

Collecting, organizing, and preserving diverse publication sources for the good of one community archive: Legal challenges and recommendations^{*}

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Over the past several years, the bicycle movement in Indianapolis, Indiana, has gained a great deal of momentum. Bicycle lanes and trails have been designed and implemented to support commuting to work, rental stations have been installed in strategic locations across the city, and a bike hub has been built providing showers, lockers, and repair services. The 2007-2015 mayoral administration was a strong advocate for the movement, and the city has received over \$60 million in private donations and federal grants to build the Indianapolis Cultural Trail, which is at the heart of the improved pedestrian and cycling infrastructure. The city has also developed 74 miles of on-street bike lanes within the metropolitan area. Representatives from other national and international municipalities have visited the city to study Indianapolis's cycling infrastructure. These changes have brought about economic growth, improvement to the general air quality, and personal health gains.¹

Despite the extensive investment in fostering a culture of cycling, there is not yet a significant formal mechanism for documenting or analyzing the effects of these changes. A future goal of this research is to develop a community archive development processes/prototype application that will provide such a tool. Indianapolis is an ideal city for the system design as cycling infrastructure in Indianapolis is emerging and developing rapidly. continuum of cycling infrastructure development. The prototype (archive and mobile application) will be called CHIME: Citizen-data Harvest in Motion–Everywhere. CHIME will be designed to combine the data collected in the form of the various community voices expressed in a diversity of formats (images, video, textual narratives, and geographical information), along with overlays of geographic data to provide context. The cycling experience in Indianapolis is an ideal community issue for which to develop these processes, as the geographic and mobile nature of the phenomenon will expose the challenges of capturing both place-bound and digital history as it is happening. Most information regarding cycling is written on the landscape or in a digital form. Much like changes to the physical landscape of a city, current digital information can be difficult to grasp all at once as it is widely distributed. In this way, cycling produces both tangible and intangible cultural artifacts and provides a venue for exploring the preservation and sharing of both types of artifacts.

The perception that communities are a harmonious whole is seldom accurate. Tensions of varying degrees between different groups invariably exist. In some cases, the group divisions are based on obvious distinctions such as religious preferences, political beliefs, income, and ethnicity. In the case of the bicycle movement, these differences serve as a backdrop to the common dilemma of how to best use shared public space. In the case of Indianapolis, not all residents are supportive of the movement. Most of the dissent manifests in community news forums and in broadcast and print media. Motorists have been vocal about not wanting to share the roads. Residents in predominantly African-American neighborhoods are upset that the city chose to equip roadways in their communities with bike lanes without asking for their input.²

Humanities-based practices of public scholarship and civic engagement are particularly important to the design of the prototype. Scholars in fields such as cultural studies, public history, digital humanities, and museum studies have long recognized that archives, exhibitions, and official histories have privileged the perspectives and experiences of people and institutions in positions of power. While city records and newspaper reports (among other sources) are already documenting

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¹ Sustainable Communities. (2013). Indianapolis Cultural Trail: Improving livability in Central Indiana.

www.sustainablecommunities.gov/sites/sustainablecommunities.gov/files/docs/2013_5_23_indianapolis_case_study.pdf

² Brown, A. (2012). Indy's bike lanes blasted by black community; Question why, the cost and the need. PraiseIndy.com. <http://tinyurl.com/m6ugk66>

the ways in which policy makers and commercial entities are engaging with the changes in the city’s cycling infrastructure, it is harder to collect, preserve, and make known the experiences of individual cyclists, drivers, and pedestrians. For example, the public discourse taking place in the comments sections of blogs and online newspaper articles, as well as the personal snapshots and reflections published via social media platforms, are of a troublingly ephemeral nature. If we are to document a community’s experience, we must look beyond official accounts and acknowledge the ways in which individuals’ daily lives shape and are shaped by cycling infrastructure. Capturing a diverse array of perspectives is just one part of the task.

Even more challenging than incorporating multiple perspectives is the task of capturing individuals’ experiences of space while they inhabit it. Life events are merged with objects, buildings, and places; one is not realized independent of the other.³ To better document events that occur within a community space, the corresponding human experience needs to be captured simultaneously. This is a challenging proposition, especially when one considers the growing influence of tools and interaction in the digital realm on the human narrative.

Documentation and dialogue captured or facilitated with digital tools and platforms is our collective social history and resides mainly in the hands of corporate entities like Facebook, which could cease to exist tomorrow or choose to shut down platforms without notice. Further, corporations have no legal obligation to preserve our collective social heritage and have often demonstrated a lack of concern for users and user-created content.⁴ For the most part, heritage organizations are not involved in the process of collecting and preserving born digital information generated in this everyday digital context from individuals or communities of individuals. This paper will explore the legal and ethical issues involved with the capture of the kinds of data (see Table 1 for list of data types) described in support of building the prototype archives.

