Consultation on Digital Cultural Heritage Position Paper

This contribution has been prepared by academics from the School of Law and members of the library services of the University of Essex. The different areas this paper touches upon (*viz.* copyright, accessibility, orphan works, news, digital monopolies, and the risk of intentional destruction) is a reflection of their diverse specializations.

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Digital Cultural Heritage

Cultural heritage is one of the assets of the European Union. As Magdalena Pasikowska-Schass remarked in a European Parliament briefing "cultural heritage can be an economic asset, a tourist attraction and an identity factor, and it can also contribute to social cohesion."[1] Digitization has enabled access to and availability of this heritage to an extent previously unknown and, in addition, it has enhanced preservation and modern research opportunities, e.g. through text mining and data analytics.[2] The availability of and access to cultural materials in digital form can provide significant support to conservation, renovation, research, study and promotion of cultural assets and, in this regard, digital cultural heritage can serve as a resource for education, enjoyment or re-use, including its use towards the development of new knowledge. The need for digital transformation has been revealed and become as relevant as ever as a result of the COVID-19 pandemic.

Defining cultural heritage

For the purposes of this consultation, we adopt a broad definition of cultural heritage, including any tangible or intangible cultural and creative expression, such as natural, built and archaeological sites, collections of museums, libraries and cultural institutions, artworks and monuments, literary, musical and audiovisual works, underwater cultural heritage, and more broadly the knowledge, practices and traditions of past generations[3] which can become the heritage of the future. The digitization and preservation of Europe's cultural memory includes mass communication materials too. Audio-visual and print-media content create vivid testimonies of cultural identities, traditions and historical itineraries. For example, online newspaper collections are on great demand by researchers as well as the public at large who are interested in exploring nations, places and human life over centuries.

Copyright

Although some of these materials are born digital, many of them are only available in physical copy and have not yet been digitized. Many of the works that have not yet been digitized are works subject to copyright protection or works whose digital reproduction has not been possible before the advent of relevant copying technologies, such as 3D printing. Digitization initiatives have been ongoing for more than a decade but have not taken off principally due to copyright restrictions, despite the enactment of various legislative instruments that are meant to enable digitization. Unlike the United States where digitization of millions of books was found to amount to fair use in the *Google Books* case,[4] EU copyright law can still be seen as an obstacle to digitization. Recent legislative initiatives, such as the new copyright exceptions and limitations introduced through the Orphan Works Directive 2012/28/EC and the Digital Single Market Directive 2019/790 (particularly: the copyright exceptions on text mining and out-of-commerce works), are a positive development but do not enable the full benefit from digitization initiatives as they are subject to numerous limitations.

Accessibility for people with special needs and educational institutions

A fundamental aspect that must be considered within a European policy for digital cultural heritage, is ensuring appropriate and accommodating access for all users. Bearing in mind that digitization may be specifically beneficial in making cultural heritage accessible to populations such as people with disabilities, vulnerable people, and seniors, as well as educational and

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[1] Magdalena Pasikowska-Schass (2018) "Cultural Heritage in EU Policies", European Parliamentary Research Service, PE 621.876, p. 3, available at
https://www.europarl.europa.eu/RegData/etudes/BRIE/2018/621876/EPRS_BRI(2018)621876_EN.pdf
[2] C.f. Maurizio Borghi and Stavroula Karapapa, *Copyright and Mass Digitization: A Cross-Jurisdictional Perspective* (Oxford University Press 2013)
[3] C.f. Eden Sarid, 'International Underwater Cultural Heritage Governance: Past Doubts and Current Challenges' (2018) 35 Berkeley Journal of International Law 219, 256
[4] *Authors Guild, Inc. v Google, Inc*., 804 F.3d 202 (2d Cir. 2015) and *Authors Guild, Inc. v Google, Inc*., 578 U.S. 849 (2016)

cultural institutions, special accommodation measures should be made to ensure adequate access to such populations. For example, ensuring digitised collections include access tools for the visually or hearing impaired (in line with Directive EU 2016/2102 and the European Accessibility Act).

Orphan works (copyright works whose owners cannot be located)
An example includes the diligent search requirement that applies in order to digitize so-called orphan works does not work well in the context of digitizing entire collections held in Europe's cultural institutions: it enhances transaction costs and is resource consuming as the diligent search mechanism is based on the assumption of individual searches of works.[5] In this regard, the Orphan Works Directive does not offer the most appropriate solution for cases of mass use of orphan works and other subject matter. In addition, the Directive does not cover all kinds of copyright protected works and other subject matter. There are important exclusions from the scope of available protection, such as standalone photographs and other images, which are an important part of Europe's cultural heritage with substantial historical, cultural and academic value.[6] The Directive also excludes various users such as public-private partnerships and private archives and libraries, which may have an important role in making cultural heritage works available to the public.

