

# Open Up Museums!

## Prospects and Challenges of Accessibility, Diversity and Inclusion

Edited by

**Giulia Dore and Marta Arisi**





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Edited by Giulia Dore and Marta Arisi

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# PREFACE

***Roberto Caso***

The cultural heritage of humanity includes works of ingenuity whose economic copyright has expired and, in large quantities, works that have never been protected by copyright, such as Michelangelo's David and Leonardo da Vinci's Vitruvian Man. These latter works represent a significant portion of cultural heritage, as copyright laws cover only a tiny fraction of human history. It is worth noting that the English Statute of Anne of 1710 is the first modern copyright law.

The fact that a large part of cultural heritage belongs to the public domain might suggest that cultural assets' reproduction, especially digital reproduction, is free for both commercial and non-commercial reasons. However, the existence of a public domain regime is threatened by exclusive control asserted by those who own or oversee the material cultural asset subject to reproduction. Two goals generally drive these instances: censorial control and economic control. The former involves assessments of the compatibility of use with the purpose of the asset, while the latter concerns profit prospects associated with its use.

Instances of exclusive control are primarily based on legal instruments that constitute anomalous forms of intellectual property, definable as surrogates of intellectual property or pseudo-intellectual property. The main instruments of exclusive control are listed below:

- a) Prohibitions on reproduction based on ownership of the material asset.
- b) Prohibitions on reproduction based on unilateral statements or contracts.
- c) Prohibitions on reproduction based on public disciplines related to cultural heritage.
- d) Prohibitions on reproduction based on personality rights.

The open access movement to cultural heritage, such as the OpenGLAM network, is investing efforts in promoting the free reproduction of cultural heritage. Many cultural institutions worldwide guarantee free reproduction of their physical and digital collections for any purpose, commercial or non-commercial. However, the online opening of cultural heritage is very far from representing the dominant model.

The Euro-Italian panorama is emblematic. The legal framework issued to protect the public domain at the European Union level is fragmented, incomplete, and only partially effective. Article 14 of Directive (EU) 2019/790 on the reproduction of works of visual arts in the public domain is a provision with limited scope and susceptible to interpretations that further narrow its application.

At the Italian level, there is an emerging idea that Articles 106 to 108 of the Code of Cultural Heritage (Legislative Decree 2004/42) attribute the power of exclusive control over reproductions to the State. It should be noted that this exclusive control would not only apply to reproductions made on the site where the material asset is physically located but would also extend to reproductions of copies already made on-site and communicated to the public. In particular, the extension would also cover digital copies available online. In some legal interpretations, the power of exclusive control deriving from the Code of Cultural Heritage would be associated with a presumed right to the image of the cultural asset based on the discipline of personality rights found in the Constitution and the Civil Code.



The example of cultural heritage demonstrates that the public domain is threatened not only by the extension of intellectual property but also by the emergence of pseudo-intellectual property in the legal scene. Instances of exclusive control over the reproduction of cultural assets heavily impact open science and the common goods of knowledge, eroding fundamental rights and freedoms related to development and promoting culture and research.

These and many other critical issues were explored by the authors of following contributions. I would like to warmly thank all of them for their insightful contribution to the debate. The workshop offered a wonderful opportunity to explore and discuss different perspectives on accessibility, diversity and inclusion in museums. It confirmed the significance of engaging academics and practitioners in a fruitful dialogue I wish will endure.



# EDITORS' FOREWORD

*Giulia Dore and Marta Arisi*

This edited book contains a selection of essays inspired by the presentations delivered during the two-day itinerant workshop 'Open Up Museums! Prospects and challenges of Accessibility, Diversity and Inclusion', held in Trento and Rovereto, Italy, on May 26-27, 2022, as reframed by their authors.

The workshop was the result of a tremendous synergy of three EU-funded projects: reCreating Europe,<sup>1</sup> DANCING,<sup>2</sup> and inDICEs.<sup>3</sup> It also

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1 reCreating Europe – Rethinking digital copyright law for a culturally diverse, accessible, creative Europe, Horizon 2020 – Grant Agreement 87062 <<https://recreating.eu/>>. The project tackled the challenges of digital copyright to advocate for a regulatory framework supporting diversity, inclusive access to and use of cultural and creative resources. The project mapped regulations and stakeholders' practices across the European Union, assessed the effects of digitisation on cultural production and consumption, analysed platforms's operation a from legal and technological perspective, and ultimately presented policy recommendations. <<https://doi.org/10.3030/870626>>.

2 DANCING – Protecting the Right to Culture of Persons with Disabilities and Enhancing Cultural Diversity through European Union Law: Exploring New Paths, European Research Council (ERC) – Grant Agreement 864182 <<https://ercdancing.maynoothuniversity.ie/>>. The project started in 2020 and expected to end in 2025. It endeavors to examine how safeguarding the right of individuals with disabilities to engage in culture intersects with and complements efforts to promote cultural diversity within the EU legal framework. Utilizing legal, empirical, and arts-based methodologies, the project pursues three key objectives: gaining experiential insights, conducting normative analysis, and developing theoretical perspectives. <<https://doi.org/10.3030/864182>>.

3 inDICEs – Measuring the Impact of Digital Culture, Horizon 2020 – Grant Agree-

benefited from the superlative collaboration with two local but internationally renewed museums: MUSE – Museo delle Scienze di Trento,<sup>4</sup> and Mart – Museo di arte moderna e contemporanea di Trento e Rovereto,<sup>5</sup> which jointly hosted the event. In this special occasion, participants explored key issues and tools to promote ‘openness’ in the cultural sector, bridging theory and practice through interdisciplinary perspectives. The workshop led to remarkable and powerful reflections.

Participants were faced with the challenge of unpacking important ideas – Accessibility, Diversity and Inclusion – that have difficult stories, for they reflect social struggles and often remain empty signifiers or get strategically deployed for distant ends. The prominent keyword of the workshop title was accessibility, which also permeates the essays in this book. Since the earliest conversations held during the event, a possible definition was interrogated, acknowledging that it encompasses multiple significations. In principle, accessibility conveys the meaning of the conditions that allow everyone, regardless of their abilities, to reach, use or engage with information or services (and in this specific context, cultural resources). Accessibility undoubtedly concerns the access to cultural resources for vulnerable groups, including people with visual impairments, blind people, and people with disabilities more at large, but also minorities or the otherwise marginalised for their social or economic conditions. In a similar vein, accessibility touches upon anyone’s expectation to access, use and enjoy culture, by promoting a further focus on the barriers to access cultural resources (an ‘open’ culture) and by focusing on the interaction between technologies, infrastructures and legal tools. Regarding

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ment 870792 <<https://indices-culture.eu/>>. The project analysed how the advancement of digital technology is transforming our cultural experience, particularly by enhancing access and participation. It assessed the economic and social effects of digitisation of cultural heritage in Europe. It finally offered valuable insights for cultural heritage institutions to evaluate their response to the digital shift, leveraging on the researchers’ expertise in economics, intellectual property law, and digital humanities. <<https://doi.org/10.3030/870792>>.

4 <<https://www.muse.it/>>.

5 <<https://www.mart.tn.it/>>.

the latter, barriers and mandates primarily regard intellectual property rights, but other areas of law also come into play.

In bringing forward a reflection on these concepts, the three projects shared the call for a bottom-up approach in their policy commitments, one aimed at hearing the voice of those who are directly affected by the legal challenges of digitisation (meaning cultural heritage institutions, artists and different publics). Along these lines, the authors brought their experiences as researchers and cultural heritage practitioners to explain the opportunities and difficulties tied to the choice of 'opening' the museum. Their contributions highlighted the features of the extremely complex regulatory framework applicable to each project, especially focusing on the one objective they shared: digitising cultural heritage. Deepening the discussion around the concepts of access, use and enjoyment of culture, the essays also anticipate some of the various carousel rides of cultural heritage institutions, constantly hindered by intellectual property, data protection and cultural heritage laws, which often collide with their attempts to perform their mission.

The authors provided different views on what is needed to create truly accessible and inclusive institutions and practices in the collective by showing possible agendas and expertise that give substance to the multifold and blurred concept of 'open' culture.

The preface by **Roberto Caso**, Professor of Law at the University of Trento, Italy, poignantly introduces an image of the cultural heritage and the spatial metaphor of the public domain as terrains of contention, where exclusivity is constructed through law and, most notably, intellectual property and pseudo-intellectual property.

Thereafter, the book proceeds with a few outstanding accounts of museum experiences. The essays open with the work of **Aldo Grassini**, Director of the Museo Omero in Ancona, Italy, titled "Accessibility is not an option". This work advocates for recognising the aesthetics of tactility and explores the roughness of the prohibition of touching. It elaborates on the right to participate in cultural life for the blind and

visually impaired, and how this implies rethinking practices from the design phase.

The contribution by **Paolo Degiovanni**, **Patrizia Famà**, **Katia Franzoso** and **Romana Scandolari**, with the title “Making museums accessible: best practices from MUSE”, delves into their experience as professionals working in this science museum, located in Trento, Italy, respectively in the roles of Educator, Director of the Office for the public, and representatives for the program for accessibility and inclusion. The work unfolds their serious commitment to the powerful motto “Nothing about us without us”, offering examples from many initiatives, from creating accessible communication materials to the imagination and co-design of new forms of participation.

**Ornella Dossi** describes strategies and projects at the Mart museum in Rovereto, Italy, in her contribution titled “Accessibility and Inclusion at the Mart”. Here, she outlines the fundamental endeavours undertaken at the museum’s Education Department, where Ornella works as a coordinator. At Mart, workshops, guided tours with sign language interpreters, and guided and tactile tours stand – amongst other initiatives – as the primary outcome of a knowledge and design process that centres around empowering and engaging with all the people, to break down existing barriers.

**Alessia Fassone** and **Federica Facchetti**, Egyptologists and museum curators, present the good practices of the Museo Egizio in Turin, Italy. Their “Museo Egizio In & Out” is an exemplary illustration of the involvement of marginalised groups in the activities of the museum, as well as of the effort to stretch its borders and inhabit the city and its surroundings. It remarkably illustrates how accessibility to cultural heritage can also mean active participation in creating cultural objects – including, in some of the meaningful examples hereby described, replicas of Egyptian artefacts – and experiences.

**James Bradburne**, formerly Director of Pinacoteca di Brera, reflects on the meaning of community and the difficulty of belonging in his piece "Opening up to the community". The author problematises the role of memory and lingers on the vulnerabilities that the act of memory reveals. The author concludes on the importance of a commitment to listening to everyone, and cultural institutions as places full of potential to make this happen.

"A Human Rights Approach to Accessibility for Visitors with Disabilities in Museums. Reflections from the DANCING Project" by **Léa Urzel Francil**, **Ann Leahy**, and **Delia Ferri**, respectively, Doctoral student, Post Doctoral researcher and Professor of Law at the University of Maynooth, Ireland, is the first of a series of scholarly contributions included in this book. Their piece focuses on the access to digital resources for persons with disabilities and more precisely it targets the role of copyright law and the impact of the copyright exceptions introduced by the Marrakesh Treaty to enhance accessibility. More broadly, the work elaborates the results of an empirical study held within the project DANCING by reflecting on the different limits that inform accessibility thinking (often a mere after-thought). This work bring a critical perspective informed by a human rights model of disability to analyse the social situation where the law applies.

**Fiona Macmillan**, Professor of Law at the University of Birkbeck London, United Kingdom, and Roma Tre, Italy, contributes to this book with her piece "Regulating Communities: Strategies for an Open Museum Sector". She tackles a central question: how the concept of a community – specifically, the idea of an inclusive community or inclusive communities – might mediate the relationship between cultural heritage and intellectual property. Therefore, she asks how concept of community might help regulate possible tensions around making museums more open to people with disabilities and respecting the intellectual and cultural property rights that attach to works on display in museums.

**Barbara Pasa**, Professor of Law at the University luav of Venezia, Italy, comments on the reproduction and reuse of public domain works, touching on the issue of ‘artistic’ reuse of works more in general, in “Reproduction, re-use and open access”. Elaborating critically on ‘the culture of permission’, in this piece the author focuses on how reuse is achievable only under certain limited conditions, worthy to be investigated. The author hence explores the extent to which the EU legal framework is concerned with incentivising the economic exploitation of public domain materials and maps out the legal and policy measures adopted by an important heritage institution in Venice, the MUVE (Fondazione Musei Civici di Venezia, a private entity responsible for eleven Venetian museums), proposing two main case studies – the Natural history Museum of Venice and the Historical Archives of Contemporary Arts of the Venice Biennale (ASAC).

With her closing contribution, “Reading ‘Open museums’ through a copyright lens: a primer on evidence-based legal research”, **Giulia Dore**, Assistant Professor at the University of Trento, Italy, highlights the need for empirical research to support the theoretical debate on the challenges posed by digital technologies and intellectual property law and their impact on the museum’s mission. The empirical analysis is key for supporting the museum’s open policies and strategies that otherwise risk to remain mere statements, and for tackling the practical (for instance, managerial) implications that are largely unexplored. Empirical research, the author argues, may also provide policymakers with the necessary data to assess current legislation and suggest legal reform.

All these contributions help us reflecting on whether the route to a less skewed legal framework may begin by acknowledging the importance of all people’s participation in cultural life. Future efforts could and should lighten up the mission of museums in the creative, diverse and accessible cultural heritage sector advocated in the reCreating Europe, DANCING and inDICEs projects together. We sincerely hope that the contributions collected here can allow readers



to face the complexity and urgency of this blueprint from different angles.

To conclude, we shall leave our readers with two questions we aimed to prompt in the following pages. First, suppose that the current regulatory framework is not fit for the challenges that museums face and that it should be arguably redesigned to make new sense of different stakeholders' conflicting needs and aims. How could museums contribute to this process, advancing which roles and priorities? Second, could readers see themselves as having an active role in pursuing accessibility, diversity and inclusion and working with museums to open up, and how? Our work has been dedicated to some possible and different answers to these questions, and we hope this short book may offer some trajectories to navigate the debate and keep the conversation going.

We thank everyone to thank everyone who has contributed to making this publication happen: the authors for their generosity in providing their precious reflections, the reviewers for offering insightful comments; and the publisher's team of Ledizioni for their patience and support.

Finally, we wish to thank the colleagues who could not include their speech in this book, but will still be remembered for their brilliant contributions to the workshop and the initiative more at large: Rosie Allison (LIBER Europe), Giorgia Bincoletto (University of Trento), Umberto Cecchinato (Roma Tre University), Maria Della Lucia (University of Trento), Sara Di Giorgio (Ministero della Cultura – Istituto Centrale per il Catalogo Unico delle Biblioteche Italiane e per le Informazioni Bibliografiche), Francisco Duque Lima (Katholieke Universiteit Leuven, Centre for IT&IP Law), Konrad Gliściński (Jagiellonian University/Centrum Cyfrowe), István Harkai (Szeged University), Marta Iljadica (Glasgow University, CREATE), Aleksandra Janus (Centrum Cyfrowe), Francesca Manfredini (European Fashion Heritage Association), Nadia Nadesan (Platoniq), Ginevra Niccolucci

(PRISMA), Kristina Pretrasova (Netherlands Institute for Sound and Vision), Massimo Rospocher (Fondazione Bruno Kessler – Italian-German Historical Institute), Giulia Rossello (Scuola Superiore Sant’Anna), Caterina Sganga ( Scuola Superiore Sant’Anna), Sofie Taes (Katholieke Universiteit Leuven), Carlo Tamanini (Mart Rovereto), Maria Tartari (Fondazione Bruno Kessler), Tatsiana Yankelevich (LIBER Europe), among others.

# **ACCESSIBILITY IS NOT AN OPTION, IT IS A RIGHT TO CULTURE AND THE ENJOYMENT OF ART**

***Aldo Grassini***

The right to participate in cultural life, stated in the Universal Declaration of Human Rights (10<sup>th</sup> December 1948, art. 27) and enshrined in the Italian Constitution (art. 3), is reaffirmed in the Convention on the Rights of Persons with Disabilities adopted by the United Nations General Assembly (13<sup>th</sup> December 2006, art. 30), also implemented by Italy with Law no. 18 of 2009.

The problem is, therefore, not whether but how but how to allow everyone enjoy cultural treasures. Breaking down these barriers is a civic duty that must be enacted right from the design phase. All technical experts are fully aware of the specific nature of the problems that must be solved to break down architectural barriers. However, we are far from completely satisfied with the results obtained. When it comes to sensory barriers, there is still a long way to go. For some operators, the problem is still unclear, and there is a belief that, at best, this is a matter of refining the usual design process; people think that accessibility requires additional investment and that accessibility would imply an elaborate design process to be delegated to specialised experts. To “design accessibly” is still a rare flower.

Acting a posteriori entails higher costs and technical hurdles that cannot always be overcome. The principle of accessibility paves the

way for a new culture, even a new aesthetic concept, and a profound transformation of museology.

Traditional culture has established a hierarchy among the senses, prioritising sight and relegating touch to the least important sense. Touching is considered dangerous, impolite, rough and harmful. Woe to the use of hands in the majority of life situations! It is allowed only in exceptional circumstances. Children need to learn quickly how to restrict the use of their hands so as not to get dirty, hurt themselves, damage things, or, above all, be rude.

However, we are not sufficiently aware of the deprivation that the prohibition of touch causes in children's cognitive and affective development, let alone adults. Each sense has its own specificity, which cannot be replaced by other sensations. Colours, sounds, smells and tastes can only be perceived through their senses. This is also true for touch. All the senses are essential for understanding reality and appreciating its beauty.

Given the traditional supremacy of sight over the other senses, the social category most discriminated against by this prejudice is the visually impaired, who are usually forbidden to use their own tool for "seeing things" – touch.

First and foremost, it is necessary to abolish the indiscriminate ban on touching objects in general and the prohibitions established in exhibitions to break down this unjust barrier. A prohibition should be limited to cases where it is strictly necessary for safety reasons, and it should not result from consolidated practice in the absence of adequate scientific justification.

The "no touching" rule is not only the greatest enemy of the blind and visually impaired but also those who wish to establish a full and authentic relationship with nature, social and environmental reality, and the plastic arts.

It is beautiful to caress what we love. This is true of people, things and, of course, art. The discovery of the aesthetic value of touch challenges the absolute dominance of sight in artistic exhibitions. Museology cannot remain indifferent to this new perspective and must adapt to the social and aesthetic motivations that make accessibility an essential objective. The new definition of the museum proposed by the ICOM General Assembly on 24<sup>th</sup> August 2022 leaves no doubt in this regard.



*Fig. 1 – Tactile experience of the face of David by Michelangelo Buonarroti, Archive of the Museo Tattile Omero.*



*Fig. 2 - Aldo and Daniela Grassini touch the sculpture Man Imitating Horses (Uomo che imita i cavalli) by Felice Tagliaferri, Archive of the Museo Tattile Omero.*

# MAKING MUSEUMS ACCESSIBLE: BEST PRACTICES FROM MUSE

***Paolo Degiovanni, Patrizia Famà, Katia Franzoso and Romana Scandolari***

Accessibility is an increasingly important issue for museums and cultural institutions. It can be argued that access to heritage and culture is a fundamental right of all people, regardless of identity or ability. Accessibility and inclusion are also highly valued and explicitly mentioned in ICOM's (International Council of Museums) new definition of a museum. These two broad issues are, therefore, becoming essential elements of the identity of contemporary museums.

