Preserving Public Domain Collections: Institutional Policies Best Practice

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Preserving Public Domain Collections

Institutional Policies Best Practices

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Résumé : *Cet article fournit des conseils pratiques pour assister les acteurs et institutions dans les tâches successives liées au droit d'auteur dans le processus de création d'une archive en ligne. Il est destiné aux institutions culturelles, éducatives, de recherche ou de patrimoine qui constituent, gèrent et distribuent des collections d'œuvres et de données, et plaide pour que les éléments soient le plus librement disponibles et réutilisables, proche du domaine public. Le domaine public, au sens strict, est l'état juridique des œuvres et des données culturelles, scientifiques et littéraires lorsque le droit d'auteur n'existe plus, ce qui signifie qu'elles peuvent être librement consultées et réutilisées sans autorisation préalable ou sans rémunération. L'article commence par des définitions juridiques suivant chaque action et étape dans la constitution d'archives, et explique quels droits doivent être autorisés pour chaque type d'œuvres ou de données. Ces explications sont suivies d'une présentation des licences ouvertes recommandées (Creative Commons et les outils de licences du domaine public). Enfin, il présente les politiques institutionnelles et les problèmes rencontrés par les institutions dans le processus de numérisation des collections. Il explique pourquoi la tarification des reproductions n'est pas toujours la meilleure solution pour en assurer le financement, et donne des arguments pour soutenir des politiques institutionnelles ouvertes et négocier des contrats.*

Introduction

This article provides legal definitions (*), recommendations (→) and best practices for cultural, scientific and memory institutions to constitute, manage, and distribute public domain collections.

Public domain, in the strict sense, is the legal state of cultural, scientific and literary works and data when copyright does not subsist, meaning they can be freely accessed and reused without asking for permission, or paying any remuneration.

Memory institutions designate public service and university libraries, archives, museums, but also private galleries and volunteer-based projects such as Wikipedia, acting as *de facto* memory institutions as their mission is to collect, process and

disseminate archives to the public.[1] Other cultural and scientific institutions in charge of curating public domain collections can include primary education, research bodies, universities, broadcasting organisations.

These policy recommendations are anchored in European law and framed through the normative perspective of the preservation of the public domain under open terms:[2] "No other intellectual property right must be used to reconstitute exclusivity over Public Domain material" (Communia Public Domain Manifesto 2012, following Boyle 2009). Following each of the five steps defined by the scientific editors of the book[3] allows to structure the delivery of practical advice and "things to think about" to support the successive copyright-related tasks leading to the creation of an online archive.

The article is composed of four parts: core legal definitions following the actions and steps of archiving (1), more legal definitions around rights which need to be licensed (2), a presentation of open licenses which can be used (3), and a discussion of institutional policies and issues faced by memory institutions, being galleries, libraries, universities, museums, or archives as well as public, commons-based, or private institutions in the process of creating collections of a variety of works (4).

Core legal definitions for each step of the research and archiving lifecycle

Preparation of the research and anticipation of the archiving

This initial phase involves the definition of a licensing strategy,[4] and the identification of the partners who may hold rights on the collections (eg. authors and publishers of books, heirs of painters, movie producer), or on the data which will accompany the collections (eg. notices and metadata).

Data collection

The collection of data and works which are going to populate the archive is the step where this strategy should be implemented through contracts with external partners, which will guarantee that the data will be available under the licensing terms chosen at the previous step. In some cases, data and works are already part of the physical collection of the institution, and the constitution of the archive will

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1   I argue elsewhere that Wikimedia should be considered as a memory institution and enjoy copyright exceptions reserved to these public bodies (Dulong de Rosnay and Langlais 2017). https://policyreview.info/articles/analysis/public-artworks-and-freedom-panorama-controversy-case-wikimedia-influence.

2   Disclaimer: the author was a founding member and legal lead of Creative Commons France, and a founding member and first chair of the board of Communia, the international association for the preservation of the Public Domain.

