

Recommendations on digital restitution and intellectual property restitution

Submission to the Advisory Committee for Guidelines for Collections in Austrian Federal Museums from Colonial Contexts convened by the Federal Ministry of Arts, Culture, Civil Service and Sport (BMKÖS)¹

To: Advisory Committee for Guidelines for Collections in Austrian Federal Museums from Colonial Contexts

Re: Expert submission on the restitution of digital cultural heritage and intellectual property rights

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Recommendations

This submission focuses on the vital role of **digital cultural heritage** and **intellectual property rights** to restitution initiatives. We recommend that the Advisory Committee includes a **restitution strategy for digital cultural heritage and intellectual property rights** in its forthcoming Guidelines to support communities of origin and Austrian institutions. These Guidelines should incorporate the following matters:

Principles on Digital Restitution and Intellectual Property Restitution

1. The digitisation and online publication of the relevant collections (including any associated inventory information and data) can have a profound impact on the underlying physical items and the ultimate goals of restitution.
2. New collections digitisation should be carried out only with the consent of the communities of origin (whenever possible) and/or when necessary to support restitution claims.
3. Any online publication of digital assets should be carried out after careful consideration of the risks and benefits in making the digital information and assets publicly available online. This assessment should balance **(1)** the benefit(s) of making information/data about the collections (*e.g.*, their content and location) available to the public and/or the communities of origin who

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seek restitution against **(2)** the risk of harm any online publication may pose to communities of origin by enabling further dissemination, misappropriation, or exploitation of those materials without sufficient care. For the avoidance of doubt, this assessment refers to the scope, quality, and formats of the digital heritage made available online, rather than the initial decision to publish records of the collections from colonial contexts to support transparency and restitution claims.

4. Any restitution strategies for physical collections (*e.g.*, the physical items, catalogue materials, and other records generated over the period of dispossession) should extend to any associated digital materials (*e.g.*, digital reproductions, data, and datasets generated over the dispossession period). We refer to this as “**digital restitution**”.
5. Any restitution strategies for these physical and digital collections should extend to any intellectual property and other legal rights that may have arisen over the dispossession period. We refer to this as “**intellectual property restitution**”.

Practical Recommendations on Digital Restitution and Intellectual Property Restitution

When **publishing** any collections data (*i.e.*, digital information, images, and other assets):

- Rather than publishing all existing digital materials, first assess what data, in what quality, and in what formats are necessary to support transparency goals and restitution claims;
- Consider publishing images at lower resolutions sufficient for collections research and evidentiary purposes in support of ownership and restitution claims;
- Consider installing technical safeguards against inappropriate data mining, scraping, and other uses of any data published online; and
- Bolster any databases, datasets, or online tools with clear terms and conditions that inform users of legal and ethical restrictions on downloading, downstream reuse, and further dissemination of collections data.

When undertaking **digital restitution** (digital property and property rights):

- Inventory all digital reproductions and data related to collections items and associated materials (*e.g.*, archival materials, curatorial notes, provenance information, records of acquisition, loan, etc.);
- Include all digital assets (*i.e.*, digital property) within the scope of restitution and collaborate with communities of origin to prepare the materials so they can be meaningfully held, used, and engaged with upon restitution;
- Support or provide communities of origin with the necessary skills, technologies, and facilities to hold and engage with the digital assets, when required; and
- Remove digital assets published online (including as open access) prior to restitution from institutional websites and publicly-available repositories.

When undertaking **intellectual property restitution** (and associated rights):

- Inventory any legal rights rooted in intellectual property, contract, or other laws relevant to all physical and digital materials generated around the items over the dispossession period;
- Waive, declare void, or transfer with the materials any and all rights arising over the dispossession period to restore ownership and agency to communities of origin in a manner consistent with the goals of restitution; and

- Modify intellectual property policies, including open access policies, to exclude digital assets generated around collections from colonial contexts and communicate new access parameters for these materials.

These recommendations are informed by research and evidence in fields of law, digitisation, and cultural heritage stewardship and management conducted by independent academic researchers as well as law and heritage practitioners.

Analysis

1. Background on Digital and Intellectual Property Restitution

Digital cultural heritage and intellectual property rights are integral to restitution strategies due to the pivotal role they play in heritage ownership and knowledge production.² This view is supported by over 100 scholars and practitioners around the world who attest the restitution of collections from colonial eras is incomplete without the restitution of any associated physical materials, digital collections and data, and the legal rights related to them.³

National approaches to digitisation and the online publication of digital collections and data in the context of restitution are rapidly developing. One example includes the 2020 German *Framework Principles* and *3-Road Strategy* that position digital collections and data as important records to support the “greatest possible degree of transparency” around German collections and enable communities of origin to make restitution claims.⁴ The *3-Road Strategy* also advises that certain holdings (e.g., ancestral remains and culturally sensitive items) should be subjected to careful

² Temi Odumosu, ‘The Crying Child: On Colonial Archives, Digitization, and Ethics of Care in the Cultural Commons’ [2020] 61(22) *Current Anthropology*, DOI: 10.1086/710062; 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’ (23 March 2019) DOI: 10.5281/zenodo.2620597, published in [2019] 10(2) *Journal of Intellectual Property, Information Technology and E-Commerce Law*; Jane Anderson and Kimberly Christen, ‘Decolonizing Attribution: Traditions of Exclusion’ [2019] 5 *Journal of Radical Librarianship* 113-152; Desmond Osaretin Oriakhogba, ‘Repatriation of ancient Benin Bronzes to Nigeria: reflection on copyright and related issues’ [2022] *Journal of Intellectual Property Law and Practice*.

