016

Panel Discussion

with

Prof. Alison McCleery
Edinburgh Napier University

Prof. Alistair McCleery
Edinburgh Napier University

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Property at the British Library*

Naomi Korn
*Copyright Consultancy
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Joris Pekel
*Europeana Community
Coordinator Cultural Heritage*

Margaret Haig
Intellectual Property Office

Professor Alison McCleery: Good morning, or perhaps it's afternoon, ladies and gentlemen. Team McCleery – Alison and Alistair – are speaking about Megan Rae Blakely's paper.

We heard a clear, comprehensive and concise exposition of the nature and context of Intangible Cultural Heritage and the challenges surrounding its protection and safeguarding. These challenges comprise a fundamental paradox. 'Tangification' of ICH appears necessary to protect it because it has to be precisely defined with its form pinned down, and that precise definition starts a process that tends to fix it, something which of course is inimical to the concept of the evolution of Intangible Cultural Heritage and surely, colleagues, living culture must be evolving to live. So that's a fundamental paradox that is difficult to overcome.

Tangification's not the sole issue for ICH and cultural memory, in fact it's the thin end of a wedge, a wedge that leads inexorably to 'propertisation', to 'commodification' and, as Megan so eruditely explained, commercialisation. These are not all inevitably bad in every context but they have to be very carefully handled. Furthermore, they take us into even more hostile territory where all sorts of issues like authenticity, ownership, cultural appropriation, hybridisation, and finally, ethics and morality rear their extremely contentious heads.



Professors Alison and Alistair McCleery responding to Megan Rae Blakely's paper

So, what's the answer? I am aware of a lot of questions and Megan posed a great number of questions very clearly. How do we find an answer to this paradox? Perhaps if I hand this to the other Professor McCleery he might be able to supply that answer.

Professor Alistair McCleery: No. What I'm going to do is briefly outline a case study that I've actually discussed with Megan and it's a case study of Maori body and face tattoos, tā moko.

Some of you will be familiar with those wonderful insights into the male psyche, the Hangover films, and you will know that in the first of the Hangover films Mike Tyson appears and he has a Maori moko on the side of his face.

In Hangover II the Director decided that it would be funny if one of the characters woke up from his drunken state with a similar moko on his face. When that film came out the original tattooist, Victor Whitmill, who had done Tyson's tattoo, then sued the studios for breach of copyright. He claimed that the tattoo on Tyson's face was his copyright. It was in fixed form, he had been the creator of it and they'd copied it without attribution or payment.

The legal opinion at the time seemed to suggest that, yes, a tattoo was capable of copyright but, like most things, the case was settled out of Court and never actually went to judgement, and there it may have ended as a kind of unique case study for students of copyright law, but there was one voice absent from that whole procedure, and that was the Maoris themselves who were incensed that someone should claim ownership over a traditional practice that was theirs. Indeed, from a legal point of view I think the studio could have defended what they did on grounds of lack of originality – the threshold for that is set pretty low in Anglo-Saxon practice – rather than fair use.

But the Maoris were angry, they were angry because no-one had consulted them to say do you own this, because they felt they did, not as individuals but as a community. They were incensed because the notion that someone could copyright the moko meant because of TRIPS, that then Maoris having their faces tattooed in New Zealand, might in turn be sued for breach of copyright by Victor Whitmill or any other tattooist who got first in and saying 'I own this.'

And so there is a great difficulty here as Megan pointed out between, on the one hand, the legal world with its concepts of individual ownership, and then the right to exploit, and then the view of communities and their sense of more communal collective ownership of practices like tattooing or wood carving or the telling of stories, and how they then can be taken over and taken away from these communities.

And I think again, just as Alison left you with questions, I would leave you with a challenge, and that is how do you recognise the rights of these communities, communities of crafts people, of storytellers, of artisans, how do you recognise their rights within a world of systems that geared towards this notion of individual ownership?

Ben White: Okay, so I'm responding to Kerry's fascinating presentation on the Edwin Morgan scrapbooks. I'd like to, although it seems quite an extreme project, I think it's absolutely typical of the kinds of materials that sit in libraries, archives, museums, the British Library has, you know, we have scrapbooks of newspaper articles that were collected by Chatham House over decades, again, individual articles removed from their original context.

We're wanting to digitise letters, photographs, collections of materials that organisations and individuals have kept over the years, fanzines, club magazines, these have high research value, and I think it's fair to say that our copyright system is not based around the kind of things that we see in these projects. It's based around material that is, or the way copyright has developed is it works if you're trying to get permission to reuse a Beatles track or something where the rightsholders can be quickly found, but that isn't the case with a lot of the material that we see there.

A couple of thoughts, one is I wonder if we'd even be having the presentation if this was in America or South Korea or Israel – fair use countries – so we don't have an exception in UK copyright law that helps this kind of thing.

I think Kerry showed very adeptly that the Orphan Works exception wasn't the solution: the time, the scale, the cost for doing this, and inevitably, as you showed in the slides, depending on your appetite for risk, large parts would have to be redacted, so Orphan Works would leave a very big hole.



Ben White responding to Kerry Patterson's paper

So we don't have an exception. The Orphan Works would only get us a few images perhaps per page, and I'm very interested in extended collective licensing, a form of licensing which allows collecting societies to extend their mandate in certain instances beyond their members, so I'm wondering if you've spoken to the Design Artists' Collecting Societies or any Artistic Collecting Society to see their take on it.

I think, again, we have issues there that the law was introduced in October 2014. Nearly two years later not one collecting society has applied for an Extended Collective Licence, so actually they haven't applied for their business as usual, and, particularly, if you look at the CRM directive and the requirements on transparency, the high bar that Collecting Societies have to jump over in order to apply for an Extended Collective Licence.

I wonder when/if this country will be in a position like the French, the Germans, the Swedes, the Danes, the Poles, a lot of other European countries that seem to have found legal solutions for large scale digitisation.

So I'm not really sure where that leaves us in terms of copyright law. In the Edwin Morgan example we haven't got an exception, Orphan Works isn't the solution, we don't have an Extended Collective Licence, so copyright just doesn't seem to be able to cope with the kinds of things that archives are doing in this high research-interests space. Again, if it was the Beatles we wouldn't have a problem, we could clear those rights quite easily.



Naomi Korn responding to Victoria Stobo's paper

So a crazy idea that I came up with is moving away from – not moving entirely away from copyright law – but can we have perhaps a committee of the great and the good, where there isn't a licence available for in-copyright material like this scrapbook where the exceptions are not working, that actually sits down and decides, actually, is it the cultural value of this material that's important or is it the exclusive rights of each rightsholder? Maybe that's a way that we can move beyond the sort of copyright impasse that we seem, or the difficulties that we have at the moment in terms of this category of material that was not produced commercially - a thought.

Naomi Korn: Good afternoon everyone. So I have great pleasure in responding to Victoria's presentation. I am a great believer in, and actually as a result of the work that I do across the sector, that in the 21st century a Cultural Heritage Organisation, whether it's an archive or museum or library, that we have to consider that rights management means risk management. There's no other way around that.

And Victoria's presentation, and in fact the presentation before hers, was very much focusing on the role of risk management and looking at copyright through the lens of a business decision which is that in order to achieve what we want to do, achieve digitisation, connect with our public, make these works available because often we don't have the physical space to put them out on display but we do online, we have to take very thoughtful decisions with regards to how much does it cost, what is the benefit, and what are the risks? So the magic triangle of costs, risks and benefits I think is a resounding discussion, it's an ongoing discussion that we need to have in an organisation.

Now what's also I think quite important to stress, and this was also picked up by Victoria but also in some of the other presentations, is that we are not a homogenous sector, but organisations function very differently and something that might be cheap in one organisation will be expensive in another, and so it is also very difficult to come up with specific models that apply universally but, what we can do, I believe, is come up with principles that we can then apply and then they can be bespoke according to the individual organisations.

Now I wrote a report back in 2009 called 'In from the Cold' which was one of the first reports ever written looking at the extent and impact of Orphan Works on public service delivery, and I wanted to read you something from the report which is just over six years old now:

Orphan Works are selected for digitisation based on the fact that they do not pose any copyright issues. Thus creating a black hole of 20th century contents, these issues stress the need for an informed and skilled public sector to deal with all the issues associated with copyright related materials, the necessity for access to resources to deal with Orphan Works, and an informed and proportionate understanding of the nature of the risks associated with the use of these works.