News
In addition, the contemporary media environment is increasingly fraught with rumour, misinformation and disinformation campaigns, which have been popularised in the English vernacular as 'fake news' and can provoke uncertainty, doubt and fear. This became particularly evident in the context of the current COVID-19 pandemic, during which the media circulation and proliferation of misleading and baseless health content (often at odds with official advice) took a more dangerous turn, thereby posing pressing challenges for public health. Although the term 'fake news' rose to prominence during the 2016 United States presidential election and the Brexit referendum, it is not an entirely new problem. The content, agency and impact of such information has, however, considerably changed largely due to the internet. Whilst many information specialists concentrate their efforts on curbing fake news by capitalising on technological advancements and building resilient communities through media literacy, archival and digital collection management professionals need to think about the ways in which fake news can be properly captured, preserved and archived in the interests of developing credible and reliable data sources, while avoiding perpetuating the potential harm caused by untruthful expression. In the current climate, it is not enough, for instance, to digitize newspaper collections and make them accessible with enhanced search possibilities. It is critical to revisit traditional archival practices and the infrastructure around digital collections to take account of the phenomenon with a view to developing robust mechanisms that sufficiently contextualise information to help researchers, including the general public, to interpret and make sense of their findings.

Digital monopolies
Digitization opens a number of questions that have to be addressed at the policy level. This includes, for instance, questions over the ownership of the information that has been digitized. For materials that are currently in the public domain, we believe that digitization should not result in a new copyright on the digitized version to be owned by the body who engaged in the digitization process. Materials in the public domain should remain in the public domain. This aligns with principles of EU copyright law[7] and, to a certain extent, the protection available under

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[5] See Eden Sarid and Omri Ben-Zvi, 'A theoretical Analysis of Copyright's Orphan Works' (on file with the authors)
[6] Stavroula Karapapa, *Defences to Copyright Infringement: Creativity, Innovation, and Freedom on the Internet* (Oxford University Press 2020) 238
[7] Commission Recommendtion of 27 October 2011 on the Digitisation and Online Accessibility of Cultural Material and Digital Preservation, 2011/711/EU, OJ L 283/39, Art. 5(a); also see Maurizio Borghi and

the national laws of unfair competition. More clarity in copyright law in this regard would be useful.

Digitization in light of risks of intentional destruction
There has been a growing trend of deliberate destruction of cultural heritage committed by armed non-State actors (ANSAs) which started to take shape in 2001 with the chilling denotation of the Buddhas of Bamiyan (Afghanistan). In the past years, this strategy has been followed by the Islamic State with the raid of the Mosul Museum, the partial destruction of Palmyra, Hatra and others. Similarly, radical groups operating in the Sahel destroyed 14 shrines in the world heritage town of Timbuktu and burned thousands of its ancient manuscripts in 2012. Radicalization has also made Libyan cultural heritage a target since the outbreak of its civil conflict. None of these ANSAs or any other radical group has hit European cultural heritage yet, but the possibility cannot be ruled out. Just as the Islamic State has perpetrated attacks on European soil against persons (e.g. Paris, Brussels airport), it would be imaginable that they would export their cultural aggression methods to Europe. Most of these radical groups seem to have prioritized sites of international renown, such as those inscribed on the World Heritage List. It would therefore be advisable that the European Union began from there and funded a digitization of the world heritage properties situated on its territory in collaboration with the World Heritage Centre, either through 3D printing or other technology. Since all cultural objects make a contribution to the cultural heritage of humanity, regardless of its origin and location, an initiative of this sort could prompt similar initiatives in other regions of the world.

Digitization and cybersecurity
If digital artefacts are of value and their safety important, we need to ensure that the computer infrastructure on which they are held - whether this is centralised or spread through a network - is secure. Currently the security of computer systems does not cover this issue: while the NIS Directive (Directive 2016/1148 OJ [2016] L 194/1) applies to network and information systems, it is far from clear whether digital repositories of cultural artefacts would fall within the definition of services covered by the directive. They are clearly neither essential service providers nor do they fall within the identified categories of digital service. The underpinning concern of the directive (disruption of digital services to third parties) is not a good fit for the context of safeguarding digital culture.

We therefore recommend:
- digitization should enable preservation of cultural artefacts, including world heritage properties, access to the public, and accessibility by people with special needs and educational institutions
- law and policy should offer further support to cultural institutions towards developing digitization initiatives (e.g. the legislative framework on orphan works should be revisited in terms of its breadth and parameters of application)
- digital monopolies should be avoided (e.g. public domain material should remain in the public domain after digitization)
- legal provisions ensuring the security of computer infrastructure are needed both to safeguard digital culture and avoid the spread of misinformation

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Stavroula Karapapa, *Copyright and Mass Digitization: A Cross-Jurisdictional Perspective* (Oxford University Press 2013) 92