³ Pavis and Wallace (2019).

⁴ Federal Foreign Office, Language Services Division, *Framework Principles for dealing with collections from colonial contexts agreed by the Federal Government Commissioner for Culture and the Media, the Federal Foreign Office Minister of State for International Cultural Policy, the Cultural Affairs Ministers of the Länder and the municipal umbrella organisations*’ (13 March 2019) p. 4, <https://www.auswaertiges-amt.de/blob/2210152/b2731f8b59210c77c68177cdcd3d03de/190412-stm-m-sammlungsgut-kolonial-kontext-en-data.pdf>; Federal Foreign Office, Language Services Division, *‘Access – Transparency – Cooperation: Guidelines for a “3-road strategy” on the documentation and digital publication of collections from colonial contexts held in Germany’* (14 October 2020) p. 1-2, https://www.cp3c.org/relevant_documents/cp3c_3-road_strategy_on_the_documentation_and_digital_publication_of_collections_colcontexts_20210812.pdf.

treatment around registration, digitisation, or access, in conversation with communities of origin and in line with the highest ethical considerations.⁵

We push this impetus further and recommend the Advisory Committee sets out a clear position and strategy for digital restitution and intellectual property restitution consistent with the recommendations below.

2. Recommendations on Digital and Intellectual Property Restitution

Restitution Guidelines should consider the impact of decisions related to:

1. The **online publication** of existing digital assets and data on collections from colonial contexts;
2. Any **new digitisation** to support ownership and restitution claims;
3. The **impact of contested ownership** on associated physical and digital materials generated over the period of dispossession; and
4. Any **intellectual property rights and policies** developed around collections from colonial contexts.

Below, each issue is summarised and accompanied by recommendations. Section 3 includes practical steps in support of digital and intellectual property restitution.

The online publication of existing digital assets and data on collections from colonial contexts

We acknowledge:

- Transparency is crucial to support restitution claims;
- Publishing data and information on collections from colonial contexts is a practical and effective way to support restitution claims and transparency goals;
- Such data and information is more accessible if presented in structured, machine readable, and interoperable formats and licensed openly or dedicated to the public domain; and
- Such data and information may be more useful to communities of origin if it includes digital assets, such as images, including those already held by Austrian institutions.

We highlight:

- The scope, format, and quality of the data published should mediate the risks that online publication can present to the longer-term goals of restitution related to epistemic justice and to restoring agency and control. In this way, the risk of publishing detailed, in-depth data, including images, about collections can make these materials vulnerable to

⁵ Federal Foreign Office, Language Services Division, ‘Access – Transparency – Cooperation: Guidelines for a “3-road strategy” on the documentation and digital publication of collections from colonial contexts held in Germany’ (14 October 2020) p. 2, https://www.cp3c.org/relevant_documents/cp3c_3-road_strategy_on_the_documentation_and_digital_publication_of_collections_colcontexts_20210812.pdf, citing German Museum Association, ‘Guidelines on Care for collections from colonial contexts’ (2021) <https://www.museumsbund.de/wp-content/uploads/2021/03/mb-leitfaden-en-web.pdf>.

exploitation or misappropriation by users other than the communities and individuals associated with the heritage. This is because digital availability can enable data scraping, downloading, dissemination, and reuse in ways that create new harms and negatively impact the longer-term goals of restitution. The effect is to undermine epistemic justice and further reduce the agency and control of communities of origin over their heritage and any associated materials subject to restitution. In this way, the very materials that support greater transparency and restitution claims are also crucial to the production of knowledge, narratives, histories, and new epistemologies, which should be rebalanced and restored to the communities of origin.

We recommend:

- Institutions engaged in the online publication of existing digital assets and data related to collections from colonial contexts should consider these risks when designing publication strategies or fulfilling transparency obligations, as set out by the Advisory Committee.

On new digitisation to support restitution claims

We acknowledge:

- New digitisation can further support restitution claims by providing new and more detailed data on collections holdings;
- Certain holdings, such as ancestral remains or culturally sensitive items, should be excluded from digitisation; and
- Many collections have been digitised in part or in whole, despite whether they form part of the digital collection online.