Table 1. Community Archive (case study CHIME, Indianapolis, IN): Legal Issues

<i>Document</i>	<i>Copyright and Licensing Other Issues</i>	<i>Privacy</i>	<i>Zoning and Related Regulation</i>	<i>Public Domain</i>
Photographs – personal, community events Videos (e.g. GoPro)	Copyrightability: pictorial works. <i>Bridgeman Art Library, Ltd. v. Corel Corp.</i> , 36 F.Supp.2d 191 (S.D.N.Y. 1999). Thin Copyright and fair use. Ownership: Work made for hire.	Intrusion: intrusion and appropriation.		
Photographs shared via social media platforms	CMI (17 U.S.C. § 1202): <i>Cable v. Agence France Presse</i> , 728 F.Supp.2d 977 (N.D.Ill. 2010) (“Cable created [] works ... reproduced ... and attributed [] as follows ‘Photos ©2009 wayne cable, selfmadephoto.com.’” Id. at 978. “[U]nder the plain language of the statute [] plaintiff’s name and hotlink fall within the scope of ‘copyright management information.’” Id. at 981. Ownership and use: End User License Agreement. See below.	Privacy: intrusion and appropriation.		
Videos shared via Social Media	Ownership and Use: End User License Agreement. Some social media websites claim either ownership or non-exclusive rights to use content posted photographs so posted. See, Lipinski and Copeland (2013).	Privacy: intrusion and appropriation.		

³ Halbwachs, M. Space and the collective memory. In *The Collective Memory*; Harper & Row: New York, NY, 1950

⁴ <http://kernelmag.dailydot.com/issue-sections/features-issue-sections/16616/archive-team-saving-the-web/>

Document	Copyright and Licensing Other Issues	Privacy	Zoning and Related Regulation	Public Domain
Online News Articles (e.g. Indy Star)	Thin copyright and fair use. Literary works. See, <i>Los Angeles Times v. Free Republic</i> , 29 Media L. Rep. 1028 (C.D. Cal. 2000) (online discussion board use of complete articles not fair use). Ownership: Work made for hire. Source of clippings: End User License Agreement?			
Comments contributed at the end of the articles (often document the conflict generated by motorists not wanting to share the road)	Thin copyright and fair use of literary works. Ownership and Use: End User License Agreement. Defamatory of otherwise tortious: application of 47 U.S.C. § 230?			
Newsletters of these advocacy groups	Fair use: Congress has recognized that “the scope of the fair use doctrine should be considerably narrower in the case of newsletters than in that of either mass-circulation periodicals or scientific journals....newsletters are particularly vulnerable to mass photocopying, and ... most newsletters have fairly modest circulations.” H.R. No. 94–1476 at 73 (1976), <i>reprinted in</i> 1976 U.S.C.C.A.N. 5659, 5687.			
Social media and websites cycling advocacy groups Include government documents: city reports, crime (bike theft) and accident data, routes, maps, city planning documents, minutes from the Mayors Advisory Council on Cycling	States and local governments are free to claim copyright protection subject to the standards of the copyright law. For example, the crime data are not protected by copyright as purely factual content unless selected, coordinated or arranged in some creative manner as a compilation copyright. Routes/Maps: The question would be whether “the overall manner in which [the plaintiff] selected, coordinated, and arranged the expressive elements in its map, including color, to depict the map’s factual content.” <i>Streetwise Maps, Inc. v. Vandam, Inc.</i> , 159 F.3d 739, 748 (2d Cir. 1998).			Works of the federal government are in the public domain. 17 U.S.C. § 105. Public policy dictates that the documentary building blocks of law and government; its cases, statutes, regulations, etc. are in the public domain: “It is well settled that judicial opinions and statutes are in the public domain and are not subject to copyright.” <i>Veeck v. Southern Bldg. Code Congress Intern. Inc.</i> , 241 F.3d 398, 412 (5th Cir. 2001).
TV news Radio shows discussing cycling	Thin copyright and fair use of audiovisual works. “For the foregoing reasons, TVEyes’ archiving function qualifies as fair use, and its downloading and Date–Time search functions do not qualify as fair use. Its e-mailing feature can qualify as fair use, but only if TVEyes develops and implements adequate protective measures.” <i>Fox News Network, LLC TVEyes, Inc.</i> , 2015 WL 5025274, *10 (S.D. N.Y.). <i>Maxtone-Graham v. Burtchaell</i> , 803 F.2d 1253 (2d Cir. 1986), cert. denied 481 U.S. 1059 (1987). Ownership: Work made for hire.			
Comments on TV news clips posted to station website	See above, same analysis as commentary on news articles.			

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Blogs* Example: Neil Kelty blog of his commuting by bike death in a traffic accident with a school bus: https://medium.com/urban-cycling/a-novice-cycles-to-work-ad5df66c937#.ivvairtwz	See above regarding specific content and circumstances: photographs, audiovisual works and commentary, etc. Blog posts may not be not be protected by its state shield laws as are traditional news reporters and publishers: "By contrast, defendant's comments on an online message board would resemble a pamphlet full of unfiltered, unscreened letters to the editor submitted for publication—or, in modern-day terms, unedited, unscreened comments posted by readers on NJ.com." <i>Too Much Media, LLC v. Hale</i> , 993 A.2d 845, 847 (N.J. Superior Court 2010), affirmed 20 A.3d 364, 379 (N.J. 2011).			
Ghost Bikes These bikes mark where someone was killed, see http://ghostbikes.org				Roadways, sidewalks, bike paths and other public right of ways are government property. Regulation is subject to constitutional requirements: regulation should be content neutral or strict scrutiny analysis applies. Content neutral, reasonable time, place and manner restrictions must be viewpoint neutral.
Street Art decorating city pedestrian and cycling path ways: http://www.indianatrails.com/content/trails-and-public-art	Fair use of pictorial work: <i>Seltzer v. Green Day, Inc.</i> , 725 F.3d 1170, 1173 (9th Cir. 2013): "Staub photographed a brick wall at the corner of Sunset Boulevard and Gardner Avenue in Los Angeles which was covered in graffiti and posters—including a weathered and torn copy of <i>Scream Icon</i> ." Id.			
Databases – Routes, trails, uploaded, MapMyRide and Garmin – using GPS technology.				<i>County of Santa Clara v. Superior Court</i> , 89 Cal.Rptr.3d 374, 3934 (Cal. App. Dist. 6, 2009): "Matching the GIS Basemap with orthophotographs, which are in the public domain..."
Community Cycling events – Tweed Ride, NITE Ride (etc).	See above regarding specific content and circumstances: photographs, interviews and commentary and interviews, audiovisual works, etc.			See above regarding specific content and circumstances: route map and geospatial information.