Now this is six years ago, this is after a massive change to UK copyright legislation, this is after our 2014 Orphan Works Licensing Scheme and Orphan Works Exception, and the issues are the same, and Victoria's study is crucial because it corroborates work that was carried out a while ago, both in terms of highlighting those issues, but also if you look through her figures Victoria found that on average archives have between 40-50% of their items being Orphan Works. Now this hasn't changed, but the costs associated with dealing with them are greater now than they ever were before, and so her report and all the work that she's doing is highlighting the issues that we're facing which are the growing costs at a time when our sector has reduced capacity to fulfil those costs, so it's a very, very important piece of work.

Now what I'm also interested in, and I think that's something that again looking, like Ben, at possible solutions for some of the issues that have been flagged are the causes of Orphan Works. Now one of the major causes of Orphan Works in the UK, certainly for text based works, is the duration of copyright. In certain circumstances, and this is irrespective of when they were created, some text based works can be in copyright until the end of the year 2039, and this is one of the reasons why we have so many Orphan Works in our archives.

And in response to this and, this is the final thing that I will say, the Libraries and Archives Copyright Alliance on Monday launched a survey looking at the costs to the sector of 2039 works. Now I will tweet again, I've been tweeting all week the link to the survey, but I would really urge any of you who have text based works in your collections, if you are archives or museums or libraries, to complete the survey because, like Ben, we have to be proactive in trying to seek the changes that we need in order for copyright to work more effectively for us.

Joris Pekel: I'm responding on the last presentation by Andrea. So first of all, yes, I have to give compliments to what you've done here with all the prints, it's very pretty, and I think it's exactly why we digitise material because you're now able to pull in these works that are scattered all over the world into a room in Glasgow.

So, with Europeana we advocate for maintaining a healthy and thriving public domain, and that all starts with the question if digitisation actually generates new copyright? And, for example, in the Netherlands if you would make a two-dimensional scan of a painting you would have a pretty hard time actually claiming copyright on the picture as there's no original work and I think in the UK more and more it goes into that direction, but Naomi knows more about that.

And that's what's clearly also been seen in this exhibition is that institutions think quite differently about it and not in a standardised way, so you have all these public domain works but all here with different rights statements and, for example, this is not only here but this is in Europeana on a much larger scale. I looked up that painting by Munch over there, he is in the public domain for two years now, we have 190 works of Munch on Europeana, of which five are labelled public domain, nine CC-BY, three CC-BY, and 14 CC BY-NC-ND, and 146 all rights reserved, so that shows a bit that institutions take a very different approach in making rights statements.



Joris Pekel responding to Andrea Wallace's paper

And it's interesting to see in this presentation that our open champions are also still struggling. We have the Rijksmuseum which is always used as a great example of opening up high resolution collections, but in the show they even have issues with just keeping up with new policies, which then means there's a legacy problem because previously, probably, in the metadata they have put down 'copyright Rijksmuseum.'

So this is one of the reasons why, we at Europeana – but with many other organisations – advocate for the standardisation of rights statements. We have been doing this since 2011 now, and we are actually forcing every institution to pick one of the 13 rights statements that we offer, so there's some form of standardisation, but, as I just told to you with the Munch example, there's still great form of variety. And then there's also the DC Rights field which is an open text field which is very often still conflicting with the rights statement chosen, or sometimes just very weird. We have a collection where it says 'public domain,' but in DC rights it says 'For rights information please tweet at this personal Twitter account.'

So, I think finally, opening up collections, opening up content, we talk a lot about copyright here, but I have to say that it's more than just putting a rights statement on top of something. A large deal in opening up is how do you make stuff accessible? Do you make it easy enough for a user to go to your collection on your website and to find the material? Because if you don't, probably they'll find it somewhere else.

I mean, again, the question, does digitisation generate new copyright? There are a lot of people that think it doesn't, like most famous the Wikimedia Foundation, so they take public domain works, two-dimensional public domain works, put it on Wikimedia Commons with the public domain stamp on it, and for a user I think in the end if he looks for a particular painting, he doesn't really care where he finds it, he wants to find it in the best resolution and with the best terms of use.

So actually what I think would be quite a nice exercise to follow up on this exhibition, is to do the same thing with the exact same artworks but this time with all the sources you can find including Flickr, Wikimedia Commons, and probably nearly everything here will be in super high resolution.

My final comment is that this comes a bit back to the conflicting rights statements – I really like the idea of the Archive of a Copy That, so instead of writing something down like 'this is in copyright' and then two years later you change your policy and you have to do it all over again, you can simply link to that page in your metadata and people can see 'ah right, back then it was like this, right now if I find it this is the situation of the institution.' I think that would be a great help in standardising these kinds of things. Yeah, that was it, thanks.

Margaret Haig: Well I get the pleasure of going last, before we open up to questions I guess, so I'm Margaret Haig from the Intellectual Property Office, and before you start throwing things at me, we obviously appreciate that there are lots of issues around this area, and actually it's very useful for us to attend events like this, look at the presentations, the research that's being done to actually understand the context of what's happening, and I've met with various institutions and looked at various projects over the time I've been at the IPO and have seen, for myself, some of the things you struggle with.

I would encourage you to, one of the things that really struck me about Andee's presentation there at the end is about public awareness, but I think it's also about specialist awareness and, yeah, it's great to get people to be engaging with art but, actually, all of you to be understanding what the other policies are out there in terms of what people have on their websites. I think probably, as practitioners, you want to put things out there, you want to put things on your websites, not realising that there is an underlying terms and conditions on your website that says 'XYZ' that would be restrictive, and so I would really encourage you to get involved with your legal teams, which was also something that came up in the other presentations.



Margaret Haig responding to the body of research as a whole

In terms of Government work, we did put some exceptions in place a couple of years ago, 2014, which hopefully helped the cultural heritage sector, things about preservation and archiving. We did put in place the Orphan Works Licensing Scheme, we have got an extended collective licensing structure, although no-one's made an application, I appreciate that. So there are things that we are trying to do to help you, and one thing I would say is looking to the future, obviously I have to slightly disregard what's happening in a couple of weeks' time [reference to the EU Referendum], but in the EU the Digital Single Market package is expected to have some content which will be relevant to the cultural heritage sector. So what I would say now is just to keep an eye out for what's happening on that level, and engage when you can about influencing that and what that will actually look like.

I won't say too much more now, obviously if people have questions about particular Government policies about particular things then we can take those in panel.



Chair, Ronan Deazley, opening up the floor to the audience for questions



Fiona MacMillan asking the panel the first question

Ronan Deazley: Okay, so we have our five panellists, thank you for your remarks. We've got about twenty minutes. We also have all the speakers who gave presentations at the front this morning, so if people have questions please hands in the air. What I will say is in about 10 minutes' time Ben White is going to dramatically leave the room because he has to catch a flight, that's his kind of international jet-set life, he can never be in one place for too long, so he's not being rude, but he will leave before this conversation is over, so if you've got questions for Ben get them in early alright? Okay, now I did see hands in the air. Fiona?

Fiona MacMillan: Thank you very much. I'm Fiona MacMillan from Birkbeck University of London. I just wanted to make a couple of comments which have a couple of questions attached about the trajectory of the UNESCO Conventions on Cultural Heritage, and this relates I think partly to the things that Megan said about this and also to the specific points that were raised by both of the Professors McCleery in response to that presentation.

The first one relates to this convention that hardly anyone mentions but it's worth saying something about on this, and this is the Convention on the Protection, strangely, of Underwater Cultural Heritage, which is not relevant to this but, has in it, a provision on anti-commercialisation, so it actually creates a commons around underwater cultural heritage. And I think it would be useful if we said a little bit more about this story and why it's there and why it doesn't exist, for example, in the Intangible Cultural Heritage Convention, so that's really a general comment.

But the other thing that I wanted to say, and it relates to this example of the moko and of the Maori people and another problem that we might, and Megan may have something to say about this, about the Intangible Cultural Heritage Convention, sorry I've almost finished, sorry, which is that the other problem is that ... Megan talked about this problem about Cultural Heritage of Humanity versus Cultural Heritage of Community, which is a problem which runs through all the UNESCO Conventions, but indigenous people – but not only indigenous people – have a special problem, which is to have their cultural heritage listed they have to get into a relationship with their own Government with whom they often have a very bad relationship, Maori people a bit less so. Australian indigenous people don't want it. Australia's not a party to the Convention, but they don't want to use, they don't want to be in this relationship where they have to ask the Government to list their heritage in ways that they might not like, but not only them, also people in Venice, the Venetian gondola builders have exactly the same problem with the Italian Government. So another problem that maybe someone has something to say about is what we do about this idea that actually what the UNESCO Conventions ask us to think about is culture as a national thing, not as a Cultural Heritage of Humanity, not as a community, but as a nation?



