Copyright, Cultural Heritage and Photography: A Gordian Knot?

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Abstract

EuropeanaPhotography was a project funded by the European Commission with the remit to digitise photographic collections from museums, libraries, archives and photograph agencies, and to make the digitised images available via the European portal, Europeana. The collections spanned 100 years of photography from 1839 to 1939 and many of the photographs depicted individuals and family life during these 100 years. In this contribution we explore the experiences of members of the consortium as they sought to navigate what are considered to be the complexities of copyright as it applies to digital photography. Of particular concern to many members of the consortium was (a) the desire to protect (family) privacy against commercial exploitation; (b) a concern to safeguard the authenticity and integrity of our cultural heritage; and (c) the perceived need to protect existing business models. This chapter discusses the challenges that members of the consortium faced and how they dealt with the challenges as they arose. Finally, the chapter suggests that the copyright strategy developed for the RICHES project that encourages cultural heritage institutions to think about their digitisation programmes first through the human rights lens to culture and cultural rights, and then ask how copyright may be used as a tool to meet those aims. While it is not suggested that such an approach could resolve all of the copyright conundrums that arise in this sector, what it could do is to help stakeholders to think differently about issues involved.

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K.J. Borowiecki et al. (eds.), *Cultural Heritage in a Changing World*,
DOI 10.1007/978-3-319-29544-2_5

1 Introduction

Copyright law underpins a host of creative activities. From artworks through to photographs and computer software, copyright laws have been developed over many years with a view to incentivising creative activities. The theory is that because the author is given exclusive rights over exploitation of the subject matter of the right, so she can trade those rights with others in return for financial or other gain. So, according to Anglo-American theory, she has the economic incentive to create and invent more. While continental Europe also sees the economic inventive of copyright to be important, equally, if not more important are the moral rights—droit moral in France and Urheberpersönlichkeitsrecht in Germany—which spring not from economic concerns, but from the inalienable link between the work and the personality of the author and which reflect that inalienable link.

While the true effect of the economic incentive embedded in copyright may be debated among scholars, there is concern over the reality of the ways in which the law impacts on activities within its purview, including those undertaken by libraries, museums and archives, organisations which face specific challenges most particularly when seeking to digitise cultural heritage collections and to make them available for re-use. These challenges will be investigated in this paper with specific reference to the activities undertaken by a European funded project: EuropeanaPhotography.[1] EuropeanaPhotography (EUROPEAN Ancient PHOTOgraphic vintaGe repositoRies of DigitAized Pictures of Historic qualitY) was a project with 19 members from 13 member states of the EU encompassing highly prestigious photographic collections from museums, libraries, archives and photograph agencies. The collections covered 100 years of photography from 1839 to 1939. The project was funded within the European Competitiveness and Innovation framework programme 2007–2013 and ran for 36 months, from 1 February 2012 to 31 January 2015. Its activities continue under the Photoconsortium banner.[2]

EuropeanaPhotography is not the only publicly funded project to have encountered challenges with copyright law. Other EC-funded projects also aimed at the creative reuse of cultural heritage have tackled copyright related issues. These include EuropeanaSpace[3] and RICHES[4] both of which have interesting experiences to bring to the copyright and cultural re-use debate and both of which will be noted at appropriate points in this chapter.

[1] http://www.europeana-photography.eu

[2] http://www.photoconsortium.net

[3] http://www.europeana-space.eu

[4] http://riches-project.eu

2 The Copyright Framework

There is not one single international copyright law, but a web of laws at international, regional and domestic levels. At international level, the oldest treaty is the Berne Convention for the Protection of Literary and Artistic works 1886. This treaty, which specifies certain minimum standards of copyright protection which signatory states must implement in their domestic laws, was agreed by the international community in response to the 'pirating' of the works of, among others, Charles Dickens.[5] Dickens, whose works were protected in the UK, found that copies were being made in the US. Dickens could not stop these copies being made because copyright law is territorial: in other words, copyright law is only effective in the territory in which it is enacted. So the current UK copyright law—the Copyright Designs and Patents Act 1988 (as amended) (CDPA) is only effective in the UK (and the territories to which it is extended by statutory instrument); the French Intellectual Property Code of 1 July 1992 extends to French territory; the German Copyright Act of 9 September 1965 (as amended) extends to Germany. The Berne Convention introduced the principle of national treatment. This means that every state that signs up to the Convention will treat the nationals of every other signatory state in the same way as they treat their own nationals. So, for example, both France and the UK are signatories to Berne. Therefore a French national, with regard to their copyright, will be treated in the same way in the UK as a UK national. So if a French author has her copyright infringed in the UK, she can sue in the UK in the same way that a UK national can. There are currently 168 countries signatory to the Berne Convention and who must incorporate the minimum standards of protection of copyright into their laws as mandated by the Convention. In this way there is a web of similar laws around the world for the protection of authors and their copyrights.

