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To: European Commission

Re: Consultation on Digital Cultural
Heritage and Recommendation
2011/711/EU

Submission of The Centre for Science, Culture and the Law at the University of Exeter

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1. Introduction and Summary

We write to welcome and support the consultation of the European Commission on the [Commission Recommendation of 27 October 2011 on the digitisation and online accessibility of cultural material and digital preservation](#) (2011/711/EU, hereafter '2011 Recommendation'). The 2011 Recommendation remains an important policy instrument for promoting digitisation, online access and the digital preservation of cultural heritage materials. As such, this consultation brings a new strategic direction to the Recommendation's future regarding digitisation and digital transformation of EU cultural heritage.

Since its publication, various obstacles related to interpretations of copyright law and limited funding for the cultural sector have impeded the 2011 Recommendation's implementation. The EU Commission's Progress Reports on the Recommendation's implementation have documented these and other obstacles in the following years in detail.¹ This consultation comes at a crucial moment to coincide with new EU legal developments impacting how rights arise during the reproduction of public domain works, and COVID-19 economic developments impacting how the cultural sector navigates

* Andrea Wallace and Mathilde Pavis, 'SCuLE Submission for the EU Consultation on Digital Cultural Heritage,' (14 September 2019) CC BY 4.0.

¹ 'Progress Report (2011-2013) on the Implementation of Commission Recommendation 2011/711/EU on the Digitisation and Online Accessibility of Cultural Material and Digital Preservation' (European Commission 2014); 'Progress Report (2013-2015) on the Implementation of Commission Recommendation 2011/711/EU on the Digitisation and Online Accessibility of Cultural Material and Digital Preservation' (European Commission 2016); 'Progress Report (2015-2017) on the Implementation of Commission Recommendation 2011/711/EU on the Digitisation and Online Accessibility of Cultural Material and Digital Preservation' (European Commission 2018).

increased financial pressures. A revised Recommendation must address these obstacles and new challenges that are likely to arise.

With this in mind, we identify three areas where the 2011 Recommendation and its underpinning strategy can be expanded:

- 1. Clarifying the Recommendation's scope and obligations** on media generated during the reproduction of public domain cultural heritage, particularly on matters of **open access, IPR management and licensing**.
- 2. Limiting the Recommendation's scope and obligations** on digitisation and open access **in relation to collections acquired during and after periods of colonisation**, forced occupation or conquest, which may belong to other countries, communities or individuals.
- 3. Encouraging the Recommendation's implementation** by Member States and the cultural sector **by developing the necessary infrastructure to provide sustainable financial, practical and legal support** for digitisation and digital transformation processes.

We direct our response to these areas and the revisions necessary to ensure public domain materials remain in the public domain following digitisation. We begin by scoping various obstacles to the 2011 Recommendation's implementation. We then outline the above areas for the Commission's consideration to ensure an expanded future for the Recommendation and a cultural sector better equipped to align with its goals.

2. Scoping Obstacles to the Recommendation's Implementation

Despite the 2011 Recommendation's ambition for public domain content to remain in the public domain once digitised, **inconsistent copyright practices and limited funding across Member States for the cultural sector have unnecessarily limited access and reuse of public domain digital collections**.

Cultural heritage collections, buildings, monuments, and sites are highly attractive sources for new revenue generation, merchandising and commercialisation opportunities by both private and public users. But IPR claims made in the non-original and basic outputs generated during digitisation reduces the potential new knowledge and creative works that can be generated by unencumbered access. This positions the vast amount of public domain cultural heritage materials in a unique and tense relationship with the cultural sector's public missions and operational demands.

The 2011 Recommendation and more recent 2019 Directives on *Copyright and Related Rights in the Digital Single Market* and *Open Data and the Re-use of Public Sector Information* respond to this dilemma.² At the heart of these legal measures is a goal of ensuring **a level playing field to innovate around the public domain** for the cultural sector who stewards these materials, the private companies who have the bargaining power to

² Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (17 April 2019) OJ L 130/92; Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information (recast) (26 June 2019) OJ L 172/56.

access and reuse these materials, and the general public who must rely on digitisation, digital access and open licensing to undertake the same activities.

Many of the challenges to implementing the 2011 Recommendation and Directives arise from the **serious financial pressures felt everywhere** by cultural heritage institutions and organisations in the EU. Since the economic fallout of 2008, our collective cultural sector has been operating within ever-declining budgets while technology costs, digit remits and obligations to the public expand, and they have been doing so without adequate support. Digitisation programmes are extremely time, resource and expertise intensive. The decision to align with the 2011 Recommendation, cease licensing practices and forego revenue (however small) can be an extremely difficult one to make. As a result, IPR claims in digitised public domain materials survive almost a decade after the 2011 Recommendation.

A new Recommendation must:

- Be accompanied **by the necessary investments to deter the cultural sector from licensing basic and non-original reproduction media to generate revenue**. This is especially important in light of the financial pressures of COVID-19;
- Consider imposing **open access obligations for initiatives funded by public support** to release basic reproduction media as CC BY and non-original reproduction media as CC0;
- Close the gaps left by the 2019 Copyright in the Digital Single Market Directive by encouraging Member States and the cultural sector to **apply the premise of Article 14 beyond “works of visual art” in the public domain**.