Museums must provide equal access and services to all types of audiences. However, various barriers can prevent people from accessing museums. These barriers can be physical, sensory, intellectual, financial, cultural, emotional and attitudinal. Finding ways to remove these barriers is one of a museum's most important ethical challenges.

A few years ago, MUSE (the Science Museum of Trento, Trentino, Italy) began to engage in ongoing training and participatory planning. Our main goal is to involve people with disabilities in our cultural activities and to remove the barriers to their participation. All these efforts cannot be separated from a deep understanding of the culture of inclusion, focusing on the value of working in partnership and how strong relationships can have a great and long-lasting

impact. Organisations need to learn to listen to communities (and learn how to do so), to act on their feedback, to become part of their network, and even to work with them to create larger and more engaged communities.

At MUSE we attach great importance to the motto “Nothing about us without us” when planning new activities: the active involvement of people with disabilities through a co-project working process is essential in creating a meeting point between different backgrounds. In addition, it can certainly raise awareness of the needs and wishes of people with disabilities and hence, a much deeper and more solid understanding of everyone’s needs can be achieved. In this way, museums can become an extraordinarily appropriate place for all social perspectives. It should also be the starting point for a network of different organisations spread throughout the territory, to involve and give visibility to those who often experience isolation and social stigmatisation.

As an example, MUSE is currently running an experimental project called “Tandem Tours”, which consists of guided tours of the museum led by young people with cognitive and/or physical disabilities, assisted by scientists. As a result, we hope to begin to break down stereotypes, tackle prejudice and emphasise that people with disabilities can (and should) play an active role in the cultural life of the community.

Below we present MUSE’s journey and experiences over the last five years in accessible communication, neurodiversity and different forms of sensory impairment.

## **Accessible Communication**

Being an accessible museum also means making all content clear to a wide range of audiences. The content can be very complex in



science museums, especially for children, foreign visitors or people with cognitive disabilities. At MUSE we have published an Easy to Read guide about permanent exhibitions in the museum, "MUSE facile da leggere". This guide was produced in collaboration with Anffas Trentino Onlus, the local chapter of a national association committed to the protection of the rights of people with intellectual disabilities and neurodevelopmental disorders and their family members; museum staff and people with disabilities worked side by side for more than a year to create it.

The text was checked for scientific content by the scientific communicators of MUSE and revised by a specialised reading group of Anffas to obtain the official certification and logo ETR (Easy to Read). ETR, promoted at the European level by Inclusion Europe (a European association of people with intellectual disabilities and their families) and in Italy by Anffas, is a simplified language that is easy to understand.

The main features of ETR are short sentences and frequent new paragraphs, while complex and difficult words are replaced by much simpler ones. This type of writing helps people with intellectual disabilities (but not only them) to read and understand any information that could be a very difficult barrier to overcome without an intermediary.

An additional accessibility tool for people with a wide range of speech and language impairments is the MUSE guide in symbolic language (Augmentative Alternative Communication). It results from translating the Easy to Read guide "MUSE facile da leggere". It was finalised using a publicly available programme (SymWriter) that also allows the morphological translation of scientific texts, albeit simplified, such as those in the museum guide.

## Neurodiversity

Autism spectrum disorder (ASD) is a complex developmental condition that presents persistent challenges in non-verbal or verbal communication, social interaction and repetitive behaviours. As a lifelong developmental disability, autism spectrum disorder affects the way a person interacts with people around them.

The symptoms of ASD vary from person to person, but people with ASD often have a high sensitivity to sounds, lights or other sensory experiences such as being touched. They also have difficulties with communication and social interaction.

There are many physical barriers and difficulties that people with autism can encounter when exploring exhibition halls and public spaces. Particularly when a museum is crowded, the sensory stimuli can be overwhelming and the noise unbearable, leading to a negative experience.

MUSE's commitment to accessibility and inclusion for people with autism began in 2021 with a project called "Al museo mi diverto anche io! (In the museum I have fun too!)". In short, a training course supported by Fondazione Caritro and aimed at the main museums of the Province of Trento and the main associations working with autism in the same area (AGSAT, Albero Blu, Fondazione Trentina Autismo, Il Ponte, La Locanda Dal Barba, TimeAUT), ASD Tersicore - Spazio Danza and the University of Trento (CIMeC-TRAIN).

The project aims to train museum staff and to identify the physical barriers and other difficulties that people with autism might encounter when exploring the 4 participating museums (MART, MUSE, Castello del Buonconsiglio, METS - Museo etnografico trentino San Michele). During this process, the need to create a sensory decompression room, a so-called "comfort zone" at MUSE emerged. This type of room was inspired by the Snoezelen approach, which uses

light, colours, sounds, music, scents, etc. to promote relaxation and experiential learning. It is a sensory room equipped with soft seating, dimmable lights and other sensory elements with a calming effect. The main users are people with autism spectrum disorder. Still, this room can also welcome other audiences who, for various reasons, may need a break from sensory overload (e.g. people with dementia).

“El mondo nóf” (The New World) is an interactive workshop inspired by a game our grandparents used to play to make a simple everyday object “extraordinary”. MUSE has created a 2.0 version of the game, using natural and museum objects (replicas and originals) as engagement tools to stimulate curiosity in all participants. Furthermore, these objects incentivise them to dig into their lives and share their personal stories.

If possible, the local dialect/language seems to be the best choice as a privileged communication with the elderly, as it is strongly linked to affective and emotional values. In the future, after an experimental phase in some nursing homes in Trentino, “El mondo nóf” will be held in personal care centres, such as Alzheimer’s centres and RSAs (Residenza Sanitaria Assistenziale). In 2022 the workshop was also proposed at the “Alzheimer Fest” in Florence.

## **Sensory Disabilities**

Sensory disabilities affect an individual’s access to auditory and/or visual information. In the specific case of visually impaired visitors, many museums – such as MUSE – try to break the famous “don’t touch” rule whenever possible, offering the opportunity to interact in the exhibition halls with tactile stations and tactile models representing artefacts, objects and the building itself. When it’s forbidden to touch the original, 3D printing is also a great alternative to create replicas and allow blind visitors to grasp the shape of the “untouchable” specimens.

At MUSE we also offer tactile tours, where the building, collections and contexts are described to highlight their physical characteristics and some exhibits can be touched. We offer sign language tours and videos for the hearing impaired.

In December 2022, brand new tactile maps were installed in all 6 museum exhibition halls. They were produced in collaboration with the Abilnova cooperative and the Progresso Ciechi Onlus association: their main purpose is to provide people with sensory disabilities with useful information to help them find their way around the museum.

As an example of an educational workshop accessible to people with visual impairments, MUSE has developed “Coding a scatola chiusa” (“Code in a box”). Its main purpose is to introduce basic concepts of coding, computational thinking and problem solving without using technological devices, relying only on our sense of touch.

“Coding a scatola chiusa” was conceived in collaboration with the Abilnova cooperative to be fully accessible to everyone: players who are “blind” (both blind people and people wearing eye masks) have to rely on their sense of touch to learn the rules, remember them and use them to get out of a maze. This workshop premiered at the Genoa Science Festival and is now part of MUSE’s educational programme.

## **“Obiettivo Accessibilità”**

3<sup>rd</sup> December is the International Day of Persons with Disabilities. Declared by the United Nations in 1992, its main aim is to raise awareness of disability-related issues to ensure the dignity and well-being of people with disabilities.

Since 2018, MUSE has organised an annual event on the importance of accessibility and inclusion. It includes workshops, exhibitions, presentations and meetings focusing on different aspects of this topic in a

museum context. In 2021, MUSE organised the Open Access Hackathon, a 24-hour marathon to design and build devices to help people with sensory disabilities visit the museum's Sustainability Gallery.

In 2022, the event lasted not one day, but two weeks, to promote the meaning and value of the celebration and to extend the various accessible activities to schools. An exhibition entitled "Oltre il buio le stelle" ("Beyond the Darkness, the Stars") was also held. The exhibition, held at MUSE from 3<sup>rd</sup> to 18<sup>th</sup> December 2022, allowed visitors with sensory disability to explore the theme of astronomy. A visually impaired person with expertise in the subject led tours to provide basic and more detailed knowledge and look at complex concepts from a different angle. Tactile panels enabled people to find their way around the exhibition, while Braille panels and audio files were available for more in-depth insights.



*Fig. 1 - Temporary exhibition "Oltre Il buio le stelle" aimed to discover astronomy through touch. Description: a person touches a reconstruction of the cosmos created with a 3D printer. Archivio MUSE - Museo delle Scienze, photographer: Michele Purin.*



*Fig. 2 - Tour in Italian Sign Language. Description: on floor -1 of the MUSE, a guide and an interpreter are conducting a tour in Italian Sign language. Archivio MUSE - Museo delle Scienze, photographer: Michele Purin.*



*Fig. 3 - 'El mondo nòf' workshop, dedicated to people with dementia or Alzheimer's disease. Description: in a classroom in MUSE some boxes are displayed, covered with a layer of potting soil. By removing the soil, it is possible to discover some of the museum exhibits. Archivio MUSE - Museo delle Scienze, photographer: Michele Purin.*



*Fig. 4 - Tactile map of MUSE with braille lettering.*

*Description: close up on a hand touching a panel with braille inscriptions at MUSE. Archivio MUSE - Museo delle Scienze, photographer: Michele Purin.*





# **ACCESSIBILITY AND INCLUSION AT THE MART**

***Ornella Dossi***

Since its inception, the Museum of Modern and Contemporary Art of Trento and Rovereto (MART) has placed particular emphasis on accessibility and inclusion, striving to be a place that preserves and protects art while also being physically and culturally welcoming and accessible to the entire community.

Museums should be seen as places in live; they should play an increasingly important role in social and civic development. They are understood to promote and support meeting places that embrace diversity and inclusion and enhance individual talent.

For this reason, MART's Education Department has always placed the individual at the centre of its planning, believing that everyone has the right to experience or rediscover the joy of art. There are numerous activities to make the museum more accessible to people with disabilities, who can be involved through workshops, guided tours with a sign language interpreter, and tactile tours, among others, so that they can learn and experiment with new artistic languages and expand their knowledge simultaneously. Over the years, we have involved around 30,000 people with special needs in an arts experience supported by our facilitators.

We have implemented inclusive projects through specific activities where people with disabilities are no longer spectators but active participants. True inclusion is achieved by creating situations and

conditions that empower and engage people in the knowledge process and by creating tools to break down cultural barriers.

One of the museum's first inclusive projects was a video guide in Italian sign language, created in collaboration with the Italian National Association of the Deaf of Trento, with the participation of a young deaf interpreter. The video guide, available free of charge at the museum's ticket office, allows visitors to visit the collections and the Depero Futurist Art House without any assistance.

The beauty of art overcomes sensory disabilities, even visual ones. While light and colour may be essential elements of a painting, people with visual impairments can still experience art through form and content on a physical, perceptual, emotional and cognitive level.

MART's Touch Tour initially featured some sculptures from the permanent collection, which could be explored by touching the artworks. The tour has been recently enhanced in collaboration with the Omero State Tactile Museum in Ancona. Today, visitors can find, alongside the actual paintings, relief reproductions of Carlo Carrà's *Lot's Daughters* and Depero's *Bird in Motion*. These perfect three-dimensional copies allow the visually impaired to experience the works concretely. Working and growing together and maintaining an ongoing dialogue with people are crucial factors in these projects, as is the need to work with local organisations from the 'third sector'.

In collaboration with Coop Impronte, projects have been carried out on several fronts involving several autistic young people. Considering that inclusion implies spontaneous relationships, normalisation and interaction, some autistic young people have given workshops and guided tours to secondary school students after being prepared and trained by the staff of the Education Area.

Others have created a paper guide using Augmentative and Alternative Communication (AAC) to facilitate access to the MART collections and the Depero Futurist Art House for the special-needs

audience. Translating complex content into an alternative and simplified language removes cultural and physical barriers, making personal growth and enrichment accessible to all.

Empowering disabled people and valuing their thoughts were the objectives behind creating “MART – the Inclusive Museum”, a series of videos where disabled people discuss works from the museum’s collections. The videos, posted on social media, allow users to share the works actively, thus strengthening the point of view of these new art critics. In addition to some social cooperatives, the project also involved the Vannetti Alzheimer’s Day Centre and the Rovereto Mental Health Centre (Futuro in Circolo).

Art grows and evolves thanks to the diversity and uniqueness of each individual, which is why inclusive projects never really end. We continue to work daily to make the MART a welcoming museum for everyone.

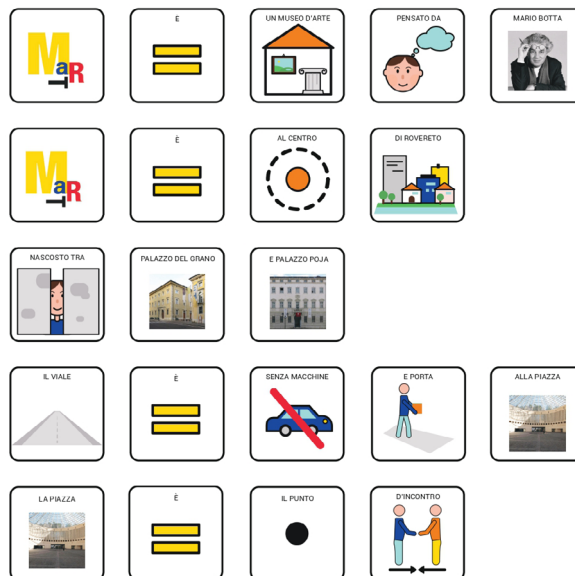


Fig. 1



*Fig. 2 – AAC GUIDE*

Creating art and culture through Augmentative Alternative Communication (AAC) to promote awareness of the MART and some works in the Permanent Collection for an audience with complex communication needs. Through this project, developed in collaboration with Coop Impronte, the disabled person is no longer just a passive spectator but a contributor to content production, becoming an active participant in change.



*Fig. 3 - TOUCH TOUR of the Permanent Collection*

The Permanent Collection itinerary includes tactile reproductions.



*Fig. 4 - Tactile reproduction of Lot's daughters by Carlo Carrà*

The Permanent Collection itinerary has been expanded to include tactile reproductions of the masterpieces *Bird in Motion* by Fortunato Depero and *Lot's daughters* by Carlo Carrà.

# MUSEO EGIZIO IN & OUT

*Alessia Fassone and Federica Facchetti*

Since its 2015 renovation, the Museo Egizio has introduced numerous activities to engage and participate with a wide range of audiences. In some cases, the museum reaches out to people wherever they are, especially if they live in places where they cannot move around freely or with ease. This “social” approach is an integral part of the initiative of the so-called new museum, a mission that is concretely shaping our work. Without an audience, a museum might lose its meaning, or at least fail in its fundamental educational and cultural role.<sup>1</sup> This brief contribution illustrates two projects that exactly match this commitment: one aims to attract those who are not likely to come to the museum on their own accord, while the other aspires to take the museum beyond its own borders.

The Museo Egizio seeks ambassadors from all over the world. Who better than new citizens to be spokespersons for an intercultural message? In 2018, a collaboration with CPIA Torino 1 (Centro Provinciale per l’Istruzione degli Adulti) and Diskolé APS brought new narratives, many stories, and numerous voices to the galleries of the museum.

With teacher Valentina Sacchetto, groups of boys and girls, who are migrant minors working towards the successful achievement of the

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1 Federica Facchetti, Alessia Fassone, “Dialoghi Interculturali al Museo”, in *Musei e Migranti gli strumenti dell’incontro. Atti del workshop internazionale 4 Giugno 2018, 26 novembre 2018, 18 febbraio 2019*, a cura di Anna Chiara Cimoli, Federica Facchetti, Alessia Fassone, Christian Greco, Paola Matossi, Modena, Franco Cosimo Panini Editore, 2022, 11-16.

eighth-grade exams, became passionate about certain objects, studied them, and they discovered similarities and differences between ancient Egypt and their culture of origin. They finally got involved by telling anecdotes, revealing emotions, and recollecting critical life moments. Participants in the activities came from all around the world, especially from the African continent.

Their level of Italian language proficiency varied widely, with some being able to interact linguistically with greater ease, while others still learning. Their interaction became an opportunity for mutual exchange. Therefore, the museum has been transformed into a space to learn Italian as a second language through art and archaeology. Objects and words became the tools to better understand Italian culture and become new citizens of Turin.

The ten study classes at the museum involved constant training sessions in understanding, processing, and speaking. The last session consisted of a guided tour, where the students led their friends and families to discover the museum, with brief explanations in Italian and their native languages. One of the tours was viewed live on Facebook from the Philippines.

Students gained self-confidence and increased awareness of the importance of cultural heritage, and demonstrated how motivated and passionate they are. Several students' relatives and friends would never visit a museum on their own, sometimes because they feel that they are not educated enough to understand what they are seeing. Frustration produces anxiety and self-segregation. Some CPIA students decided to continue their education and enrolled in high school, supported by their families.

Like all schools activities, the CPIA workshop also had to transform into a distance learning course during the COVID-19 pandemic. Online meetings were organised starting in March 2020, despite technological problems and poor internet connections. Many students lived in difficult



settings, in noisy places, without a suitable electronic device, but they did not give up and attended online classes as much as possible.

An engaging booklet was written by the students, containing brief descriptions of their favourite object, and a comparison with an Egyptian artefact chosen by the curators as a parallel. Emotions and memories are at the heart of the texts, so art is nothing more than a means of communication. Through the students' words, the Museo Egizio's collections speak to new generations. The past thus became a tool for understanding the present and enriching one's experience.

Once the doors reopened to the public, the students saw for themselves in person what they had studied with amazement and excitement. While visiting the museum, they were proud to recognise the art objects that had become familiar to them. The project is ongoing, with a new round of classes starting in 2024.

In order to take the museum beyond its borders, and bring the collection closer to those who cannot, for the most various reasons, come to the museum, some projects were designed in collaboration with other institutions in Turin. One of these is the project "Free to Learn" in collaboration with the penitentiary in Turin.<sup>2</sup> The project originated in 2018 from a meeting between the Director of Museo Egizio Christian Greco and the former Director of the Lorusso-Cutugno penitentiary in Turin, Domenico Minervini. The collaboration was between the curators at the Museo Egizio and the teachers of the Professional School ITIS "Plana" and the "Primo" Fine Arts School, who had been working in the penitentiary for years. Therefore, carpentry workshops and across different artistic disciplines were already being conducted in the penitentiary, and we proposed to the teachers to make replicas of our artefacts.

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2 Alessia Fassone, "Il Museo fuori dal Museo", in *Atti del XXIX Congresso ANMS. L'Accessibilità nei Musei. Limiti, risorse e strategie. Chieti 23-25 Ottobre 2019*, a cura di Luigi Capasso, Firenze, ANMS, 2020, 117-120.

The project started with a lecture on the tomb and the grave goods of Kha and Merit, from where the objects chosen for the reproductions came. The curators and restorers held classes on Egyptological aspects and the conservation of artefacts. To make the replicas, the Museo Egizio provided high-resolution 1:1 scale images, and the teachers took measurements of the originals. In one case, we were also able to provide technical drawings. At the end of the school programme, we were invited to see the replicas, and the results surprised us all. The quality of the artefacts was exceptional in the precision of the details and above all in the resemblance to the originals. The quality was so remarkable that it was decided to display them to the public and describe the project simultaneously.