Ethical Issues Explored

CHIME has positive aims. Through data and technology, it seeks to create a socio-technical infrastructure that can speak to the experiences and interests of a broad array of stakeholders. In so doing, it will become an empowering technology that, among other things, will give individuals and groups the opportunity to have a voice in the way their city is molded and captured in history. Regardless of the good intentions, there are a number of important ethical considerations to address.

First, there is a question of whether or not the burden of documentation is justifiable given possible invasions of privacy. The public will be subject to archived documentation in perpetuity. And while documentation born from public places and spaces seems defensible from a legal

standpoint, it may be that CHIME administrators have an ethical duty to provide for fair information practices should members of the public feel that their inclusion in the archive is a personal invasion of privacy.

Second, it is unclear at this point who will receive the benefits of CHIME's intended goods. On the face of it, CHIME's administrators position themselves as neutral entities, as system designers and researchers simply providing information resources for its users. But all data is "cooked" in some way, and the privileged position of technological designers always needs to be interrogated for embedded values and interests that may disenfranchise other parties.

Third, the data aggregated for and analyzed as a result of CHIME holds the potential to create significant value and create tensions around data ownership. Actors with the right technical skill set or in a position of power (e.g., city and university administrators) may claim that the datasets and resulting algorithms are a new product over which they can claim ownership and subsequently monetize. In contrast, the public has an equally powerful ownership claim on the grounds that such information products would not exist were it not for their active or passive participation in the project to begin with.

Finally, there is an open problem concerning who is or should be held responsible for CHIME's maintenance. Building an open data and community-based infrastructure like CHIME aims to do requires significant financial expenditures, and the labor involved will be highly specialized. While the project is oriented towards community needs, it would be unfair to place burden of its maintenance and future development on public volunteers.

In what follows, we briefly consider each of these four thematic ethical issues. None of the discussion definitively answers or resolves the problems; however, it lays an important foundation on which to examine how CHIME may bring to the fore moral problems related to rights, responsibilities, and benefits and burdens.

The Burdens of Documentation

CHIME seeks to aggregate a wide variety of data and information as part of a larger initiative to document and analyze Indianapolis' cycling infrastructure. The legal analysis of data sources suggests that, in most cases, information observed in public places and extracted from online sources does not trigger any specific individual right to privacy. For instance, photographs taken of cyclists on public roads or trails do not intrude in private spheres of life. Regardless of whether or not there exists a legal protection against intrusion, the CHIME project's documentation may burden members of the public. Three specific problems exist with respect to documentation: 1) the perpetuity of that which is documented, 2) the decontextualization of documentation, and 3) the ways in which documentation subjects can (or cannot) express agency.

Only through a longitudinal perspective will CHIME's primary goals be met. That is, CHIME aims to document the changes in cycling landscape over time, which requires the ongoing documentation of cycling experiences expressed in data and information. It is imaginable that subjects caught in the data net CHIME administrators throw onto the public would have valid arguments for not wanting their cycling life archived in perpetuity, even though they might have legal standing. Cycling can be a social experience shared between family members, friends, and acquaintances. And it is entirely plausible that individuals associating with each other on a public cycling path believe that their ride is ephemeral, that it leaves no lasting history. Now, the same individuals may willingly submit themselves to surveillant gaze of the city for the purposes of participating in a "safe cycling" campaign where police have access to trail-based cameras. But those individuals might think differently about having their association captured in a publicly available database.

Consider, also, information mined from a community Facebook group of cyclists. In this space, the members freely share their routes, experiences, and opinions on the state of cycling in their neighborhood. The information is contextualized, there are norms of reciprocity, and members develop trustworthy friendships with one another, bonding over the cycling experience and in so doing create a willingness to exchange thoughts and ideas. Decontextualizing the information the members share and depositing it in a public archive for analysis and wider consumption is a *prima*

facie threat to contextual integrity.⁵ In other words, the migration of the information into another context immediately raises privacy issues—in the social but not the legal sense—because normative expectations about how that information should be accessed, used, and disseminated are no longer respected.

It is not to CHIME's advantage to create mechanisms by which particular sets of public information (e.g., videos capturing public individuals) can be suppressed or expunged from the archive. The more data the CHIME administrators and researchers have at their disposal, the argument goes, the wider and greater the insights they can distill from the archive. All that aside, harms that could accrue from perpetual documentation and decontextualization of public information may be manageable through fair information practices built into CHIME's information policies and technological infrastructure. Such practices may include the ability for an individual to express a privacy harm, prove her identity in relationship to CHIME's documentation, and request suppression of her identity or that the documentation be removed from the archive. By following this approach, CHIME would respect the interests of concerned individuals included in its archive without necessarily devaluing analytic findings.