Ongoing IPR Legal Developments and Gaps Impacting Open Access

This consultation is occurring during a crucial phase of EU legal developments due to Member States’ ongoing implementation of Article 14 of the Copyright in the Digital Single Market Directive (CDSM Directive) and various provisions and exceptions applying to cultural institutions in the Open Data Directive (OD Directive).³ Reinforcing and expanding the 2011 Recommendation’s position on digitised public domain materials and other media generated by the cultural sector will also serve the successful implementation of these Directives and the realisation of their goals.

Article 14 of the CDSM Directive will prohibit anyone in the EU from claiming certain IPR in any material generated during the reproduction of public domain works, including emerging and future media formats. **This welcome provision applies to cultural institutions, private companies, and private individuals alike**. In addition, the OD Directive requires cultural institutions to make reproduction materials and other media available for public reuse. Together, these measures will create a new EU digital market for open access digital materials that can be reused and harvested for various innovative purposes.

Notably, Article 14 applies to only “works of visual art” and lacks the teeth necessary for public enforcement. Moreover, the text is circular. Its immediate effect is to prohibit the small number of Member States who recognise related rights in photographs of public

³ See Andrea Wallace and Ellen Euler, ‘Revisiting Access to Cultural Heritage in the Public Domain: EU and International Developments’ [2020] 51(7) International Review of Intellectual Property and Competition Law 823-855, <https://link.springer.com/article/10.1007/s40319-020-00961-8>.

domain visual artworks from doing so in the future.⁴ Copyright can be claimed so long as the media produced meets the harmonised EU threshold of originality, the “author’s own intellectual creation”. Many cultural institutions and commercial photo image libraries have long taken the position that this threshold is met during digital reproduction.

Whether rights arise has been subject to much contention between experts, scholars, courts, and heritage communities of practice.⁵ In the cultural sector, many take the position that copyright is an operational decision to be taken by each institution, which is informed by their own interpretation of copyright law. This results in **a majority of cultural institutions and organisations claiming copyright in digital reproduction media for revenue generation purposes**. This opinion is primarily practice-led and is not supported by leading EU copyright academics.⁶

Nevertheless, Article 14 should introduce greater consistency to these practices.⁷ **Strengthening the 2011 Recommendation’s position is therefore of significant importance to ensure Article 14 has its intended impact and expands to other creative works in the public domain**. Otherwise, IPR claims in non-original reproductions and other media generated during the reproduction of public domain works will continue mediate access, reuse and engagement. Left unchecked, this will result in damage to public welfare, cultural diversity and memory, and knowledge generation in an increasingly networked environment.⁸

Urgency in Light of COVID-19

This consultation is also occurring during a critical time for the heritage sector, which is unlikely to end soon. Studies by UNESCO, ICOM and NEMO have detailed the dire economic impact of COVID-19 on an already financially-stressed sector.⁹ UNESCO estimates more than 10% of museums worldwide may close.

⁴ For a list of these Member States, see Thomas Margoni, ‘The Digitisation of Cultural Heritage: Originality, Derivative Works and (Non) Original Photographs’ (2014) Institute for Information Law (IViR) ID 2573104.

⁵ Andrea Wallace and Ellen Euler, ‘Revisiting Access to Cultural Heritage in the Public Domain: EU and International Developments’ [2020] 51(7) International Review of Intellectual Property and Competition Law 823-855.

⁶ ‘Comment of the European Copyright Society on the Implementation of Art. 14 of the Directive (EU) 2019/790 on Copyright in the Digital Single Market (26 April 2020), available at https://europeancopyrightsocietydotorg.files.wordpress.com/2020/04/ecs_cds_m_implementation_article_14_final.pdf.

⁷ It is important to note that other jurisdiction-specific obligations may need addressing (eg, *domaine public payant* in Italy). See also the Institut national d’histoire de l’art 2018 Report by Martine Denoyelle, Katie Durand, Johanna Daniel, Elli Douikaridou-Ramamantani, “Image rights, art history and society: A report on the systems regulating the circulation of images of works of art and their impact on scholarship, teaching and the visibility of French public collections.”

⁸ Fiona Macmillan, ‘The Dysfunctional Relationship Between Copyright and Cultural Diversity’ [2007] *Quaderns Del CAC* 101.

⁹ ‘Museums around the World in the Face of COVID-19’ (UNESCO 2020) <https://unesdoc.unesco.org/ark:/48223/pf0000373530>. See also ‘Museums, Museum Professionals and COVID-19’ (ICOM 2020). <https://icom.museum/wp-content/uploads/2020/05/Report-Museums-and-COVID-19.pdf>; ‘Survey on the Impact of the COVID-19 Situation on Museums in Europe’ (Network of European Museums Organisations 2020),

Meanwhile, cultural institutions have expanded programs to digitally engage with audiences indefinitely homebound. These same studies reveal cultural institutions with digital collections and programmes have been able to adapt most easily, redirecting labour to data management and other digital activities while the physical institution remains closed. **Lockdown has thus exacerbated the digital divide for cultural institutions without existing digital resources, expertise, and presence.**

Open access programs may similarly stall as priorities shift to operational survival. At least one national museum has recalled its public domain policy in recent months, though reasons have been attributed to the general desire to license images again rather than as a direct response to COVID-19.¹⁰ This decision was taken in spite of the research consistently showing the economic inefficiencies of licensing business models, which overwhelmingly operate at a cost to most cultural institutions when comparing the licensing overhead to the amount of revenue it brings in.¹¹ These licensing business models are now at further risk due to Article 14.