Alistair McCleery responding to Fiona MacMillan's question

Alistair McCleery: I agree largely with what you've said and, in fact, I can add two further examples. One is the issue in Australia over petroglyphs. It's over Aborigine paintings, and who has the right to reproduce these, and there have been some notable cases where gallery owners in Australia have been reproducing Aborigine petroglyphs and then selling them, again, much to the anger of the Aborigine community, but I'd also say that there is no necessary tension or antagonism between commercialisation on the one hand and the requirements of the UNESCO Convention.

Murano glass, anyone know where Murano glass comes from?

Audience: Murano.

Alistair McCleery: Well, that's wrong actually, most Murano glass as sold comes from China and Pakistan, and the glass manufacturers in Murano, which are commercial enterprises, art design enterprises, have a real problem even in Venice itself, because a lot of the glass that you buy in Venice as you come off your cruise ship and have half an hour to go and visit the stores on the Rialto, comes from Pakistan and China, and they are without recourse. They can't defend their rights in Murano and Murano glass. They cannot claim any rights in it. The best they can do is to put a label on the Murano glass they make, saying 'Authentic Murano Glass', but unless you're a particularly discriminating tourist and look for the label you can't tell if it's authentic.

So, sometimes the defence of communities of craftspeople and others involved in ICH is not, as it were, to defend them against commercialisation, but to defend their primary rights to commercialise the products of their communities, the traditions that they've developed.



Alison McCleery responding to Fiona MacMillian's question



Naomi Korn responding to Fiona MacMillian's question

Alison McCleery: I should just like to make a separate, perhaps rather a trite comment, that UNESCO of the UNESCO Convention and ICH is based in Paris. Paris is the capital of France. France as we all know is a very centralised country, and from time immemorial France has had great difficulty at governmental level in recognising the identities and cultural heritages of its various regions, and that is a tension which, arguably, is ongoing.

Naomi Korn: And if I could bring it back to copyright in that we've spoken a lot about the sort of conventions and treaties that exist and that surround our cultural heritage, but I think it's also worth giving a sense as well that within any Cultural Heritage Organisation there are also a number of standards that we follow. For example, we want to actually achieve the levels of funding that we need, there's archive accreditation, there's museum accreditation, collections management standards - SPECTRUM, there are also commitments that museums, libraries and archives have to their funding bodies, like the Heritage Lottery Fund and Arts Council England. They have contractual agreements with people who give them money to buy stuff, so that might be the Art Fund, they also have agreements with people who give them the stuff as well and so that broader context that's been discussed today is also very, very important to be aware that there are both international, national and other types of agreements and commitments that organisations have that ultimately have an impact as well on what goes online and how that's communicated, so it all sort of filters through.

Ronan Deazley: Thanks Naomi, I'm going to take another question.

Ruth Towse: Ruth Towse, I'm an Economist working on Culture. Well, there's been a lot of discussion on risk, which is of course a very normal problem for economists. Risk consists of the probability of an event happening and the damages, and I wonder if there have been any - and now I understand that this is not always an economic problem because reputation is also involved - but I wonder if there have been any sort of attempts to work out what the sort of probabilities of being sort of caught out doing the wrong thing are, and what the costs would be for that?



Ruth Towse asking the panel the second question



Naomi Korn responding to Ruth Towse's question

Now, that of course is normally covered in ordinary life by insurance, and I'm not suggesting that a commercial insurance policy would be interested in this, but the Government does have indemnity insurance policies for all kinds of things associated with the art world, and I wonder if this might be a kind of channel to go down to consider, and it might make it more attractive to smaller institutions particularly if they knew that there was some sort of covering of their backs in case of infringement?

Naomi Korn: I'll take that. Hi Ruth, it's really nice to meet you, I've been aware of your work, there you go.

There has been some work done on this area. I can tell you that some of the organisations that I work with have taken out insurance against copyright risk and that is a matter of a few hundred pounds a year, so there is that available, and some of the big insurers like Hiscox are now aware of the types of issues that they face and are prepared to give that insurance.

We've effectively got Government insurance through the Orphan Works Licensing Scheme because that is an insurance situation, and also in terms of calculating risks.

I did some work about four years ago for Jisc which was a sort of funding body then, supporting the Open Education Resource Projects, and we created a risk management calculator for trying to calculate the risks associated with both putting Orphan Works online and also the different risks in terms of a spectrum of risks associated with the different types of creative commons that those licences, that those Orphan Works may go out under.

Now this was something that was discussed between myself and my team of Copyright Practitioners, Charles Oppenheim who's in the audience as well was part of the team, and we also had lawyers on our team. We didn't get as far as quantifying the costs because I think that's almost the next step, but we did take it some way to try and give the sector a tool to provide an indicative level of risk associated with that type of activity.

Ronan Deazley: And, Naomi, if I just ask about the kind of figures you're talking about there, a couple of hundred pounds for a policy, would that be relating to non commercial activity by institution or also commercial activity as well?

Naomi Korn: For one organisation that I work with it's for putting hundreds of thousands of artworks online for non-commercial purposes, and another organisation I work with it's covering all their copyright related risks as part of a bigger insurance policy that they have.

Ben White: Just an anecdotal experience. We have tried to get insurance which is difficult for a public sector body. We're told that for this particular purpose we cannot get insurance, but we did go against what our lawyers were saying and tried to get insurance from people like Hiscox and it essentially went into the 'doesn't compute' box. We were not able to get any quotes back.

Joris Pekel: Yeah, this is more about calculating risk. A nice case I think, well it's not that nice, but a good example is from the National Library of the Netherlands. They had a set of magazines from 1880 'til the start of the First World War, so very similar to a scrapbook collection basically, loads of authors, photographers in one set, and because of the dates it's quite likely that like 95% of what's in there would be out-of-copyright and in the public domain. But they weren't sure, so they calculated how long would it take us to actually find out all the rightsholders and that this was about five years for two full-time people, so quite expensive.

So instead they figured let's reverse it and we're going to announce it, we're going to put everything online and if you are a potential rights holder let us know and we can work something out before we publish, either by taking it out or by giving you some kind of compensation.



Ben White responding to Ruth Towse's question



Joris Pekel responding to Ruth Towse's question



Sheona Burrow asking the panel the third question

And they did that for a while before publishing, and they got one response from a guy who was actually really happy that his granddad's stuff was finally going to be online, but also a letter from a Collective Rights Management Organisation in the Netherlands that said 'you can't work like this, we have rightsholders, you need to pay us,' and [the Library] said 'well okay then give us the list of names and we can start checking,' and [the organisation] said 'no, no, we don't need to give you that list, it's just how things work, you need to pay us because you're going to publish this.' And in the end, lawyers came in and they decided because the works were, commercially speaking, so uninteresting it was really difficult to make money out of early 20th century magazines that they could put it up with like a huge clause saying 'you can read it, use it for research, but not for commercial purposes' and that's where it's at now. So it didn't really solve anything, but that's the risk they took. From rightsholders they got nothing, but from Collective Rights Management Organisations they did.

Ronan Deazley: Thanks, Joris. There will be time for more questions and discussion after lunch. Are there any other comments or questions in the room now, or has everyone just started thinking about their lunch?

Sheona Burrow: Sheona Burrow, I'm at CREATE but actually I'm also a Solicitor, and my question comes more from my background as a Solicitor. Is there any widespread view on who actually drafts all these contracts that we've been talking about today? Is it lawyers, is it people in-house, is it people working for smaller organisations that just copy what another organisation's done and then tweak things to make it work for their situation? Do we know what's happening?



Naomi Korn responding to Sheona Burrow's question

Naomi Korn: It depends. It depends on the resources that the organisation has, so some of the bigger national museums will create their own and they might either get their internal law teams to do it or they'll bring in outside lawyers.

As we sort of go down in terms of resource, a capability, the less resources the more likelihood that people will copy from each other because they don't have the capacity to have in-house legal teams or even to bring people in to do it. That's my experience anyway, I don't know if the panel ...