*Fig. 1 – The Free to Learn exhibition in Museo Egizio (Museo Egizio, Torino)*

In December 2018, a small exhibition of these objects was organised at the Museo Egizio (Fig. 1), then moved to the Turin Courts of Law cafeteria. We soon realized that the collection represented unique and extraordinary educational materials. We therefore decided to use them during summer schools organised with the University of California, Los Angeles (UCLA) and the University of Pisa. They then became fundamental in another project, 'Il Bello che fa bene' (possibly translated as: 'Beauty that does good'), active since 2014 in collaboration with the Forma Foundation, which organises workshops for the young patients of the Regina Margherita Children's Hospital. Our workshops were enriched with the replicas and were of great interest to the children (Fig. 2). The production of the artefacts was carried out with tools and techniques very similar to those used in antiquity; therefore, the penitentiary inmates' work also provides important and useful information for Egyptological research, especially regarding production methods.



*Fig. 2 – A workshop in the Regina Margherita hospital in Turin (Museo Egizio, Torino)*

The work of the inmates also allowed to realize one of our temporary exhibitions: 'Invisible Archaeology'. They made a wooden box that we displayed disassembled in its various parts, and we showed

how they were put together. It was also possible to reconstruct a nineteenth-century restoration of a papyrus and show this via video format. The production of replicas did not stop, and consequently, neither did the exhibitions. In particular, the reproduction of the Book of the Dead of Taysnakht, was the subject of a small exhibition, called 'Papirotour', centred around a replica of the book as a pivotal object. The exhibition travelled through twelve city libraries, and a curator-led conference was held each month, at every stop. The project made it possible to bring the museum closer to the residents of the suburbs (Fig. 3). Moreover, in 2019, the library card allowed free admission to the museum and thus reached out to those who do not usually visit the museum to do so. The tour concluded in July 2022 after a two-year forced stoppage due to the health emergency caused by COVID-19. At the time of the writing, the exhibition will soon begin a new tour involving libraries in the Turin hinterland.



Fig. 3 – The Papirotour exhibition in the Dietrich Bonhoeffer library in Turin (Museo Egizio, Torino)

In 2021, the 'Free to Learn 2' exhibition was inaugurated at the museum, and afterwards, it began touring many Piedmontese pro loco (Tourism Offices), thus taking the Museo Egizio around the whole region. All this was possible thanks to the passionate involvement and keen interest of all the institutions involved. First, the teachers who believed in the project; the penitentiary staff, who supervised the work, especially during the school's closed summer months. And, obviously, thanks to the inmates, a group of people that are very passionate about this activity. They always asked to produce new copies, and the classes we organised have always been very popular. One told us he woke up at night and thought of ancient Egypt. Above all, it was a great stimulus to know what those objects were intended for. Their social destination, especially in the case of Regina Margherita Children's Hospital, was greatly appreciated. One of the people involved told us that what made him the happiest was that "on the outside", they would no longer be thought of for the "wrong things" they had done, but also for "positive things".

The commitment of the people involved in all the design phases, and the impact on other activities were certainly the key elements for the success of this project. At the time of the writing, the museum team is working on a systematisation our projects, so that they become a daily and shared part of the work of the whole museum.



# OPENING UP TO THE COMMUNITY

*James Bradburne*

A museum is like the big house of the community. The museum is the place where we keep the things we cannot have at home. The special things, the rare things, the things that not everyone can have. So we put them in a building, which we call the museum. And it is really a home for all our memories. It is a record of the things we want to be there. Ideally, the museum becomes the collective memory of a community. But everyone has to feel that they belong there, not just one group. That is the big challenge we face, that many of these houses of memory started out serving a very, very exclusive private clientele.

For example, the Kunsthistorisches Museum in Vienna, which opened at the end of the 19th century, was the memory of the Habsburg family. It was a very private collection and it became the memory of a country – Domus Austriae. But the collection was that of a family of rich white people, the ruling class. What about the other people? Our challenge is to make our houses of memory a place where everyone feels they belong. That doesn't mean that everyone's stuff is there. It means that everyone feels that they belong and that the objects that are collected are somehow theirs, so you don't have to include everything. But we want everyone to feel that the Caravaggio in Brera is everyone's Caravaggio, whether they are from Syria or Sudan, or recent refugees from Ukraine. They may have been born in Milan and have been princesses for a thousand years. But it's everyone's Caravaggio, it's our Caravaggio.

A museum is about our memory. Without our memory, we're like a society with Alzheimer's disease. We constantly live in the present, frenetically making decisions and forgetting who we are and who we were in the past. Memory signals our entry into our common democratic humanity. Very young children don't have memory. Every day is new, and it's not until they're about three or four that they start to say, 'Well, that person who broke the glass yesterday is me, that's the same person, and I'll be the same person going to school tomorrow'. We grow into memory, and as we grow into memory we grow into our society, into our memories, our grandmother's memories, our friends' memories, each other's memories. This arc of shared memory sometimes ends tragically when we lose our memory and we all know that terrible time when you go to someone you've known and loved all your life and they look at you and say 'who are you?' So just as our own memories make us who we are, our memory houses are the most important thing that a society has. So they must belong to all of us.

That's why it's so important to open our museums to all, and why it's so important that our memory institutions are inclusive, because they have to be who we all are. Without these traces of where we've been, of what we thought was valuable, we are left vulnerable as we face the future, because things continually change. We have objects in museums that ask us 'why on earth did they have that?' But it's who we were. Our society and our democracy and our ability to live together depends on having a memory of who we are, where we're going and where we've come from. Without that memory, and without institutions to look after it, we don't have a way of steering towards the future – we have to keep looking back in order to move forward, and in that way, we can navigate the present much better.

Minor institutions are sometimes better placed to act as custodians of collective memory, free from the weight of politics and polemics, to truly record the memories that matter to a particular community. There are two starting points for any community memory institution:



listening and documenting. You listen to stories, to experiences; you listen to children, you listen to 90-year-olds; you listen to teachers and you listen to students – you listen and you don't just let that listening fade away because talking is just talking. Otherwise, the words disappear. What museums and libraries and all our houses of memory are for is listening and making that listening visible. You put it on paper, you put it on audiotape, you put it on video. You have to capture memories, they're like butterflies. So you have captured memories and your identity is which butterflies you have been able to track and preserve. If you don't make your listening visible and you don't make it clear to the community that you're listening, someone may come in and say, "Well, why didn't you listen to me?" Then you can say, "Look – I listened to your mother and I listened to your friend, now I'm going to listen to you". Belonging to a community is about how well our institutions of memory demonstrate our commitment to listening.



*Fig. 1 – Visitors in front of 'Supper et Emmaus' by Caravaggio (Michelangelo Merisi), 1606, at the Pinacoteca di Brera (Pinacoteca di Brera, Milan).*



*Fig. 2 – A visitor enjoys a sensory experience accompanying the description of a painting on display at Pinacoteca di Brera (Pinacoteca di Brera, Milan).*



*Fig. 3 – Different artworks on display in Room IX at Pinacoteca di Brera (Pinacoteca di Brera, Milan).*



*Fig. 4 – A visitor in front of ‘The Martyrs Cecilia, Valerian and Tiburtius’ by Orazio Gentileschi, 1606-1607, at Pinacoteca di Brera (Pinacoteca di Brera, Milan).*



# A HUMAN RIGHTS APPROACH TO ACCESSIBILITY FOR VISITORS WITH DISABILITIES IN MUSEUMS. REFLECTIONS FROM THE DANCING PROJECT

*Léa Urzel Francil, Ann Leahy and Delia Ferri*

## Introduction

It has been recognised by the former Special Rapporteur in the field of cultural rights, Karine Bennoune, that cultural participation has potential to build mutual understanding and trust and that it is essential to achieve a range of human rights goals.<sup>1</sup> Most recently, the newly appointed Special Rapporteur, Alexandra Xanthaki, has highlighted that ‘culture is a positive element and a positive drive for the realization of human rights’.<sup>2</sup> She has also emphasised that the recognition and pro-

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\* This contribution has been written within the remit of the project ‘Protecting the Right to Culture of Persons with Disabilities and Enhancing Cultural Diversity through European Union Law: Exploring New Paths – DANCING’, funded by the European Research Council (ERC) under the European Union’s Horizon 2020 research and innovation programme (Grant Agreement No. 864182). The contribution has been written in early 2023 and includes legal developments up until March 2023.

1 United Nations Human Rights Council (UNHRC), “Report of the Special Rapporteur in the Field of Cultural Rights: Note by the Secretariat”, (4 January 2018) A/HRC/37/55 <<https://digitallibrary.un.org/record/1473375?ln=en>>, accessed 06 November 2023.

2 UNHRC, “Cultural Rights: An Empowering Agenda: Report of the Special Rapporteur in the Field of Cultural Rights, Alexandra Xanthaki”, (22 March 2022) A/HRC/49/54, para 10 <<https://digitallibrary.un.org/record/3982215?ln=en>>, accessed 06 November 2023.

tection of cultural rights is thus ‘a tool of affirmation of one’s identity and ultimately a tool of empowerment’.<sup>3</sup>

The right to participate in cultural life involves the protection of the right of everyone to access, participate in, and enjoy cultural goods and services and heritage. It is provided for in a number of international human rights treaties.<sup>4</sup> Among them, Article 27 of the Universal Declaration of Human Rights (UDHR) and Article 15 of the International Covenant on Economic Social and Cultural Rights (ICESCR) explicitly and in a general fashion articulate the right to culture. With regard to persons with disabilities, the United Nations Convention on the Rights of Persons with Disabilities (hereafter, ‘CRPD’ or ‘the Convention’)<sup>5</sup> recognises the right to cultural participation in its Article 30. This provision imposes several obligations on States Parties, including that of ensuring accessibility of cultural goods, services, institutions, and heritage, for persons with disabilities.

In spite of such widespread recognition of the right to cultural participation, it is acknowledged that people with disabilities still face numerous barriers in accessing culture. Xanthaki has generally argued for the need to ‘eradicate discrimination in cultural activities’.<sup>6</sup> In Europe, the European Parliament has called for further action to improve access for people with disabilities to cultural activities and infrastructures, and for more work towards removal of existing barriers.<sup>7</sup> In a similar vein, the

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3 Ibidem para 13.

4 Delia Ferri and others, “Implementing the Right of People with Disabilities to Participate in Cultural Life across Five European Countries: Narratives and Counter-narratives” (2022) 14 *Journal of Human Rights Practice* 859, 860, citing Elsa Stamatopoulou, *Cultural Rights in International Law: Article 27 of the Universal Declaration of Human Rights and Beyond* (Martinus Nijhoff 2007); Mylène Bidault, *La Protection Internationale des Droits Culturels* (Bruylant 2009); Pok Yin S. Chow, “Cultural Rights” in Christina Binder and others (eds), *Elgar Encyclopedia of Human Rights* (Edward Elgar Publishing Limited 2022).

5 United Nations Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD).

6 UNHRC, A/HRC/49/54 (n 2) para 7.

7 European Parliament, “Report on Structural and Financial Barriers in the Access to Culture” A8-0169/2018.

Council Conclusions on the Work Plan for Culture 2019-2022 state that a stronger orientation towards the interests and needs of specific groups, including people with disabilities, is necessary to enhance access to culture.<sup>8</sup> Consistent with this, the European Commission report related to the Work Plan for Culture 2019-2022 identifies the need for a renewed focus on access to culture for persons with disabilities as spectators and as artists.<sup>9</sup>

When it comes to museums and cultural heritage, disability issues are discussed within the remit of broader debates regarding audience development,<sup>10</sup> or providing equal access in the context of legislation on discrimination or equality.<sup>11</sup> Contributions from a disability perspective sometimes focus on how people with disabilities are under-represented in museum exhibitions and are seldom recognised as a social minority with their own culture and identity,<sup>12</sup> notwithstanding how museums could operate as places where visitors could reframe what they know using a disability consciousness.<sup>13</sup> Furthermore, a series of reports in a range of cultural sectors and countries evidence relatively low levels of participation of people with disabilities, and

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8 Council of the European Union, "Council conclusions on the Work Plan for Culture 2019-2022" 2018/C 460/10.

9 European Commission, "Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Work Plan for Culture 2019-2022" COM (2022) 317 final, <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022DC0317&qid=1656662290105>> accessed 06 November 2023.

10 Steven Hadley, *Audience Development and Cultural Policy* (Palgrave 2021).

11 Vassilios S. Argyropoulos and Charikleia Kanari, "Re-Imagining the Museum through "Touch": Reflections of Individuals with Visual Disability on Their Experience of Museum-Visiting in Greece" (2015) 9 *Alter* 130; Jonathan Rix, Ticky Lowe, and the Heritage Forum, "Including People with Learning Difficulties in Cultural and Heritage Sites" (2010) 16 *International Journal of Heritage Studies* 207.

12 Patrícia Roque Martins, "Redefining Disability in Museums: Exploring Representation" (2021) 15 *International Journal of the Inclusive Museum* 20; Amanda Cachia, "'Disabling' the Museum: Curator as Infrastructural Activist" (2013) 12 *Journal of Visual Art Practice* 257.

13 Katherine Ott, "Collective Bodies: What Museums Do for Disability Studies" in Richard Sandell, Jocelyn Dodd and Rosemarie Garland-Thomson (eds), *Re-presenting Disability: Activism and Agency in the Museum* (Routledge 2010).

ongoing accessibility issues with infrastructure.<sup>14</sup> Museum and gallery collections have traditionally been accessed through sight and strictly without touch, making them particularly inaccessible for people who are blind or visually impaired.<sup>15</sup> In addition, certain groups, especially people with Intellectual Disability (ID) or neurodivergent conditions, such as dementia, are thought to be at particular risk of exclusion and are under-represented in terms of navigational information design in museums and heritage sites.<sup>16</sup> Where access to people with disabilities is catered for, most attention has been placed on physical access. In that regard, cultural heritage projects that address only physical barriers are erroneously considered to be fully accessible. Thus, a thoroughgoing approach to accessibility is often lacking within the museum sector, with access to cultural content facilitated only in limited ways, or to limited exhibitions.<sup>17</sup> It is difficult not to agree with Weisen that inclusive design of cultural services often remains an after-thought worldwide.<sup>18</sup> As Eardley and colleagues put it, 'despite the moral, legal and financial motivations, the majority of museum collections remain largely inaccessible to visitors with an impairment or disability'.<sup>19</sup>

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14 Ann Leahy and Delia Ferri, "Barriers and Facilitators to Cultural Participation by People with Disabilities: A Narrative Literature Review" (2022) 24 *Scandinavian Journal of Disability Research* 68.

15 Alison F. Eardley and others, "Redefining Access: Embracing Multimodality, Memorability and Shared Experience in Museums" (2016) 59 *Curator: The Museum Journal* 263.

16 William Renel, "Sonic Accessibility: Increasing Social Equity Through the Inclusive Design of Sound in Museums and Heritage Sites" (2019) 62 *Curator: The Museum Journal* 377; Jane Seale and others, "A Participatory Approach to the Evaluation of Participatory Museum Research Projects" (2021) 44 *International Journal of Research & Method in Education* 20.

17 Eardley and others (n 15); Susana Mesquita and Maria João Carneiro, "Accessibility of European Museums to Visitors with Visual Impairments" (2016) 31 *Disability & Society* 373; Argyropoulos and Kanari (n 11); Rix, Lowe, and the Heritage Forum (n 11).

18 Marcus Weisen, "International Perspectives on the Cultural Accessibility of People with Disabilities (European Centre for Cultural Accessibility; Art Beyond Sight)" in Jörn Berding and Matthias Gather (eds), *The Inclusive Museum – Challenges and Solutions, State of the Art and Perspectives* (Proceedings of the 1st and 2nd COME-IN! -Thematic Conferences Berichte des Instituts Verkehr und Raum, 2018) 12–17.

19 Eardley and others (n 15) 263–264.



This chapter is informed by the human rights model of disability, which will be discussed below, and adopts a socio-legal approach in that it focuses on analysis of law and is directly linked to the analysis of the social situation to which the law applies. In that connection, we draw on a new empirical study to shed light on the need for a more thorough approach to accessibility and inclusivity in museums. The research was conducted within the remit of the project '*Protecting the Right to Culture of Persons with Disabilities and Enhancing Cultural Diversity through European Union Law: Exploring New Paths (DANCING)*'. Funded by the European Research Council, the DANCING project uses a combination of legal, empirical, and arts-based research to pursue three complementary objectives: experiential, normative, and theoretical. One of its aims is to identify and categorise barriers and facilitators to cultural participation experienced by people with disabilities. In particular, in this chapter, we present findings from empirical, qualitative research, mainly in the form of semi structured interviews with representatives of organisations of people with disabilities, organisations of Deaf people and organisations working on disability and arts in 28 European countries (27 European Union Member States plus the UK) as well as from a focus group conducted with people from five countries who work on accessibility in the cultural sector. While both the interviews and the focus group sought, *inter alia*, to understand what factors operate as barriers to, or facilitators of, cultural participation generally conceived of, this chapter only discusses the findings that relate to participation as audience or visitors in museums and cultural heritage.

Following these introductory remarks, the chapter is presented in five sections. We first contextualise our analysis by outlining the human rights approach to accessibility that characterises and frames the empirical study (Section 2). In doing so, we briefly examine the human rights model of disability as lens of analysis, and consider key provisions of the CRPD, with particular emphasis on its Article 9. Section 3 delineates the methods used in our empirical study, before discussing our findings in Sections 4 and 5, which focus especially on

the experiences of people with disabilities with regard to the practical implementation of access measures in museums, rather than overarching policy issues. We then present some concluding remarks.

## **A Human Rights Approach to Accessibility for Persons with Disabilities**

This section first briefly discusses the CRPD and its core tenets. In fact, by embedding the human rights model of disability, the Convention provides the lens through which we understand barriers and facilitators experienced by persons with disabilities in museums and the heritage sector. Further, this section zooms in on accessibility, highlighting the interrelatedness of a range of CRPD provisions when it comes to cultural participation.

### ***The CRPD and the Human Rights Model of Disability***

Nearly 18 years after its adoption, the CRPD is widely regarded as a global normative standard on disability rights. As such, it is considered the primary human rights framework that must inform national disability policies. Being the first binding human rights instrument addressing specifically disability rights and the result of an unprecedented involvement of civil society in the drafting process, the Convention is in many ways deemed a ground-breaking treaty.<sup>20</sup> In this respect, it has contributed greatly to 'refram[ing] the needs and concerns of persons with disability in terms of human rights',<sup>21</sup> and to clarifying 'existing international human rights law'.<sup>22</sup>

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20 Rosemary Kayess and Phillip French, "Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities" (2008) 8 Human Rights Law Review 1, 2.