This consultation thus comes at a time of strategic importance for the cultural sector in the EU, and globally. **A revised Recommendation accompanied by the necessary infrastructure to support its implementation will secure the EU's position as a leader in digitisation and digital transformation in the global cultural sector.**

3. Clarifying the Recommendation's Scope and Substance

There are still clear differences among Member States' approaches to implementation of the 2011 Recommendation, as well as among the cultural institutions that sit within a given Member State.

The **prevailing approach is to claim copyright in faithful reproductions of public domain works.** So far, at least 158 EU cultural institutions, organisations and universities have

https://www.nemo.org/fileadmin/Dateien/public/NEMO_documents/NEMO_Corona_Survey_Results_6_4_20.pdf.

¹⁰ The National Museum in Prague quietly withdrew its public domain policy in 2020. This change is viewable by accessing a June 2020 version of Douglas McCarthy and Andrea Wallace, 'Survey of GLAM Open Access Policy and Practice' (2018), <http://bit.ly/OpenGLAMsurvey>.

¹¹ Simon Tanner, 'Reproduction Charging Models & Rights Policy for Digital Images in American Art Museums: A Mellon Foundation Funded Study' (2004) 40

http://www.kdcs.kcl.ac.uk/fileadmin/documents/USMuseum_SimonTanner.pdf; Jean Dryden, 'Copyfraud or Legitimate Concerns? Controlling Further Uses of Online Archival Holdings' (2011) 74 *The American Archivist* 522; Kristin Kelly, 'Images of Works of Art in Museum Collections: The Experience of Open Access' (Council on Library and Information Resources 2013) 4–5; Joris Pekel, 'Making a Big Impact on a Small Budget - How the LSH Museums Shared Their Collection with the World' (Europeana 2015) 9, <http://pro.europeana.eu/blogpost/making-a-big-impact-on-a-small-budget-how-the-lsh-museums-share>; Michelle Light, 'Controlling Goods or Promoting the Public Good: Choices for Special Collections in the Marketplace' (2015) 16 *RBM: A Journal of Rare Books, Manuscripts, and Cultural Heritage* 48; Antje Schmidt, 'MKG Collection Online: The Potential of Open Museum Collections' (2017) 7 *HJK* 25, 31–32; Foteini Valeonti and others, 'Reaping the Benefits of Digitisation: Pilot Study Exploring Revenue Generation from Digitised Collections through Technological Innovation' (2018) 57, <https://ewic.bcs.org/content/ConWebDoc/59616>.

aligned their policies with the 2011 Recommendation.¹² An additional 386 EU cultural institutions, organisations and universities have released collections under open licenses on a case-by-case basis.¹³ Even so, many of these approaches are not legally enforceable. One example of this is when CC BY is used to release two-dimensional digital reproductions of two-dimensional public domain artworks, given a valid copyright may not arise to justify the application of an open license.

Cultural institutions are also exempted from certain provisions of the Open Data Directive related to original and non-original materials, such as obligations to release high-value datasets and limits placed on private partnerships. There is also **demonstrated disagreement across the cultural sector as to what digital activity and media qualifies as “open” and whether that understanding should require allowing commercial reuse.** The text of the Open Data Directive provides little guidance, as it requires public bodies to allow use for “commercial or non-commercial purposes”.¹⁴

Accordingly, **clear statements are necessary on the appropriateness of licensing and IPR management for digitised public domain materials,** how a new Recommendation should inform Member States’ and cultural institutions’ implementation of the Open Data Directive, and the standards for “open access” that should be used to convey reuse restrictions according to cross-border users. This is crucial for reducing risk and providing legal certainty to users accessing Europe’s digital cultural heritage online, both within and without the EU.

A new Recommendation must:

- Clearly state that **licenses are inappropriate for materials that are non-original** under harmonised EU copyright law;
- Encourage **use of CCO** over the Public Domain Mark (or equivalents) **for cross-border reuse;**
- Encourage **use of CCO** over CC BY **for data and metadata** to facilitate their integration with key platforms and aggregators (eg, Wikidata and Europeana);
- Discourage licensing structures modelled after opaque private sector practices; and instead,
- Encourage **service fees and the publication of transparent fee models** in line with the OD Directive and a reasonable return on investment, in cases when charging is necessary;
- Encourage **more nuanced approaches to (legitimate) IPR commercialisation,** especially when private partners are involved. Any periods of exclusivity should be avoided, or set to a period of no more than two years;
- Encourage **the release of high-resolution images, rich data and metadata.** Obligations to release raw data to the public with embedded metadata should be

¹² This number includes all Galleries, Libraries, Archives, Museums and Universities in EU Member States, and the UK, that release “All eligible data” under open access frameworks. McCarthy and Wallace (n 10).