Can I just add something as well? Because this is the space I live and breathe in, I do this day in, day out, this whole thing, but I'm working right now with two organisations, one a national museum and another non national museum to help them to open up their images, in other words to help them put images of their collections online under a Creative Commons Licence. And in both situations these are three year projects, because I think what people don't realise in many cases is that the decision is only the first part of the story. So organisationally agreeing what they want to do is only the first bit. After that it's about looking at the data that they hold in their collections management systems and making sure that that's fit for purpose, and making sure that they've got procedures in place in order to understand what rights need to be cleared in works that are in copyright so that they can then deliver that material under Creative Commons Licences, making sure they've got the right templates in place to do that, making sure they've got a policy in place so that everyone understands their roles and responsibilities, and then making sure that there's training so they can basically keep this going and this takes so much time, so much effort and it costs so much. And I really wanted to say that what you see in terms of the delivery of items online, under Creative Commons Licences, it's not because the sector doesn't want to do it – it really, really does – but the costs involved in getting there are so substantial that it's taking much longer I think than anyone realises in order to get to that point.



COPYRIGHT AND CULTURAL MEMORY

The Lighthouse, Glasgow // 9 June 2016

Simon Tanner

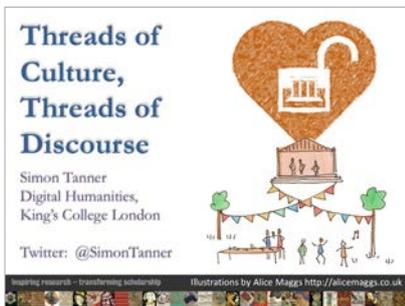


Figure 1

Introduction to Threads of Culture, Threads of Discourse by Simon Tanner

Threads of Culture, Threads of Discourse

I would like to thank you for coming back after lunch. We will try and keep this short and lively so that you don't nod off, but also I would like to thank the speakers this morning for making this task nigh on impossible, because it is highly unlikely that I can say anything more intelligent than they've already said to you today. It was a terrific set of talks and a great panel as well (Fig. 1).

I would also like to take this moment to thank Andrea and Ronan for what they have done here in this event, so I'm going to use the bully pulpit here on stage to embarrass them for a moment. It's not my job to do this, they got in touch with me and said 'would you like to do this with us' and I kind of went 'that sounds really cool' and then we talked about it and I went 'that sounds kind of amazing' and I worked with them and that was kind of incredible. Such generous, intelligent people to work with. Then I thought 'well this exhibition is going to be really great' and I came and it was unbelievable! And then the conference was great until this bit, and now you've got me! But can we give them a round of applause; they've just been fantastic haven't they?

So what I'm going to do is offer you a series of pictures, that's pretty much it. You know the usual type of thing, and I'll talk to you about some of the things which inspired me from the talks. I did have the advantage of having a preview of some of the Power-Points so that allowed me to have a little think, but as this morning went on, so many issues came up and I will refer back to my note book as they come along.



Illustrations by Alice Maggs <http://alicemaggs.co.uk>

Figure 2

Utility value and inheritance / bequest value

Illustration by Alice Maggs, <http://alicemaggs.co.uk>

We started off with Megan Blakely, and she was talking about this 'intangible cultural heritage,' and it made me really think that when we talk about this tangible versus intangible heritage that we're engaging with issues around values and fixity. And that issue of fixity came up a couple of times during the event and that, in some ways, what we're dealing with here is also a contention between instrumental and intrinsic values or direct and indirect values. In some of the work that I've done where I've looked at modes of cultural value: I could look at two examples of that. One image here is of the utility value of a bridge – it has the ability to enable you to get from one side of the river to the other (Fig. 2). Alternatively if you like the inheritance bequest value of what many museums are really engaged with: that aspect of what can we pass on to the next generation, what can we enable future generations to see of our culture and our heritage as it is now.

I was struck by the examples and the aspects here in Megan's presentation, which is to be reminded that culture is a contested space. It's not something we can just take for granted, these examples from Wales and Ireland. We are very much speaking to that aspect of when we talk about cultural heritage – well whose heritage, who gets to own it, who gets to have a role in it? And I think there's some important lessons for museums, archives and libraries as well and I will come back to that later on in the talk.



Image by : opensource.com

Figure 3

"Orphan?"

Image by opensource.com

But also there was that sense of being careful which values we encourage through our frameworks, whether those are legal frameworks, cultural frameworks or the way in which we even catalogue our collections. I think DAYOR has expressed some of those issues around the way that we catalogue, the way that we record things and how that has an effect on us. So, there is a whole series of unintended consequences that came out in that really interesting talk by Megan, and I would recommend you going and grabbing a hold of the PowerPoint when you get access to that because there's more there than you could probably see this morning.

And then we had scrapbooks from Kerry – and that was lovely wasn't it, just a really interesting, in-depth look at one example, which kind of talks to all other examples around it – and really started to address those issues around orphan works and the costs and onerous actions around orphan works (Fig. 3). I saw one tweet, I apologise for not mentioning the Twitter person, who said 'the real cost here is time, not fees' and you know human time is one of our main investments here, so we need to be thinking about how we can invest that carefully. But also with that 72% of orphan material in those 54,000 items, there was that question of 'Well what is diligent?' At what point can I stop being diligent? Where do I say I have had enough? Certainly when you start looking at one image taking almost three hours to clear (even if you are looking at the lowest common denominator there of 35 minutes to clear for that) you can see that those are massive investments.

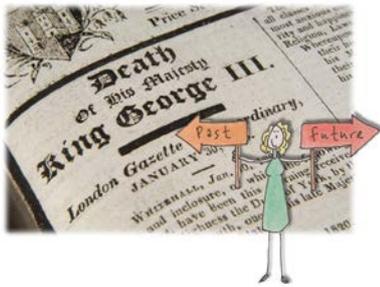


Figure 4

Archivists are being pulled in two directions at the same time regarding past and future considerations

That also comes with an issue, which is: are we going to be willing to either take the risk, as shown in other talks? Will we take the risk and just go for it without doing all of the elements of due diligence? Are there some bits of due diligence we can do and then just stop and say: 'I'm going to take the risk?' Also, are we going to be looking at some of our collections and saying, 'let's not do this, because it is just too hard' – and that being a significant issue?

I had an example about 10 years ago of a German choreographer who wanted to donate his years and years of dance choreography videos that he had been filming over 30-40 years and he had one condition – that whoever he donated it to would digitise this collection and make it available. But the rights were intractable. It was almost impossible to know who had what rights in any given piece of that activity, and so we do have to deal with the fact that in some cases, whether it's orphan works; whether it's not being able to deal with that question of identification (who owns the rights?); when we look at those risk factors sometimes they're going to be too great for us and that came through from Kerry's talk, and I think was taken up to a certain extent in Victoria's talk.

I was very taken by what Victoria Stobo was saying in terms of copyright, digitisation and risk (Fig. 4). I think it is correct: archivists are being pulled in two directions at the same time. What's pulling them in those directions, could be all sorts of different things but certainly this issue about 'how do we make our collections available to as many people as possible'. This is a big driver for what they are trying to do, and, in some respects (if one was to take the sort of view from the high mountain top) you know I would say there is a responsibility for as much of our collections to be available to as many people as possible, but the wrinkles in that 'as possible'. I think that our collections are about engagement, are about entertainment, enlightenment and education. I do think it is about allowing communities to connect with a past and through re-use – not just through reading – through re-use to generate a new future that they are self-determining from their access to those materials. And that came through from some of the examples that were given. You could see how the way in which a community might want to engage with materials as diverse as the Churchill Blood Acts, Codebreakers, the Glasgow School of Art – that those different types of materials talk to different communities in different ways and they will want to do different things with them.

I was fortunate enough to work with the Wellcome Trust on Codebreakers in helping them design their evaluation and impact measurement mechanisms, and one of the outcomes of that was we need more metadata, which I think is going to be a theme that will come up again as we talk through this. But another thing they were finding was the digital archive on a one-for-one comparison was being used two hundred times more than materials that had been sat in the physical archive environment, so they are really opening up availability and access to those materials. But when we talk about risk you are also in an environment where the Wellcome Trust is a very large, very well funded organisation that has as part of its remit for being that its research will be open access, that it's research will be openly accessible. So they might be willing to take risks that another organisation that doesn't have the corporate wealth, if you like, behind it, that doesn't have that vision and mission central to its meaning as an organisation in some respects, might not be so willing. So one of the other things we have to deal with is the fact that 98% of the museums, libraries and archives out there are not open access with their collections. It's at least 90%, I am going to say it is 98%. I have no figures but I'm going to say that it is along those lines, because I think actually the real number could even be 99.5% if we were to add them up just as institutions.