The Berne Convention is not the only international instrument. Other important treaties include the WIPO Copyright Treaty 1996 (WCT) and the Agreement on Trade Related Aspects on Intellectual Property Rights 1994 (TRIPs). The WCT was negotiated and agreed in response to the advent of digitisation and the internet and the challenges that brought for new ways in which works protected by copyright could be disseminated and the attendant difficulties for enforcement of rights. The Treaty includes a new 'communication to the public'[6] right for rights holders, and introduced technical protection measures and anti-circumvention rules.[7] TRIPs is a trade treaty which, for the first time, linked copyright with trade. Perhaps the most graphic example of this is the absence of moral rights from its provisions and the focus on economic rights.

[5] Peter K. Yu, Intellectual Property at a Crossroads: Why History Matters, 38 Loy. L.A. L. Rev. 1 (2004)

[6] WCT Article 8.

[7] WCT Articles 11, 12.

At European level there is a range of Directives applicable to copyright,[8] the most important of which for the purposes of this chapter are the Information Society Directive[9] (Infosoc Directive) and the Orphan Works Directive.[10] The Infosoc Directive among other things contains the European interpretation of the provisions of the WCT including measures relating to the new economic right of communication to the public and the protection of technological protection measures. The Orphan Works Directive is the European response to the challenges posed by works protected by copyright, but for which the owner of the copyright cannot be found even after a diligent search.

The obligations to be found in International Treaties and Conventions are generally implemented into national legislation via national law. So for example in the US there is the general US Copyright Law[11] as well as the Digital Millennium Copyright Act of 1998.[12] (DMCA). The US implemented the provisions of the WCT in the DMCA. In Europe, the obligations to be found in international instruments are often translated into a Directive that in turn is implemented into national law. So the provisions of the WCT, for example, were incorporated in the Infosoc Directive which member states then implement in domestic legislation. In the UK for example, this was done by amendments to the CDPA.

There are a number of notable points that arise from this web of international, European and national measures relating to copyright. The first is that while economic rights are present in all of the measures, moral rights are not. TRIPs, as noted, has no provisions on moral rights within its Articles. Moral rights also differ markedly as between territories. While the US has some rights within its domestic law that are akin to copyright, the general consensus is that its domestic law does not contain even the minimum standards in relation to moral rights that are found in the Berne Convention. These are found in Article 6 bis of Berne and are:

> *Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation*

These rights are to last at least as long as economic rights in works.[13] Similar to the US, the moral rights in UK domestic legislation are generally considered to be

[8] There are copyright directives on: Management of Copyright and Related Rights; Copyright in the Information Society; Orphan works; Rental and lending rights; Term of Protection; Satellite and Cable; Resale right; Protection of Computer Programs; Protection of Databases; Protection of semi-conductor topographies; Enforcement.

[9] The Directive on the harmonisation of certain aspects of copyright and related rights in the information society (2001/29/EC).

[10] Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works.

[11] http://copyright.gov/title17/

[12] http://www.copyright.gov/legislation/dmca.pdf

[13] Berne Convention Article 6 bis.

weak. They include the right to object to derogatory treatment and to claim authorship.[14] However, they have to be asserted and may be waived. Other countries laws contain moral rights provisions that go well beyond the standards in these measures—France and Germany being examples. In France moral rights include the rights of divulgation, attribution and integrity,[15] while in Germany they include right of dissemination[16]; the right of attribution[17]; the right of integrity[18]; and the right to access copies of the work.[19] One of the prime results of this is the enduring 'split' ownership of works protected by copyright where there are both economic and moral rights. Economic rights can be assigned and/or licensed: that is the way in which the incentive operates as described above. But moral rights cannot be assigned as they attach only to the author. Furthermore, in many countries moral rights last as long as the economic rights,[20] while in other countries, moral rights are perpetual.[21] All of this means that in a work protected by copyright there is 'split' ownership: the moral rights in a work vest only in the author while the economic rights may initially vest in the author but then can belong to a third party through assignation or licensing. If one then considers that ownership of the tangible work—the book; the painting; the film;—may then belong to someone else, so there may be three rights in a single work: the copyright owner, the moral rights belonging to the author; the tangible copy to a third party. Having split ownership, most particularly as between the economic and moral rights, means that the economic rights could be challenging to exploit as the moral rights of the author must always be considered on commercial exploitation. These thorny issues go some way to explaining why there has been no attempt at European level at harmonisation of moral rights. The passion generated by moral rights—and moral right like considerations—is well illustrated in the EuropeanaPhotography study discussed below.

A final introductory point needs to be made about the copyright framework: although the international and regional legislative instruments serve to approximate laws as between different territories and members states, the laws within individual territories do differ in form, substance and interpretation. The copyright laws—which are territorial as explained above—are interpreted and litigated before national courts where interpretations can and do vary. Certainly there are centralising influences: the Court of Justice of the EU (CoJ) for instance is the superior court in matters of interpretation of European Directives, but that court only has a say when a question is referred to it.[22] And when the CoJ has interpreted

[14] See Generally CDPA Chapter IV Moral Rights.

[15] French Intellectual Property Code Art. L. 111-1.

[16] German Copyright Act Art 12.

[17] German Copyright Act Art 13.