¹³ This number includes all Galleries, Libraries, Archives, Museums and Universities in EU Member States, and the UK, that release “Some eligible data” under open access frameworks. *ibid.*

¹⁴ It is worth noting translations of this may vary. For example, the German Directive text translates this phrase to “commercial and non-commercial purposes” which introduces new inconsistencies to harmonisation.

standard where an initiative produces digital reproductions during more complex digital innovations;

- Discourage setting conditions or contract-based restrictions around the reuse of materials, unless the restrictions are in the public interest (eg, personal data). This should extend to contractual obligations to acknowledge the source, especially where there is no intention to legally enforce the contractual provision. Instead, **best practice citation standards should be advised**;
- Align “open access” with international initiatives that qualify materials according to their commercial reusability (eg, Budapest, Bethesda and Berlin open access standards);
- Centre **users and legal certainty** in approaches to access and reuse policies;
- Encourage use of “not open” to describe various legitimate reuse restrictions around in-copyright materials, as well as culturally sensitive materials (where it is appropriate to make them available online).

Licensing and IPR Management

Under harmonised EU copyright law, **no new IPR should arise in non-original reproduction media**. Accordingly, the application of certain labels and licenses to such media is inappropriate where such use requires a valid copyright.

The majority of cultural institutions in the EU use [Creative Commons](#) licenses to release materials via open frameworks. However, the application of Creative Commons’ open licenses, like CC BY and CC BY-SA, as well as closed licenses, like CC BY-ND,¹⁵ CC BY-NC, CC BY-NC-SA, and CC BY-NC-ND, are inappropriate if no copyright arises in the media. This comment is also relevant to various labels, such as [Rights Statements](#) labels meant to convey copyright in the digital layer of the object (eg, In Copyright).

By contrast, many EU cultural institutions use the open tool CCO 1.0 Universal Public Domain Dedication to release digital materials. **For legal certainty on cross-border reuse, CCO is the best tool to apply**. This is because CCO recognises the uncertainty between different copyright (and public domain¹⁶) regimes and ensures users that if any IPR or other rights arise in the jurisdiction of use, the rightsholder has waived them or agrees to a fallback license. For these reasons, Creative Commons recommends the CCO Public

¹⁵ CC BY-ND is not open according to the Budapest Open Access Initiative and its 2012 recommendations. This is because the ND (No-Derivatives) restriction will prevent modification, translations, adaptations, and other useful activities, including how subsequent research might be shared. ‘Ten Years on from the Budapest Open Access Initiative: Setting the Default to Open’ (Budapest Open Access Initiative, 2012), <https://www.budapestopenaccessinitiative.org/boai-10-recommendations>; Brigitte Vézina, ‘Why Sharing Academic Publications Under “No Derivatives” Licenses Is Misguided’ (Creative Commons, 21 April 2020), <https://creativecommons.org/2020/04/21/academic-publications-under-no-derivatives-licenses-is-misguided>.

¹⁶ Christina Angelopoulos, ‘The Myth of European Term Harmonisation: 27 Public Domains for the 27 Member States’ (Social Science Research Network 2012) SSRN Scholarly Paper ID 2145862, <http://papers.ssrn.com/abstract=2145862>.

Domain dedication for the reproduction media of public domain works over the Public Domain Mark.¹⁷

Standardisation around the application of licenses and labels is also important given the demonstrated confusion around the layers of rights that might arise in a given digital reproduction and how these layers are communicated (or not) to users.¹⁸ Licenses are appropriate only when IPR arises, and can only be applied by (or with the express permission of) the rightsholder. Otherwise, labels should be used (eg, Rights Statements).

Finally, data and metadata should be released as CCO rather than CC BY. The CC BY legal obligation to attribute the data can pose significant issues when aggregated and combined with other datasets. For many, this is technically impossible. Accordingly, CC BY and CC BY-SA will chill or even prevent reuse of data. Instead, the cultural sector might educate users about citation best practices in line with public missions and release data via the CCO tool.

A revised Recommendation should reinforce the notion that licensing models are not appropriate forms of commercialisation if no valid copyright arises in reproduction media. This does not mean other forms of revenue generation around reproduction media are not possible. Cultural institutions may **charge service fees for digitisation or provision of a high-quality digital reproduction and continue to use images in merchandising and commercial partnerships** that generate income. To support this, reasonable service fee business models and more nuanced approaches to IPR and public domain collections management should be encouraged and published, especially for initiatives that involve third-party partnerships.¹⁹

How the Recommendation aligns with the Open Data Directive

The 2011 Recommendation and this consultation are directly relevant to the legislative intent behind the 2019 Open Data and the Re-use of Public Sector Information Directive, which requires Member States to **encourage public sector bodies to produce and disseminate data based on the “principle of ‘open by design and by default.’”**²⁰ At the same time, the OD Directive includes various exceptions to this principle to enable cultural institutions to generate revenue in support of operations. These include:

- **Article 6** exempts institutions from providing documents for free and permits setting fees above marginal costs to support operations. **Recital 38** suggests looking for guidance in the private sector, where fee structures are less transparent and based on scarcity, when calculating a reasonable return on investment while setting those fees.
- **Article 12** recognises the importance of private partnerships and the need to grant exclusive rights to digitisation, noting a certain period of exclusivity might be

¹⁷ Jane Park, 'For Faithful Digital Reproductions of Public Domain Works Use CCO', <https://creativecommons.org/2015/01/23/for-faithful-digital-reproductions-of-public-domain-works-use-cc0/>.

¹⁸ Judith Blijden, 'Research Paper: The Accuracy of Rights Statements on Europeana.Eu' (Kennisland, 5 February 2018) <<https://www.kl.nl/en/publications/research-paper-the-accuracy-of-rights-statements-on-europeana-eu/>> accessed 19 April 2020.