Balance of Benefits

CHIME is, first and foremost, a research endeavor. Its creators aim to develop tools and insights that push the boundaries of knowledge. This requires the researchers to develop and disseminate their research in journal articles and presentations. Thus, the initial benefits of the project will redound to CHIME researchers who will reap professional and scholarly goods. But what about the data subjects who inform the project with their social media? Or the partners in city administration who provide insights into the cycling infrastructure? Or the general public who are captured in videos of cycling routes? Given that the scope of participants in the CHIME project is large, CHIME must carefully consider if its benefits will be equitably distributed.

The principle of beneficence in research maintains that the welfare of the research participant should be a guiding goal; however, it is challenging for researchers to claim who will benefit from their research and when those benefits will accrue. These types of moral calculations are always fraught with unknown variables. Regardless, researchers are burdened with conceptually mapping how their interventions or programs will create foreseeable benefits in the short and long term and for whom.

CHIME aims to create a community platform of data and information for the public to access. While CHIME requires users of the data to create accounts and agree to a terms of service, researchers will not be able to know exactly how the public will use the data and to what ends—good or bad. On one hand, it could be that a CHIME user analyzes the data to peddle erroneous information to heavily-biked areas about future city planning projects. Surely, this would be a negative use of the data in that the data is not being used to promote positive benefits in the community. On the other hand, community artists might use the data to develop place-based art to beautify heavily-biked areas and engage populated spaces. Many in the public would agree that this is a good use of the data. In both cases, however, these uses would be unknowable to CHIME's creators.

To develop equitable benefits, CHIME must strategically develop objectives that map to specific research participant groups. It is not enough to release the data into the wild via the community and hope for benefits to result and outweigh potential harms. To these ends, CHIME can develop community engagement strategies for, among others, bicyclist advocacy groups, city administrators, neighborhood businesses, and the like to share how to use CHIME and be specific about how CHIME might benefit them.

Data Ownership

Users of social media, like Facebook and Twitter, agree to end user license agreements (EULAs) or terms of service (TOS) upon registering for their accounts. EULAs and TOS legally bind users to a contract dictating, among other things, the rights the service provider and the user retain related to

⁵ Nissenbaum, H. (2010) *Privacy in Context: Technology, Policy, and the Integrity of Social Life*. Palo Alto, CA: Stanford University Press.

the data and information (broadly defined as content) created while interacting with the social media site. Yet, it is not clear if CHIME's action, such as aggregating social media into its databases, obligates researchers to respect TOS and EULAs users previously agreed to.

Facebook grants itself the right to use a user's data in its TOS. The company writes that its users give them "a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that [users] post on or in connection with Facebook" (www.facebook.com/terms). Moreover, users who post information publicly without using privacy restrictions "means that [users] are allowing everyone, including people off of Facebook, to access and use that information, and to associate it with [the content creator]." So, Facebook is at liberty to disclose user data and, at the same time, places no restrictions on third parties, such as CHIME, to access and manipulate user data, as long as it is public.

Twitter's TOS provides similar rights to itself, in that it retains the ability to distribute user data to third parties. For instance, Twitter can make user content available through APIs, business platforms, and by other technical routes, as long as individuals who gain access to user content agree to the terms and conditions governing content use. Where CHIME is concerned, this TOS provides less freedom to scrape publicly available sites—like Facebook groups or accounts—by requiring researchers to use Twitter approved methods to aggregate its content. Moreover, CHIME cannot distribute Twitter content to other parties via its own API: it can only distribute tweet or user IDs. It can, however, provide downloadable spreadsheets or PDFs of user content with some restrictions (<https://dev.twitter.com/overview/terms/policy.html>).

The Facebook and Twitter cases represent the complexity CHIME faces in not only accessing user data but also distributing it via its community platform. But, more importantly it shines light on the complicated matter of data ownership. Twitter explicitly states that users own their content, yet empowers its business partners to make use of user content for remunerative purposes without active user consent. Similarly research projects, like CHIME, can make derivative datasets of user data, again, without informing users. This is a loose and fast definition of "data ownership."

While CHIME is not in a position to force social media companies to rethink their data ownership definitions and related policies, it should justify its position on the manner transparently to be in the clear, ethically speaking. CHIME should create information policy that discusses how it has gained access to social media content and why it has a right to do so. This policy should also state what rights CHIME has to the data as the curator of the dataset; similarly, the policy should state what rights data subjects retain. As the TOS analysis above shows, 'data ownership' is a legally complex concept. CHIME would benefit by not expressing its right to own data acquired by public means, but rather by expressing its role as a steward over the data.

Infrastructure Maintenance

CHIME is an advanced technological system that will undoubtedly require maintenance in order to maximize the informational and social goods it seeks to produce. Its database structures archive the useful data and information; its application programming interfaces (APIs) enable data access; its algorithms help to analyze the data; and its interfaces make the data and information usable for the community. All of these technical components require an advanced technical skill set to maintain into the future, which requires significant funding to pay for the labor. While CHIME may be sustainable in the near term with sufficient grant funding, its success in the future is still unknown. The ethical question here concerns who should be held responsible for the upkeep of the infrastructure. Put a different way and more specifically, we might ask who is morally obligated to maintain all of the technology once the initial funding runs out.