[18] German Copyright Act Art 14.

[19] German Copyright Act Art 25.

[20] e.g. in the UK CDPA s 86.

[21] e.g. in France, French Intellectual Property Code Art. L. 121-1.

[22] When that happens is the subject of carefully crafted rules.

any particular question, the judgment often then has to be implemented by the national court. The way the judgment is implemented nationally may vary as between jurisdictions. All of this means that copyright law can and does vary not insignificantly as between territories, including those of Member States of the EU. This Gordian Knot of copyright laws and underlying cultural and socio-economic differences make pan-European projects which have high dependency on copyright—such as EuropeanaPhotography—challenging to implement in practice.

3 Copyright, Cultural Heritage and Photographs

Three broad themes recur in the discussion around the re-use of digitised photographs that contain family stories and which are considered to be a part of our cultural heritage.

These are concerns for the protection of:

(a) (family) privacy against commercial exploitation;
(b) the authenticity and integrity of our cultural heritage;
(c) existing business models of cultural institutions.

In each case copyright is used as the means to control the re-use of the digitised photographic image albeit for different purposes. In the case of a and b, and even where the image might be in the public domain, commercial re-use is often prohibited to meet these goals and moral rights may be claimed; in the case of c. the business model is often the means through which the digitisation and curation of photographs is paid for and copyright may be claimed in the digitisation process. Each of these will be further explored below by reference to the experience of EuropeanaPhotography.

3.1 Copyright and Photography

The interrelationship between copyright and photographs in the cultural heritage sector raises two key questions. The first is as to whether copyright protects photographs. As will be seen, the question is not as straightforward as might be expected. The second key question is as to whether the digitisation processes results in a new copyright in the digitised photograph.

Copyright and photographs have something of an uneasy relationship. While photographs are often included in domestic legislation in the list of works that are protected by copyright[23] what has troubled policy-makers, commentators and

[23] e.g. CDPA s 4.2 which defines photograph as 'a recording of light or other radiation on any medium on which an image is produced or from which an image may by any means be produced, and which is not part of a film.

courts over the years is the level of originality that the law requires for the subsistence of copyright and how this applies to photographs. While common law countries such as the UK have historically had a very low standard of originality for the subsistence of copyright in photographs,[24] this has changed, at least within Europe, where the standard for protection is now one of 'intellectual creation'. This standard has been harmonised in Europe as a result of measures introduced in the Term Directive in 1993.[25]

Article 6 of that Directive provides that:

> *Photographs which are original in the sense that they are the author's own intellectual creation shall be protected … No other criteria shall be applied to determine their eligibility for protection.*

Article 6 however goes on to provide that Member States may provide for the protection of other photographs. So there may be protection for two levels of photographs in Member States—ones that meet the standard of intellectual creation and are thus protected by copyright, and ones that do not but can be protected by some other unspecified (sui generis) regime. The level of originality required in a portrait photograph was considered by the CoJ *in Eva-Maria Painer v Standard VerlagsGmbH*.[26] Here the issue concerned photographs of a child who was abducted in 1998 when she was 10—Natascha K. Photographs of Natascha, taken by Ms Panier, were used in connection with an extensive police search. When Natascha escaped her captor in 2006 Ms Panier's photographs were used, without her permission, by a number of newspapers. One argument by the newspapers was that no permission was needed for their use because there was no originality, in the European sense, in portrait photographs. The CoJ disagreed. The Court pointed to the requirement of intellectual creativity in Article 6 of the Term Directive and stated that an intellectual creation is an author's own if it reflects the author's personality. That would be the case if the author were able to express her creative abilities in the production of the work by making free and creative choices. In a portrait photograph this would be shown at various points: in the preparation phase the photographer could choose the background, the pose and the lighting. When taking the photograph she could choose the framing, the angle of view and the atmosphere. And when selecting shot the photographer could choose from a variety of developing techniques and software programs. In so doing the photographer can stamp her personal touch on the work.[27] Portrait photographs can thus be protected by copyright, as can other photographs be so long as the necessary element of intellectual creativity is present.

[24] *University of London Press Ltd* v. *University Tutorial Press Ltd* ([1916] 2 Ch. 601).

[25] Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights.

[26] Case C-145/10.

[27] ibid paras 85–93.

But what of a photograph that seeks to replicate exactly existing artifacts which may themselves be in the public domain? This question is also the subject of quite some debate (and controversy). A key US case, *Bridgeman Art Library v. Corel Corp*,[28] concerned photographic images of public domain works made by Bridgeman and in which Bridgeman claimed it owned the copyright. These were copied by Corel. Kaplan, the judge in the case, cited the main copyright treatise by Nimmer in the US that stated that a photograph lacks originality where 'a photograph of a photograph or other printed matter is made that amounts to nothing more than slavish copying'. Unsurprisingly there was an outcry from many cultural heritage institutions after this finding and many attempts to limit its impact because of the reliance that such institutions place on the licensing of digital images for revenue. The situation may be different in Europe although it is far from clear especially where the intent is to make a 'true' copy of the original. In a judgment of the Austrian Supreme Court concerning photographs of grape varieties, the court said:

> *What is decisive is that an individual allocation between photograph and photographer is possible in so far as the latter's personality is reflected by the arrangements (motif, visual angle, illumination, etc.) selected by him. Such freedom of creation does certainly exist not only for professional photographers with regard to works claiming a high artistic level, but also for a lot of amateur photographers, who take pictures of everyday scenes in the form of photos of landscapes, persons and holiday pictures; also, such photographs shall be deemed photographic works, as far as the arrangements used cause distinctiveness. This criterion of distinctiveness is already met, if it can be said that another photographer may have arranged the photograph differently [. . .]. The two-dimensional reproduction of an object found in nature is considered to have the character of a work in the sense of copyright law, if one's task of achieving a representation as true to nature as possible still leaves ample room for an individual arrangement [. . .].* [29]

What is going to be key in deciding the originality—and thus the copyrightability—of photographs which seek to replicate faithfully public domain artifacts, is whether there is room for intellectual creativity allowing the author to stamp her own personal touch on the work.

So what of the digitisation process? Does this give rise to a new copyright in the digitised photograph? The majority of the partners in EuropeanaPhotography argued that the high-end digitisation techniques that were applied to the original photographs did create a new copyright. Their view was that the digital master obtained from the original yields an object with distinctive new properties. Given the effort required in the digitisation process—for instance manipulating the glass plates in such a way that the maximum amount of information is captured and rendered—substantial investment in equipment and expertise is necessary, all of which add to the costs of digitisation.

[28] 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

[29] *O (Peter) v F KG* ([2006] ECDR 9) para 2.1.

But this argument seems to conflate two legal tests. One is the originality requirement for the subsistence of copyright as discussed above. The other is the investment criterion that is at the heart of other—mostly sui generis—intellectual property rights. The main one is the sui generis database right,[30] where there exists the right to control extraction and re-utilisation of the whole or a substantial part of the contents of a database where there has been investment in the obtaining, verification or presentation of the content.[31] What this right seeks to protect is the investment that goes into the compilation of the database[32]: the level of originality is irrelevant. However, and while an investment right may seem the most appropriate form of right for the digitisation of photographs, it is not one that is currently available in all countries. Some Member States have included measures protecting non-original photographs under the sui generis provisions discussed above,[33] which may help to protect the investment in digitisation.

So for EuropeanaPhotography, the position as regards copyright in photographs may be one that seems unanticipated by the team. The assumption is that some of the 'original' photographs used in the project are in the public domain. In other words, the author will have died more than 70 years ago and copyright will have ceased to exist in the photographs. Where photographs were taken of the original, and the intention was to be as faithful as possible to the original, then no copyright would subsist in the copy. The digitisation process would not result in a new copyright. The position with moral rights will differ depending on the jurisdiction. As noted above, in some jurisdictions moral rights last only as long as the copyright; in others they are perpetual.

How then can EuropeanaPhotography meet the three strategic goals outlined above—those of protecting (family) privacy against commercial exploitation; the authenticity and integrity of our cultural heritage; and existing business models? In the next section Europeana's rights labelling campaign will be noted along with the EuropeanaPhotography strategy of using these labels to meet these aims and the problems as they emerged in the project.[34]

[30] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (Database Directive).

[31] Database Directive Art 7.

[32] Database Directive Recital 7.

[33] Germany, Austria, Spain, Italy and the Scandinavian countries. See T Margoni, 'The digitisation of cultural heritage: originality, derivative works and (non) original photograph', Institute for Information Law (IViR)—Faculty of Law University of Amsterdam available at http://www.ivir.nl/publicaties/download/1507.

[34] The final report of EuropeanaPhotography can be found here: http://www.photoconsortium.net/wp-content/uploads/2015/04/D1-2-EuropeanaPhotography-Final-Report_DEF_revised.pdf

4 Rights Labelling

Europeana is the publicly funded portal that gives access to digital images of cultural heritage resources from throughout Europe. It describes itself as 'the trusted source of cultural heritage brought to you by the Europeana Foundation and a large number of European cultural institutions, projects and partners.'[35]

One of the essential steps in making digital objects available is the need to associate metadata with the object. Metadata are descriptive data about the primary object; they are the 'glue' that links digital data. Metadata ensure that objects can be identified, retrieved and shared. Metadata would include information such as the creator of the object—in the case of EuropeanaPhotography a photograph, a description of its subject, the time when the photograph was taken, the place, possibly geolocation references, and perhaps some photographic qualities of the image, such as the ISO value, the diaphragm of the camera and the shutter speed. This could go as far as including the serial number of the camera.

For information systems to manage those who are given permission to use the images, and under what conditions, it is increasingly important to codify this information as metadata. This was the route taken by Europeana in its approach to rights labelling.

For ICT automation and interoperability, software must be permitted to access the databases holding the objects to query for specific content. In this way the user can discover the rights status and permissions. Application developers can then create new functionalities using the collections made available through Europeana and on other platforms knowing the copyright permissions being granted. Museums and archives can enhance the findability and visibility of their collections which could in turn attract extra footfall to the institution.