¹⁹ For example, see the Bridgeman Images announcement of an agreement with the Italian Ministry of Culture to become the exclusive international picture agency for all 439 state-owned museums, <https://perma.cc/9EVQ-RKPV>.

²⁰ Directive 2019/1024, Article 5(2).

necessary to recoup investment. **Recital 49** recommends this period should “be limited to as short a time as possible *in order to comply with the principle that public domain material should stay in the public domain once it is digitised.*” Per these agreements, cultural institutions must receive free copies of the materials, which require publication upon the agreement’s conclusion. **Article 12(3)** suggests a period of no more than 10 years. Here, it is worth noting the 2011 Recommendation is not yet ten years old, and advancements in technology, digitisation formats and standards during this decade have already rendered older materials difficult to reuse or not sufficiently operable for certain purposes under today’s standards. In addition, the 2011 Recommendation sets this period at no longer than 7 years.

- **Article 14(4)** exempts institutions from making high-value datasets available free of charge. This could reinforce incentives to release lower-quality datasets (eg, images and/or metadata) while commercialising high-value datasets. No obligation exists to make raw data available to the general public, who might clean or edit the data for reuse themselves.
- **Recital 44** discourages setting conditions or restrictions around the reuse of materials, unless the public interest justifies the parameters, such as when the documents include personal data or should acknowledge the source. If so, any conditions must be “objective, proportionate and non-discriminatory” and limited to the greatest extent possible.

These **exceptions can frustrate many of the 2011 and new Recommendation’s goals** by enabling stewards and digitisers of our public domain cultural heritage to reserve valuable primary materials generated during the digitisation for their own private commercialisation purposes. Understandably, these have been provided to fill the gaps created by more than a decade of insufficient government funding for the heritage sector. Accordingly, **adequate and sustainable financial support with open access obligations is crucial to realising the Recommendation’s goals**, both in its current form and if revised to include new and expanded obligations for cultural institutions. In addition, any periods of exclusivity should be reduced from suggestions of no more than 10 or 7 years to, for example, no more than 2 years from publication.²¹ Finally, fee models for access to data and documents should resemble service fees rather than copyright licensing fees, which are opaque and do not represent actual costs with a reasonable return on investment.

More on the Open Data Directive and access to public domain cultural heritage can be found in a recent paper on EU and other legal developments by one of the authors with Ellen Euler.²²

²¹ This suggestion is more realistic due to shifting technical standards, and supported by UK evidence suggesting with monographs that 70% of publishers’ sales occur during the first two years. Universities UK Open Access Monographs Group, ‘Open Access and Monographs: Evidence Review’, <https://www.universitiesuk.ac.uk/policy-and-analysis/reports/Documents/2019/UUK-Open-Access-Evidence-Review.pdf>.

²² Andrea Wallace and Ellen Euler, ‘Revisiting Access to Cultural Heritage in the Public Domain: EU and International Developments’ [2020] 51(7) *International Review of Intellectual Property and Competition Law* 823-855, <https://link.springer.com/article/10.1007/s40319-020-00961-8>.

Standards for “Open Access”

For these reasons, **a clear and useful definition is necessary to inform cultural institutions’ application of “open access”** to describe their various heritage platforms and the media they contain.

Across the EU cultural sector, “open access” is currently used to describe a range of activities, from making digital collections (allegedly protected by copyright) viewable for free on an institution’s website (ie, without a paywall), to releasing high-quality digital surrogates embedded with rich metadata under open tools, like CCO, to various platforms online for reuse without restriction. The former describes a scholarly publishing approach to open access, which many institutions use to describe their digital collections by broadly framing the approach as “open access.” From a user perspective, **this introduces risk by conflating the status of the platform with the status of its materials.** By contrast, the latter aligns with a range of international definitions and measures on open access, which centre the user and legal certainty in their approaches.

For this reason, the Commission should align any reference to “open access” with international initiatives that qualify materials according to their commercial reusability. These include, for example, the 2002 Budapest Open Access Initiative,²³ the 2003 Bethesda Statement on Open Access Publishing,²⁴ the 2003 Berlin Declaration on Open Access to Knowledge in the Science and Humanities,²⁵ and standards of the Open Access Scholarly Publishers Association.²⁶ Under such initiatives, **only materials published under tools and licenses that permit commercial re-use are open compliant.**²⁷ In fact, this already aligns with EU approaches to open access, with reference to the [Declaration of Cooperation on Cultural Heritage](#), the [European Heritage Alliance Manifesto](#) and the Commission’s own Statement on the adoption of CCO and CC BY 4.0 for non-original and original data and materials.²⁸ An official position on this would therefore extend this approach to harmonise how practices are described across the cultural sector.

Doing so will **increase reuse certainty, benefitting users and cultural institutions** in three immediate ways. First, “open” will signal material that can be used for any purpose, allowing its integration into public platforms that condition uploads upon commercial reuse. This will enable EU digital heritage to better network and connect with other heritage made available under open access conditions. Second, it will bring greater clarity to the cultural sector around what activity and materials qualify as open access, rather referring to activities that extend only digital access and limit reuse of public domain collections. Third, it will help validate various non-open activities and materials that cannot be “open” due to legitimate legal or ethical reasons. This is particularly important for bolstering public

²³ ‘Budapest Open Access Initiative’, <http://www.budapestopenaccessinitiative.org/>.