It struck me with the Glasgow School of Art with the pre-1939 being considered low enough risk and okay for them to digitise that that also speaks to some of the issues in terms of both the orphan works, but in terms of how we view collections and what is going to be available on the internet and what is available for people to see, to engage with and to access. But also, it was nice to see some actual numbers around take down and some actual numbers around reputation risk and around the fact that there's very little suing or litigation going on out there in our space. It reminded me that when I did my survey of American Art Museums in 2004 (which is a long time ago, you can see how aged I am in this environment) that I went to speak to folk at the New York Museum of Modern Art and I said 'what is your attitude to copyright?' and artists. Micky Carpenter, Head of Images at the time, said 'there are only three types of artists: there are the living, there are the dead and there are the good and dead!' They liked 'the good and dead' because it allowed them to do more things with their materials, and then when I asked museums like the New York Met, like San Francisco MoMA, the National Gallery etc., 'what do you do when people steal your works?' they said 'well we send them escalating levels of really rude letters telling them to stop.' I asked 'will you ever go to court?' and they went 'no, we will never go to court.' So we're dealing with, if you like, a sort of distorted playing field, where one side can never go to court and another side could potentially go to court, and so that places a series of risk environments that practitioners have to be aware of and be engaged with and understand where they sit in that.



Figure 1: img_japanese04, Bridgestone Museum of Art, 17.146 px/in, 2016. Fujishima Takeji, 1867-1943, *Black Fan*, 1908-1909, Oil on canvas, 63.7 x 42.4 cm, Bridgestone Museum of Art, Tokyo. This digital surrogate is © Bridgestone Museum of Art.

Figure 5

Bridgestone Museum of Art's digital surrogate for Fujishima Takeiji's 'Black Fan'

Now moving onto DAYOR and Andrea's great talk. I think I also have to say that all the talks this morning only scratched the surface of the amount of research that is behind them. There's a massive amount more to come from all of our speakers this morning in terms of publications and future talks, future pop up exhibitions, future events like this, and I would also say I want to see that stuff. This is the heart blood of academic scholarly engagement, our ability to talk to each other, but it's also to get it written down so that we can cite it and share it. I think particularly with Andrea's talk there's probably about 20 papers in just that little talk this morning, not just one or two.

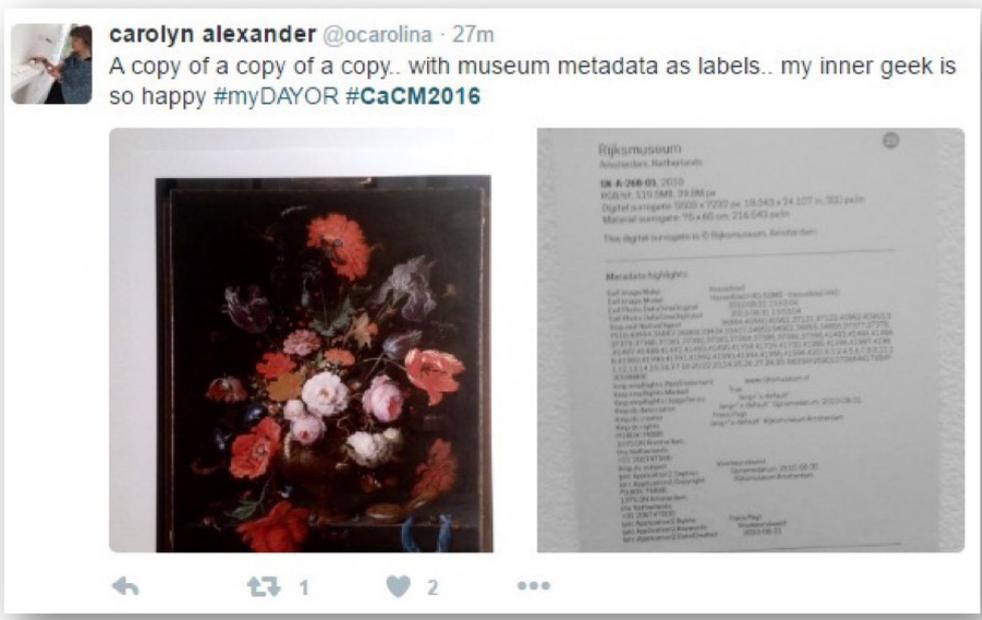


Figure 6

@ocarolina (Carolyn Alexander) tweets: 'A copy of a copy of a copy.. with museum metadata as labels.. my inner geek is so happy #myDAYOR #CaCM2016'

Now, I was invited to give a paper to DAYOR and I talked about the Black Fan and this image, I'm not going to repeat that paper, you've all got access to it (Fig. 5). But, to quote Andrea 'it gets pretty meta' and then she said 'I get quite obsessed with metadata' and I saw that got re-tweeted a few times. And then, I hope Caroline doesn't mind me showing her tweet, but 'a copy of a copy of a copy with Museum metadata as labels, my inner geek is so happy' (Fig. 5). Yes, we are all really, really happy Andrea! Our inner geek is celebrating and applauding you and DAYOR and Ronan for going as meta as you have because it has been so revealing and so informative, because DAYOR talks to different levels of risk.

It reveals the opacity of licences which I think is quite an important thing to understand and learn from. So even those as open as open, you know, the SMK in Denmark, or the Rijksmuseum, can still be opaque or confusing in their environments. Yet when you listen to Taco Dibbits (Rijksmuseum), when you listen to my very good friend Merete Sanderhoff (SMK), they talk about being as open as you possibly can. I think there is a very important principle there, which is how do you engage a community in an environment of trust where, to a certain extent, the actual wording of the licences becomes less important because the reality is that members of the public (the general public who aren't us) shouldn't have to care about this. They should be able to just know what they can do and have confidence in that. As Merete would say, 'it is important to be seen as open, it is not enough just to be open.' It's important to be seen as open and to convey what that means, and I think that both those organisations have done that through the way that they act, the way that the SMK has opened up artist hack days has enabled wearable pieces of art and really worked with their local community to make people aware that it's free, it's open, do things with it, make things.



Figure 7

Standards and best practice is important to incorporate into institutional policies

But there's still that slight tension there between the copyright and the image or the metadata; and what that means and how it exists and I talk about this often, as you know. The members of the public want us to be transparent, but there's a way of being transparent which is so transparent it is invisible and a lot of the time copyright sits in that space. So in the same way that we can see a weather system (we can tell whether it's going to be sunny or stormy today, we can feel that the air is warm in this room at this moment) we can see something that's as transparent as the air in terms of big weather movements, but then if I look at my hand, and we get to that level of detail air becomes utterly invisible. When we talk about opaque or transparency often we mean exactly the same thing - in terms of how the public's behaviour responds to the information that we give them, and so we need to be giving them these big messages. It's important to be seen as open.

I think that Copy That is going to be really exciting, those interactive graphics would clearly show what can and cannot be done. There is obviously always going to be that issue for all of us with anything that we're doing: it does rely to a certain extent upon the user caring enough to click, caring enough to hover, caring enough to spend however much time it takes (whether that is one second, or fifty) to look at and engage with the materials. But I do think that there's a lot of useful elements in something like Copy That, the things you heard from Naomi Korn when she was talking about the tools that are out there to help manage risk, the way in which a lot of these presentations provide you with exemplars of best practice (Fig. 7). The way we're starting to see a whole community building standards around open GLAM and open access is important. Recently I was at the IIF [International Image Interoperability Framework] conference which is about image interoperability, so a very low cost way of sharing images in an open GLAM environment, and also got that sense that we can use standards to our benefit. We can use it in the same way that we've gained with the Creative Commons, with the CCOs and CC BY licenses we can use these to our benefit to shorten the distance between what we want to achieve and how we can get there and to reduce the amount of costs that it is going to cost us to make those resources available.

One thing I would maybe say at this moment is, and this is something that comes up a lot from my digital humanities perspective. So I'm from the Department of Digital Humanities, Kings College London, and we're often having to have the conversation with the people we are partnering with (whether those are museums, libraries, archives or other academics or other subject areas) and reminding them that the data is not the website and the website is not your data. When we talk about openness sometimes we're talking about the openness of the website 'can you access things on the website?'