21 Ibidem.

22 Gerard Quinn, "Resisting the 'Temptation of Elegance': Can the Convention on the Rights of Persons with Disabilities Socialise States to Right Behaviour?" in

The CRPD was not meant to introduce new rights, but rather to reaffirm the application of 'existing human rights to the particular circumstances of persons with disability'.<sup>23</sup> Participating in a revolutionary 'paradigm shift' in the way disability is approached globally, the CRPD 'brings into play a different way of seeing the reality of the lives of persons with disabilities, a different set of values with which to judge existing social arrangements and wholly new policy prescriptions to bring about improvement'.<sup>24</sup> This 'paradigm shift' implies moving away from a medical approach, where individuals with disabilities are seen as objects of charity, to a rights-based approach, where persons with disabilities are considered as subjects, as holders of rights.<sup>25</sup>

Central to the Convention is the novel conceptualisation of disability it embodies. In this respect, the CRPD is underpinned by what has been termed the 'social contextual model of disability',<sup>26</sup> which centres on the interaction between the individual's impairment and social as well as environmental barriers. Although it does not articulate a fixed definition of disability, the Convention does address it in the preamble, highlighting that '[d]isability is an evolving concept and that [it] results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society, on an equal basis with

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Oddný Mjöll Arnardóttir and Gerard Quinn (eds), *The UN Convention on the Rights of Persons with Disabilities* (Brill Nijhoff 2009) 215.

23 Kayess and French (n 20) 20.

24 Quinn (n 22) 216.

25 Kayess and French (n 20) 3, citing the Office of the High Commissioner for Human Rights, "Statement by Louise Arbour UN High Commissioner for Human Rights on the Ad Hoc Committee's adoption of the International Convention on the Rights of Persons with Disabilities" (5 December 2006), available at: <<https://www.ohchr.org/en/statements/2009/10/statement-louise-arbour-un-high-commissioner-human-rights-ad-hoc-committees>>, last accessed 06 November 2023; Quinn (n 22) 216.

26 Andrea Broderick and Delia Ferri, *International and European Disability Law and Policy: Text, Cases, and Materials* (Cambridge University Press 2019).

others'.<sup>27</sup> Furthermore, Article 1(2) CRPD provides that '[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'. In doing so, it is clear that the Convention 'acknowledge[s] the role of societal barriers in the process of disablement', whilst 'not view[ing] disability as being entirely socially constructed'.<sup>28</sup>

The CRPD is also understood to embed the human rights model of disability. According to Degener, one of the most authoritative exponents of this model, the human rights model of disability revolves around human dignity of persons with disabilities, and 'encompasses both sets of human rights, civil and political as well as economic, social and cultural rights'.<sup>29</sup> Such model further emphasises 'the indivisibility, interdependence and interrelatedness of all human rights' set out in the CRPD,<sup>30</sup> and reinforces the recognition of persons with disabilities as rightsholders.<sup>31</sup> The human rights model effectively underpins the CRPD and is recalled consistently by the Committee on the Rights of Persons with Disabilities ('CRPD Committee') as it monitors 'the efforts of State parties to implement the CRPD'.<sup>32</sup> In that regard, Lawson and Beckett point to the prescriptive nature of this model, that can be viewed 'not as a model of disability but as a model of disability policy', thus instrumental to 'progress[ing] disability policy and law reform in line with human rights principles and obligations, as set out in the CRPD'.<sup>33</sup>

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27 CRPD preamble recital(e).

28 Andrea Broderick, *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities* (Intersentia 2015) 79.

29 Theresia Degener, "Disability in a Human Rights Context" (2016) 5 *Laws* 35, 4.

30 *Ibidem* 5.

31 *Ibidem* 8; Anna Lawson and Angharad E. Beckett, "The Social and Human Rights Models of Disability: Towards a Complementarity Thesis" (2021) 25 *The International Journal of Human Rights* 348, 368.

32 Lawson and Beckett (n 31) 349.

33 *Ibidem* 364–365.

### ***Accessibility in the CRPD***

As mentioned above, the CRPD was not designed to affirm new rights. However, as it is focused on the realisation of the human rights of persons with disabilities, it integrated innovative provisions on accessibility, which are not found in other international instruments.<sup>34</sup> Accessibility is mentioned as one of the general principles of the CRPD in Article 3, along with a selection of other principles such as respect for inherent dignity, equality or non-discrimination. As a general principle, accessibility acts as a standard of reference for States Parties in their implementation of the Convention, allowing them to assess their domestic legislation against it.<sup>35</sup>

Accessibility is also ‘a vital precondition for the effective and equal enjoyment of civil, political, economic, social and cultural rights by persons with disabilities’.<sup>36</sup> As such, it is the subject of a separate provision – Article 9 CRPD. In the latter norm, the Convention embraces a broad understanding of accessibility, including physical accessibility, economic accessibility (i.e. affordability), and accessibility of information, addressing accessibility ‘in all its complexity’.<sup>37</sup> Article 9(1) CRPD requires States Parties to the Convention to:

take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, both in urban and in rural areas.

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34 Broderick and Ferri (n 26) 132, citing Janet Lord, “Accessibility and Human Rights Fusion in the CRPD: Assessing the Scope and Content of the Accessibility Principle and Duty under the CRPD” (Presentation for the General Day of Discussion on Accessibility, UN CRPD Committee, Geneva, 7 October 2010).

35 Ibidem 67.

36 UN Committee on the Rights of Persons with Disabilities (CRPD Committee), “General Comment No. 2 (2014): Article 9: Accessibility” (22 May 2014) CRPD/C/GC/2 (General Comment No. 2), para 4.

37 Ibidem para 13.

Moreover, Article 9(2)(b) and 9(2)(d) CRPD oblige States Parties to ensure that private entities provide for accessible buildings, services, and facilities. The CRPD Committee confirms that, '[a]s long as goods, products and services are open or provided to the public, they must be accessible to all, regardless of whether they are owned and/or provided by a public authority or a private enterprise'.<sup>38</sup> Article 9 CRPD also refers 'to a principle of geographic equity, requiring equivalent levels of environmental accessibility in both urban and rural areas'.<sup>39</sup> In its General Comment on Article 9, the CRPD Committee even specifies that '[i]n both urban and rural areas, access should be available for persons with disabilities to the natural and heritage parts of the physical environment that the public can enter and enjoy'.<sup>40</sup>

In order to realise Article 9 CRPD, the Committee indicates that States Parties must 'adopt, promulgate, and monitor national accessibility standards'.<sup>41</sup> It is worth noting that Article 9 CRPD is subject to the doctrine of progressive realisation, meaning that 'the obligation to ensure accessibility is intended to be implemented gradually by States Parties'.<sup>42</sup> The CRPD Committee provides indications on how to ensure such progress, insisting that '[b]arriers should be removed in a continuous and systematic way, gradually yet steadily'.<sup>43</sup> Additionally, States Parties are required to take adequate measures to the maximum of the resources available to them, as outlined in Article 4(2) CRPD. In that regard the CRPD Committee notes that 'the obligation to implement accessibility is *unconditional*'<sup>44</sup> in that it does not tolerate any undue burden exception to realising accessibility for persons with disabilities. Recently, in the views adopted on the Individual Communication 56/2018 in the case of *Henley v Australia*, the CRPD Committee recalled that:

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38 CRPD Committee, General Comment No. 2 (n 36) para 13.

39 Kayess and French (n 20) 28.

40 CRPD Committee, General Comment No. 2 (n 36) para 16.

41 Ibidem para 27.

42 Broderick and Ferri (n 26) 143.

43 CRPD Committee, General Comment No. 2 (n 36) para 27.

44 Ibidem para 25.

progressive realization means that States parties have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization of rights. The Committee considers that the steps taken towards the full realization of rights should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Convention.<sup>45</sup>

Further to the obligations laid down in Article 9 CRPD, accessibility remains instrumental to the realisation of other rights set out in the Convention, which effectively cannot be read in isolation from each other. Therefore, we will briefly address Article 21 CRPD on Freedom of expression and opinion, and access to information, and Article 30 CRPD on Participation in cultural life, recreation, leisure and sport, which are particularly relevant to the analysis provided in the present chapter.

Indeed, Article 21 CRPD provides for access to information, within the remit of freedom of expression. The CRPD Committee has noted how Articles 9 and 21 CRPD intersect on the issue of information and communication, with Article 21 CRPD discussing at greater length the ways to ensure accessibility of information and communication in practice.<sup>46</sup> Article 21 CRPD requires States Parties to take appropriate measures to ensure that persons with disabilities may exercise their rights on an equal basis with others, and through all forms of communication of their choice, including information and services in accessible formats and technologies that are appropriate for different kinds of disabilities (covering also the mass media), sign language, Braille, augmentative and alternative communication, and 'all other accessible means, modes and format of communication of their choice by persons with disabilities in official interactions'.<sup>47</sup> Such measures must be intended broadly and entail the identification and

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45 CRPD Committee, "Views adopted by the Committee under article 5 of the Optional Protocol, concerning Communication No. 56/2018" (*Henley v Australia*, 15 February 2023) CRPD/C/27/D/56/2018 (*Henley v Australia*), para 10.7.

46 CRPD Committee, General Comment No. 2 (n 36) para 38.

47 CRPD art 21.

elimination of obstacles and barriers that prevent the enjoyment of all the rights. Notably, the interpretation of ‘information and communications technologies and systems’ for the purpose of Articles 9 and 21 CRPD is broad and includes ‘a wide range of access technologies, such as radio, television, satellite, mobile phones, fixed lines, computers, network hardware and software’.<sup>48</sup> In the abovementioned case of *Henley v Australia*, the CRPD Committee further emphasised that:

the importance of information and communications technology lies in its ability to open up a wide range of services, transform existing services and create greater demand for access to information and knowledge, in particular in underserved and excluded populations, such as persons with disabilities.<sup>49</sup>

Accessibility is also central to Article 30 CRPD, which focuses on participation in cultural life, leisure and sport. For the purpose of this provision, the right to take part in cultural life encompasses a twofold individual dimension, focusing on the right to access culture and the right to active involvement in culture,<sup>50</sup> and a collective dimension, referring to the recognition and protection of disability groups as cultural communities. Article 30 CRPD, in recognising the right of persons with disabilities to participate in cultural life, requires States Parties to ensure access to cultural goods and services, cultural heritage and cultural institutions.<sup>51</sup> States Parties must, therefore, take all appropriate measures to ensure that individuals enjoy, as audience or visitors, ‘access to television programmes, films, theatre and other cultural activities, in accessible formats’ as well as ‘access to places for cultural performances or services, such as theatres, museums, cinemas, libraries and tourism services, and, as far as possible, enjoy access to monuments and sites of national cultural importance’.<sup>52</sup>

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48 CRPD Committee, General Comment No. 2 (n 36) para 5.

49 CRPD Committee, *Henley v Australia* (n 45) para 10.8.

50 Ferri and others (n 4) 4–5.

51 CRPD art 30(1), (2), and (3).

52 CRPD art 30 (1)(b) and (c).



In this respect, the CRPD Committee touches upon the intersection between Article 9 CRPD and Article 30 CRPD, discussing access to cultural and historical monuments, and recognising that:

[it] may indeed be a challenge in some circumstances. However, States parties are obliged to strive to provide access to these sites. Many monuments and sites of national cultural importance have been made accessible in a way that preserves their cultural and historical identity and uniqueness.<sup>53</sup>

On the whole, the CRPD offers an important backdrop against which to identify existing barriers to cultural accessibility, but also to understand what resources and steps are necessary to remove these barriers.

### ***Methodology***

As noted above in the Introduction, this chapter is based on a pan-European qualitative study conducted within the remit of the project DANCING. This study involved a range of interviews with representatives of organisations of people with disabilities. Further, it encompassed an online focus group with participants from several countries who work on access to art and culture. The research took place between mid-2021 and mid-2023. We obtained ethical clearance from the Maynooth University Ethics committee, and participants received information in advance about the study and agreed in writing to participate.

With regard to the interviews, we recruited representatives from 64 organisations that consisted of three types – umbrella organisation of people with disabilities, organisations working on arts and disability, and organisations of Deaf people. We prioritised organisations primarily governed by people with disabilities based on the definition in

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53 CRPD Committee, General Comment No. 2 (n 36) para 44.

General Comment 7, para 11 from the CRPD Committee.<sup>54</sup> Participant organisations were drawn from 28 countries (all European Union Member States plus UK) with at least two participating organisations from each country. We conducted semi-structured interviews mainly by video conference, allowing for maintenance of the face-to-face element of interviewing.<sup>55</sup> Although a majority of participants opted for an online interview, in some instances and as a reasonable accommodation measure, we decided to offer some alternative accommodations to potential interviewees using qualitative questionnaires, which sought open-ended or free-text answers and can be combined in a complementary way with interviews.<sup>56</sup>

The findings of these interviews are supplemented by the analysis of the discussion at the focus group, which took place in December 2021, to which we invited people working on arts/culture and disability in various ways. Its participants mainly consisted of people working on access for people with disabilities within museums and galleries or within European projects that address issues of accessibility. There were nine participants in this focus group and they came from five countries: Austria, Finland, France, Italy and UK.

Each interview was recorded and transcribed verbatim as was the focus group discussion. The analysis process we pursued followed the steps for thematic analysis outlined by Braun and Clarke,<sup>57</sup> a

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54 General comment No. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention on the participation of persons with disabilities (CRPD/C/GC/7 para 11) states that organisations of persons with disabilities are those 'led, directed and governed by persons with disabilities' and that 'a clear majority of their membership should be recruited among persons with disabilities themselves'.

55 Geraldine Foley, "Video-Based Online Interviews for Palliative Care Research: A New Normal in COVID-19?" (2021) 35 *Palliative Medicine* 625.

56 Pauline M. McGuirk and Philip O'Neill, "Using Questionnaires in Qualitative Human Geography" in Iain Hay (ed), *Qualitative Research Methods in Human Geography* (Oxford University Press 2016).

57 Virginia Braun and Victoria Clarke, "One Size Fits All? What Counts as Quality

flexible method for identifying and analysing patterns in qualitative data. All contributions have been anonymised, but we identify which country participants were drawn from and whether they worked with organisations of people with disabilities (DPOs), arts and disability organisations (A&D) or organisations of Deaf people (D). In the analysis presented, we also make it clear where we are drawing from the discussion that took place at our focus group.

The interview guide and questions for the focus group included questions about barriers to access and facilitators of access to a range of cultural opportunities, including access as audience to museums and cultural heritage sites. As mentioned in the Introduction, those perceptions and experiences of participants about access to museums and cultural heritage sites are the focus of this chapter.

## **Barriers Experienced by Visitors with Disabilities in Museums**

Interestingly, many participants acknowledged that improvements in practices, often following implementation of legislation in recent decades, had led to cultural opportunities, including museum visiting, having become more accessible. Further, participants have highlighted that more cultural activities are indeed accessed by people with disabilities in their countries. For example, a German participant felt that a lot of cultural bodies, including museums, galleries and heritage centres, were 'all starting to make efforts to change things', adding that while these might be 'tiny baby steps' or restricted by lack of resources or because of being in a protected building, she felt it was 'wonderful' to see so many institutions, 'all starting to tackle access' (DE A&D). However, this participant and many others also identified a series of persisting barriers in accessing cultural opportunities. There were similarities across countries in many respects,

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Practice in (Reflexive) Thematic Analysis?" (2021) 18 *Qualitative Research in Psychology* 328.

even if some participants perceived that developments in their country were far behind those of other countries in addressing many of those barriers. In this section, we discuss barriers encountered by people with disabilities in accessing museums and cultural heritage as audience under two sub-headings: first we focus on physical barriers, second, we examine access to cultural content.

### ***Ongoing Physical Barriers***

Participants in many countries considered that physical access to museums had improved overall for visitors, especially for groups like wheelchair users and particularly in newer buildings in public ownership. Participants often felt that physical access has been prioritised over other forms of access. This is consistent with an analysis of a series of States Parties' reports made by European states to the CRPD Committee, which identified an emphasis on physical accessibility in the cultural/heritage sphere.<sup>58</sup>

However, continuing barriers based on lack of physical access were associated especially with older, heritage buildings that had not been adapted, or had been minimally adapted, and also with buildings outside large urban areas or in private ownership. In addition, participants often felt that, in practice, laws mandating physical access to public buildings (or to cultural institutions) could be ignored or only partially implemented with little or no consequences for the institutions involved. Thus, several participants outlined how legislation requiring accessible buildings – even new buildings – was not implemented properly or enforced. For example, a participant from Germany suggested that even new or renovated museums do not always comply with the prescribed standards and that 'nobody is really checking; nobody is really controlling this' (DE A&D).

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58 Ann Leahy and Delia Ferri, "The Right to Participate in Cultural Life of Persons with Disabilities in Europe: Where is the Paradigm Shift?" (2022) 16 *Alter* 5.

Thus, even with new buildings, there were some ongoing issues with physical access identified by several participants. These included buildings where access measures were included, but, on completion, were found by people with disabilities to be unusable, such as a ramps recently installed that were too steep, or tactile flooring laid in the wrong place relative to lifts, making, even new buildings inaccessible (or partially inaccessible) for some groups. For example, for a Danish participant 'there is a lack of awareness amongst architects, builders, the ones who build the buildings and there is still a tendency in Denmark that you don't build universally' (DK DPO). In the experience of a Lithuanian participant, new buildings were often inaccessible for some groups of people with visual impairment. That participant described how: 'all the signs and walls and doors and everything is blinking, they have very bright lights which are really with low contrast very hard to see' (LT DPO). In the absence of a more comprehensive approach or enforced guidelines, she felt that good design in new buildings for blind people and people with visual impairments often depended on the knowledge and 'good wishes' of the designer.

Another issue raised by some participants was that the access provided for people with disabilities might involve a different type of experience. For example, an Italian participant discussed how access around a museum might be different from (and more limited than) access granted to non-disabled people: 'they have museum paths that are limited and.... not entirely usable by people with disabilities' (IT DPO). She added that there is insufficient attention paid not just to paths but to the overall experience of exhibitions in museums for people with disabilities. Thus, accessibility – even of new cultural buildings – often lacked a universal approach, informed by different groups of people with disabilities. Participants highlighted that accessibility measures could often result in a piecemeal approach, which might vary depending on the interest and skills of designers and architects.

### ***Barriers to Accessing Content***

Participants also discussed barriers encountered in accessing exhibitions and other cultural content. Often, participants felt that accessible content of museums was lagging behind accessible infrastructure and they sometimes felt that there could also be significant regional or geographical divergences within countries. Staff of cultural organisations were often perceived to lack knowledge about how to make cultural content, such as exhibitions, accessible and to be apprehensive about engaging with people with disabilities or with some groups amongst them. So, for example, for a Greek participant, museums and heritage sites were more accessible now for people using wheelchairs, but not for blind people or people with visual impairments for whom there is a lack of tactile exhibitions (EL DPO). Participants representing organisation of Deaf people referred to a paucity of exhibitions incorporating sign language interpretation. Occasionally, even where exhibitions or events were meant to be accessible, participants talked about lack of quality in how accessibility in museums was approached in practice. An example came from a Romanian interview participant (RO A&D) who described how a museum claimed to offer accessible visits to Deaf people, even though they only had one staff member that was minimally trained in sign-language and not able to deliver a quality experience. Consistent with this, discussion in our focus group referred to how there were still museums that are unaware that it is possible go beyond physical access and make content accessible to people with other types of disabilities. The focus group discussion also suggested that, despite a lot of information being available to museums about how to make their offerings more accessible, the information is scattered and hard to engage with. Sometimes participants highlighted how accessible content entirely depended on the 'goodwill' or knowledge within an individual institution, or was even associated with an individual staff member, and depended on whether funding for access measures could be obtained.