²⁴ ‘Bethesda Statement on Open Access Publishing’, <http://legacy.earlham.edu/%7Eepeters/fos/bethesda.htm>.

²⁵ ‘Berlin Declaration’, <https://openaccess.mpg.de/Berlin-Declaration>.

²⁶ Open Access Scholarly Publishers Association, ‘Licensing FAQ’ (Open Access Scholarly Publishers Association), <https://oaspa.org/information-resources/frequently-asked-questions/>.

²⁷ This includes: Public Domain Mark, CCO 1.0 Public Domain Dedication, CC BY, CC BY-SA, and equivalent statements (e.g., ‘no known copyright restrictions’).

²⁸ Commission Decision of 22/02/2019 adopting creative Commons as an open license under the European Commission’s reuse policy, Arts. 1-2.

understanding of copyright and any legitimate reuse restrictions around in-copyright materials, as well as restrictions on access and reuse of culturally sensitive materials in a digital environment (where it is appropriate to make them available online).

Lastly, **it is equally important to consider qualitative aspects of “open”**. The varying technical standards that are used for resolution, format, or metadata can compromise reuse of open-compliant materials. Even if no rights are claimed (or if open licenses are applied), cultural institutions might release images that are low resolution, embedded with messy or non-existent metadata, or lacking machine-readable rights statements. This poses difficulties to digital transformation in the cultural sector and the creative industries around public domain content. These technical aspects demonstrate the need for further discussion around **baseline standards for resolution, interoperability, machine-readable formats**, and other technical standards to facilitate reuse of open data.

4. Limiting the Recommendation’s Scope

Related to this, the scope of the Recommendation should also be reconsidered. Europe’s cultural institutions hold a vast and rich amount of collections by European artists, authors, and other creators. Considering many Member States’ legacies of colonisation, they also hold a vast and rich amount of collections acquired during and after periods of forced occupation and violent conquest which may belong to other countries, communities or individuals. This **consultation is therefore a welcome opportunity to reconsider the 2011 Recommendation’s scope in relation to Europe’s cultural heritage**. This includes interrogating how Europe’s cultural heritage is defined, the role of digital heritage during restitution, what cultural heritage is appropriate for digitisation, access and open access frameworks, and who should make those decisions and direct that process.

This section is largely informed by our research on the impact of digitisation, IPR and open access frameworks for African material cultural heritage and Indigenous ceremonial objects and ancestral remains held by EU cultural institutions and others outside of the EU. Further information can be found in our response to the Sarr-Savoy Report on the Restitution of African Cultural Heritage,²⁹ and in our submission to the Expert Mechanism on the Rights of Indigenous Peoples on the repatriation of ceremonial objects and human remains under the United Nations Declaration on the Rights of Indigenous Peoples.³⁰

A new Recommendation must:

- State that **digital asset creation and management, IPR commercialisation or open access around materials acquired during and after periods of colonisation, forced occupation or conquest can be undertaken only with the consent** of the communities of origin. This is essential for aligning a new Recommendation with other international human rights agreements (e.g. UNDRIP);

²⁹ The response is available online and was republished in open access by the Journal of Intellectual Property, Information Technology and E-Commerce Law in both French and English. Mathilde Pavis and Andrea Wallace, “Response to the 2018 Sarr-Savoy Report: Statement on Intellectual Property Rights and Open Access relevant to the digitization and restitution of African Cultural Heritage and associated materials,” (2019) Journal of Intellectual Property, Information Technology and Electronic Commerce Law 10(2), 115-129 <https://www.jipitec.eu/issues/jipitec-10-2-2019/4910>; and in French <https://www.jipitec.eu/issues/jipitec-10-2-2019/4911>.

³⁰ 2007 United Nations Declaration on the Rights of Indigenous Peoples.

- Encourage **digital and/or IPR repatriation** of such collections, including in instances where the material collections have not yet been returned to the communities of origin;
- Design **targeted research and funding strategies to assess the impact of networking interoperable cultural heritage data with big data** on obligations imposed by GDPR, the right to be forgotten, and other laws related to privacy and confidentiality;
- Encourage **expertise and capacity-building** in the cultural heritage sector on:
 - IPR repatriation;
 - The obligations of privacy, sensitivity and confidentiality implicated by linked open data and interoperable cultural heritage data networked with big data across the EU, and globally.

Critical Approaches to Open Access

So far, the EU has been a leading figure globally on developments in digital heritage, reuse and its many demonstrated benefits. This consultation **provides an additional opportunity to take a forward-thinking policy approach to shaping more critical understandings of open access and the public domain.**

To illustrate, the current practice of Western policy-makers, governments and heritage institutions campaigning for and leading digitisation projects according to Western values and priorities, such as open access, is appropriate for Western cultural heritage. As applied to non-Western cultural materials and ancestral remains, **it carries the potential to sustain and expose communities of origin to harm** when digitised and made available online under open access.