Illustrations by Alice Maggs <http://alicemaggs.co.uk>

Figure 8

Money will always be a driver in decision making

Sometimes what we really need to be talking about is well maybe you can make the data open and let people build their own interfaces to it and let people build their own ways of viewing that. The way that the Walters Art Museum collection, known today as the Digital Walters, was made available and the way that Will Noel talks about these sorts of activities. And, again, standards can be our friend in this environment. Always remember when you're having that discussion sometimes the block is because people are talking about the website and the marketing department are saying you're not allowed to doing anything with the website - so just make your data directly available. They're not necessarily the same thing. Keep it in mind that there is some separation there.

Let's have no doubt that you are going to be worrying about money and money is going to be a driver in decision making (Fig. 8). It's going to be a driver in terms of your ability to take action and to do things and that might be money in the form of people, it might be money in the form of infrastructure costs, it might be money in terms of your director saying I don't want to give up those licence fees that we get from certain types of uses. And undoubtedly this sort of conversation is an important one to have.

I was recently involved with conversations with a major museum who has made most of their material available with a CC-BY licence and having that internal conversation could we go CC0, could we go the full Europeana? And they are having to have that conversation about ‘well what would happen to our commercial revenue and what would that mean to our commercial revenue?’ but then on the other hand, the other part of that conversation is ‘do you know how much time we spend negotiating licences with a commercial provider who is going to put a mug in our shop?’ And actually the amount of time and effort put into negotiating those commercial licences is getting in the way of that supplier putting a mug in our shop and where do we actually make money from this transaction? We don’t make it from that licence sale, we make it from the mug being sold in the shop.

So when you look at where are the major places of revenue for museums in particular, it’s in exhibitions, it’s the shop, it’s the restaurant. One could even say that the “perfect” visitor to the museum is one who will come in buy your exhibition tickets, sprint through the exhibition, wander into your shop and spend their money in the shop, then go to the café and then leave (so that other people who are actually interested in the art can enjoy it in peace). This was actually said to me by a Museum Director who wanted me to get the point that obviously that sort of cynicism is a very dangerous thing. But it also means that we have to remember that images are often the Cinderella service of the museum, essential to that exhibition, essential to that exhibition catalogue, essential to the brand of that museum and organisation, essential to those abilities to make tea towels and mugs and t-shirts but often not actually appreciated for those roles and those activities. As I would say, it’s a little bit like a car manufacturer only valuing its showroom and saying the only thing that matters is the showroom because that is the only place we get any money. But actually, without the factory, without the materials, there’s no showroom, there is nothing to sell. There is no public engagement without images in some ways, because you need something which can actually be reused, repurposed, worked with. We need to think about what are the opportunities that we’re gaining and are those opportunities when we think about that risk-cost-benefit circle or triangle (which Naomi was talking about) mount up the benefits so they become worth it for us to make this move? For some people, it may not happen but for others I would contend that if we can get the proportions not doing OpenGLAM from 98% to 80% not doing it, that would be a really great thing, and it would be amazing for our public engagement with these materials.

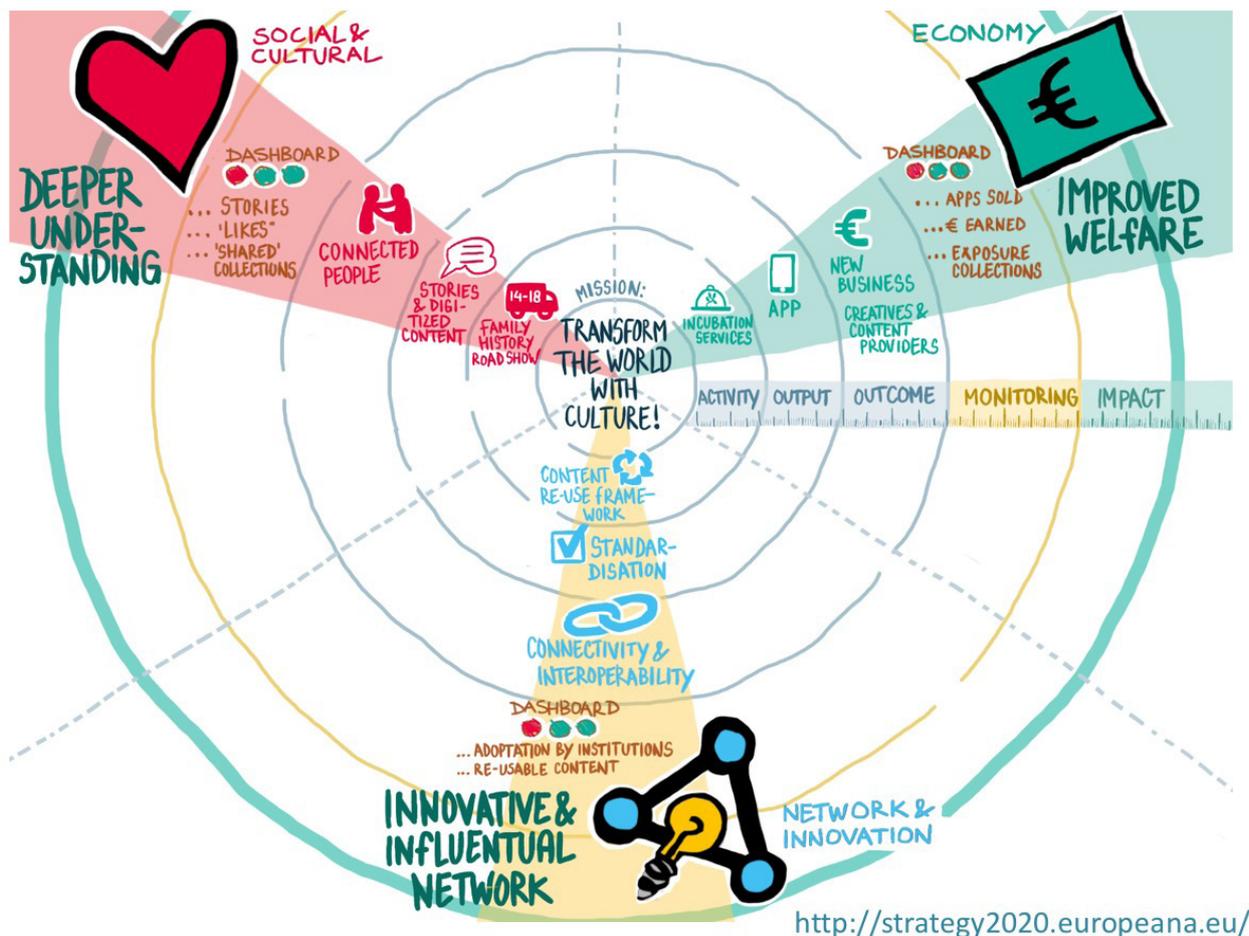


Figure 9

Europeana Impact Taskforce taking three perspectives in measuring impact when making content available

I have been Chair of the Impact Taskforce for Europeana for a few years (Fig. 9). We've been building impact measures. How do we show those benefits? I think this is the thing that needs to go alongside any investment in making content available is finding out, if when it's available, what would that mean to people and how would it be used and why is that going to be of benefit to them. We kind of look at this from three different perspectives: an economic perspective of improved welfare; a social and cultural perspective, a deeper understanding; and an innovative and influential network. Could we do things that we previously would not have been able to do if we hadn't had this material available in digital form, or available with a CCO licence? You can see the results moving from activity through to outcomes and impacts. Having a content re-use framework leads to standardisation, which leads to connectivity; interoperability, which leads to our ability to then measure innovation and influence within the network. So, I think these elements are important.