Some participants felt that improvements had occurred in relation to access to cultural content – such as exhibitions that included tactile models or tours involving sign language translation, or sometimes use of various technologies to facilitate access. For example, a Portuguese participant suggested that there were ‘some good examples in the museum field’ and listed positive initiatives on the part of museums, including audio guides and live tours with audio description, video guides and live tours with sign language and also a museum with relaxed visits for people who are neurodivergent (PT A&D). Yet, that participant also felt that overall museums often think that it is ‘enough for the entrance to be accessible,’ and suggested that:

[they] don’t consider at what height we present the objects, where are the labels? What is the size of the letters? What are the contrasts of the panels? If we give alternative information in Braille or audio description or sign language tours etc. So for the majority I would say this doesn’t... maybe even if they have an accessible entrance, that is where it ends. (PT A&D)

Relatedly, good practice might remain somewhat fragile, with knowledge and expertise being lost at the end of a project or with loss of a particular staff member. This point was reinforced in our focus group discussion, where participants referred to the need for access measures to become embedded throughout cultural organisations and supported from the top-down.

A related issue involved lack of access to information and communications with many participants perceiving that obtaining information from websites about cultural events or accessible programming could be difficult and off-putting for some groups. Specifically, websites of cultural bodies often remained inaccessible or hard to navigate or inadequate in terms of the accessibility of the information provided (such as lack of information on transport links) and some obstacles around booking tickets were mentioned. For example, speaking about her experience, a Cypriot participant suggested

that, in spite of the legal framework prescribing accessibility,<sup>59</sup> the websites of cultural public bodies tended not to be accessible:

We don't have accessible websites especially in the public sector at all; they are not even user friendly for me, so I cannot use those.  
(CY A&D)

Another example was given by a participant from Estonia (EE A&D) who felt that cultural websites were often not well organised from the perspective of blind and visually impaired people and did not make it easy to find information on accessibility. Again, however, in many cases, participants acknowledged that things had somewhat improved or were improving in the area of information. Participants working in museums at our focus group also talked about this issue, suggesting that liaison with organisations of people with disabilities about communications was important, that a decision to take part in a cultural activity starts long before people leave home, and that improving the information published on websites was not always expensive to implement.

Finally, some participants suggested that opportunities for certain groups of people with disabilities, such as people with intellectual disabilities and people with psychosocial disabilities, remained particularly limited. For example, an Italian participant felt that accessibility was often thought of in terms of physical disability, but access for people with ID was 'much behind' (IT DPO). A Romanian participant linked exclusion from cultural centres to lack of knowledge and fear, especially of some types of disability such as ID, and talked about staff being 'very afraid to welcome people with disabilities' (RO A&D). Thus, for certain groups, access was perceived to be still very limited in many countries.

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59 The Web Accessibility Directive (Directive (EU) 2016/2102 of the European Parliament and of the Council of 26 October 2016 on the accessibility of the websites and mobile applications of public sector bodies OJ L 327, 2.12.2016, p. 1–15) prescribes accessibility requirements for all public websites and mobile applications in the Member States of the EU, and has been implemented into national legislation by all Member States.



Overall, while participants had often experience of individual projects in which cultural content was accessible within museums and galleries, a patchiness, or lack of integration of accessibility across all offerings, was quite common across interviews with many other participants.

## **Facilitating Access to Museums: Good Practices and Experiences**

Before turning to address what facilitates access to museums, it is worth noting that there were many good examples given of accessible buildings, museum content and websites, including tactile exhibits, audio guides/description, technical aids, tours with audio description and sign language, and relaxed visits. For example, a German participant characterised a museum in Hamburg and an art gallery in Bonn as having 'played a pioneering role' in providing sign language tours (DE D). It was also perceived that, sometimes, other institutions had begun to learn from these 'pioneering' bodies. Thus, there is good practice in accessibility for visitors/audience in many countries. However, in most cases, it seems to still depend on the interest of a few key allies, or on project-funding (as opposed to ongoing/mainstream funding), and, therefore, its dispersal is uneven and the knowledge of what facilitates access is not widely shared or understood.

As referred to already, participants often perceived that a widespread lack of knowledge on disability or accessibility on the part of staff of arts organisations constituted or contributed to barriers to participation. Against that backdrop, participating in training delivered by groups of people with disabilities was considered a key facilitator, as were processes of meaningful consultation. This could mean receiving advice about the diverse accommodations needed and links being made with different groups of people with disabilities who could consult on the design of buildings, exhibitions and websites. This could be effective when it took place in the conception

stages of projects, and it also needed to involve input by people with different impairment types. On the other hand, in reality, consultation could also be attempted in a half-hearted manner after key decisions had been taken, which was clearly not considered useful. A few participants also regretted the lack of a universal design or design-for-all approach embedded within cultural institutions – which would involve moving away from access facilitated for particular groups and towards designing such that it could be accessed and understood as much as possible by all people regardless of impairment type. Focus group discussion also indicated that good practices on accessibility, including a more widespread use of technology, should not be considered a niche interest, because whatever affords access to people with disabilities is helpful for everyone.

Though it was not widely perceived to be the case in practice, employment of people with disabilities within cultural organisations at all levels was considered capable of making a difference, including by engendering trust with groups of people with disabilities. Discussion at the focus group included consideration of how, within museums, it can often be non-disabled people talking about access for groups that they do not know well, and that having a more diverse workforce and having people with disabilities amongst volunteers or as board members was another way to address barriers. Relatedly, a focus group participant suggested that even when access is provided, take-up can be challenging amongst communities ‘that aren’t used to be addressed...[or] not used to being considered’. In that connection, it was suggested that museums need to start by acting as allies of communities of people with disabilities.

Linked to this, another identified facilitator of access to museums was providing information to people with disabilities (or to particular groups amongst them). Information was perceived as key to ensuring that the availability and accessibility of these events were known to the target group. Again, it was felt that this was facilitated by engaging with people with disabilities and by employment of people

from the target group. For example, a Slovenian participant (SI DPO) highlighted the need for links between cultural organisations and different communities of people with disabilities, suggesting that 'efficient communication' requires people with disabilities acting as 'sort of ambassadors', which can then 'motivate their co-members of a certain organisation to participate'.

Finally, a few participants referred to more cultural content (including exhibitions of works) having been made available online during the Covid-19 pandemic, especially in its first year, and this was often considered positive. In some cases, participants perceived that this was likely to continue. For example, a Swedish participant (SE DPO) discussed streaming of theatre and of museum exhibitions that was continuing (at least at the time of interview), as the institutions now saw its potential for reaching not only people with disabilities, but also people living in remote areas. However, the shift to digital access witnessed during the pandemic was not always perceived as continuing or it was not known if it would continue.

## **Conclusion**

It is clear from our research that the issue of 'accessibility' for visitors or audiences is now on the agenda of cultural bodies, such as museums and galleries, and that there have been improvements especially as regards access for some groups, such as wheelchair users. Access to exhibitions and other cultural content is perceived to also have improved in many countries. However, this still remains intermittent and patchy. Frequently, such access depends on the engagement of a limited number of venues and even on the interest and knowledge of an individual staff member and whether they can access the necessary funding. There are also many factors that continue to hinder people with disabilities from participating, including poorly conceived of access measures that are insufficiently informed by knowledge of what facilitates access for a broad range

of people, limited employment of people with disabilities, and absence of links and trust between institutions and groups of people with disabilities.

Moves towards accessibility measures informed by broader understandings of accessibility, beyond physical accessibility, were not universally experienced amongst the participants in our study, but these approaches are key to realising the human rights model of disability and fulfilling the obligations of the CRPD. Not least, they may make for greater accessibility for a broad range of groups, including older people, children and, arguably, even tourists. It is clear from the findings presented that there is a need for people with disabilities to contribute more to design and implementation processes within cultural institutions, and to lead on providing quality assurance. In this regard, we need proactive museums. As one of our participants put it, 'we don't always want to act as supplicants. It must be a matter of course that we get access to a wide variety of offers' (AT D).

On the whole, accessibility should be embedded throughout organisations from the top down and should be capable of influencing decisions, including funding decisions, at every level. Participants were aware of a range of good practices developed in many countries, but channels that make this knowledge more widely understood and available should be fostered.

# REGULATING COMMUNITIES: STRATEGIES FOR AN OPEN MUSEUM SECTOR

*Fiona Macmillan*

## Introduction: Openings and closings

Questions of (non-physical) opening and closing in the sector of galleries, libraries, archives, and museums (the so-called GLAM sector) have become increasingly fraught. Framed – and inflamed – by competing discourses of cosmopolitanism, preservation, and post-colonial exploitation, the relative merits of openness and closure are the subject of often heated debate. At the same time, the practice of digitising the holdings of the GLAM sector has blurred the very distinction between what is open and what is closed.

The idea of digitising tangible materials held in GLAM institutions seems to have begun with the concern for the preservation of fragile items.<sup>1</sup> But it has now taken on a life of its own, driven by a diverse range of motives, including conservation, documentation of GLAM sector holdings, broadening access, and the wish on the part of this generally cash-strapped sector to raise revenue by controlling the intellectual property rights to reproduce digital versions of their holdings.<sup>2</sup> Another increasingly important driver for the digitisation

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1 In relation to which, exemptions from copyright infringement – should they be needed – are typically granted by legislative regimes: see, e.g., the UK Copyright Designs and Patents Act 1988, s 42.

2 See Andrea Wallace, Ronan Deazley, “Display at Your Own Risk” (2016) <<https://>

of holdings, especially by museums, has been the rising number of claims from parts of the post-colonial world for the return of cultural items relocated to the museums of the imperial powers during the colonial period. This has led to the practice of returning tangible items while retaining an intangible digitised version.<sup>3</sup> This disputed practice brings together debates around the legitimacy and the meaning of openness and closure in the GLAM sector. Is it legitimate to treat all holdings of the GLAM sector as open to all? Does the process of digitisation, and its implicit creation of intellectual property rights over the digitised artefact, open museums or close them?

## The Legitimacy of Openness

### *The authorised heritage discourse<sup>4</sup>*

The fourth and current version of the Open GLAM principles begins with this short paragraph:

Galleries, libraries, archives, and museums have a fundamental role in **supporting the advance of humanity's knowledge**. They are the **custodians of our cultural heritage** and in their collections they hold the **record of humankind**.<sup>5</sup>

The Open GLAM principles seem to understand “our cultural heritage” as referring to the heritage of humanity as a whole. This inclusive and cosmopolitan idea has an intuitive appeal. Its underlying premise is that since humanity should be regarded as one largely undifferentiated whole (perhaps on the basis of the principle that

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displayatyourownrisk.org/wallace-and-deazley/> accessed 20 November 2022.

- 3 See, e.g., Felwine Sarr, Bénédicte Savoy, “Rapport sur la restitution du patrimoine culturel africain: Vers une nouvelle éthique relationnelle” [The Restitution of African Cultural Heritage: Toward a New Relational Ethics] (2018).
- 4 Laurajane Smith, *Uses of Heritage* (Routledge 2006).
- 5 OpenGLAM Principles, OpenGLAM Principles – OpenGLAM <<https://openglam.org/principles/>> accessed 20 November 2022, bold as in the original.

what holds us together is more important than what separates us), museum holdings should be universally open to be accessed and used by everyone falling within the category of human.

Some qualified support for a cosmopolitan approach of this sort can be found in the authorised heritage discourse contained in the UNESCO Conventions on cultural heritage protection.<sup>6</sup> These Conventions make more or less constant reference to the common heritage of (hu)mankind, an invocation that is probably best understood as a reason or justification for protecting cultural heritage.<sup>7</sup> But the general humankind referred to in these conventions often seems to be decidedly Western in nature. This is evident from the way in which the Conventions identify and distinguish the things they intend to protect. These Conventions, especially as they relate to tangible heritage, tend to conceptualise it as being about objects, the identification of which as cultural heritage is heavily invested in Western legal and cultural ideas and tropes that, amongst other things, always locate heritage in the past.<sup>8</sup> From a legal perspective, the taxonomic model of the UNESCO Conventions seems to owe a substantial debt to that governing the organisation of rivalrous private property rights in Western legal systems. This is evident in the way in which the Conventions are divided between those concerned with tangible property, which is further split between movables and immovables, and those concerned with intangible property.<sup>9</sup> Certainly, there are

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6 For a fuller account of the UNESCO regime for the protection of cultural property and heritage, see Fiona Macmillan, *Intellectual and Cultural Property: Between Market and Community* (Routledge 2021), ch 3.

7 See Fiona Macmillan, "The Protection of Cultural Heritage: Common Heritage of Humankind, National Cultural 'Patrimony' of Private Property?" (2013) 64 *North-eastern Ireland Legal Quarterly* 351.

8 See also Rodney Harrison, *Heritage: Critical Approaches* (Routledge 2013), 25-26, who connects this with modernity's relationship with time.

9 The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970) deals with tangible movables. The Convention Concerning the Protection of World Cultural and Natural Heritage (1972) deals with tangible immovables. The Convention for the Safeguarding of the Intangible Cultural Heritage (2003) and (perhaps)

UNESCO Conventions that stand in some respects outside this classification, but overall the organisational influence of Western legal concepts of property is strong.<sup>10</sup>

The question of what types of tangible or intangible property constitute cultural heritage for the purpose of these Conventions is not consistently addressed at a general level. With the exception of the Convention for the Safeguarding of the Intangible Cultural Heritage of 2003, the Conventions do not define their subject of protection by reference to an overarching concept, but rather by closed or open lists of specific objects to which the relevant Convention purports to extend protection. The content of these lists tends to have a strong whiff of Western Enlightenment thinking. An example of a closed list is provided by the arguably most famous UNESCO Convention, the Convention Concerning the Protection of World Cultural and Natural Heritage of 1972 (usually known as the World Heritage Convention). This Convention protects, among other things, monuments and groups of buildings, which are “of outstanding universal value from the point of view of history, art or science”.<sup>11</sup> Points of view change from where one is standing, however the list of qualifiers makes reference to Western knowledge systems that are reinterpreted here as being “universal”. Even more fundamentally, the division in this Convention between cultural and natural heritage invokes the longstanding Cartesian (and thus fundamentally Western) distinction between nature and culture.<sup>12</sup>

None of this can be regarded as surprising given the historical antecedents of the UNESCO system. Cultural heritage first became

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the Convention for the Protection and Promotion of the Diversity of Cultural Expressions (2005) deal with intangibles.

10 The Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), which does however refer to “movable or immovable property” (Art 1(a)), stands outside this classification, as does the Convention for the Protection of Underwater Cultural Heritage (2001).

11 World Heritage Convention, Art 1.

12 See further Macmillan, n 6 above, ch 5, part 6; Fiona Macmillan, *Western Dualism and the Regulation of Cultural Production* (Brill 2021).



a recognised concept in post-Westphalian international law at the time of the Vienna Treaty of 1815, which was imposed by the British victors at the end of the Napoleonic Wars.<sup>13</sup> Under the terms of this Treaty, France was required to atone for the war-time destruction of heritage and return the movable artefacts looted by Napoleon during his campaigns. In the circumstances, it seems reasonable to assume that this requirement was intended to be punitive. However, more interesting in the context of the present argument, is the likelihood that it was influenced by the concurrent rise of a discourse that linked people, territory and cultural objects.<sup>14</sup> This was, of course, an entirely Eurocentric and imperial discourse: at the same time as Britain was championing the return of European cultural objects, it continued to plunder the cultural artefacts of its colonies with impunity.<sup>15</sup> By the end of the Second World War, however, this particular colonial free-for-all was coming to an end. Britain had been replaced by the US as the dominant world power, the regimes of international law were being remade, and the period of decolonisation was commencing.<sup>16</sup> The specific origins of the current regime are located in the policy discourses – heavily influenced by particular ideas of nation, class and ethnicity – of the International Council on Monuments and Sites (ICOMOS) and UNESCO itself.<sup>17</sup> Even though the UNESCO regime for the protection of cultural heritage was born out of the rupture that marked the end of the British period of world dominance and inaugurated the American one, it is indelibly marked by its historical

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13 Ana Filipa Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (Cambridge University Press 2008), at 23-29.

14 Vrdoljak, n 13 above, Part 1.

15 Special Rapporteur, Mohammed Bedjaoui, who was responsible for the preparation of the work that eventually lead to the conclusion of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts (1983) found that the removal of cultural objects during the colonial period was generally not “in accordance with the canons of justice, morality and law”: UN Doc.A/CN.4/292, quoted in Vrdoljak, n 13 above, at 202.

16 Giovanni Arrighi, *The Long Twentieth Century: Money, Power and the Origins of Our Times* (Verso 1994), at 47-74 & ch 3.

17 For an account of the relationship between ICOMOS & UNESCO, & its role in the authorized heritage discourse, see Smith, n 4 above, ch 1.

antecedents and contemporaneous geopolitical, cultural and legal discourses.<sup>18</sup>

### ***Challenging the authorised heritage discourse***

The concept of heritage embedded in the authorised heritage discourse has been subject to sustained challenge by critical heritage scholars who argue that heritage is:

a constitutive social process that on the one hand is about regulating and legitimizing, and on the other hand is about working out, contesting and challenging a range of cultural and social identities, sense of place, collective memories, values and meanings that prevail in the present and can be passed on to the future.<sup>19</sup>

Heritage, community and identity are, in this account, inextricably linked in an ongoing and current process of social constitution.<sup>20</sup> This vision of the world tends to militate against the cosmopolitan idea that humanity is one enormous and undifferentiated cultural heritage community. Certainly, the identification and enjoyment of heritage is one of the things that makes us human (this is perhaps a better way to understand the apparently cosmopolitan claims of the UNESCO Conventions). However, the idea that everything – including non-Western items – held in predominantly Western museums should be open to free access and use by everyone because we are all part of the same community of undifferentiated humanity is problematic.

We live in a world marked by extreme power imbalances and great inequality; a world where it seems improbable that a concept of common humanity could constitute an identity upon which processes of

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18 On the long historical antecedents, see also Margaret M Miles, *Art as Plunder: The Ancient Origins of Debate about Cultural Property* (Cambridge University Press 2010).

19 Smith, n 4 above, at 82.

20 Macmillan, n 6 above, ch 4.

social constitution are based. If these are the sorts of general reasons why understanding humanity as one big (happy or unhappy) community seems somewhat naïve, then we must also take into account the fact that Western museums have extensive holdings of objects removed from former colonies in circumstances that were not “in accordance with the canons of justice, morality and law”.<sup>21</sup> This is not the type of behaviour upon which common and mutual processes of community identity and social constitution can be easily built.

Perhaps the major attraction of the idea that we are one big global and cosmopolitan community is that it permits us to avoid the difficult question of how we define or identify community. This is a troubling concept, philosophically and legally. The very idea of community has its famous and distinguished detractors.<sup>22</sup> As one of them, Roberto Esposito, observes:

Nothing seems more appropriate today than thinking community; nothing more necessary, demanded, and heralded by a situation that joins in a unique epochal knot the failure of all communisms with the misery of new individualisms.<sup>23</sup> Nevertheless, nothing is further from view; nothing so remote, repressed, and put off until later, to a distant and indecipherable horizon.<sup>24</sup>

At the same time, as Esposito’s comment suggests, like culture, community is a concept that is constantly invoked in all sorts of political and social discourses. This is as true in the cultural heritage/property context as in any other. Even the international legal Conventions governing cultural property and heritage, which of course bind only states, have increasingly made reference to the role and rights of

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21 See n 15 above.

22 See Macmillan, n 6 above, ch 4.

23 Citing Jean-Luc Nancy, *The Inoperative Community* (University of Minneapolis Press, 1991, trans Peter Connor, Lisa Garbus, Michael Holland, Simona Sawhney).