This is because materials in the public domain are available for anyone to use without restriction. Once digitised, open access, or even just digital access, can perpetuate violence(s) against culture(s). For example, **the digitisation, display, and dissemination of sacred culture or ancestral remains online can expose communities to spiritual or cultural harms**, whether they are displayed with a copyright or released via open licenses and tools for any type of reuse. In this way, **open access goals can violate the right of Indigenous peoples and vulnerable communities to maintain, control, protect and develop their cultural heritage** guaranteed by UNDRIP and other human rights around self-determination.

Digitisation itself is not a neutral act. In fact, there are a number of materials that may be inappropriate for digitisation, IPR and open access frameworks. This is especially true with regards to ceremonial objects, ancestral human remains and many of the associated materials maintained in archives that may express offensive personal opinions. **Whether and how digitisation of these materials proceeds, even for preservation, is a cultural and curatorial prerogative.** We encourage the Commission to adopt a position that communities of origin should enjoy full autonomy in devising any access strategies to cultural objects and associated materials, both physical and digital.

Impact on Legitimate IPR Commercialisation by Communities of Origin

In addition, **the waiver of legitimate IPR in digital media can subvert the ability of those communities to commercialise their own culture** in the same ways Western institutions

have been doing for decades.³¹ In this sense, IPR claims can directly affect the rights of Indigenous peoples to “maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures” as guaranteed by articles 11, 12 and 13 of UNDRIP. What is less explored is how **open access can similarly impact these rights**, when digital surrogates are made available online to the world and under open access frameworks.

As an example, the Benin bronzes have been distributed to various countries following the punitive campaign by British forces against the Kingdom of Benin. Numerous photographs of the 3D bronzes that satisfy national thresholds of originality can be found online, some in-copyright and some released under open tools like CCO. In this case, open access raises a few issues. First, the open status of these images means they are more frequently reused and credited to the host institutions. The more clicks they receive, the more the search engine algorithms will prioritise their return and reinforce their authority. Second, the Nigerian Government and the Benin Royal Family have requested their return from the various institutions who hold them for display in a new Benin Royal Museum, scheduled to be completed by 2023. Should they be restituted, the Museum might plan to digitise and commercially exploit the works, which would be their right and valid under international and national copyright laws. But that market has been undercut by the availability of high-quality open access images made available online by Western institutions. For the others who claim copyright and license or merchandise the images, the revenue flows to the host institutions rather than the Museum and community of origin.

This example can be applied to a breadth of materials held by cultural institutions across the EU. Even where IPR arises, tools like CCO allow digital reproductions to be released for any reuse. Such **content is unable to be recalled and has already been incorporated into new cultural goods and products**. Articles 11 and 31 rights and any exercise of sovereignty over these materials and future manifestations of culture have already been compromised. The application of CCO, open licenses like CC BY, CC BY-SA, closed licenses, or even copyright in general should be re-examined in light of this changing legal landscape and the increased calls and government-led initiatives for the restitution of the colonial-era looted cultural materials held in EU cultural collections.

IPR Repatriation

Lastly, **IPR is an important aspect of the restitution of material and digital cultural heritage**, which must be considered alongside rights management, open access and future policy development.

Here, two points must be made. First, when the restitution of material heritage occurs, digital cultural heritage and related IPR must accompany it. This is not currently happening. Second, where restitution is not yet possible, the digital restitution and/or IPR repatriation is still possible. It is important to note **these forms of reparation are not interchangeable with material restitution**, nor can they replace it.

³¹ Mathilde Pavis and Andrea Wallace, ‘SCuLE Response for the EMRIP Report on Repatriation of Ceremonial Objects and Human Remains under the UN Declaration on the Rights of Indigenous Peoples’ (2020) https://zenodo.org/record/3760293#.XtEZ5MYo_Wy.

IPR repatriation can also extend to cases where material cultural heritage remains in situ with EU cultural institutions, organisations, and universities acting as custodians. In these cases, **agreements should be developed with the communities of origin to determine whether digitisation (even for preservation purposes), access, IPR, and/or open access is appropriate.** This assessment is particularly important in the context of ritual or funerary objects and ancestral remains. Such materials (including their documentation and archival materials) might embody a spirit, personhood or life. Allowing reuse via open licences or public domain dedications, without the community's consent, would not be appropriate. Nor might digitising and claiming IPR on behalf of the cultural institution or community of origin as a protective measure.

For these reasons, **institutions should seek permissions from the communities or individuals associated with the culture prior to digitisation, wherever possible.** Such permissions should be obtained even if the materials are part of the public domain according to international or national laws and reflect various levels of access as deemed appropriate by the community. Rather than reinforcing Western systems of access, preservation, and exclusion, these permissions and systems of care allow for the integration of localised approaches according to their culture of origin.

Limiting the Recommendation's scope regarding digitisation and public domain content **provides the EU with an opportunity to shape best practice on the equitable management of cultural heritage acquired during and after periods of colonisation,** which is associated with other countries, communities or individuals. So far, IPR has been overlooked during these complex processes.³² Restitution processes must also consider aspects of IPR and reproduction media. Yet the absence of IPR raises additional ethical questions around the appropriateness of digitisation and open access.

Privacy and Sensitivity

Finally, the potential for networked interoperability of cultural heritage data with big data raises additional concerns. Cultural **heritage collections contain extensive amounts of personal information that can be attributed to various individuals** (living or dead) responsible for the generation of data and documents, the donation or care of heritage collections, the creation of cultural works and records, and even as subjects within various datasets and research materials. With growing global awareness and demands around privacy and sensitivity, these paths are largely uncharted. If guidance or legislation exists, it is often unharmonised. In some cases, these areas are unregulated altogether.