3   Internal reference to the exact five steps as defined by the editors? Voir : https://ethiquedroit.hypotheses.org.

4   For a more extensive document providing guidelines and licensing strategy see Dulong de Rosnay and Tsiavos (2014).

involve the digitisation, the curation, and the delivery of the collection to the public under licensing terms which will have been defined in the strategy. This article advocates following an open strategy and provides guidelines for this purpose.

Contract and license

In this article, a *licence designates a standard legal text explaining to final users under which terms and conditions the data and the collection can be accessed to, used and reused. In the context of public domain archives and public service missions, it is recommended to offer open licences, in order to not restrict users' rights. Most widespread open licences are Creative Commons licences. They will be presented later.

A *contract will be understood as the agreement between the institution collecting the material on the one hand, and the works or data provider on the other hand, being an employee, a contractor, a volunteer, or any third party who could be holding prior rights on part of the works or data which are going to constitute the archive (eg. authors, heirs, rightholders, publishers, another private or public institution which would have previously acquired the rights, such as an editor or a publisher).

In order to be able to re-license content under any licence, and a fortiori to use an open licence, the archivist, project manager, or heritage institution will have to identify and enter into an agreement with third party rights owners and contributors. The contract should either guarantee that the scope of rights transferred allows the institution to re-license those rights under the chosen open terms, or that the agreement will directly authorise the institution to release the material under the terms of the open license defined in the licensing strategy.

Both terms, licence and contract, designate a binding legal agreement between parties, they could be used interchangeably. Terms of use, conditions, terms of reference, or user agreement would be potential equivalent. They have to respect certain formal rules to ensure validity (i.e. written consent, description of the scope of rights, duration, format, etc.), which are defined in national copyright laws.[5]

Rights according to law and rights to be licensed or contracted

Rights under copyright or exclusive rights encompass the right of reproduction (eg. edit a book out of a manuscript, produce a recording), of communication to the public (eg. distribute online, broadcast on television or at an event, demonstrate at a conference, include in slides in a public presentation), and the right to make derivatives (eg. translate, summarise, modify, remix, adapt, make a movie out of a book, etc). They are granted by law to original rights holders (eg. authors, producers) who can exercise them through licences or contracts. These rights are limited in time (public domain, copyright lasts typically 70 years after the death of the author) and scope (some rights cannot be reserved, eg. as of 2017 in Europe, the right of literary citation of textual material for scientific purposes, educational use, reproduction for preservation purposes are *exceptions or limitations to copyright*[6] which scope varies between countries). *Neighbouring rights* include performers' rights, sound

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5   These laws can be found in the references at section 5.2.

6   For a survey of exceptions and limitations to copyright for museums in all countries, see Crews, 2015.

and video recording producers' rights, and database producers' rights. Additional rights are granted to individuals over their personal data, and their image.

The general common sense rule is that you cannot licence more rights than you were holding in the first place. And being able to exercise some rights is a prerogative of a lesser scope than being able to exercise and to further transfer them, for instance to authorise a third party or the public to exercise the same rights. Finally, owning some rights does not require to exercise them in a restrictive manner: it is not because you can reserve them exclusively, that you have to do it.

Processing, archiving and data description

The making of an archive requires the archiving institution to hold and exercise the rights of reproduction and communication to the public. It also almost certainly requires to be able to exercise the right of making derivatives. Indeed, formats will be changed, images will have to be processed, works will be annotated, indexed. Notices and data description drafted by museum or university staff or volunteers will be translated, summarised or edited.

Contracts should therefore specify in which ways the archiving parties will be authorised to interact with the material: for instance, a contract may authorise a couple of formats of reproduction or one language of translation, but reserve others to different geographic markets and commercial publishers.

Dissemination of research results

Research results produced during the course of the archiving will carry different rights than the collections already in the public domain. The collections might be constituted by a mix of *public domain works* (which copyright expired), *orphan works* (whose authors cannot be identified, eg. private archives collections of postcards or anonymous photographs of the late 19th century or early 20th) and *works under copyright* (for which permission should be negotiated and obtained), while the research results can be composed by copyrightable output of the institution's staff or contractors (which should also be managed, through a different contractual process).