Europeana's Rights Labelling Campaign[36] was launched to ensure that digital objects found on and via on Europeana have a clear rights status. One reason for this campaign was to support Europeana's change of strategic direction from a portal to a re-use platform the aim of which is to encourage creative reuse of the content. Where the access and reuse is partly automated, such as in applications that would integrate this content, software developers need a simple way to determine which content is freely available for (commercial) reuse.[37]

[35] http://www.europeana.eu/portal/aboutus.html

[36] http://pro.europeana.eu/blogpost/europeana-launches-rights-labelling-campaign

[37] http://pro.europeana.eu/publication/make-the-beautiful-thing-business-plan-2015

The labels (or rights statements[38]) were developed in collaboration with Creative Commons.[39] In addition to the seven CC licenses,[40] a Public Domain Mark[41] (PDM) has been added to indicate that a work is in the public domain. This differs from the CC0 license in that when a work is in the public domain, no-one can claim the copyright. It would thus make no sense for the work to be dedicated to the public domain. In addition there are the following labels: out of copyright—non-commercial reuse label for those collections which may be in the public domain but have been digitised under arrangements which give exclusive use for a set period; rights reserved—free access where it does not cost to access content but copyright may restrict re-use; rights reserved—paid access where access has to be paid for; orphan work—where the right owner cannot be located after a diligent search; and unknown—where the content provider does not know the copyright status of the work.

Europeana gives instructions as to the metadata to be added about the rights status of the object (in the edm:rights field). For example, for the public domain mark the metadata reads: <edm:rightsrdf:resource="http://creativecommons.org/publicdomain/mark/1.0/"/>

The metadata themselves are CC0 as laid down in the Data Exchange Agreement entered into with contributors before Europeana accepts content.[42] Contributors also grant Europeana the right to publish an image preview.[43]

5 The Public Domain Mark (PDM)

An attempt to value the public domain has been documented in the work of Simon Tanner, 'Measuring the Impact of Digital Resources: The Balanced Value Impact Model'.[44] In this study, Tanner shows how giving public access to holdings by publishing them as digital resources can create new business models for museums, creative industries, heritage organisations and archives. The study also highlights the often hidden costs of charging for the licensing of digitised works.

[38] http://pro.europeana.eu/web/guest/available-rights-statements

[39] http://creativecommons.org/

[40] The Creative Commons CC0 1.0 Universal Public Domain Dedication (CC0); Creative Commons—Attribution (BY); Creative Commons—Attribution, ShareAlike (BY-SA); Creative Commons—Attribution, No Derivatives (BY-ND); Creative Commons—Attribution, Non-Commercial (BY-NC); Creative Commons—Attribution, Non Commercial, ShareAlike (BY-NC-SA); Creative Commons—Attribution, Non-Commercial, No Derivatives (BY-NC-ND).

[41] http://creativecommons.org/publicdomain/mark/1.0/

[42] http://pro.europeana.eu/page/the-data-exchange-agreement

[43] Note also the Out of Copyright Calculator which helps to determine whether a work is in the public domain http://www.outofcopyright.eu

[44] Simon Tanner, 'Measuring the Impact of Digital Resources: The Balanced Value Impact Model.' King's College London, October 2012. Available at: www.kdcs.kcl.ac.uk/innovation/impact.html

With the PDM, Europeana aims to encourage contributors to share their content in ways that it can be freely re-used. In EuropeanaPhotography, more than 95,500 of the 450,000 images contributed to Europeana are labelled with the PDM, representing more than 20 % of the overall number. The project experienced excellent exposure of these collections through the Europeana platform, notably with the Lithuanian Art Museum collection.[45] This experience bears out the findings of work done by Tanner noted above.

Despite these successes, members of the EuropeanaPhotography consortium were hesitant about using the PDM. As noted above, monetising images, including public domain images, through licensing, is often the means through which the digitisation and curation of photographs is paid for by heritage institutions. In addition, family photographs, which are of the utmost importance in building histories of how people lived, are often donated with a condition prohibiting commercial re-use, their donors fearful of seeing ancestors images used in advertising campaigns.

5.1 Monetising Images

As noted above, licensing of digital images from photographic collections is one way in which the collections can be maintained. In addition, many photographic agencies depend on licensing digital copies for their livelihood. Bearing in mind that the images collected and made available by EuropeanaPhotography mostly have people as their subject matter, meaningful re-use of the images generally requires direct contact with the archives in which the photographs are kept, and with the relatives of the subjects of the photographs with the aim of gathering the stories of and behind the people. In other words, re-use often requires a relationship between the re-user of the photograph and the organisation and the individuals who have knowledge of its subject matter. A concern of EuropeanaPhotography is that app developers working with content sourced via Europeana would be unlikely to spend time cultivating these relationships, and that any re-use may be as background material only, unlikely to generate significant value.