EU cultural heritage institutions are not equipped with the expertise and resources required to research the potential harms posed by the digitisation and connectivity of cultural collections and data that currently remain siloed, and disconnected from other big data sources. We **recommend the Commission design targeted research and funding strategies to explore this potential** in light of obligations imposed by GDPR, the right to be forgotten, and other laws related to privacy and confidentiality. This is especially important considering any such materials digitised by EU cultural institutions may be made available under open frameworks to users outside of the EU, not subject to various territorial legal obligations. This should include comprehensive risk assessments and

³² See for example, Projet de loi n° 3221 relatif à la restitution de biens culturels à la République du Bénin et à la République du Sénégal, http://www.assemblee-nationale.fr/dyn/15/textes/15b3221_projet-loi.

impact studies on the specific question of how digitisation might challenge or frustrate compliance with these obligations, as well as the harms posed to living individuals by the increased interconnectivity of data and metadata.

5. Supporting the Recommendation's Application

Our final section briefly highlights the necessary financial, practical and legal support for wider implementation of the 2011 Recommendation, as well as any future expanded version. This section is not exhaustive. In this sense, we also strongly support the submissions made by [Creative Commons](#) and [Europeana](#).

A new Recommendation must:

- Lead to **increased financial support** to fund digitisation, digital heritage management, and new research around open access business models and nuanced rights management as new methods and opportunities for more sustainable revenue generation;
- **Support capacity-building** in the sector around the technical knowledge necessary for digitisation, digital heritage management and legal and ethical assessments on copyright clearance, IPR generation and management, ethics, and open access frameworks;
- **Build on existing legal resources** to aid the cultural sector's implementation of open access frameworks and digital strategies, in addition to exploring how new EU measures might harmonise fragmented areas that impede cross-border preservation, access and reuse.

Financial support

Without increased funding for the heritage sector, **any future Recommendation will experience the same obstacles to implementation as the 2011 Recommendation**. Increased financial support is crucial to the importance of digitisation and digital transformation in the cultural heritage sector and the ways of supporting such processes. This is especially important for the preservation, access and reuse of collections cared for by smaller and less well-resourced cultural institutions.

First, this must include **funding to digitise**. Currently, the lure of commercial licensing and the need to generate revenue incentivise cultural institutions to digitise public domain works and claim copyright in the non-original outputs, rather than to produce a new creative work as actually intended by copyright law. With the onset of COVID-19, revenue generation is becoming even more important to supporting an institution's survival. Future EU and national measures must reflect a commitment to the cultural sector and come equipped with the financial support to help them meet their digital remits and preservation goals.

Second, this must include **funding to explore new research around open access business models** as new methods and opportunities for more sustainable revenue generation. More evidence is needed on the positive impact of open access policies for revenue generation to encourage the wider release of non-original and more basic outputs, like raw data, metadata, paradata, and images for public reuse. This research should explore how more nuanced rights management and open access frameworks can be leveraged to

support more commercially sustainable business models in a digital single market at EU and global levels.

Practical support

In many cases, the technical knowledge, legal and cultural expertise necessary to achieve digitisation sits outside of the public sector. Practical forms of support must extend to capacity-building within the cultural sector, which also requires adequate funding. This should include **capacity-building and training on the technical knowledge necessary for digitisation and digital heritage management, and the legal knowledge** necessary for assessments on copyright clearance, IPR generation and management, ethics, and open access frameworks.

A revised Recommendation should also consider various practical aspects of open access. These might include guidelines on: technical implementation; qualitative aspects of reuse, such as baseline standards for high-quality formats, metadata and other digital materials; legal and technical interoperability; digital strategies; and drafting terms of use and other important policies that can be standardised to the extent that is possible, translated across EU Member State languages, and understood across various borders by both EU and international users.

Legal support

Finally, **legal support is necessary** to aid the cultural sector's implementation of open access frameworks and digital strategies, in addition to exploring how new EU measures might harmonise fragmented areas that impede cross-border preservation, access and reuse. For the former, various efforts by Creative Commons and Europeana, as well as national initiatives to develop legal guidelines might be supported and encouraged, with new research and resources to close any gaps specific to EU law. For the latter, future harmonisation should consider: moral rights; legal standards for publication (as opposed to an unpublished status); legal deposit for born-digital outputs; contract override provisions to counter attempts to limit access and reuse of public domain materials; the treatment of sensitive cultural materials and private information; reasonable limitations to balancing IPR commercialisation and open access obligations during private-public partnerships; and a revisited orphan works framework.

Conclusion

The 2011 Recommendation has been a major contribution to pushing digital developments in the cultural sector and by users, even stimulating national and international policy changes around the treatment of digital cultural heritage. Financial, practical and legal constraints have long affected the sustainability and scope of digitisation and digital initiatives, the availability and interoperability of their outputs, and their reusability by the wider public. In turn, this has impacted the generation of new cultural goods and knowledge, economic growth and wellbeing. A revised Recommendation must provide the necessary infrastructure to ensure its wide implementation and a more secure climate for the generation of new knowledge, goods and services via the important primary materials held in Europe's cultural institutions.