Only after the initial research is done will stakeholders, like community members, local businesses, and the city's administration, will be able to use the technological infrastructure for their own ends. But if the project is not sustainable in the long-term due to maintenance issues, it is less sure that these stakeholders will be able to use CHIME to, among other things, meaningfully support city planning projects or promote neighborhood cycling needs. In this scenario, CHIME's creators benefit from the data and information provided by the public without returning anything back to those who have supported their project.

To account for this issue and work towards the overarching goal of creating a sustainable archive, CHIME researchers have a responsibility to plan for extending the infrastructure's life and

establishing end-of-life circumstances. Optimally, the researchers themselves will be able to find new funds or integrate CHIME into a university's technical infrastructure. But should this option not materialize, researchers need to account for the costs of CHIME's maintenance and the skill sets required to maintain for a certain period of time. Doing so will help the researcher's communicate to potential partners, like the city of Indianapolis, what resources are required to maintain CHIME. Moreover, the researchers should consider developing CHIME with sustainability in mind. This may require the researchers to think about and subsequently design for a CHIME-lite version without the technical 'bells and whistles.'

Legal Issues

The creation, preservation and use of the documentary record of the biking community of Indianapolis raise several issues including copyright and licensing, privacy and regulation of speech. Many of the copyright and licensing issues were covered in previous GL conferences and publications and are not discussed here.⁶

However, the copyrightability of local municipality official records (proceedings, minutes, etc.) and data, in specific geographic information raises new issues and are discussed in addition to the privacy (intrusion and appropriation rights) and First Amendment concerns raised by regulation of ghost bike sites.

Regulation of Ghost Bikes and other Memorials: Reasonable Time Place and Manner Restrictions

Some states and municipalities prohibited the erection of road side or curbside monuments or memorials. In the alternative some states or municipalities may allow be require removal after some time period such as thirty days. Such regulations are often a combination of state and local authority control as a municipality may have state roadways traversing its boundaries.

Indiana House Bill 1108 was introduced in 2009 to require that "uniform roadside memorials" be erected at the request of the "immediate family" with erection lasting no more than one year. Proposed Indiana Code § 8-23-5-10(a)(b) and (c). The statute would have required the Indiana Department of Transportation to "remove roadside memorials that are not erected or sanctioned by the department." Proposed Indiana Code § 8-23-5-109(e). A "unit" other than the Indiana Department of Transportation could erect a "uniform roadside memorials within the right-of-way alongside highways, street, or roads within the unit's jurisdiction" but the erection must comply with the above requirements, i.e., Proposed Indiana Code § 8-23-5-10. Proposed Indiana Code § 36-1-4-6.5. The bill did not pass.

Another example is found in Milwaukee proposed Ordinance § 116-7 regulating "Roadside Memorials" defined as "any of the following items including but not limited to balloons, flowers, pictures, stuffed animals and religious items commemorating the site of a fatal accident or

⁶ Tomas A. Lipinski and Katie Chamberlain Kritikos, Copyright Reform and the Library and Patron Use of Non-text or Mixed-Test Grey Literature in Digital Scholarship, 12 THE GREY JOURNAL, INTERNATIONAL JOURNAL ON GREY LITERATURE (Grey Publishing, Licensing, and Open Access), No. 2, at 67 (2016), selected by the editors (pp. 67-81).

Tomas A. Lipinski and Andrea J. Copeland, Is the Licensing of Grey Literature Using the Full Palette of "Contractual" Colors?, 11 THE GREY JOURNAL, INTERNATIONAL JOURNAL ON GREY LITERATURE (Grey Publishing, Licensing, and Open Access), No. 2, at 69 (2015), selected by the editors (pp. 69-87).

Tomas A. Lipinski and Andrea Copeland, Look before you License: The Use of Public Sharing Websites in building Patron Initiated Public Library Repositories, 42(4) PRESERVATION, DIGITAL TECHNOLOGY & CULTURE, at 174, November, 2013 (Vol. 42, No. 3, pp. 174-198). ISSN (Online) 2195-2965, ISSN (Print) 2195-2957, DOI: [10.1515/pdte-2013-0028](https://doi.org/10.1515/pdte-2013-0028).

Joachim Schöpfel and Tomas A. Lipinski, Legal Aspects of Grey Literature, THE GREY JOURNAL: INTERNATIONAL JOURNAL ON GREY LITERATURE (Managing Change in Grey Literature), Autumn, 2012 (Issue 8, No. 3) (pp. 137-153) (ISSN 1574-1796, available at <http://www.greynet.org/thegreyjournal/previousissues.html>).

Tomas A. Lipinsk, Green Light for Grey Literature? Orphan Works, Web-Archiving and other Digitization Initiative—Recent Developments in U.S. Copyright Law and Policy, THE GREY JOURNAL: AN INTERNATIONAL JOURNAL ON GREY LITERATURE, Spring 2009, at 11 (11-21), also available at <http://www.greynet.org/thegreyjournal.html> (ISSN 1574-1796).

occurrence.” Milwaukee proposed Ordinance § 116-7(1). The ordinance prohibits such memorials “on or within the boundaries of any public street, sidewalk or walkway for more than 14 days from the date of a fatal accident or occurrence.” Milwaukee proposed Ordinance § 116-7(2). Here the triggering date is not when the memorial was first erected but from the date of the accident the memorial is intended to commemorate. The Milwaukee ordinance requires the commissioner of public works to “dismantle and discard a roadside memorial left on or within the boundaries of any public street, sidewalk or walkway after 30 days from the date of a fatal accident or occurrence.” Milwaukee proposed Ordinance § 116-7(3). City of Milwaukee, Legislative Reference Bureau File Number: 050770 (March 23, 2006).