For EuropeanaPhotography, and its successor, Photoconsortium, one of the main advantages of making content available via Europeana is to develop the profile of their organisation through which relations can be built with researchers, the general public, developers and other industries. When access to their content is anonymous and automated, this negates this potential advantage, and adds to the concern that any benefit to come from new business models to emerge from developing apps would be for the app developers and not for the content providers that make their content freely accessible. EuropeanaPhotography thus saw limited return on the investment expended in developing metadata for rights labelling, it being unclear

[45] http://pro.europeana.eu/blogpost/how-the-lithuanian-art-museum-shares-their-culture-with-the-worl

what this process added to the business model of the organisations involved, nor to end users who may re-use content irrespective of the licence associated with it. The clear message to come from EuropeanaPhotography was that to stimulate reuse that adds economic value, business models should be developed in which current copyright holders and cultural heritage institutions that care for the content can participate. Through participating in EuropeanaSpace, and engaging in pilot demonstrators, hackathons, incubators and monetising events, EuropeanaPhotography is aiming to develop just such participatory models.

5.2 Control by Heirs and Third Parties

It was noted above that moral rights exist in most jurisdictions, and in some countries are perpetual and so can be called upon by the heirs of the author to, among other things, exert control over certain uses that might be considered derogatory to the reputation of the author. Furthermore, in other countries special rules—beyond moral rights—exist to protect valuable works of art, including major photographic collections.[46] The aim of this type of legislation is to protect the cultural and moral integrity of important works that are kept in national collections. This was the law that was called on by an Italian minister in response to a commercial company's use of a photograph in an advertisement of Michelangelo's David carrying an assault rifle.[47] The limitation of these 'special' laws is that they will be enforceable only in the territory in which they are enacted. Unlike copyright, they are not a part of the 'international' web of laws discussed above.

It can be seen from this discussion that using a PDM mark could cause users to erroneously believe that a work can be re-used without limitation: which is not the case. The PDM mixes two concepts: a legal fact attached to the digitised work, that a work is in the public domain; and reuse permission, the possibility of reusing the digital object without restriction. This may be misleading because the work may continue to be subject to the moral rights of the author. It is notable that the PDM rights label associated with Europeana states that 'Works that are labeled as being in the public domain can be used by anyone without any restrictions.' In addition there is a link to the CC public domain mark which states 'In some jurisdictions moral rights of the author may persist beyond the term of copyright. These rights may include the right to be identified as the author and the right to object to derogatory treatments.' In addition Europeana has guidelines on the use of public domain works that include such exhortations to 'give credit where credit is due', and 'protect the reputation of creators and providers'.[48] Thus the PDM licence is subject to moral rights, but the bare statement on free-re-usability by Europeana

[46] Articles 10 and ff. Legislative Decree 42/2004 of the Italian Code of Cultural Heritage and Landscape under Legislative Decree No. 42, dated January 22, 2004 as amended.

[47] http://ipkitten.blogspot.be/2014/03/exclusive-rights-in-classical-art-works.html

[48] http://www.europeana.eu/portal/rights/pd-usage-guide.html

could be misleading for the user is she does not follow the links to the fuller explanations.

There are other challenges with the PDM mark. Given the general rule that published works come into the public domain after the death of the author plus 70 years, works keep falling into the public domain, which then becomes a moving target. Information systems that indicate the rights status of a work need to recalculate once a year to decide whether a work should be relabelled with the PDM. The task is not helped by the complexity of the legislation meaning that there is no algorithmically certain way to determine this status (tools like outofcopyright.eu are not 100 % accurate). There is also the philosophical question of who should take responsibility of attributing the PDM, if no one owns the copyright. If Europeana develops an algorithm that can determine which works are in the public domain, would Europeana have the authority to attach the PDM to works, even if the provider attached another label? If no-one owns the rights, who should care for them? Is this a task for public museums and institutions?

For a consortium as diverse as EuropeanaPhotography, one of the strengths is that it gathers organisations of different forms and with a range of differing core missions such as universities, photo agencies, museums and archives. These organisations, united by the common goal of caring for photographic heritage, found that it was not possible to have a 'one-size-fits-all' solution to rights management. It was accordingly decided that the choice of the rights label would remain with every partner, and would not be made or enforced at the consortium level with many in the consortium noting a preference for a label that precludes commercial reuse explicitly.[49]

6 Out of Copyright: No Commercial Reuse

Along with the launch of the rights labelling campaign, Europeana introduced a new label, tagged OOC—NC, for Out Of Copyright—No Commercial Reuse.[50] Such a label is a solution for those libraries and archives that have made an agreement with private organisations which gives to the private partner exclusive exploitation rights for a specific duration in exchange for making the digitisation investment. This is precisely the arrangement that has been made possible by the Re-Use of Public Sector Information Directive 2015.[51] Generally, the aim of this Directive (and the earlier Directive which it amends[52]) is to liberalise the use by third parties of public sector information. This now includes information developed by libraries, museums and archives. In general, exclusive licensing is not permitted by the Directive, except in exceptional circumstances. Exceptional circumstances

[49] http://www.europeana-photography.eu/getFile.php?id=298 for further information.

