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The Importance of the Public Domain for Cultural Collections and Metadata

Melanie Dulong de Rosnay

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The Importance of the Public Domain for Cultural Collections and Metadata*

Mélanie Dulong de Rosnay

Introduction

This article provides legal definitions and licensing recommendations for memory institutions to managing public domain collections, following principles of the Communia Public Domain Manifesto (Communia 2012):



* This article is a revised and shorter version of a chapter by the author: *Preserving Public Domain Collections: Institutional Policies Best Practices*, in V. Ginouvès, I. Gras (éds.), *La diffusion numérique des données en SHS – Guide de bonnes pratiques éthiques et juridiques*, Aix-en-Provence, Presses universitaires de Provence, 2018, pp. 39-47.

The public domain, in the strict sense, is the legal state of works and data when copyright does not subsist, meaning they can be freely accessed and reused. Other rights may limit the freedom of users, and several public domain mechanisms are available to minimise unwanted restrictions and support the broadest access rights for the public and other institutions to reuse and build upon our cultural heritage.

Memory institutions designate libraries, archives, museums, private galleries and volunteer-based projects such as Wikipedia, which mission is to collect, process and disseminate archives and cultural heritage to the public.

1. Legal definitions

A licence designates a standard legal text explaining to final users under which terms and conditions the data and the collection can be accessed to, used and reused. It is recommended to offer open licences, in order to not restrict users' rights. A contract is an agreement between the institution collecting the material, and the works or data provider (employee, contractor, volunteer, any third party who could be holding prior rights on part of the works or data which are going to constitute the archive: authors, heirs, rightsholders, publishers, editors).

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

Rights under copyright or exclusive rights encompass the right of reproduction (eg. edit a book out of a manuscript, produce a recording), of communication to the public (eg. distribute online, broadcast on television or at an event, demonstrate at a conference, include in slides in a public presentation), and the right to make derivatives (eg. translate, summarise, modify, remix, adapt, make a movie out of a book, etc.).

They are granted by law to original rights holders (eg. authors, producers) who can exercise them through licences or contracts. These rights are limited in time (copyright lasts typically 70 years after the death of the author) and scope (some rights cannot be reserved, eg. in Europe, the right of literary citation of textual material for scientific purposes, educational use, reproduction for preservation purposes). Neighbouring rights include *performers'* rights, sound and video recording producers' rights, and database producers' rights. Additional rights are granted to individuals over their personal data, and their image.

The making of an archive requires the archiving institution to hold and exercise the rights of reproduction and communication to the public. It also almost certainly requires to be able to exercise the right of making derivatives. Indeed, formats will be changed, images will have to be processed, works will be annotated,

indexed. Notices and data description drafted by museum or university staff or volunteers will be translated, summarised or edited.

Research results produced during the course of the archiving will carry different rights than the collections already in the public domain. The collections might be constituted by a mix of public domain works (which copyright expired), orphan works (whose authors cannot be identified, eg. private archives collections of postcards or anonymous photographs of the late 19th century or early 20th) and works under copyright (for which permission should be negotiated and obtained), while the research results can be composed by copyrightable output of the institution's staff or contractors (which should also be managed, through a different contractual process). Reproducing part of the archive in a scientific presentation, in a catalogue, in educational material, or the making of postcards for a commercial purpose will involve different uses, and rights. The right of data mining, or the processing of the archive and its underlying metadata for search or research purposes, will often trigger the right of making a derivative work.

The general common sense rule is that you cannot licence more rights than you were holding in the first place. And being able to exercise some rights is a prerogative of a lesser scope than being able to exercise and to further transfer them, for instance to authorise a third party or the public to exercise the same rights. Finally, owning some rights does not require to exercise them in a restrictive manner: it is not because you can reserve them exclusively, that you have to do it. An open licensing strategy should never lead to grant less rights than the law originally confers to users. A license should not restrict exceptions or limitations to copyright.

2. The content of an archive

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

Copyrightable works can include texts, photos, audio or visual recordings, notices, observations, results and comments produced by curators and scientists, previous or external contributors. The ownership of the physical artefact of a public domain work (manuscripts, paintings, sculptures, monuments) may imply a duty of care and preservation, including restrictions to physical access. Once digitised, this relation does not justify the institution to apply similar restrictions to the intangible version of the object. Digital reproductions and 2D photos do not necessarily produce an additional layer of rights for the person or entity in charge of the reproduction, with the exception of the case of 3D objects (eg. sculptures, buildings), which are recognised as creative works by photographers (Dulong de

Rosnay 2013; Petri 2014), but which can still be voluntarily placed in the public domain (see the New Palmyra Project initiated by Bassel Khartabil).

Sound and visual archives will carry, in addition to the copyright on the work (eg. a song, a movie), so-called neighbouring rights on the performance (by the singer or the actor) and its recording (by a producer) for about 50 years. Oral archives will include another layer as the voice and the content of the recordings can be assimilable to personal data and will also require the permission of the subject.