We highlight:

- Decisions around digitisation belong to the communities and countries of origin. Digitisation is not a neutral act; it is a curatorial decision that can impact how the item is reproduced, as well as what (or whose) narratives, histories, data, and epistemologies are associated with the physical item or knowledge it contains. In this way, physical heritage and digital heritage are intimately connected;
- Digitisation generates new assets and legal rights, notably property and intellectual property rights. If undertaken in Austria as the country of possession, those rights will be defined and regulated by Austrian laws. In most cases, the default legal position means such rights will be owned by Austrian cultural institutions as the collections holders. In effect, the generation of new rights and property and their ownership appropriates the digital heritage and related rights to collections holders under the Austrian laws, resulting in a new form of dispossession. This consequence holds the potential to contradict restitution's very goals; and
- In many cases, intellectual property rights and other legal rights can be waived, transferred, or not enforced.

We recommend:

- New digitisation occurs only when necessary to enable restitution claims;
- New digitisation occurs with consent of the communities of origin, whenever possible;
- Any restitution of physical collections extends to the associated physical materials and all digital assets generated and associated with the collections over the period of dispossession; and
- Any restitution should extend to the restitution of intellectual property rights and other legal rights arising in the associated physical materials and all digital assets generated around the collections over the course of dispossession.

On the impact of contested ownership on associated physical and digital materials

We acknowledge:

- Physical collections may be subject to overlapping or competing ownership claims, including but not limited to different individuals and communities of origin.

We highlight:

- Any contested ownership of the physical collections necessarily extends to ownership of the associated materials, digital assets, and the legal rights associated with them, due to the initial act of dispossession and the generation of these materials as a result of possession; and
- When considering the impact of dispossession, the items subject to restitution, and any intellectual property in physical and digital materials generated around them, framings of “ownership” must also consider ownership of culture, heritage, and narrative. The effects of this broader framing of ownership continue to impact the peoples, communities, and countries who were marginalized or oppressed by systems connected to these colonial histories. Expanding restitution strategies to encompass the full range of materials generated over the period of dispossession provides an opportunity to reverse existing power hierarchies and restore power with the peoples, communities, and countries of origin, including diaspora groups.

We recommend:

- Any risk and benefits assessments on new digitisation and online publication of data or other digital assets must consider the underlying contested ownership claims.

On intellectual property and open access related to collections from colonial contexts

We acknowledge:

- Many collections from colonial contexts are already digitised and/or published online under the possessing institutions’ policies on intellectual property, open access, and public reuse.

We highlight:

- Where possessing institutions have published digital collections and data under new rights claims, including open licenses, they subject these digital assets to systems of control and commercial exploitation; and
- Where possessing institutions have published digital collections and data under open access policies that waive rights and dedicate the materials to the public domain, these statements are irrevocable according to the terms of the legal statement applied to the materials.

We recommend:

- Using technological and practical safeguards to mitigate the potential harms arising from digital access to digital assets and data, including but not limited to the publication of lower quality data, restrictions on download, and so on; and
- Modifying policies on rights, digitisation, and collections management procedures to reflect localised systems of ownership, treatment, and care associated with the communities of origin.

3. Practical Steps for Digital and Intellectual Property Restitution

In light of the above recommendations, the following steps are proposed in support of digital and intellectual property restitution.

To implement transparency while mitigating risk or harm to communities of origin

- Transparency does not require an all-or-nothing approach to digital asset and data publication. Investigate and support mitigation strategies using practical and technological solutions, such as limiting the resolution or quality of data published, tailoring levels of access to individuals or communities associated with the cultural heritage, and so on.

To implement digital restitution

- Inventory all relevant digital materials, including digital reproductions, data, and digitised associated materials;
- Include all digital materials in restitution strategies and collaborate with communities of origin to prepare data so it can be meaningfully held, used, and engaged with upon restitution; and
- Support and provide communities of origin with the necessary skills, technologies, or facilities to hold and engage with the digital materials, when required.
- Remove digital materials from online collections (including those published in open access) at the outset of the restitution process; and
- Retain copies only with the permission of the community of origin, subject to new use conditions designed with the community of origin.

To implement intellectual property restitution

- Inventory all associated physical and digital materials generated around collections from colonial contexts, including but not limited to image reproductions, cataloguing

information, provenance and collections data, acquisition and loan histories, curatorial notes and research, and so on;

- Inventory all legal rights in these materials based in intellectual property, contract, or other laws generated around the collections; and
- Waive, declare void, or transfer with the collections any rights held by the institution and/or its staff to the extent it is possible and/or form non-enforcement agreements whenever possible.

To address conflicts among restitution goals, open access policies, and other licensing systems

- As a default position, possessing institutions should plan to: withdraw existing digital materials from online availability; refrain from any new digitisation without the active involvement (and permission) of the relevant communities of origin; revise internal and external intellectual property rights policies (including open access policies) to inform users of legal and ethical restrictions on access, downloading, downstream reuse, and/or further dissemination; and retain copies only with the permission of the community of origin, subject to new use conditions designed with the community of origin.