Data reuse

Once published, the general public and other institutions may interact with an archive in different ways. The mere access, by means of reading, listening, or contemplating through one's perceptive senses, will be the only activity authorised, in addition to exceptions and limitations granted by law, and in the absence of a specific licence, or terms of use on the website indicating which further rights are granted by the institution to the public.

Additional activities will require to grant extra rights to the public. For instance, reproducing part of the archive in a scientific presentation, in a catalogue, in educational material, or the making of postcards for a commercial purpose will involve different uses, and rights. The *right of data mining*, or the processing of the archive and its underlying metadata for search or research purposes, will often trigger the right of making a derivative work.

Some of these activities may be covered by exceptions to exclusive rights under copyright (such as educational use), but the scope of these users' prerogatives vary from country to country, and a licence could provide more certainty, legal security and harmonisation, especially for international users.

An open licensing strategy should nevertheless never lead to grant less rights than the law originally confers to users. A license should not restrict exceptions or limitations to copyright.

Licensing what? More legal notions on the rights involved for each element of an archive

Archives can be constituted by a plurality of elements, which will be covered by a variety of rights (granted to original right holders by the law), before being submitted to different legal conditions, explaining which rights can be exercised (through contracts between the original right holder and the archive, operating as a cultural and a rights mediator, and then through open licenses between the archive and the public).

*Raw data, a functioning public domain

Ideas and facts are not subjected to copyright. Some research data,[7] such as scientific facts and discoveries are outside of the scope of copyright law, and do not lead to exclusive rights which could be reserved or further contracted. The structured aggregation of an amount of research data in a database, or the literary expression of a scientific fact in a text, will be covered by law, but not the isolated result or numbers.[8]

As conceptualised by the Communia Public Domain Manifesto,[9] this realm corresponds to "the essential commons of information that is not covered by copyright. Works that are not protected by copyright because they fail the test of originality, or are excluded from protection (such as data, facts, ideas, procedures, processes, systems, methods of operation, concepts, principles, or discoveries, regardless of the form in which they are described, explained, illustrated, or embodied in a work, as well as laws and judicial and administrative decisions). This essential commons is too important for the functioning of our societies to be burdened with legal restrictions of any nature even for a limited period."

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7   Depending on the nature and definition of research data, some will be in the public domain, for instance if it is unstructured or isolated. However, in the UK for instance, research data has a much broader definition; see for example definitions in research funders' policies such as the EPSRC or the ESRC. The definition in the H2020 policy on data management also includes research materials such as statistics, audio recordings, images, etc., which are actually works.

8   Precise definitions of what is and what is not in the public domain can be found in an international study by Dusollier (2010), which inspired the work of Communia.

9   https://publicdomainmanifesto.org/manifesto.html.

*Copyrighted vs public domain works

Copyrightable works can include texts, photos, audio or visual recordings, notices, observations, results and comments produced by curators and scientists, previous or external contributors. Exclusive rights can be exercised around 70 years after the death of the last co-author (with countless exceptions – see Christina Angelopoulos [2012]), and moral rights, in the countries where they are recognised, are perpetual. *Moral rights*, depending on countries, may be including the right of attribution (of pseudonymity, of anonymity, or to renouncing to these states), of integrity (against unauthorised modifications which could damage the honour or the reputation of the author), or disclosure (the decision of the time to release a work for the first time to the public) and of withdrawal (or a work which no longer satisfies the author); the two latter, if exercised, will require to compensate the publisher with whom a contract would have been signed for economic losses.

The ownership of the physical artefact of a public domain work (manuscripts, paintings, sculptures, monuments) may imply a duty of care and preservation, including restrictions to physical access.