24 Roberto Esposito, *Communitas: The Origin and Destiny of Community* (Stanford University Press 2010, trans Timothy Campbell), at 1.

community.<sup>25</sup> Yet community remains a concept that, delinked from other collectivities, is unrecognised by law. For reasons related to the structure and nature of international law, as a set of obligations undertaken by and between states, the authorised heritage discourse tends to understand the cultural heritage community as being national. In order to suppress dissonance, it often ignores the fact that community identities are formed at multiple levels and in multiple layers.<sup>26</sup> It also ignores the fact that one of the more contentious levels of community identity may be that of the nation.

The assimilation of community into nation is the target of Anderson's famous critique of nationalism.<sup>27</sup> In the context of the argument in this chapter, what is of particular interest about this argument is Anderson's account of community formation. Anderson proposes that the central foundational concepts around which community rotates are identification and memory, which are reflexively linked to one another. For Anderson, communities are always imagined.<sup>28</sup> By this he means, not that they are fake, but rather that they are created by being imagined. He observes that "[c]ommunities are to be distinguished not by their falsity/genuineness, but by the style in which they are imagined".<sup>29</sup> This suggests that community constitution is subjective in nature. Anderson's observations are important because they do much to enrich the foundational relation between identification and memory. There are three aspects of this, in particular, that go to the heart of how community is imagined. First, Anderson notes the "deep horizontal comradeship" that characterizes community – something that might also be referred to as solidarity and so invoke the idea of reciprocity.<sup>30</sup> Secondly, he places

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25 See Macmillan, n 6 above, ch 3.

26 Smith, n 4 above, at 53.

27 Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso 2006, revised edition; first published 1983).

28 With the possible exception of "primordial villages of face-to-face contact": Anderson, n 27 above, at 6.

29 Anderson, n 27 above, at 6.

30 Anderson, n 27 above, at 7. See also Smith, n 4 above, at 303; Emiliós Chris-

emphasis on the temporal aspect of community, "this sense of parallelism or simultaneity".<sup>31</sup> The temporal dimensions here are both horizontal and vertical: horizontal because comradeship and solidarity carry with them some notion of a shared temporal space; vertical because if memory is critical to the imagined community, then this implies a shared concept of the community's history and its temporal progression. Following this, the third aspect of Anderson's study that has particular resonance is exactly the question of how a community imagines its relationship with its own past. Thus, we arrive at the critical question of the reflexive relationship between community and memory. This process of remembering and forgetting lies at the heart of the discourse of community.<sup>32</sup> And remembering here also means remembering to forget about the things that have been excluded, or at least, forgetting to remember them.

These observations are important here. We know that much of the non-Western post-colonial world has forged its identity and sense of community around resistance to Western dominance and, particularly, resistance to colonial misappropriation of cultural artefacts.<sup>33</sup> In some cases, this has provided a discourse that sustains national identities constituted during the period of decolonisation. In others, it has been an important part of the relationship of memory and identity that holds together communities of Indigenous Peoples and other communities that have formed at either the subnational or supranational level. The collective memory of these communities, and their common perception of being in the same historical and contemporary boat in relation to both the colonial period and the post-colonial period, make them the sort of communities that must be acknowledged in the context of the location and so-called custodianship of cultural heritage that was taken from them.

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todoulidis, 'Social Rights Constitutionalism: an Antagonistic Endorsement' (2017) 44 *Journal of Law & Society* 123, at 127-129.

31 Anderson, n 27 above, at 188.

32 Anderson, n 27 above, ch 11; Eric Hobsbawm, *Fractured Times: Culture and Society in the Twentieth Century* (Little, Brown 2013), at 150-151.

33 Macmillan, n 6 above, ch 5; Macmillan, n 12 above.

The international legal framework has provided little sustenance for the resistance of such communities to the relocation of their heritage into the museums (and other spaces) of the Global North. The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property provides in Article 2 “that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property” and “the States Parties undertake to oppose such practices with the means at their disposal”. Article 7 obliges parties to the Convention to “take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party”. However, these provisions only apply to cultural property moved after the entry into force of the Convention. The Convention entered into force on 24 April 1972. This, of course, is well after the time at which the former imperial powers were freely (mis)appropriating the cultural property of their colonial holdings. As one might expect, nothing in subsequent international legal instruments remedies this problem.<sup>34</sup> The more recent partner Convention to the 1970 UNESCO Convention, the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 1995, provides that, notwithstanding its lack of retrospectivity, it:

does not in any way legitimise any illegal transaction ... which has taken place before the entry into force of this Convention ... nor limit any right of a State or other person to make a claim under remedies available outside the framework of this Convention for the restitution or return of a cultural object stolen or illegally exported before the entry into force of this Convention.<sup>35</sup>

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34 See Legal Texts on illicit trafficking (unesco.org) <<https://en.unesco.org/fighttrafficking/legaltexts>> accessed 23 November 2022.

35 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995), Art 10(3).

The result is that states, and other communities, of the Global South remain obliged to use the process established under the UNESCO Intergovernmental Committee to negotiate the return of individual items of tangible cultural property.<sup>36</sup> It is as if the international community has acknowledged the wrongfulness of colonial plunder, but found itself unable or unwilling to take comprehensive steps to address it.

Taking into account this state of affairs, it is perhaps correct to say that as a matter of fact we, the Global North, continue to be the “custodians” of their (the Global South’s) “cultural heritage”. However, it is not a situation to be celebrated and certainly not one that is acceptable to states and other communities of the Global South. In these circumstances, the Global North might like to think we are in community with the Global South, but the communities of the Global South are likely to disagree. On top of this, we need to remember that museums are generally public, state funded, and/or state recognised institutions. As is acknowledged in the latest version of the ICOM (International Council of Museums) definition, the link between museums, society, and community is strong.<sup>37</sup> Although this definition is somewhat lacking in specificity on the point, it is difficult to escape the conclusion that the society and communities in question are those represented by states or local authorities that

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36 See Return and Restitution Cases (unesco.org) < [https://en.unesco.org/fightrafficking/Return\\_and\\_Restitution\\_Cases](https://en.unesco.org/fightrafficking/Return_and_Restitution_Cases) > accessed 23 November 2022. For a critique of this process, see Vrdoljak, n 13 above, 211-217.

37 “A museum is a not-for-profit, permanent institution in the service of society that researches, collects, conserves, interprets and exhibits tangible and intangible heritage. Open to the public, accessible and inclusive, museums foster diversity and sustainability. They operate and communicate ethically, professionally and with the participation of communities, offering varied experiences for education, enjoyment, reflection and knowledge sharing.” Adopted at the 26<sup>th</sup> ICOM Annual Conference, 24 August 2022, see ‘ICOM approves a new museum definition – International Council of Museums -International Council of Museums’ <<https://icom.museum/en/news/icom-approves-a-new-museum-definition/>> accessed 23 November 2022.

have established and recognised the relevant museum's activities.<sup>38</sup> As a result, everything about museums, from their physical premises to their governance structures, is a product of the norms of the community that established and runs them. As with all institutions, it is impossible for them to be free of this connection.

From the point of view of ethics and justice, we need to make a distinction between what is our cultural heritage in the Global North and what belongs to communities in the Global South. All this has two particularly important implications for the question of openness. First, to the extent that *our* museums are concerned with *our* heritage, we must ensure that they are one of the sites of the constitutive social processes of *our* community. This necessarily means that they must be inclusive of all members of our community and they must be sites of both access and use. Active, not passive, engagement with the museum and its holdings follows from the proposition that heritage is a constitutive social process. Secondly, however, where museums contain holdings that do not belong to the community of which the museum is a part (including a community defined as a nation state), then the arguments in favour of this type of openness fall away.

## Digitisation and the Meaning of Openness

Once we move into the territory of digitisation, then we must take account of another Western legal construct, intellectual property, that has the capacity to close what might appear to the naked eye, focused on physical space and the physical movement of objects, to be open. Norms around digitisation practices that make digitised heritage available as part of the process of community formation are

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38 There could be, of course, exceptions to this & perhaps the proposal for the *Museum for the United Nations: UN Live* is an example of this: "About UN Live — MUSEUM FOR THE UNITED NATIONS" <<https://www.museumfortheunitednations.com/about-un-live>> accessed 23 November 2022



indissolubly tied to the concept of cultural heritage as a constitutive social process. Using intellectual property rights to close access to digitised heritage not only interferes with this process, but also constitutes another example of their pernicious use to achieve closure without any corresponding advantages in terms of encouraging cultural production. However, the issues raised by digitisation are complex and may play out differently depending on what has been made subject to this process.

There are three issues that merit particular consideration in this context. The first is that digitisation creates a new object that nevertheless exists in relation to, and impacts upon, the object from which it was digitised. Secondly, digitisation is intimately related to questions of access and use, both of which are culturally determined concepts. And thirdly, the ambiguous intellectual property status of digital artefacts is problematic, not only because of its potential enabling of Western reappropriation of non-Western heritage, but also because of its potential to privatise Western heritage and so limit our community access to our cultural heritage. These three points are interwoven with one another, but in an attempt at clarity they are dealt with separately in the sections below.

### ***Re-representation and co-constitution***

A digital reproduction of a non-digital artefact creates a cultural and legal object that is different from the original. To represent an object is to re-represent and co-constitute it.<sup>39</sup> So digitisation creates a new object, but it also creates a new life for the re-represented object. In the context of digitised cultural heritage, the link between the tangible and the digitised objects means that the respect due to tangible objects must also be accorded to their digitised versions. Damage to this link, and therefore to both objects, occurs if the conditions

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39 Jacques Derrida, *The Paper Machine* (Stanford University Press 2005, trans Rachel Bowlby).

of access, use and control of the two objects are different in ways that are not the consequence of deliberation by the community of origin. Intellectual property rights pose particular problems in this context. The fact that they make the digital version a new legal object, potentially subject to different rights, renders it vulnerable to being severed from the tangible object it represents. One way that this severance may occur is through the authorship/ownership function of copyright law, which is based on the assumption that in the absence of indications to the contrary, the author is the first owner of copyright. This means that the digitiser is the owner of the copyright in digitised copies of physical artefacts.<sup>40</sup> In their response to the *Sarr-Savoy Report* on the restitution of African cultural heritage,<sup>41</sup> Mathilde Pavis and Andrea Wallace note the way in which digitisation invokes copyright's concept of authorship in a new guise, implicating "the ability to symbolically appropriate and control the knowledge, personhood and objecthood embodied in the material object."<sup>42</sup>

### **Access and use**

The use of digital technologies to reproduce tangible heritage objects makes them, at least potentially, more widely available to anyone who wants to see them. Digitisation, when associated with open access policies, fits into a discourse about the democratisation of heritage. This discourse is associated with ideas of the "encyclopaedic" museum and with UNESCO's concepts of the cultural heritage of hu-

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40 In the European Union this is subject to the, yet to be fully understood, role of EU Directive 2019/790 on copyright and related rights in the digital single market, Art 14.

41 N 3 above.

42 Mathilde Pavis, Andrea Wallace, *Response to the Sarr-Savoy Report: Statement on Intellectual Property Rights and Open Access Relevant to the Digitization of African Cultural Heritage and Associated Materials* (25 March 2019) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3378200](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3378200)> accessed 25 November 2022. As the Response records, it was signed by "108 scholars and practitioners working in the fields of intellectual property law and material and digital cultural heritage at universities, heritage institutions and organizations around the world", including me.

manity and cultural diversity.<sup>43</sup> It was also foundational for an earlier iteration of the OpenGLAM Principles, as noted by Pavis and Wallace, which made reference to “the advance of humanity’s knowledge” and the ability of users to “enjoy the riches of the world’s memory institutions, but also to contribute, participate and share”.<sup>44</sup> However, the discourse of the democratisation of heritage and its embodiment in the concept of open access are imbricated with Western values and priorities.<sup>45</sup> The unthinking imposition of these values on non-Western cultural objects is simply to perpetuate the colonial mind-set that resulted in the relocation of vast amounts of other people’s cultural property into the “encyclopaedic” museums of the imperial masters. Further, the post-colonial nature of a commitment to make the heritage of other people available on open access terms is complicated and potentially exacerbated by the variable meanings of “open access”. In particular, there is some ambiguity around the relationship

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43 On the concept of the “encyclopaedic” museum, see eg Neil MacGregor, ‘Preface’ in Kim Sloan (ed), *Enlightenment: Discovering the World in the Eighteenth Century* (British Museum Press 2004), at 6. See also Neil MacGregor, ‘To Shape the Citizens of ‘That Great City, the World’ in James Cuno (ed), *Whose Culture? The Promise of Museums and the Debate over Antiquities* (Princeton University Press 2009). On UNESCO’s concept on the common heritage of humanity, or as UNESCO puts it “the common heritage of mankind”, see Macmillan, n 6, ch 3, section 2.3. On UNESCO’s concept of cultural diversity and its focus on cultural exchange, see the Convention for the Protection and Promotion of the Diversity of Cultural Expressions (2005), Recital 11 (“*Being aware* that cultural diversity is strengthened by the free flow of ideas, and that it is nurtured by constant exchanges and interaction between cultures”), 16 & Art 7.1(b). However, it should be noted that this Convention recognises the downside of cultural exchange: see Recital 19 (“*Being aware* that while the processes of globalization, which have been facilitated by the rapid development of information and communication technologies, afford unprecedented conditions for enhanced interaction between cultures, they also represent a challenge for cultural diversity, namely in view of risks of imbalances between rich and poor countries”); see also the Convention for the Safeguarding of the Intangible Cultural Heritage (2003), Art 2.1, which makes reference to the concept of cultural diversity.

44 Pavis, Wallace, n 42 above, quoting the then version of the OpenGlam Principles.

45 Pavis, Wallace, n 42 above, Introduction.

between access and use. It is unclear whether the former always implies the latter or, if not, under what circumstances.<sup>46</sup>

The point here is not to demonise democratisation discourses around cultural property or UNESCO's commitment to a concept of the cultural heritage of humanity. However, both of these need to be considered in the light of the enormously unequal post-colonial world in which we live. The hypocrisy of using these concepts to perpetrate power imbalances that continue to create vast differences in the political, cultural and material circumstances of the peoples of the Global North and South should not be overlooked. Discourses of democracy have little room to manoeuvre in such circumstances. Even if one accepts a type of democratisation discourse that focusses on cultural exchange and understanding, instead of cultural misappropriation, it seems unlikely that this can be achieved by digitising and making available the cultural heritage and property of other people without their consent and active participation. As Andrew Prescott and Lorna Hughes observe (in more restrained terms):

Paradoxically, there is a risk that an emphasis on digitizing cultural treasures will undermine the claim that digitization opens up and democratizes access to cultural heritage. If digital libraries [and other digital collections] merely reiterate and reinforce long-standing cultural narratives and stereotypes, rather than enabling the exploration of forgotten and neglected collections, then they can become agents of cultural exclusion.<sup>47</sup>

### ***Intellectual property (always and inescapably)***

One of the claims often made in favour of open access for digital artefacts, whether digitised or born digital, is that it is a way of re-

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46 Pavis, Wallace, n 42 above, Section 2.

47 Andrew Prescott, Lorna Hughes, 'Why Do We Digitize? The Case for Slow Digitization' (2018) Archive Journal, <<http://www.archivejournal.net/essays/why-do-we-digitize-the-case-for-slow-digitization/>> accessed 27 November 2022.

sisting the power of the intellectual property regime. This, however, is only the case where open access comprises the renunciation of all restrictions over the artefacts. Making something open access does not automatically waive all copyright restrictions over it. Access and use are different concepts in copyright (and in life): to make a digital artefact freely accessible does not make it freely usable. Since copyright and all the restrictions imposed by it arise automatically, when digital stuff is made freely accessible the default position is that all other copyright restrictions that have not been explicitly waived still apply. This means that open access digital material always implies the potential to exercise some types of copyright restrictions. Where digitisation and open access is managed by institutions in the GLAM sector, then the constant economic pressure on these institutions may result, and in many cases has resulted, in pressure to exploit these rights for revenue-raising purposes.

Exploitation of copyright restrictions in this context raises a range of problems. Some of them are specific to the post-colonial context, where the complications raised by intellectual property rights are considerable. So far as Indigenous Peoples are concerned, Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples of 2007 asserts their intellectual property rights over their “cultural heritage, traditional knowledge, and traditional cultural expressions”. In practice, the recognition of such intellectual property rights in Western legal systems has been, to say the least, sparse as a result of a variety of technical legal problems that have functioned as a smokescreen for a lack of political will.<sup>48</sup> In the same technical legal sense, digitisation complicates the situation even further because it raises the possibility, and probably the default position, of the newly created intellectual property rights in digitised artefacts belonging to the digitiser.<sup>49</sup> Even where the digitiser renounces all such rights, we

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48 Macmillan, n 6 above, ch 3, section 4.1; Fiona Macmillan, ‘Intellectual Property and Cultural Heritage: Towards Interdisciplinarity’ in Irene Calboli, Maria Lilla Montagnani (eds), *Handbook of Intellectual Property Research: Lenses, Methods, and Perspectives* (Oxford University Press 2021).

49 See, however, n 40 above.

are left with the uncomfortable fact that, in the case of digitisation by a Western museum, the person renouncing is not a member of the community of origin. Rather, such a person has gained the ability to renounce these rights as the result of the intervention of Western law. Of course, collaborations with the community of origin in order to calibrate the desired level of openness, accessibility and reusability are possible and sometimes take place. Nevertheless, such collaborations are purely voluntary and cannot disguise the identity of the person/institution in the driver's seat. It is hard to see how it is ethically acceptable for such concessions to be in the gift of a Western museum.

The existence and/or exercise of intellectual property rights over digitised cultural artefacts is a post-colonial problem because it raises the spectre of a second neo-imperialist appropriation of the cultural property of others. However, as serious as it is, digitisation of cultural artefacts is not just a post-colonial problem; it also raises general problems about privatisation of heritage.<sup>50</sup> Digitisation carried out by GLAM sector institutions of works that are part of the Western canon has the capacity to foreclose and control access to, and use of, what is generally thought to be cultural heritage. Effectively, digitisation in this context either generates intellectual property rights over works that were never subject to intellectual property protection (because they were made before the concept existed) or gives them a second life as copyright-protected items. Either way, the effects of this are to foreclose community rights of access to and use of cultural heritage.<sup>51</sup> Lest this sound unnecessarily paranoid and alarmist, it should be noted that empirical studies of the digitisation of works of Western art by GLAM sector institutions have indicated the prevalence of this practice and the fact that often the quality of this type of digital data on open access is substantially inferior to that which is under

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50 See further Macmillan, n 6 above, ch 3, sections 3.3 & 4.3.

51 See also Guy Pessach, "[Networked] Memory Institutions: Social Remembering, Privatization and Its Discontents" (2008) 26 *Cardozo Arts and Entertainment Law Journal* 71.

copyright lock and key.<sup>52</sup> Of course, the legal devices used by GLAM institutions to lock up cultural property of all types and to prevent the creation of competing digital data are not limited to intellectual property. They also typically rely on contractual claims to control activities on the physical property of the institution. Nevertheless, intellectual property restrictions have the capacity to play an important role in locking up access to, and use of, cultural property.