[50] http://www.europeana.eu/portal/rights/out-of-copyright-non-commercial.html

[51] Council Directive 2013/37/EU3 on re-use of public sector information.

[52] Council Directive 2003/98/EC1 on the re-use of public sector information.

would include those instances where, without any form of exclusivity, the institution would not be able to carry out a digitisation project. Where a third party makes a substantial investment in a digitisation project, then an exclusive arrangement is permitted for up to a maximum of 10 years. It is said that this deal structure has mostly been used over the past few years for agreements between Europeana and Google. As Google has large quantities of digitised content, Europeana was eager to publish it and so this label was made available under conditions that fit the Google case. As noted, the arrangement should equally be available to other institutions under the conditions in the Directive. Indeed, Europeana does make the label available to institutions that can show existing contracts that indicate, to Europeana's satisfaction, that the partner does not own the full rights to publish these works unconditionally.[53]

Europeana does not allow use of this label for providers who, for the reasons outlined above, do not want commercial reuse of the public domain works that they provide to Europeana. EuropeanaPhotography, in their contacts with (smaller) archives, noticed an enthusiastic willingness to share content with Europeana, but on condition there would not be any commercial reuse. EuropeanaPhotography would therefore argue that there is a need for a label that does exactly that: indicate that the work is legally in the public domain, while at the same time precluding commercial reuse.

7 Orphan Works

One major recurrent issue remains around the digitisation and making available of our photographic heritage, and that is with orphan works. Orphan works are those works whose owners cannot be identified, or if identified cannot be traced even after a diligent search.[54] Most archives, including photographic archives, hold many such works. However, and without the requisite permission built into copyright law, these archives are not legally in a position to publish them—a clear conflict with their public sector mission to make such works accessible to the public and for which digitisation would be an obvious strategy. Some jurisdictions contain a library exception within their law[55] that makes it possible for libraries and archives

[53] As is stated on the Europeana website: 'Before applying this rights statements to digital objects that you intend to make available via Europeana, please consult the ingestion team to see if your digital objects qualify for this rights statement.' http://pro.europeana.eu/share-your-data/rights-statement-guidelines/available-rights-statements

[54] Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, Article 2.

[55] Such as §108 in US Copyright law. See also the most recent proposals from the US Copyright Office for the establishment of an extended collective licensing scheme 'Orphan Works and Mass Digitisation' A Report of the Register of Copyrights, June 2015. http://copyright.gov/orphan/reports/orphaworks2015.pdf

to digitise those works for preservation. In Europe an Orphan Works Directive[56] was introduced in 2012 to be implemented into national legislations by October 2014.[57] However, even where a work is deemed to be orphan, only limited uses may be made of it. It may be made available to the public, and may be reproduced, but only for the purposes of indexing, cataloguing, restoration or preservation.[58] Furthermore only certain works are covered. These include published works, first published in a member state; cinematographic and audio-visual works and phonograms.[59] Stand-alone photographs are not covered by the Directive.[60] Article 10 of the Directive requires the Commission to keep the functioning of the Directive under review, and in particular the exclusion of certain works including photographs. Despite the date for submission of this report being 29 October 2015, it seems that it has not yet been made publicly available—if drafted.[61]

Many in the cultural heritage sector lament the lack of a unified and robust orphan works system in Europe, and believe the Directive to be a missed opportunity to enhance the opening up the collections of archives in general and community archives in particular. While, and as has been noted above, developing relations with the communities whose history is told through these photographs is a central to the work of many archives, from a copyright perspective it is ironic that those people will not be the owners of the copyright in the photographs. Ownership of the copyright will generally reside with the individual who took the photograph; this person may have few or no connections with the community.

8 Cultural Rights and the Right to Culture

RICHES, Renewal, Innovation and Change: Heritage and European Society, is a European funded project[62] in which a strategy has been developed to reassess the basics of the intellectual property legal environment in the heritage sector in the wake of co-creation and of the move from analogue to digital.

> *The last two decades have witnessed significant changes to the ways in which our cultural heritage (CH) is created, used and disseminated. Intellectual Property Rights (IPR) in general and copyright in particular impacts on how cultural heritage is produced and*

[56] Note 54 above.

[57] Note the EIFL guide to the Orphan Works Directive http://www.eifl.net/resources/european-orphan-worksdirective-eifl-guide

[58] Orphan Works Directive Article 6.

[59] Orphans Works Directive Article 1.

[60] Orphan Works Directive Article 10.

[61] There are a number of orphan works databases. For the European registry see https://oami.europa.eu/orphanworks/. For the UK database see https://www.orphanworkslicensing.service.gov.uk/view-register

[62] The project has received funding from the European Union's Seventh Framework Programme for research, technological development and demonstration under grant agreement no 612789.

consumed, developed, accessed and preserved in this digital world. New practices such as collaboration and co-creation of CH and changes in how we engage, alter, communicate and participate in CH require appropriate IPR laws for the digital economy.[63]

Research has been done that seeks to reconcile the need for public access to grow the space for creative reuse of heritage on the one hand, and the protection of cultural rights on the other. While in EuropeanaPhotography one of the issues with the rights labelling campaign was the perception that use of the PDM would lead to unwarranted, unwanted reuse that could harm the integrity of the works, the work in RICHES stresses the positive outcomes that could flow when intellectual property strategies are developed that seek to place cultural rights and the right to culture at their heart.