Public Sector Information, data and work generated or managed by public institutions, follows a general principle of free access and reuse, with the exception of cultural heritage (institutions may but do not have to charge for the reproduction and the right to reuse). Geographical information should be released under free conditions and to use open standards (Dulong de Rosnay, Janssen 2014). Metadata and ontologies produced and used in the process of cataloguing can give birth to database rights (gathering in a structured manner data, works, or audio-visual recordings), granting an exclusive right against substantial extraction and reuse for periods of 20 years renewable for each update.

Once identified, contracts and then licenses will organise which rights can be exercised on the elements of an archive. They do not have to be as restrictive for users as the laws enables it and can be designed to make them more open.

3. Open licensing

This section introduces open licenses which usages is generally recommended for public domain collections.

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

The 6 licences combine 4 options: Attribution (BY), Share Alike (SA), Non Commercial (NC) and Non Derivatives (ND). The reservation by the licensor of commercial uses (NC) and of the making of derivatives (ND) is generally not recommended for public domain works, as it would hinder certain uses.

The Attribution clause requires to cite the authors (and their supporting institutions) when reproducing, communicating or modifying the work. All licenses require to maintain a link to the license when distributing the work and its derivatives. The Share Alike clause, inspired by copyleft and free software will besides require derivatives to be re-licensed to the public under the same license. Wikipedia is using the Creative Commons Attribution Share Alike license.

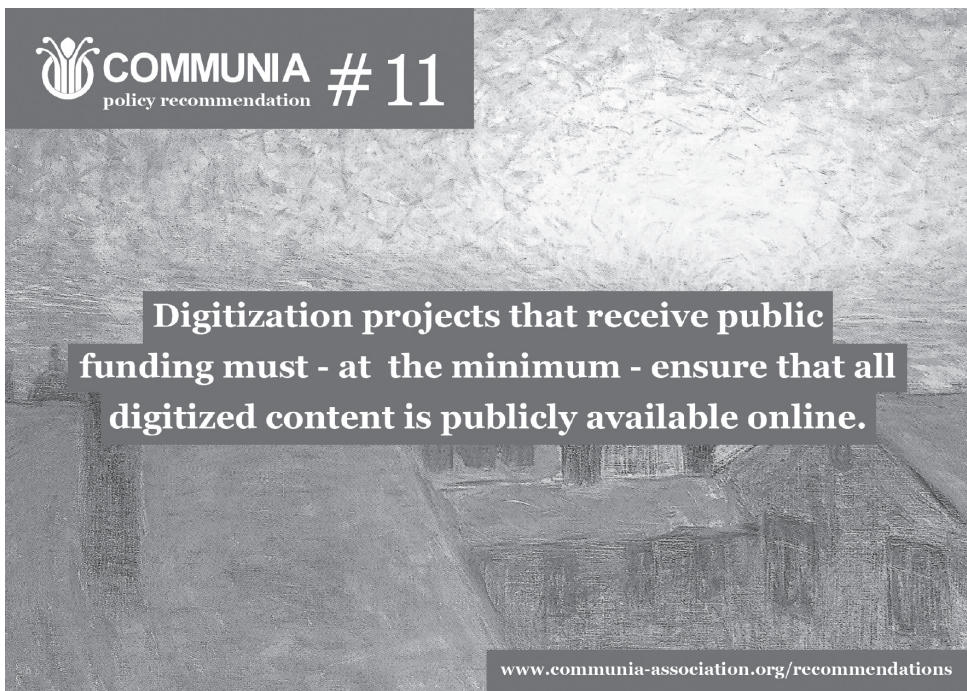
The 2 Creative Commons public domain instruments are the Public Domain Dedication (CC0) and the Public Domain Mark (PDM): the Public Domain Dedication is an anticipation of the expiration of rights (70 or so years after the death of the last co-author, 50 years or so after the publication or the performance,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

In order to release all necessary rights, it will be important to apply the Public

Domain Dedication to all the elements constituting the archive: works, data, notices, metadata and the website. The Public Domain Mark is an assertion by a knowledgeable institution who performed the research and due diligence and is able to certify that the work is already in the public domain, since “cultural heritage institutions should take upon themselves a special role in the effective labelling and preserving of Public Domain works” (Communia 2012).

Conclusion

Licensing public domain digital collections requires addressing barriers to sharing. Such barriers may be contractual, if commercial partners ask for a period of exclusive rights in order to perform digitisation for free, cultural, with the feeling that applying rights on public domain works would be beneficial for the institution, and economic, since developing a collection must be funded through sustainable institutional public domain policies. Certain clauses can be favoured or avoided in contractual agreements to avoid overreaching copyright claims leading to a privatisation of the public domain (Communia 2014; Boyle 2009; Dulong de Rosnay 2011; Crews 2012). Charging policies by museums (Tanner 2004) creates management costs which can be higher than the effective revenues extracted from the sales of reproduction of public domain works. If public domain works are made broadly available, this will increase both online and physical visitors, exposure, and therefore the impact of public funding (Verwayen *et al.* 2011; Pekel 2014; 2015).



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