A concrete example that tends to roll together the various strands of this argument is the celebrated case of the “Nefertiti hack”. In this case, two German artists made an exact three-dimensional copy of the head of Nefertiti, held in Berlin’s Neues Museum and subject to claims for its return by the Egyptian government.<sup>53</sup> The artists arranged a ceremony of return at which the copied head was received by the community of origin with, so the artists’ account goes, great joy. The Neues Museum, on the other hand, was considerably less joyful about this turn of events. The Nefertiti’s head had been digitally copied by the museum and the resulting data was not on open access. The Neues Museum, and others, raised the possibility that their intellectual property rights in this digital data had been breached by the artists. It was conceded that the copy was made using digital data, but there was a dispute about the way in which the data was obtained. The artists claimed to have obtained the data, not by hacking and copying the locked digital data of the Neues Museum, but rather by using a concealed digital scanner in order to obtain the data directly from the head of Nefertiti displayed in the museum. Although the original Nefertiti’s head was not, of course, subject to any intellectual property rights protection, scanning it was probably contrary to the contract governing entry onto the museum’s premises – and the artists apparently knew this since the scanning was a cloak and dagger operation. In the end, the Neues Museum

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52 See Wallace, Deazley, n 2 above.

53 For the artists’ account of the Nefertiti Hack, see Nora Al-Badri & Jan Nikolai Nelles, ‘The Other Nefertiti’ <<https://aksioma.org/the.other.nefertiti>> accessed 29 November 2022.

was unable to sustain the claim that its proprietary data had been used and, as a result, that its intellectual property rights had been infringed. The claim of breach of contract with respect to activities conducted on the physical premises of the museum seems not to have gone anywhere on this occasion.

The presumption on the part of the museum in this case that it had the right to defend a private property right over digital data that had been raked off another community's cultural property removed (most probably) without their consent is noteworthy. The artists, on the other hand, seem to have decided that it was acceptable to scan this property, make a replica of it, and make the file containing the digital information available under a Creative Commons Licence.<sup>54</sup> As a result of their actions, Nefertiti's head became part of (Western) remix culture, spawning many reappropriations of the image of Nefertiti in a variety of forms. It is not clear, however, if consideration was given to the possibility that these might also be neo-colonial acts of appropriation and may offend the dignity of the cultural property and its community of origin.<sup>55</sup> Perhaps, in this case, the community of origin was involved in the activities of the artists from the outset. The reported fact that the replica, appropriately aged, was received with joy by the community of origin may also confer *ex post facto* legitimacy. However, generally, the idea that artists based in Western communities would undertake such actions without the active participation from the outset of the community of origin seems ethically problematic. If this is so, then it may be that responses on the part of GLAM institutions to protect digital data obtained from, or associated with, the cultural property of other communities, can also be understood as protective if undertaken in consultation with the communities of origin.

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54 As reported in their account of the Nefertiti Hack: see n 53 above.

55 See the film that can be accessed at the website describing the Nefertiti Hack, n 53 above.



## Closing, but leaving some openings

Digitisation of GLAM sector holdings, with its consequent creation of new intellectual property rights, presents us with a complex ethical terrain. This is well illustrated by the case of the Nefertiti Hack. The difficulties in finding our way through the questions raised by the digitisation of cultural property are also evident in the *Sarr-Savoy Report* (on *The Restitution of African Cultural Heritage*). The *Report* advocates the return of items of African cultural heritage held in French GLAM institutions. This, of course, represents a clear understanding of the unacceptable neo-colonial position in which such institutions find themselves when they insist on retaining the cultural property of other people. The *Report* reads as though its authors saw the creation of digital replicas of these items to be held on open access as somehow liberatory. Perhaps because, as the performers of the Nefertiti Hack also perhaps believed, this will liberate them from Western-style commodification achieved through the exploitation of intellectual property rights. In their criticism of this aspect of the *Sarr-Savoy Report*, noting the fact that hardly any digital cultural heritage of French origin is on open access, Pavis and Wallace argue that “the French Government should refrain from taking any position that creates a double standard by requiring African Cultural Heritage to be digitized and made available when the same demands are not made of its own national institutions”.<sup>56</sup>

As is evident, here there are two conflicting discourses of open access. The discourse that sees open access as a way of resisting the domination of Western intellectual property seems not to have taken into account the domination of Western culture in a more general sense and the harms that this might cause to the forcibly opened culture of others.<sup>57</sup> As Kathy Bowrey and Jane Anderson pungently observe:

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<sup>56</sup> Pavis, Wallace, n 42 above, Executive Summary.

<sup>57</sup> See also Kathy Bowrey, Jane Anderson, ‘The Politics of Global Information Sharing: Whose Cultural Agendas Are Being Advanced?’ (2009) 18 *Social & Legal Stud-*

[F]or many Indigenous People... there is no fuzzy warm glow that automatically accompanies western words like humanity, culture, progress, freedom, openness, ... knowledge... These were the very terms that justified the denials of sovereignty, dispossession of culture and lands and removal of Indigenous children from their families and communities.<sup>58</sup>

On the other hand, so far as Western cultural production is concerned, resisting closure and commodification allows us all to realise the right to participate in our heritage and the cultural life of our community. In the context of our own cultural heritage, this line of reasoning favours digitisation as a strategy for increasing community participation in the process of cultural heritage-making, but it opposes severing the digital object from its material version through the imposition of intellectual property restrictions. However, in the context of the cultural heritage of other people, it suggests that digitisation by Western museums is a potentially problematic strategy, regardless of whether the digitized version is held on closed or open access. (In particular, it should be noted that returning the material object to its community of origin while keeping control of a digitised version is giving with one hand and taking with the other and, in the end, runs the serious risk of being an essentially post-colonial strategy of control.) It is hard to see how digitisation of other people's cultural property and heritage without their participation and consent is other than a neo-colonial misappropriation of that property and heritage. It is a misappropriation that may create new intellectual property rights in the appropriator – and those rights are there whether they are exercised or not. The illegitimacy of this misappropriation only becomes more egregious where the intellectual property rights

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ies 479; Eva Hemmungs Wirtén, 'Out of Sight and Out of Mind: On the Cultural Hegemony of Intellectual Property (Critique)' (2006) 20 *Cultural Studies* 282; Laura J. Murray, S. Tina Piper, Kristy Robertson, *Putting Intellectual Property in its Place: Rights Discourses, Creative Labor, and the Everyday* (Oxford University Press 2014), esp at 16-23.

58 Bowrey, Anderson, n 57 above, at 280, also cited in Murray, Piper, Robertson, n 57 above, at 18.

are exercised to close access and to enable exploitation of the digital version to produce revenue for the GLAM institution in question. However, it is also the case that opening access to the digital version by not enforcing intellectual property rights makes other people's cultural property and heritage vulnerable to the types of use that may be unacceptable to the community of origin for a variety of reasons – but, in particular, because it is their right to decide how and when their cultural property is used by others.

So what should we make of the second paragraph of the current Open GLAM principles?

The internet presents cultural heritage institutions with an unprecedented opportunity to **engage global audiences** and make their collections more **discoverable** and **connected** than ever, allowing users not only to **enjoy** the riches of the world's memory institutions, but also to **contribute, participate** and **share**.<sup>59</sup>

This sounds great when we are making decisions about granting access to our community's cultural heritage. We should be wary of it, I think, when that heritage in fact belongs to somebody else.

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59 Note 5 above, bold as in the original.



# REPRODUCTION, RE-USE AND OPEN ACCESS

*Barbara Pasa*

## A critique

The current discussion around the concept of artistic, transformative and commercial re-use of works in the cultural heritage sector inspires our particular point of view on how the law functions and dysfunctions precisely within the Italian cultural system, considering both Cultural Heritage Institutions (CHIs) and Cultural and Creative Industries (CCIs), and ordinary people as “users” of social, apps & platforms. We are interested in what CHIs can do with the tangible and intangible objects they hold in their permanent collections, both as creators and copyright holders themselves, or as users of works in the public domain and of the copyrighted works of others, and what CCIs and users of apps and platforms can do with the same objects. Today, when digitisation is transforming our society,<sup>1</sup> when artificial intelligence is generating previously impossible artefacts, when the metaverse is increasingly populated by realistic avatars created by each of us, living their lives in virtual properties and objects, in a digital world that resembles a large shop window, but where the actions performed by the avatars will have an impact on people’s daily lives, the reflection is even more urgent.

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1 On the social and economic impacts of digitisation of cultural heritage see the project inDICEs available at <<https://indices-culture.eu/>> accessed 6 November 2023. .

We will not say much about legal details in these brief reflections.<sup>2</sup> As we know, Italian law is inscribed in a supranational legal harmonisation process, in which international conventions and European directives and regulations call for common legal rules, but this process does not seem to be effective.<sup>3</sup>

There are many reasons for this, but in summary we could ascribe it to two dynamics, an internal one intertwined with a broader one: a) the protectionist political choices of the Italian legislature linked to the traditional notion of cultural heritage and national cultural property, on the one hand; and b) the stable occupation of culture by modern Western capitalism through the legal instrument of copyright, on the other. And in fact, one of the most complex interactions is that between cultural heritage law and copyright law: the obligation to preserve the cultural objects that CHIs hold in their collections results in an even stricter legal framework in Italy, that leaves little room for free reproduction and re-use. Articles 107-108 of the Italian Code of Cultural Heritage and Landscape, indeed, through which

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2 An analysis of EU Directive 2019/790, its transposition in Italy, and its overlapping with Italian cultural heritage rules is contained in Barbara Pasa, "Artistic, Transformative, and Commercial Reproduction and Reuse: An Italian perspective", In Celani, J., De Luca, A., Pailli, G., Palandri, L., Pessina, A., Tarantini, M. eds. *The Italian Law of Cultural Heritage A Dialogue With The United States*. Tutela & Restauro - Monografie 1 Supplemento di Tutela & Restauro. 135-149.

3 Ex multis, Andrea Wallace, Ellen Euler, "Revisiting Access to Cultural Heritage in the Public Domain: EU and the International Developments" (2020) 51(7) *IIC-International Review of Intellectual Property and Competition Law* 823; Séverine Dusollier, "The 2019 Directive on Copyright in the Digital Single Market: Some progress, a few bad choices, and an overall failed ambition" (2020) 57(4) *Common Market Law Review* 979; Tanya Aplin, Lionel Bently, *Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyright Works* (Cambridge University Press 2020); Martin Fredriksson, "Information Commons Between Enclosure and Exposure: Regulating Piracy and Privacy in the EU" in (2020) 14(1) *International Journal of the Commons* 494. In Italian, cf. Eleonora Visentin, "Le nuove eccezioni di cui agli artt. 68, comma 2-bis e 70-bis l. aut." (2022) *Giurisprudenza italiana* 1273; Caterina Sganga, "Le mille sorti e progressive delle eccezioni nel diritto d'autore europeo tra obbligatorietà, discrezionalità e flessibilità" (2021) 1 *AIDA* 449; Alberto Musso, "Eccezioni e limitazioni ai diritti d'autore nella Direttiva UE n. 790/2019" (2020) 4 *Il diritto dell'informazione e dell'informatica* 411.

public authorities control the authenticity and significance of cultural objects, give them the ultimate word over their reproduction and re-use, locking up digital and analogue content and restricting access and re-use by collective and individual users.

These provisions are contained within the Section on the “Use of Cultural Goods” of the Italian Code of Cultural Heritage and Landscape, and they assume that the reproduction is an activity for the benefit of the individual, not the community. The reproduction in fact is considered a form of use operated by an individual generally for his or her own utility: a “utility” which can be “commercial” but also “non-commercial”. It is no coincidence that study and research activities, freedom of thought and creative expression, and the promotion of knowledge of cultural heritage are all subject to a fee schedule that provides for a “reimbursement for non-profit reproductions”, as stated in the Guidelines for Determining the Minimum Amounts of Fees and Charges for the Concession of Use of Assets on Consignment to State Institutes and Cultural Sites.<sup>4</sup> Therefore, all need to be authorised by the competent authority as well as paying a fee. Such rules impose many restrictions on artistic, transformative and commercial/non-commercial reproduction and re-use, including for works of visual art in the public domain.<sup>5</sup> In the end, it is up to the authorities responsible for the works of art, such as museum institutions, to decide whether their reproduction is permitted, and these same authorities should also determine the specific authorisation fees associated with such reproduction.

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4 See the Circular of the Italian Minister of Culture, April 2023, online at <<https://cultura.gov.it/comunicato/dm-161-11042023>>. Not much has changed with the new Ministerial Decree 108 of March 2024, which amends the decree of the Minister of Culture dated April 11, 2023, rep. no. 161, online at <<https://cultura.gov.it/comunicato/26075>>.

5 Marta Arisi, “Digital Single Market Copyright Directive: Making (Digital) Room for Works of Visual Art in the Public Domain” (2021) 1(1) *Opinio Juris in Comparatione* 119.

### **a) *The protectionist approach of the Italian legislature***

As far as protectionism is concerned, it can be said without fear of contradiction that the concept of cultural property is overwhelming and, in Italy, encompasses a vast number of objects and artefacts. All these things<sup>6</sup> are subject to the protection of the cultural heritage: immovable and movable objects of artistic, historical, archaeological, ethno-anthropological, archival or bibliographical interest, belonging to both public law (the State, the Regions and other public bodies) and private law (non-profit organisations or private individuals), unless the Ministry of Culture, on the initiative of one of its local offices, deems them not to be of such “cultural interest”. This assessment involves a wide technical and evaluative discretion, which requires constant clarification by the Council of State on the different declinations of “cultural interest”.<sup>7</sup> In addition, under Italian law, works by non-living authors created between 50 and 70 years ago can be declared of “cultural interest”, as can works by living or non-living artists created more than 50 years ago, if they are of “exceptional interest for the integrity of the Italian cultural heritage”.

### **b) *The occupation of culture through the legal instrument of copyright***

On intellectual property regimes, we agreed that they can determine a disparity between the place of science as a public good – where by “science” we mean “the full breadth of intellectual activity”, all branches of learning, “any art or species of knowledge”<sup>8</sup> – which fulfils a human right to know – and the exclusive rights<sup>9</sup> of copyright, which determine a fragmented individualism, a loss of community. In particular,

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6 Articles 2, 10 and 13, Code of Cultural Heritage and Landscape 2004, Legislative Decree No 42 of 22 January 2004, as amended.

7 Cf for instance *Consiglio di Stato*, sez. I, opinion no. 1958/2020, 30/11/2020.

8 Samuel Johnson, *A Dictionary of the English Language* (Strahan 1755).

9 John Willinsky, *Copyright's Broken Promise. How to Restore the Law's Ability to Promote the Progress of Science* (The MIT Press 2023), at 10-11.



copyright, with its semi-perpetual duration, and its extensive moral rights without any possibility of waiver, as provided for by Italian law (note that moral rights are currently a big “patchwork” even in common law legal systems, such as in the UK and the US)<sup>10</sup> becomes an essential tool to ensure capitalism’s domination of culture. The right of attribution, the right to object to false attribution, the right of integrity, the right of withdrawal and the right of disclosure, combined with the fact that copyright is a way to control the activity of others (defined as a negative right),<sup>11</sup> requiring several layers of authorisation to regulate potential conflicts and to enforce agreements, creates fragmentation and can lead to a “tragedy of the anticommons”<sup>12</sup> if there is no proper trade-off between access and incentives.<sup>13</sup>

Meanwhile, cultural heritage and copyright law have clearly all been affected by the breakthroughs of the digital revolution, with infinite new frontiers opened up by digital reproduction and the re-use of analogue material and post-production, even though most experiments with reproduction, remix and re-use would be de facto unfeasible according to the Italian legal system, which in any case depends on further international treaties and European laws.

Through the experience of some Venetian museums, this brief note illustrates some of the problems cultural institutions face at

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10 Karen A. Temple, “Authors, Attribution, and Integrity: Examining Moral Rights in the United States”, Report of the Register of Copyrights (Washington, DC: US Copyright Office, 2019), at 4. In Italian literature, Giulia Dore, *Plagio e diritto d’autore. Un’analisi comparata e interdisciplinare* (CEDAM 2021).

11 William Cornish, David Llewelyn, Tanya Aplin, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (Sweet & Maxwell 2019); Silke Von Lewinski (ed), *Intellectual Property & Indigenous Heritage. Genetic Resources, Traditional Knowledge and Folklore* (Kluwer 2008).

12 Michael A. Heller, “The tragedy of the anticommons: property in the transition from Marx to markets” (1998) 111 *Harvard Law Review* 621.

13 Viva R. Moffat, “Mutant Copyrights and Backdoor Patents: The Problem of Overlapping Intellectual Property Protection” (2004) 19(4) *Berkeley Technology Law Journal* 1473; Nuno de Araújo Sousa e Silva, *The Ownership Problems of Overlaps in European Intellectual Property* (Nomos Verlagsgesellschaft mbH 2014), at 17-39.

the intersection of intellectual property and cultural heritage laws, which often conflict with their attempts to best fulfil their mission, for example by opening their collections to the community. Indeed, there seems to be an unresolvable conflict between the protection of creativity and free reproduction and re-use.

## **A way forward**

Our brief reflection here is based on the observation and transcription of some case studies, based on a research and teaching project at the IUAV University of Venice, where we have mapped the legal and policy measures adopted by some major Cultural Heritage Institutions (CHIs) in Venice. The involvement of art, architecture and design students in this research and educational project was of the utmost importance, precisely because our students, who belong to Generation Z and Generation Alpha, the so-called Digitarians, are producing the material that will be the heritage of the future; at the same time, in their projects they are often inspired by the works that are part of the actual heritage (works belonging to museum and archive collections), from which they draw inspiration and which they often copy and appropriate, re-use, adapt and modify as material for their own creative works, facilitated by contemporary technologies. By incorporating other people's materials into their creative activities, which can result either in one of the liberal professions included in the Cultural and Creative Industries (CCIs) or in the simple sharing of materials as users of social apps and platforms, they undermine the traditional dichotomy, which has much to do with Western scientific epistemology and its binary distinctions such as idea/expression, authentic/fake, production/consumption, original/copy, tangible/intangible, public/private, exclusive/common use, art/science, nature/culture...<sup>14</sup> So the first question we started with is whether there is room to appreciate a different meaning of 'access' that is compatible

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14 On a different theoretical concept of cultural property/heritage that "frees itself from Western tropes based on the Cartesian dualisms" see Fiona Macmillan, *Intellectual and Cultural Property: Between Market and Community* (Routledge 2020).

with both the preservation and the promotion of cultural heritage, e.g. with the traditional idea of protecting cultural heritage and at the same time with the need to support younger architects, designers and artists who have no bargaining power, but who also play an important role in the promotion of our cultural heritage.<sup>15</sup>

Our research and education project is based on another observation, namely that digitisation in the cultural heritage sector has changed its meaning: in the past, it meant photographing works of figurative art and other works in cultural heritage collections, because they are subject to deterioration over time and it is necessary to make records documenting their state of conservation, restoration, etc., in order to protect these works; today, digitisation means transforming our cultural heritage into digital information, it means fragmenting the national cultural treasures<sup>16</sup> into basic, single, cultural units that make up the cultural heritage in each country, becoming part of the global information economy through the process called datisation. This latter phenomenon facilitates not only text and data mining (TDM) by A.I. algorithms, but also reproduction, re-use, adaptation and transformation by humans, thanks to affordable, cheaper and (maybe) more transparent technology.<sup>17</sup> As is well known, this digital turn has opened up new types of uses (or exploitation), which are greatly enhanced by the intervention of artificial intelligence. Thus, the reproduction of material belonging to the permanent collections of museums and archives can be quite easy, and the re-use of digital works even easier. What is not easy, however, is to understand

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15 Arts Council England, "Cultural Democracy in Practice" (2018) <<https://www.artscouncil.org.uk/sites/default/files/download-file/CulturalDemocracyInPractice.pdf>> accessed 6 November 2023. Cf Gabi Arrigoni, Natalie Kane, Stephen McConnachie, Joel McKim, "Preserving and sharing born-digital and hybrid objects from and across the National Collection", Project Report of January 2022).