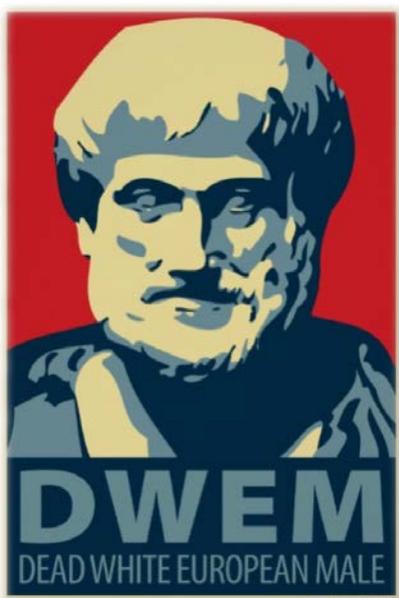


Figure 10

Dead White European Male: the white elephant in every collection

I would like to finish off by talking about Dead White European Men (Fig. 10). I know this is slightly ironic with me being a white European male, but at least I'm not yet dead. Hopefully, I can speak to this a little bit. It comes back to some of the issues around these questions: if you're not digitising material because it is not in the public domain, if you're stopping looking at 20th Century materials because they look too dangerous to digitise, too risky to digitise, what does that mean? Well, it kind of has two spaces, really. If you are a digital humanities person you want to use digital content to build digital tools to do new forms of research enquiry but all you've got is material that pre-dates 1900? That's going to skew to a certain extent which types of scholars can engage in that type of investigation. It's going to skew the scholarly output as well in terms of what things have been studied in that kind of depth. So, there is that aspect of it, but there is also the aspect that was drawn to our attention very much by Alistair McCleery in terms of what if all we're doing is digitising the things that dead white European males were interested in? Because, if you like, some people would say that is exactly what those museum, library and archive collections represent. They represent the views of Europeans who were generally male, who were generally white and who decided this is what is worth collecting. In a strange way that was one of the challenges for DAYOR. It was really hard for Andrea to find works of art that were in the public domain that didn't actually in many ways just replicate this dead white European male concept. This has consequences, because if the only things that are available online are re-emphasising an Imperial past, a colonial past, how does this allow communities to build their sense of being and their sense of engagement in this environment? When we talk about copyright there's that element of consequences and the element of what does this mean for certain communities?

Democratisation & Contested Spaces

How do we genuinely offer democratisation in a digital domain when people are struggling to:



Be
Belong
Build identity
Be: Recognised
Believed
Understood
Understand
Heard

Inspiring research – transforming scholarship



Figure 11

Democratisation & Contested Spaces: How do we genuinely offer democratisation in a digital domain when people are struggling to do so many other things?

I would just end by saying one of the things I hate most is when people say ‘the justification for digitising my collection is because it was democratised access.’ More people seeing it is not the same as democratising access (Fig. 11). This is a contested space. I and many of my colleagues work with many collections in Africa, I worked with collections in New Zealand and Australia with indigenous peoples, I have worked with collections in many areas of the world where the idea of having this sort of conference is a luxury and they’re in the process of trying to be heard. It’s not even a matter of how can we actually have something to say, it’s a matter of struggling, as I say, struggling to be, struggling to belong, struggling to build an identity, whether that is a local cultural or national identity, to be recognised, to be believed, to be understood, to understand and to be heard.

And so we also need to think about the consequences of the law and legal frameworks. Going back to those first three talks this morning where they all identified that the framework in which we work, the way in which that work is done, creates as much as reflects our culture. That’s why we called this talk bringing the threads together of cultural discourse and culture.

Thank you very much.

Image Credits

Figure 1-2: Illustrations by Alice Maggs, <http://alicemaggs.co.uk>.

Figure 3: Orphan?, image by opensource.com.

Figure 4: Illustration by Alice Maggs, <http://alicemaggs.co.uk>.

Figure 5: img.impression05, Bridgestone Museum of Art, 11.168 px/in, 2016. Pierre-Auguste Renoir (French, 1841-1919), Mlle Georgette Charpentier Seated, 1876, 97.8 x 70.8 cm, Bridgestone Museum of Art, Tokyo. This digital surrogate is © Bridgestone Museum of Art.

Figure 6: Tweet from Carolyn Alexander @ocarolina.

Figure 8: Illustration by Alice Maggs, <http://alicemaggs.co.uk>.

Figure 9: Europeana Impact Taskforce, <http://strategy2020.europeana.eu/>

Figure 10: Dead White European Male, designed by [ThePeoples-Cube.com](http://thepeoplescube.com/), <http://thepeoplescube.com/>, available at https://www.zazzle.co.uk/red_square.

Figure 11-12: Illustrations by Alice Maggs, <http://alicemaggs.co.uk>.



CREATE

COPYRIGHT AND CULTURAL MEMORY

The Lighthouse, Glasgow // 9 June 2016

Q&A

Question 1

Pauline McBride, University of Glasgow

Hi, this is a question for Simon. My name's Pauline McBride, I'm a lawyer and I have a connection with the University of Glasgow. You raised a lot of broad questions but I wanted to pick up on something you said almost in passing. You drew a distinction between open websites and open data and I wonder if you could just elaborate on what kind of business model you had in mind, or what the distinction was.

Simon Tanner: If I can just illustrate that from King's perspective and hopefully that might speak to other people. We've been building digital humanities resources for 20 years or more. We have over 105 different digital humanities resources. We have over five million digital objects in there. We're an academic department and many of those resources were built at a time when the only way that you could build that resource was by making the interface so intrinsically related to the content that you couldn't take the architecture of the resource away from the content, in other words you actually had to hardwire in content names, metadata and things like that to make it work. We're now in a very different place where you can create a web interface which can interact with a set of data below it in a standardised fashion. It usually costs an amazingly larger amount of money to maintain a website and a web interface than it does to maintain a dataset.



If you can treat them as being two slightly different things where one feeds the other then you can from one perspective either keep your costs in a more sensible place from a management perspective, but you can also, I think, look at it from the perspective of 'if I want to set it free, if I want people to have access to this, if I want people to be able to reuse this material why don't I just make it really easy for them to just come and download the stuff and build their own things around that?' Rather than requiring them to always come through your own web interface to get anywhere near the data. Why don't I just let them have access to that data?

And we're starting to see that in the way that higher education is being mandated both in terms of open access for publications and also in terms of open access for research data and we're going to have to deal with, from an academic perspective, those issues. And I sit on a whole bunch of committees where we're talking about these things all the time. So it's very hard from that perspective, but that to me was the step change that Will Noel achieved at the Walters Art Museum was you could just come and download two terabytes of their collections if you want to.

Now in response to that when everyone goes, 'isn't that a terrible thing, he also says look those collections are on Flickr, they're on all these other sites,' if you go to Google and search for medieval illuminated manuscript the Walters comes up higher ranked than the British Library because they've made their material more available, more seeable, more visible. So in some respects that helps the recognition of their institution and will drive people to them, because people will still want to go and see these things. I don't think any of us just because we've seen a fabulous quality poster of an artwork on the wall aren't still going to want to see the original.

Andrew James, Scran

I'm Andrew James, I work for Scran - a big digital database. This is just an observation, really, but hopefully opening up for discussion. I think it was Victoria earlier on that was talking about why people generally don't ever sue – we're talking about risk management, why copyright holders if their work is made available to the public and they find out about it later having not been told, why they very rarely sue, why there's never any financial restitution, and you talked about reputation as something to consider in terms of risk on the side of the people who are putting this information out, but it occurred to me that there's also reputation on the side of the people who own the copyright, and they've got to consider this as well. It's something to be borne in mind, and it may speak to why we should be less risk averse because they aren't going to sue essentially because of their reputation. People these days want to be seen to be able to share data, they don't want to be heavy handed, they don't want to be seen as bullies, and I've seen numerous examples in my career where people have asked for stuff to be taken down, but they've never asked for financial restitution because they don't want the negative publicity associated with that and maybe that's when it could be borne in mind in the future.

Victoria Stobo: Absolutely, I agree I think reputation exists on both sides and one of the contributing factors to people not suing is the fact that it is so expensive and a lot of the time it just makes more sense to have a negotiated process whereby the culture institution and the rightsholder just sort out their differences that way rather than going down the route of litigation, and, yes, I can see that reputation would play a part on both sides.

Simon Tanner: I was just going to say because I think both Charles and Adrian probably have a lot more experience of what happens in those cases that never get to court and how those are sorted because this is one of our problems isn't it, is that there isn't very much case law because they tend to get settled out of court in that sense.

Charles Oppenheim: These cases tend not to go to court, no – and one reason is precisely as has been suggested that the reputational costs on both sides and neither side wants to take the risk, and so they will settle out of court. There might be compensation.