RICHES explores how the public and private perspectives on heritage can be merged to give new dynamics to the reuse of cultural heritage in the digital context:

The starting point is to recognise that cultural heritage can be thought of in two ways by policymakers and cultural heritage institutions. It can be thought of as an asset belonging to the nation or institution, or it can be thought of as a right or heritage belonging to the community or group. These perspectives are not mutually exclusive, but give useful points of reference when developing copyright policies and strategies.[64]

This quote reflects the problems that emerged during the EuropeanaPhotography project part of the remit of which was to deliver access to cultural heritage for the public. For the participating partners, this cultural heritage is part of their assets. As noted above, while they were eager to obtain, through Europeana, exposure of their collections, the partners were also were wary of relinquishing control of copyright as its management and exploitation is at the heart of the way they do business and fund the preservation of their collections. However, and as the RICHES strategy suggests, these perspectives need not be mutually exclusive:

Where the starting point is to think of cultural heritage as an asset, then, within the legal framework, it is generally first considered through the lens of copyright. When this is the case, culture becomes commodified. In other words, culture becomes bound up in notions of private property, ownership and control. If, on the other hand, culture is first considered as a right or heritage belonging to the community, then it is looked at first through the lens of human rights, notably the rights to culture and cultural rights. When this is the case, emphasis is placed on public goods, access and cultural communication. Copyright can be used as a tool to attain these goals.[65]

[63] See C Waelde and C Cummings RICHES: Digital Copyrights Framework, 2015 available at http://www.digitalmeetsculture.net/wp-content/uploads/2015/09/RICHES-D2.2-DigitalCopyrightsFramework_public.pdf

[64] Note 63 p. 2–3.

[65] Note 63 p. 3.

There is much to say for this approach. It aligns well with other open movements, such as the open access movement[66] which seeks to ensure that access can be gained to the fruits of scientific and cultural research.[67] As the RICHES strategy notes, taking such an approach does not thereby mean that all content has to be made immediately open. It might however contribute to persuading decision makers within cultural organisations that research should be funded that might reinforce that carried out by Tanner noted above. Taking such an open approach may ultimately not only lead to increased downstream revenues but in addition it would give unprecedented opportunities to individuals and communities to interact with, and co-create new forms of heritage.[68]

9 Conclusion

Intellectual property remains a legal core as the cultural heritage sector moves from curating and preserving analogue objects to making available digital representations of them. Digitised content becomes at once intangible, and fixed in digital objects protected by copyright. Theory tells us that copyright laws are essential to stimulate new creations from which the authors can obtain financial return. But these same laws are challenged by digital working practices and seem to hamper innovative creation. Rights labelling is an important development, allowing search engines to find content, and users to see how it may be re-used. However the experience of EuropeanaPhotography shows that the area is more complex than it might first seem. The names of labels and licences may not be straightforward, and it is not easy to determine with confidence if a work is in the public domain, and even if it is, moral rights may still attach to the work, and personal and cultural sensitivities may demand that a work be dealt with respectfully. There is much to be said for rethinking the place of copyright within this melee. Many attempts have been made over the years to reform copyright laws in order to make them 'fit' for the digital age. At the time of writing (December 2015) there is yet another copyright reform package under consideration in Europe. Yet experience shows that meaningful reform is hard to achieve in practice because of the vested interests and lobbying powers in the copyright sector. The Orphan Works Directive is a good example: there were high hopes that the implementation of measures relating to orphan works in Europe would help to make available digital representations of millions of analogue artefacts 'locked up' within cultural institutions and unable to be used because of the unknown copyright status of the works. But because of the sensitivities of the subject, and because of fears of trammelling on intangible property rights, so the measure as ultimately enacted has proved to be less helpful

[66] https://www.plos.org/open-access/

[67] http://www.law.yale.edu/intellectuallife/7072.htm

[68] Dow Wasiksiri transforms old Dutch colonial photography by making photographic artworks http://www.2902gallery.com/index.php/artists/dow-wasiksiri/

than hoped to the cultural heritage sector. Furthermore, the differences in laws as between member states of the EU despite the harmonising and approximating influences of the copyright directives, and the further differences as between those laws, and the laws of countries furth of the EU despite the minimum standards to be found in international instruments, makes cross border management of copyright and works protected by copyright within the cultural heritage sector highly challenging: the copyright space is highly contested. The strategy therefore of revisiting how we think about the copyright framework and implement its provisions holds much promise for the sector. By emphasising the importance of cultural rights and the right to culture—which are fundamental building blocks of the public interest mission embedded within the cultural heritage sector—and using the proprietary rights embedded within copyright to meet those goals, so this could help to 'unloose' the Gordian knot that is, at present, seen as serving to hamper development within the field.

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