Once digitised, this relation does not justify the institution to apply similar restrictions to the intangible version of the object. Digital reproductions and 2D photos do not necessarily produce an additional layer of rights for the person or entity in charge of the reproduction, with the exception of the case of 3D objects (eg. sculptures, buildings), which are recognised as creative works by photographers (Dulong de Rosnay 2013; Petri 2014), but which can still be voluntarily placed in the public domain. [10]

Sound and visual archives will carry, in addition to the copyright on the work (eg. a song, a movie), so-called *neighbouring rights* [11] on the performance (by the singer or the actor) and its recording (by a producer, understood as the label or the publishing company, rather than the sound engineer or the film director), lasting around 50 years after the recording. Oral archives will include another layer as the voice and the content of the recordings can be assimilable to *personal data* [12] and will also require to get the permission of the subject. Personal data, according to the General Data Protection Regulation, "means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person". [13]

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10 See the New Palmyra Project initiated by Bassel Khartabil, disappeared by the Syrian government in 2015. http://www.newpalmyra.org/.

11 Internal reference to other articles in the book? Voir : https://ethiquedroit.hypotheses.org/tag/droit-voisin.

12 FAQs on the General Data Protection Regulation applicable from May 2018 is available at: http://www.eugdpr.org/gdpr-faqs.html; the ICO website also provides clear definitions: https://ico.org.uk/for-organisations/guide-to-data-protection/. Internal reference to other articles in the book?

13 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), *OJ L 119*, 4.5.2016, p. 1-88. ELI: http://data.europa.eu/eli/reg/2016/679/oj.

The case of *Public Sector Information (PSI), data and work generated or managed by public institutions, is handled in Europe by the 2013 PSI Directive, which sets a general principle of free access and reuse, with the exception of cultural heritage which authorises institutions to charge for the reproduction and the right to reuse. Geographical information (under the Directive Inspire) is submitted to broader requirements of release under free conditions and to use open standards.[14] The case of orphan works, works whose authors are unknown or cannot be identified, is also managed by a specific directive.

Metadata and ontologies produced and used in the process of cataloguing can give birth to *database rights, under the Directive for producers of databases (gathering in a structured manner data, works, or audio-visual recordings), granting an *exclusive right (as defined in section 1) against substantial extraction and reuse for periods of 20 years renewable for each update.

Once identified, contracts and then licenses will organise which rights can be exercised on the elements of an archive. It should be remembered that such terms of use do not have to be as restrictive for users as the laws enables it. Policies can always be designed to make them more open, if this is the strategy which has been defined by the institution. The next section will introduce open licenses which usages is generally recommended for public domain collections.

Open licensing

Creative Commons tools include 6 licenses and 2 public domain instruments. They are available in 3 formats, a human-readable summary, a longer legal license, and machine-readable legal metadata.

The 6 licences combine 4 options: Attribution (BY), Share Alike (SA), Non Commercial (NC) and Non Derivatives (ND). The reservation by the licensor of commercial uses (NC) and of the making of derivatives (ND)[15] is generally not recommended for public domain works, as it would hinder certain uses. The Attribution clause requires to cite the authors (and their supporting institutions) when reproducing, communicating or modifying the work. All licenses require to maintain a link to the license when distributing the work and its derivatives. The Share Alike clause, inspired by copyleft and free software will besides require derivatives to be re-licensed to the public under the same license.[16] Wikipedia is using the Creative Commons Attribution Share Alike license.

The 2 Creative Commons public domain instruments are the Public Domain Dedication (CC0) and the Public Domain Mark (PDM): the Public Domain Dedication is an anticipation of the expiration of rights (70 or so years after the death of the last co-author, 50 years or so after the publication or the performance, and 20 years after

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14 For more information on the PSI and the Inspire Directive, see Dulong de Rosnay and Janssen (2014).

15 Any adaptation or modification of a work, as defined in section 1, including the synchronisation of a recording on images, is generally considered a derivative work.

16 On the use of Creative Commons licenses by cultural heritage institutions in Flanders, see Evans, 2015.

the production of the database).[17] In order to release all necessary rights, it will be important to apply the PDD to all the elements constituting the archive: works, data, notices, metadata,[18] and the website. It is used for instance by the Rijksmuseum. The Public Domain Mark is an assertion by a knowledgeable institution who performed the research and due diligence and is able to certify that the work is already in the public domain. According to the Communia Public Domain Manifesto (2012), "Cultural heritage institutions should take upon themselves a special role in the effective labelling and preserving of Public Domain works".