Milwaukee City Attorney Grant F. Langley indicated that a municipality could not allow one type of sign or message or memorial but not others. This could constitute impermissible viewpoint discrimination under the First Amendment of the U.S. Constitution. Reasonable time, place and manner restrictions that do not target a specific message or speaker are allowed. Duration, e.g., 30 or 90 days, location, e.g., on the curbside but not the medium strip, not higher than 24 inches so as not to obstruct a driver’s view, are likely reasonable time, place and manner restrictions. Memorandum Re: CC File 050770/An Ordinance Relating to Roadside Memorials, Grant F. Lanley (October 12, 2005). In other words, if roadside memorials and messages could be erected grieving family members then other memorials and messages would also be allowed touting or promoting any idea, perspective or opinion on similar topics or on any topic.

In Milwaukee a substitute a resolution recognized that “citizens [may] grieve by placing a memorial, at the site of a fatal accident or occurrence within the boundaries of the public street, sidewalk or walkway” and noted that the Wisconsin Department of Transportation already implemented a policy that removed memorials that “interfere[d] with roadway safety, impact the free flow of traffic or fall into disrepair.” The resolution also indicated the safety hazard resulting from the interference of “pedestrian and motor vehicle traffic through illegal loitering and littering within the boundaries of the public street, sidewalk or walkway.” Finally the resolution directed the Milwaukee Department of Public Works to “develop a policy regarding roadside memorials” that would provide for the “removal of all obstructions that are in violation of current ordinances, including roadside memorials, no later than 30 days of the Department of Public Works being notified of their existence.” The Milwaukee Common Council adopted the Resolution on March 23, 2006 and the Mayor Tom Barrett signed the ordinance in law seven days later. City of Milwaukee, Legislative Reference Bureau File Number: 051413.

City of Milwaukee Legislative Reference Bureau Memo entitled “Legislation relating to roadside memorials in various communities” and dated September 23, 2005, indicated that at that time cities in Massachusetts (Leominster: 90 day memorial or permanent traffic safety sign requested with 6 months), Illinois (Chicago: case-by case dismantling), California (Oakland: dismantling of roadside memorials with 24 hour) and Maryland (Poolesville). Other states allow some form of memorial: Colorado (removal of uniform sign after three years), New Jersey (removal of impromptu memorial after 10 days), Alaska (allows impromptu memorials), Idaho (uniform gold stars and memorials limited by size and weight), and West Virginia (registration of permanent memorials). Legislation Relating to Roadside Memorials in Various Communities, City of Milwaukee Legislative Reference Bureau Memo (September 23, 2005).

Official Documents of State and Local Governments and Geographic Data

Considering the documents sourced from government sources and reproduced on the various social media or cycling websites issues relating to the copyright status emerge. Some countries legislate that such documentary record of the government at any level are part of the public domain. Such works are outside the subject matter of copyright and reside in the public domain. [Vytautas Mizaras, 2 Copyright Throughout the World § 24:13 (Database updated November 2015) (§ 24:13. Works excluded from protection: “Pursuant to Article 5 of the Copyright Law, the subject matter of copyright protection does not include the following: (1) legal acts, official documents, and texts of administrative, legal, or regulative nature (decisions, rulings, regulations, norms, territorial planning, and other official documents), as well as their official translations; (2) official state symbols and insignia (flags, coat-of-arms, anthems, banknote designs, and other state

symbols and insignia), the protection of which is regulated by other legal acts; (3) officially registered drafts of legal acts; (4) regular information reports on events; and (5) folklore.”]

While works of the federal government are designated by statute to reside outside the subject matter of copyright [“Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.” 17 U.S.C.A. § 105.], it is the courts that have made pronouncements expanding the scope of the public domain into state court, legislative and regulatory documents. “Statutes are in the public domain and cannot be copyrighted.” *Wheaton v. Peters*, 33 U.S. 591 (8 Peters) (1834); “It is well settled that judicial opinions and statutes are in the public domain and are not subject to copyright.” *Veeck v. Southern Bldg. Code Congress Intern. Inc.*, 241 F.3d 398, 412 (5th Cir. 2001).

Public policy dictates that the documentary building blocks of law and government; its cases, statutes, regulations, etc. are in the public domain. The rationale for this is as follows: “two considerations influence whether a particular work may be properly deemed in the public domain: (1) whether the entity or individual who created the work needs an economic incentive to create or has a proprietary interest in creating the work and (2) whether the public needs notice of this particular work to have notice of the law.” *County of Suffolk, New York v. First American Real Estate Solutions*, 261 F.3d 179, 194 (2d Cir. 2001). In the case study before us the crime data are not protected by copyright as purely factual content unless selected, coordinated or arranged in some creative manner as a compilation copyright. It could be argued that the remaining documentary record of city reports, planning memorandum, meeting minutes of governmental bodies are therefore in the public domain. Both criteria are satisfied. The governmental bodies creating the documents will continue to produce these with without any economic incentive to do so or not. Second, reports, planning documents, agendas and official minutes serve to notify the public of matters of concern.