But one story I'll say involved an educational institution called Greenwich College, not Greenwich University but Greenwich College, which was a small FE college in south London which was caught infringing copyright not in this area but in photocopying books and articles. There were suspicions by the publishers that this was going on so they registered a "student" on the course to observe what was going on. The publishers paid good money for the student to register to be an accredited student, they paid the fees. And it actually went to court and the court assessed the damages at let's just say £1,000, and the bursar of the college was then interviewed and said publicly, we've got no problem, this student paid £2,000 in fees, never troubled any lecturer with submitting course work or anything so we're £1,000 in profit. I thought that really was an attitude to copyright which wasn't to be encouraged.

Question 3

Fred Saunderson, National Library of Scotland

Fred Saunderson, National Library of Scotland. I'm curious about Simon, you've talked about this at the end here, but it's been obviously a theme throughout, but measuring the impact from an organisational perspective is what I'm interested in here. There are different kinds of impacts that we can get from our collections as been discussed. The money is an easy thing to measure, it's difficult for us to measure how much it costs us maybe to generate the impact of money coming in, but it's easy to measure the money that does come in.

It's easy to measure how many people come and look at our website, how many people come through our door. It's very difficult to measure and then demonstrate value to our paymasters when people are using material entirely disconnected from us.

I'm wondering if there's anything to be said about how we might go about doing that.

Simon Tanner: It's something where the blurring of the boundary between things that you do as an organisation and the things that people do with the content you have responsibility for as an organisation start to become blurred and difficult to measure. My main piece of advice on impact is just being purposeful. I don't necessarily think it's terribly important to assume that everything you're going to do is going to succeed and will drive wonderful things, but there is an awful lot of assumption built into the community.

One of the big assumptions is that being on Google Art Project is a really good thing to do. It costs an absolute fortune to be on Google Art Project, to get the metadata in the form that they want it and to share it with them. And what do you get back? Very, very little. I was talking to a particular small museum who were saying look, our art is being seen on Google Art Project and that means that this small indigenous art collection is being seen. I said okay, how many track backs to your museum do you get and over a six month period, it was less than 100. So rather than just jumping in and saying if everyone else is doing it, or if we put it on Google that equals wonderfulness because it's just great... It's about [being] purposeful about it and thinking about it in your planning, so thinking how will this generate a benefit to my community. And in thinking about how will it generate a benefit to my community you might think 'well while I'm thinking about it I might want to think about how I would understand success.'

That might be a way of measuring, or it might be a way of just being able to make the statements 'we did this, it was worth doing'. It's about being creative around that, so we've seen some really good examples of people thinking 'how can I show that what we do with images is as meaningful as what the marketing department does for my institution,' and so they started to measure how much print space their images are taking up when they're being used in the Sunday Times or in a magazine or in those areas and turning that into a monetary equivalent because that's exactly what the marketing department does. It says 'oh look we've got a big article about you in the middle of this Sunday spread and that would have cost you this much advertising if you tried to do that.' And so the imaging department for a museum will say okay we're going to measure how much of that article was taken up by our images and we're going to claim that as being our part of that marketing benefit. So that's a way of showing an indirect monetisation of the fact those images were out there in terms of a thing that's very valuable to a museum which is brand recognition.



Other museums, if you look at the Powerhouse museum in Australia it is in the 'top ten things you must do' if you go to Sydney. It's a tiny little museum. It's ranked much higher than some of the big national museums which are based in Sydney. It's one of the 'top ten things to do' and that's based on its social media profile and on all of the stuff it does online and the fact that it is very, very present in that digital space. So you can look at it from that sort of aspect.

But also then you get the really inspiring stuff, so there's a small set of public libraries, I think it's in either Hungary or Czechoslovakia where they're getting school children to come in at the weekends and build videos based on Europeana content which relates to their family history or their place in their grandparents' time, and these are six, seven, eight year olds who are building videos out of Europeana CCO content about the place in which they live. And that would melt the heart of the strongest politician who doesn't want to give you any money, in that sense, because those kids are also taking that experience back into school and saying to the their schoolteachers 'why aren't you using Europeana?' It's also doing that thing which is turning (which is really important that our physical spaces are used in our museums, libraries, archives) using the digital to be part of that community activity to draw people into the spaces. And that's the other thing to say about copyright is often people think that digital is a way of people all accessing material at home on their screen.



Actually one of the things to consider is that there's lots of things you can't do in that home space because of copyright, but you can do it your institutional space. Within your space you're not handing it off to people, you're holding it still within your space. So you can have those Microsoft Surface tables, you can have people cutting digital stuff up and doing stuff in that space and building things in those areas, because you have more control over that environment than just handing it out online. So even if you are in a space where all your material's in copyright, absolutely everything you're working with is modern art and is restricted by the copyright holders, either the living artist or their estates, you can still do things in your spaces which transcend those things that you could do in the online space using digital materials, which will still then add value back to that whether that's through an educational perspective, whether that's through a perspective of building community and culture and understanding or whether it's from some sort of social and educational build around that.

Response from Audience: Perhaps you haven't factored in sufficiently that the impulse to litigation isn't always about loss of reputation – it's also about loss of potential or actual earnings. I've done some work on derivative literary texts and there is a case there which actually did go to court and that's when J K Rowling, Scholastic and Warner Brothers took the author/compiler and publisher of the Harry Potter Encyclopaedia to court in New York and one of the defence arguments was well look we had all this stuff up online and J K Rowling didn't bother, in fact she praised what we were doing, which ignored the point completely that when you go from offering a resource free online which keeps interest in the characters and in the books that's one thing. But when you seek to make money out of that takes away from the potential earnings of J K Rowling that's another thing, and that's when you get taken to court. So, as I said, it's not just reputation, it's also actual and potential loss of earnings that is an impulse to litigation.

Question 4

Margaret Haig, Intellectual Property Office

Margaret Haig with the Intellectual Property Office. This is a slight different topic and maybe more appropriate for Megan, I'm not sure. I don't know if anyone caught on the breakfast news this morning about the Royal Voluntary Service project which is just I'll go back, a couple of weeks ago. I saw on the BBC website that they were advertising about coats being made from dog fur during the war, and this was something that was being put out – it was part of a campaign to raise money to digitise this archive of what was the Women's Royal Voluntary Service, which is now the Royal Voluntary Service, and today they've announced that they've made their target. So obviously that kind of extra advertising paid off for them and they've now got the funds to go ahead.



They've also been made a UNESCO archive of import, I don't know what the technical terms is, but I just wondered whether that's an example of that interface between the intangible and tangible and also the sort of fundraising element which might be something of wider interest for what people have been talking about, about raising that money for digitisation – is it actually about doing something quirky like about knitting coats out of dog fur to actually capture the interest to get people to actually contribute time or money into some of these projects to actually get them off the ground?

Megan Blakely: If I had the answer to that, I would probably have my own start up here. But as far as intangible cultural heritage goes, we were discussing a little bit earlier how domestically we'll often treat high art and monuments as culture and not really recognise the domestic practices that we have that are traditions as heritage. So our heritage would be museums and symphonies and our printed art like this, whereas things like cheese rolling or dog fur coats would be something that would be interesting if it were in a culture that is outside of the country. It's always a little bit about what is on the outside, so perhaps, yes, maybe emphasising the sort of quirky histories and integrating that into the lexicology that we use around culture would be one way to bring that into sharing the tangible and intangible space, and maybe that would bring some funds in too.



Simon Tanner: The British Government should be congratulated, actually, because the UNESCO memory of the world activity led to a declaration and the British arm of UNESCO and the Government here in the UK have moved further than almost any other Government in the world in endorsing and moving towards that UNESCO declaration, so I think we're doing quite a good job in that respect. So I wanted to say thanks to the Government for that.

Question 5

Ruth Towse, University of Bournemouth

Ruth Towse with University of Bournemouth. I was wanting to widen the discussion a bit. Overall what do we think the impact of digitisation has on the finance of museums, archives and so on? I mean when I first understood what digitisation was which is essentially, barring glitches with copyright, turning images and so on into public goods. There is always a strong argument in economics for public goods to be financed by the state and I had a couple of students working on this and I said this is an open and shut case for digitisation to be financed by public organisations. But of course I now see that it's become so widespread, but it has altered the balance. I'm particularly interested myself in performing arts, at one time opera was almost entirely dependent upon public subsidy or very, very high prices and now it's able to monetise way beyond anything anybody dreamt of and that obviously has implications for public finance. So I don't know if anyone has ideas about this - maybe it's for the future but I think that hasn't really been discussed.

That's a big question!, but one for another time. Thank-you all for your questions, and please thank all of our speakers.

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