According to the Open Access community, these legal standards bring legal certainty for use and reuse. Other open licenses exist (produced by organisations such as the Open Knowledge Foundation, or by states), they may however be presenting certain legal issues in terms of downstream compatibility. Besides, they do not offer the underlying infrastructure of machine-readable legal metadata and the translation into languages of over 80 jurisdictions.[19]

Licensing public domain digital collections: addressing barriers in institutional policies and funding

"Digital representations of works which are in the public domain should remain in the public domain" is the core recommendation of European policy.[20] However, several internal and external bottlenecks may prevent the effective implementation of open policies by cultural or scientific institutions. Such barriers to sharing may be (i) contractual (commercial partners may ask for a period of exclusive rights in order to perform digitisation for free), (ii) cultural (the psychological feeling that applying rights on public domain works would be beneficial for the institution) and (iii) economic (developing a collection must be funded). This last section aims at providing, in these three arenas, examples of successful and sustainable institutional policies which successfully allowed to distribute public domain collections under open terms.

Digitisation contracts

The Communia association drafted guidelines to manage public-private partnerships: when companies perform digitisation on behalf of cultural institutions, certain clauses can be favoured or avoided in contractual agreements to avoid a privatisation of the public domain, even for a limited period (Communia 2014a). Cultural barriers to sharing may lead to copyfraud, defined as overreaching copyright claims leading to public domain enclosure (Boyle 2009; Mazzone 2011; Dulong de Rosnay 2011; Crews 2012).

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17 A Comparative Analysis of National Approaches on Voluntary Copyright Relinquishment has been developed by Guadamuz, 2012.

18 For a discussion about the protectability of metadata published by cultural heritage institutions, see Kreutzer, 2011.

19 For an explanation of problems which can be otherwise raised, see Dulong de Rosnay and Janssen (2014), Dulong de Rosnay and Tsiavos (2014).

20 EC recommendations (2006 and 2011); Communia recommendations (2014b).

Arguments to support open institutional policies

As alternative open approaches have been successfully developed, several models can provide inspiration to small and large collections, and argumentation to be incorporated into funding applications to convince partners. The implementation of charging policies by museums (Tanner 2004) creates management costs which can be higher than the effective revenues extracted from the sales of reproduction of public domain works (Dulong de Rosnay 2013). If public domain works are made broadly available, this will increase both online and physical visitors, exposure, and therefore the impact of public funding as it has been demonstrated for both large museums (The case of the Yellow Milkmaid, with the pilot of the Rijksmuseum, Verwayen *et al.* 2011; Pekel 2014) and smaller institutions (Pekel 2015). As it can be difficult to assess the financial value of public domain images for other institutions in terms of cost savings and increased traffic, a methodology has been developed for Wikimedia (Erickson *et al.* 2015) and could be reused in grant applications to apply for digitisation funds.

Funding

In order to fund the digitisation of collections and develop sustainable projects, several options are available:

– Public-private partnerships, to the extend they do not lead to the creation of new rights for the company performing digitisation and a privatisation of the public domain;
– Public funding, as preservation and dissemination of culture and science is a public service mission;
– Private crowdsourcing, (Kopeć 2014);
– Active collaboration with the public on a commons basis: public-commons partnerships have been elaborated by numerous cultural, educational and scientific institutions with Wikimedia projects (Dulong de Rosnay 2011; GLAM Wikipedia).

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Creative Commons Attribution license
http://creativecommons.org/licenses/by/3.0/

Creative Commons Attribution Share Alike license
http://creativecommons.org/licenses/by-sa/3.0/

Creative Commons Public Domain Mark 1.0
http://creativecommons.org/publicdomain/mark/1.0/

Creative Commons Public Domain Dedication
http://creativecommons.org/publicdomain/zero/1.0/

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Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society
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