General route and map information would not appear to fall into this cluster of works.

The determining factor would be whether “the existence and content of Suffolk County’s maps are purely dictated by law, [then] it is likely that Suffolk County needed no additional incentive to create them. As we have indicated that Suffolk County is entitled to present evidence whether its tax maps are original.” *County of Suffolk, New York v. First American Real Estate Solutions*, 261 F.3d 179, 188 (2d Cir. 2001). Compare discussion of geographic data from two other states. The Seventh Circuit in a case involving tax assessment data from Wisconsin assumed that building block of tax assessment mapping, the “address, owner’s name, the age of the property, its assessed valuation, the number and type of rooms, and so forth... [about which] municipalities collect such data in order to assess the value of the properties for property-tax purposes” were a part of the public domain beyond the protection of the copyright tlaw. *Assessment Technologies of WI, LLC. v. Wiredata, Inc.*, 350 F.3d 640, 642 (7th Cir. 2003): “The copyright case seeks to block WIREdata from obtaining noncopyrighted data. AT claims that the data can’t be extracted without infringement of its copyright. The copyright is of a compilation format, and the general issue that the appeal presents is the right of the owner of such a copyright to prevent his customers (that is, the copyright licensees) from disclosing the compiled data even if the data are in the public domain.” In another case it was assumed that similar mapping data was in the public domain: “For public safety reasons, it is critical that geospatial information such as the GIS Basemap stay out of the public domain... The actual location of the Hetch Hetchy water lines are generally known, but not provided in any detail for obvious reasons—to minimize the threat of terrorist attack on the water system... The exact location of Hetch Hetchy water lines is an integral part of the GIS Basemap and not easily segregable.” *County of Santa Clara v. Superior Court*, 89 Cal.Rptr.3d 374, 394 (Cal. App. Dist. 6, 2009).

The route and map information in the current case study would face a similar fate as long as no creative elements were present. As one court observed: “Thus, Suffolk County may own a copyright under the Copyright Act. The question remains whether Suffolk County has sufficiently alleged that it possesses a valid copyright in its tax maps.” *County of Suffolk, New York v. First American Real Estate Solutions*, 261 F.3d 179, 188 (2d Cir. 2001).

The question would be whether “the overall manner in which [the plaintiff] selected, coordinated, and arranged the expressive elements in its map, including color, to depict the map’s factual content.” *Streetwise Maps, Inc. v. Vandam, Inc.*, 159 F.3d 739, 748 (2d Cir. 1998). Without further

examination of each map or geospatial dataset it would be difficult to generalize whether the compilation of such crosses the low level of creativity required in its selection, coordination and arrangement to qualify for copyright protection. The data itself remains in the public domain.

The Right of Privacy: Intrusion in a Public Place?

“Indiana recognizes four separate forms of the tort of invasion of privacy: (1) appropriation; (2) intrusion; (3) public disclosure of private facts; and (4) false light in the public eye. *Cullison v. Medley*, 570 N.E.2d 27, 31 (Ind. 1991). Whether there can be an “invasion” of privacy in a public place depends on the circumstances. For example, in *Wilkins v. National Broadcasting Co., Inc.*, 84 Cal.Rptr.2d 329, 336-337 (Cal.App. 1999), the court concluded that there was no intrusion when two defendant reporters posing as potential investors met with company representatives and surreptitiously recorded the conversation. The reporters brought two others with them, and the representatives did not question the two guests’ presence. The representatives, reporters, and guests sat at table close to other tables on a crowded restaurant patio. The table was not secluded and the representatives spoke freely in sales fever pitch, even when waiters came by. In other words the circumstances revealed that the subjects did not consider the conversations to be private, moreover admitting that they provided the same pitch to hundreds of other potential investors. The court concluded: “Pursuant to our review of the videotape and consideration of the admissions of Wilkins and Scott, we conclude that Wilkins and Scott had no objective expectation of privacy in their business lunch meeting.” *Wilkins v. National Broadcasting Co., Inc.*, 84 Cal.Rptr.2d 329, 336 (Cal. App. 1999). This is in contrast to an example where a woman walks over an exhaust grate and a gust of air blows her skirt to reveal her underwear and someone takes a photograph. (See, Restatement (Second) of Torts, 1977, § 652B, illustration 7) However, recording intimacies that would in the normal course of observation be perceptible would not. For example, when two individuals are observed and recorded in the throes of a passionate kiss while seated on a bench located on a pathway in a public park or the perhaps less risqué but more famous example of a photograph of then Lady Diana holding one of her nursery charges against a sun-lit background so that the outline of her legs and underwear were viewable through fabric of her sheer dress. Recording the observations of the apparent would not appear to be the sort of unexpected or unreasonable invasion the tort contemplates. Some commentators however, see less distinction: “If an action, no matter how embarrassing, is recorded or photographed in public, there can be no intrusion to seclusion because there are usually no indicia of privacy for anything that takes place in public.” L.J. Kutten and Frederic M. Wilf, 4 Computer Software Protection-Liability-Law-Forms § 19.5 (2005) (Intrusion to Seclusion) (October 2016 Update), citing *Gautier v. Pro-Fooball, Inc.*, 107 N.E.2d 485 (N.Y. 1952). The resolution may depend on what measure the subject to protect their privacy: wrapping a towel around oneself while changing out of biking gear into street clothes but the subject is disrobed by an unexpected gust of wind that is captured in image or video.

It would also seem that based on this case law and discussion found in the Restatement (Second) of Torts even if a subset of the public were self-selected because of list, board, blog or chat subject matter or through password subscription, comments made by forum participants would still appear to be made in “public view” without any sense of seclusion. Given the nature of online forums if participants desire a conversation to be private, then person-to-person email, private chat or some other means of secure communication should be used. In the author’s opinion a court would not conclude a comment lifted from a posting on a public or open forum such as a list, board, blog or chat is cloaked with that expectation nor would its publication in another venue be an intrusion.

The Right of Privacy: Appropriation

A second privacy right is appropriation. When another “appropriates to his own use or benefit the name or likeness of another” an invasion of privacy occurs. (Restatement (Second) of Torts, 1977, § 652C, “Appropriation of Name or Likeness”) “Although the protection of his personal feelings against mental distress is an important factor leading to a recognition of the rule, the right created by it is in the nature of a property right.” (Restatement (Second) of Torts, 1977, § 652C, comment a) The privacy right of appropriation, or to be more accurate to control the appropriation of one’s name or likeness is related to the property right of publicity that is often associated with celebrities, public figures or other famous people. Black’s Law Dictionary defines a right of publicity

as “[t]he right to control the use of one’s own name, picture, or likeness and to prevent another from using it for commercial benefit without one’s consent.”

Though a property right, the use need not be commercial or pecuniary. “It applies also when the defendant makes use of the plaintiff’s name or likeness for his own purposes and benefit, even though the use is not a commercial one, and even though the benefit sought to be obtained is not a pecuniary one.” (Restatement (Second) of Torts, 1977, § 652C, comment b) However, the advantage must come not from the mere use of the name, i.e., identifying the speaker of a particular comment, but from the adoption of the name or likeness for some benefit. In the present discussion the appropriation is made by the researcher for his or her personal gain: “the defendant must have appropriated to his own use or benefit the reputation, prestige, social or commercial standing, public interest or other values of the plaintiff’s name or likeness.” (Restatement (Second) of Torts, 1977, § 652C, comment c)

The difference is not found in the nature of person nor in the events that trigger the right of privacy appropriation versus a right of publicity, as the same event can trigger either. Rather the difference is found in the nature of the harm each victim experiences and the legal rights providing remedy. The appropriation that brings injury to the person, is subjective (though measureable as well in dollars a cents) whereas the right of publicity represents a loss of commercially exploitable opportunities in plaintiff’s name, likeness or appearance. The former right is a right of personhood while the latter is a right based in property. “[T]he invasion of privacy by appropriation of name or likeness is a personal right, while the right of publicity more closely resembles a property right created to protect commercial value.” *Rose v. Triple Crown Nutrition, Inc.*, 2007 WL 707348 (M.D. Pa. 2007). The cyclists whose images or likeness is appropriated may suffer either harm but more like a privacy appropriation claim would apply to individuals unfamiliar with the use of their image or persona in a commercial setting.

In online settings appropriation may also occur. But such claims are difficult to make in the ubiquitous nature of online settings: “The plaintiff, Beverly Stayart (“Stayart”), conducted search engine queries with her own name as a search term, and she didn’t like the results. Her queries produced links to *pornographic websites, online pharmacies promoting sexual dysfunction drugs, and an adult-oriented online dating service*. Stayart alleges that the defendants, Yahoo! Inc. (“Yahoo!”), Overture Services, Inc. (“Overture”), and Various, Inc. (“Various”), knowingly and intentionally used her name on the internet without authorization. *Stayart v. Yahoo! Inc.*, 651 F.Supp.2d 873 (E.D. Wis. 2009), affirmed 623 F.3d 436 (7th Cir. 2010). The plaintiff was unsuccessful. All claims were dismissed. Such uses in social media sites might likewise be deemed incidental: “The fact that the defendant is engaged in the business of publication, for example of a newspaper, out of which he makes or seeks to make a profit, is not enough to make the incidental publication a commercial use of the name or likeness. Thus a newspaper, although it is not a philanthropic institution, does not become liable under the rule stated in this Section to every person whose name or likeness it publishes.” (Restatement (Second) of Torts, 1977, § 652C, comment d) Likewise the mere mention of a subject’s name or known pseudonym or likeness in a newspaper, newsletter, or social media website would not appear to be an “appropriation” of the subject’s name for the authoring entity’s “purpose and benefit” such that it would constitute an invasion of privacy.

Conclusion

The main ethical and legal issues identified in this paper will inform the design of the community archive and the utilization of technology during its construction. As ethical considerations are less clear than legal ones, the co-creation of the archive with community members will help guide ethical decision-making about data collection, analysis, and preservation. This will be especially important when dealing with personal data or content that is contributed by citizens.

Appendix

Definitions from 17 U.S.C. § 101:

“Audiovisual works” are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

A “compilation” is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term “compilation” includes collective works.

“Literary works” are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.

“Pictorial, graphic, and sculptural” works include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

- Copyright
- Licensing
- RTPM : Regulating Ghost Bikes
- Public Domain : State and Local Governments
- Privacy Rights