16 On this notion, Michele Graziadei, Barbara Pasa, "The Single European Market and Cultural Heritage: The Protection of National Treasures in Europe" In A. Jakubowski, K. Hausler, F. Fiorentini (eds) *Cultural heritage in the European Union: a critical inquiry into law and policy* (Brill 2019) at 79–112.

17 Here the reference is to the opacity of the algorithm, which is much discussed today.

our cultural heritage law when it overlaps with the management of intellectual property,<sup>18</sup> which is already very complex such as: a) knowing whether the digital reproductions contained in the archives are usable, because few databases contain clear guidelines and examples of how their contents can be used for personal and/or commercial purposes;<sup>19</sup> b) knowing whether a work is out of copyright or in the public domain, because copyright law is not fully harmonised in Europe, and even less so within the Western legal tradition if we consider common law countries;<sup>20</sup> c) to know the principles of fair use in Anglo-American terms, which are (not entirely) in line with the system of exceptions and limitations to copyright under European law, which is vague and unclear;<sup>21</sup> d) to know when a work of art or a work of design, resulting from elaborations, transformations and adaptations of an original work, is defined as a “derivative work”, and thus must be ‘authorised’ by the author of the original work.<sup>22</sup>

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18 Among others see Vladia Borissova, “Cultural heritage digitization and related intellectual property issues” (2018) 34 *Journal of Cultural Heritage* 145.

19 On the relation between museums, archives and databases, Mike Pepi, ‘Is a Museum a Database? Institutional Conditions in Net Utopia’ (2014) *E-flux journal*, at <[http://worker01.e-flux.com/pdf/article\\_8992811.pdf](http://worker01.e-flux.com/pdf/article_8992811.pdf)>; Sonia Katyal, “Techno-heritage” (2017) 105(4) *California Law Review* 1111; Felicia Caponigri, ‘Cultural Heritage Law Between Truth and Power: Law’s Evolution and Our Collective Cultural Interest in an Informational Economy’ (2021) 96 *Notre Dame Law Review* 163.

20 For instance, in Italy there would be a system for tracing the identity of the author: it is called “the General Public Register of Protected Works (R.P.G.)” and is kept at the General Directorate of Libraries and Copyright (DG BiDA), whose main purpose is publicity-notification, e.g., providing proof of the publication of the work and its authorship. But the web interface is not exactly user-friendly and it doesn’t work: <[https://search.acs.beniculturali.it/OpacACS/search/guida/IT-ACS-AS0001-0004652?query=registro+pubblico+generale&title=&start\\_year=&end\\_year](https://search.acs.beniculturali.it/OpacACS/search/guida/IT-ACS-AS0001-0004652?query=registro+pubblico+generale&title=&start_year=&end_year)> accessed 6 November 2023.

21 On EU system of exceptions and limitations to copyright see [Copyrightexceptions.eu](https://copyrightexceptions.eu) available at: <<https://copyrightexceptions.eu>> accessed 6 November 2023.

22 According to Article 4 of the Italian Copyright law (Legge 22 aprile 1941, n. 633 *Protezione del diritto d’autore e di altri diritti connessi al suo esercizio*, as amended): “Without prejudice to the existing rights in the original work, creative elaborations of the work itself, such as translations into another language, transformations from one into another literary or artistic form, modifications and additions

Do we, as a collective and as individuals, deserve more transparent rules and guidelines, compulsory licences and even more relaxed standards of infringement?

Our educational project leads us to a different notion of access to cultural heritage,<sup>23</sup> one that can substantiate new opportunities (not just threats) and policy scenarios for established artists, but also for young artists and all workers in cultural and creative industries (CCIs), and finally for people who share user-generated content (UGC) on online platforms.

## Case studies

We have chosen to illustrate two cases to talk about the constraints and difficulties that students, e.g., young artists and future workers in the CCIs and CHIs sectors, and researchers in general, experience in their own daily practice.

The cases tell us how time-consuming, annoying and discouraging the 'culture of permission' is. Without an explicit licence and authorisation, indeed without payment of royalties to the copyright holder and payment of fees to the cultural institutions, no reproduction or re-use is allowed. The system of exceptions and limitations to copyright, implemented by EU Directive 2019/790,<sup>24</sup> and transposed in

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that constitute a substantial remake of the original work, adaptations, reductions, abridgments, variations *not constituting an original work*, are also protected": the judge has the power to decide whether the original meaning of a work has been altered and by using what conditions and thresholds.

23 Cf the Open Culture Program at Creative Commons, which promotes a better sharing of cultural heritage in GLAMs collections, and precisely VOICES, that is a vlog series launched in February 2022, with short interviews with open GLAM experts from around the world. Available at <<https://creativecommons.org/tag/open-glam/>>, accessed 6 November 2023.

24 Directive 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, OJ L 130, 17/05/2019.

Italy at the end of 2021 with Legislative Decree no. 177/2021 – which introduced several amendments to Law no. 633 of 22 April 1941<sup>25</sup> – is of little help.

## Museums: the MUVE network

The Natural History Museum of Venice is part of the MUVE (Fondazione Musei Civici di Venezia), a private entity responsible for eleven Venetian museums: over 700,000 works of art, five specialised libraries and a photographic archive, a rich network of museums, with a central management that runs a database called “Catalogue of the Collections Database”. A group of architecture and art students from the IUAV University of Venice, founders of a collective and a contemporary art laboratory for the production and exchange of multimedia artworks, wrote to the Venice Natural History Museum asking for permission to produce video and photographic material inside the museum to create an audio-visual work that combines artistic and documentary imaginaries, to be distributed in galleries, festivals, and other similar cultural events. For this purpose, they asked for access to the De Reali and Miani collections, which are not digitised by the museum and are not visible except by visiting the museum. After several emails and phone calls, the museum staff replied: “The payment of the fees depends on the purpose of the video shooting and on the need (or not) for additional supervision during the shooting”. After a few days, they added: “The only parameter that affects the price to be paid is the number of hours used for filming, and in any case a discount is made with regard to commercial use, given that its purpose is artistic/didactic”. The final price demanded by the Natural History Museum was 1,200 euros, according to its administrative

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25 *Attuazione della direttiva (UE) 2019/790 del Parlamento europeo e del Consiglio, del 17 aprile 2019, sul diritto d'autore e sui diritti connessi nel mercato unico digitale e che modifica le direttive 96/9/CE e 2001/29/CE*, Official Journal of the Italian Republic no. 283 of 27/11/2021. In Italian, Simona Lavagnini (ed), *Il diritto d'autore nel mercato digitale, Direttiva UE 2019/790 e d.lgs. 177/2021 di recepimento* (Giappichelli 2022).

fees,<sup>26</sup> although on the web you can read such a disclaimer: “Exceptions: The Director of the MUVE reserves the right not to collect the fee when the request is made for the purpose of a broader and better knowledge of the museums, as well as for the purpose of studies, dissertations, tourist promotion and other specific cases”.<sup>27</sup>

What is the likelihood of students, as young artists and designers, being able to afford the fees charged? Is it the museum that is more likely to have the resources to deal with the complex issues of preservation and promotion? The main obstacles regarding the digitisation and free online accessibility of the permanent collections are insufficient resources (money) and insufficient staff (time): what will happen now that the Italian Ministry of Culture has decided, in the National Recovery and Resilience Plan (PNRR 2022),<sup>28</sup> to allocate millions of euros to the digitisation of public and private cultural heritage in order to promote and guarantee access to this type of cultural resource?

## **Archives: ASAC Biennale, Fondazione Giorgio Cini and MUVE network**

The second case is that of the ASAC (Historical Archives of Contemporary Arts of the Venice Biennale), a private entity that collects, catalogues and expands the documentary resources gathered from 1895 to the present. It is a multidisciplinary and multimedia structure that includes the following collections: Historical Fund, Photographic Library, Film Library, Media Library, Artistic Fund, Poster Collection, Documentary Material (Books & Periodicals / etc.); the collections are available in the “ASAC Database”, a single computerised database

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26 See the pdf on reproduction costs available at <<https://www.visitmuve.it/it/modulo-di-richiesta-archivio-fotografico/>> accessed 6 November 2023.

27 Read under *Esenzioni* at <<https://palazzoducale.visitmuve.it/it/il-museo/servizi-agli-studiosi/archivio-fotografico/>> accessed 6 November 2023.

28 See <<https://pnrr.cultura.gov.it/>> accessed 6 November 2023.

in use for the management and access to the archival material, in particular the data relating to the Mostra del Cinema di Venezia, from the first edition of 1932 to the last of 2010; the editions from 1895 to 1924 and from 1995 to 2009 of the Art Exhibition, in addition to the 2008, 2010 editions of the Architecture Exhibitions and the latest editions of the Dance, Music and Theatre Festivals. The ASAC Database allows you to consult the catalogues and, for certain types of material, to access the document itself (digitised photos and posters, film trailers). What happens, for example, if a student wants to use a digitised manifesto or a poster of the Biennale di Venezia, such as the one designed by Astolfo De Maria (who died in 1946) for the 1936 Venice International Film Festival? What is the difference with the possible use of the poster designed by Unimark Studio Milano, a multinational corporate design company, by Massimo Vignelli or Bob Noorda, for the Venice International Film Festival in the 60s and 70s? Students and researchers are not in a position to know what to do, in the website there are no guidelines or clear information available.<sup>29</sup> Only by insisting by e-mail can one hope to intercept the ASAC staff, who, when asked about the possible re-use of these posters, explained that: "If you want to use the images available in the ASAC digital archives the conditions are: i) the images can be purchased under licence in low and high resolution at a cost of 10 and 100 euros, respectively; ii) once purchased, they are only available for publication on paper; iii) they cannot be published on social media; iv) they cannot be modified in any way".

Not to be discouraged by this information, let us take the case of a researcher at the Department of Architecture and Art of the IUAV University of Venice, who wrote to ASAC to consult the material relating to the Teatro Verde and the architects who designed it on the island of San Giorgio in Venice, Luigi Vietti<sup>30</sup> and Angelo Scattolin.

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29 See <<https://www.labiennale.org/en/asac/information#contact-us>>, under Services for the public, accessed 6 November 2023.

30 Whose works, for the most part, can be found at the Parma Archives CSAC of the University of Parma.



After some difficulties due to the limited opening hours and space for consultation at the headquarters of the archive, the researcher completed his research and announced that the results would be published in an essay on the Teatro Verde of San Giorgio, within an open access series, asking for the insertion of two drawings retrieved from the ASAC archive; they are part of “Teatro Verde – Isola di S. Giorgio ½ BIAP / 1/35 Fund”, corresponding to an axonometric sketch (61112) and a perspective sketch (61113) by Brenno Del Giudice from 1939, which the researcher personally photographed during his research. ASAC did not authorise the use of his photos, stating that only the archive is authorised to provide the images, even for open access scientific publications, and that in any case the cost of high resolution is 100 euros (+ VAT) per image. If he had been interested, he should have filled in the form to initiate the payment procedure with the administration. They added that the procedure would have taken time because, as the sketches were in large format, they would have had to ask their photographer for a special protocol. At this point, the researcher turned to another archive, that of the Institute of Theatre and Opera (Istituto per il teatro e il melodramma)<sup>31</sup> of the Giorgio Cini Foundation,<sup>32</sup> which provided the images free of charge<sup>33</sup> in a very short time. The mission of the Institute of Theatre and Opera is to study the history of the performing arts, in particular in various specific fields such as actors, opera, dance, stage design and theatrical and musical iconography. It has a rich thematic iconographic archive, the Archivio Iconografico Teatrale e Musicale (AITM). This

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31 See <<https://www.cini.it/en/institutes-and-centres/teatro-e-melodramma>> accessed 6 November 2023.

32 See <<https://archivi.cini.it/teatromelodramma/detail/IT-CST-ICO011-004110/isola-san-giorgio-maggiore-veduta-aerea-del-teatro-verde.html>> accessed 9 February 2023.

33 Consultation of the archival material is possible by prior request for an appointment, to be sent to the above addresses at least three working days before the date of the consultation. In any case, the request must be justified, and it must contain explicit reference to the research that is taking place and the institution / University to which you are working. See <<https://archivi.cini.it/teatromelodramma/archive/IT-CST-GUI001-000003/archivio-iconografico-teatrale-musicale.html>> accessed 6 November 2023.

archive now contains over 12,000 index cards with interdisciplinary documents ranging from portraiture to set design, theatre architecture, costume design, painting and graphics. On the other hand, the Ca' Pesaro Library, which is part of the MUVE network and holds the Brenno del Giudice Fund, never replied to the online request form filled in and sent by the researcher.<sup>34</sup>

In fact, cultural heritage institutions (CHIs) can deny access to their collections or charge high fees, with a corresponding monopoly extending to any work derived from these original sources, and often even if the work is in the public domain.

## Concluding remarks

Why is it so difficult for people to interact with Italian cultural institutions, in a country where there are 7,886 libraries open to the public (79.6% owned by public bodies such as local authorities) and 4,292 museums (65.4% owned by public bodies, the rest belonging to religious bodies, or private foundations, or associations)? A country where, on average, there are three libraries (one for every 7,000 inhabitants) and two museums (one for every 14,000 inhabitants) per 100 square kilometers?<sup>35</sup>

Cultural institutions permeate the Italian context, but despite the growing consensus for open access and open culture,<sup>36</sup> the reproduction and re-use of digital works, even those in the public domain,

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34 The Fund is currently not accessible: see <<https://siusa.archivi.beniculturali.it/cgi-bin/pagina.pl?TipoPag=comparc&Chiave=402435&RicLin=en&RicDimF=2>> accessed 6 November 2023.

35 Data source: ISTAT (the Italian National Institute of Statistics, a public research organisation, is the main producer of official statistics in the service of citizens and policy-makers), published on the 2<sup>nd</sup> December 2022, available at <<https://www.istat.it/it/files//2022/12/accessibilita-luoghi-cultura-dic2022.pdf>> accessed 6 November 2023.

36 See, for example, OpenGLAM; or CCO, a proactive approach already adopted by several institutions for raw data and metadata; or CC BY 4.0 for content, to ensure that content in the public domain remains public once it is digitized.

not to mention the reproduction of materials belonging to the permanent collections of museums, archives, film or audio heritage institutions, and other public and private cultural heritage institutions, is only allowed under certain conditions in Italy.

As some commentators have already pointed out, even when works are in the public domain, we can find many obstacles: the combination of different rules prevents us from having full access to our cultural heritage. Contractual clauses, licensing practices, website terms of use (ToU) and other contractual arrangements with third parties,<sup>37</sup> rules on open data and the re-use of public domain information for commercial and/or non-commercial purposes,<sup>38</sup> intellectual property rights claims by original authors, such as in the case of derivative works,<sup>39</sup> or by holders of related rights, such as photographers' rights,<sup>40</sup> copyright and sui generis rights in the case of the authors of a database (who created it) and the maker of a database (the person who takes the initiative in obtaining, verifying or presenting the contents of a database and who has taken the risk of investing in it<sup>41</sup>), privacy and data protection rules (e.g. the privacy of the user and the privacy of the person depicted in a photograph<sup>42</sup>), and so on. As mentioned above, one of the most complex issues remains that of the relationship between Italian cultural heritage law (Articles 107-108 of the Italian Code of Cultural Heritage and

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37 Facebook and YouTube, for example, can decide what counts as inappropriate under their policy, and therefore the content would be taken down and removed from our collective memory, banned, or destroyed.

38 Legislative Decree 36/2006, as amended by Italian Legislative Decree 200/2021.

39 Articles 4, 18 and 18bis of Italian Copyright Law, cit., as amended by legislative decree no. 177/2021.

40 Articles 87 ff Italian Copyright Law, cit., as amended by legislative decree no. 177/2021.

41 Articles 64-quinquies and 65-sexies Italian Copyright Law, as amended by legislative decree no. 177/2021. These neighbouring rights and the sui generis protection for databases, found in both common and civil law are not always balanced with the concerns of users who, for example, cannot obtain the material from another source.

42 Italian Data Protection Code, as amended by Italian Law no. 205 of 3 December 2021.

Landscape) and copyright law (such as Article 32-quater of the Italian Copyright Law<sup>43</sup>): rules that impose many restrictions on artistic and transformative reproduction and re-use, including for works of visual art in the public domain. As in the well-known case of 2022, when the Court of Venice issued an order prohibiting the use of the image of a famous Renaissance work of art by Leonardo da Vinci, *the Study of the Proportions of the Human Body in the Manner of Vitruvius*, held by the Italian State Museum Gallerie dell'Accademia in Venice. The latter, together with the Italian Ministry of Culture, initiated the precautionary procedure against the German company Ravensburger. Furthermore, according to the Court of Venice, the Galleria dell'Accademia is the custodian of the work and it is the sole which can assess the compatibility of the use of name and image with the cultural destination of the work. This means that the public domain may be further threatened by an ambiguously broad application of the scope of personality rights.<sup>44</sup> In another recent judgment of the Court of Florence of 2023, in which the Court condemned the reproduction of Michelangelo's *David* by the defendant company on the cover of issue 241 of the men's magazine *GQ Italy*, an autonomous

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43 Article 32-quater permit any reproduction of works of visual art "as identified in Article 2 of the Italian Copyright Law in the public domain, *unless they constitute an original work*". Only non-original reproductions of works of visual arts in the public domain are, therefore, not protected by copyright or related rights; technically this means only mere 'documentary photographs' as faithful reproductions of an existing work. The Article also states: "Without prejudice to the provisions governing the reproduction of cultural property set forth in Legislative Decree No 42 of 22 January 2004 [...]": the reference here is to Articles 107–108 of the Italian Code of Cultural Heritage and Landscape mentioned above. As said, these rules give public authorities control over the reproduction and re-use of our cultural heritage.

44 Cf Giulia Dore, "The puzzled tie of copyright, cultural heritage and public domain in Italian law: is the Vitruvian Man taking on unbalanced proportions?" (*Kluwer Copyright blog*, 6 April 2023) <<https://copyrightblog.kluweriplaw.com/2023/04/06/the-puzzled-tie-of-copyright-cultural-heritage-and-public-domain-in-italian-law-is-the-vitruvian-man-taking-on-unbalanced-proportions/>> accessed 6 November 2023. Ravensburger is prohibited from continuing to use the image of the Vitruvian Man for commercial purposes in any medium, but it is interesting to note that it is still possible to buy puzzles reproducing *La Gioconda* (the *Mona Lisa*) or *The Kiss* by Hayez or another *The Kiss* by Klimt on the defendant's website.

image right of cultural property was recognised, at least for “works of absolute artistic value” (such as the David by Michelangelo) which had become “a symbol of the entire national cultural heritage”. The infringement of the right to the image of cultural property in this case led to compensation for non-pecuniary damage, based on the principle of minimum compensation for the protection of inviolable constitutional rights (Article 9 of the Italian Constitution).<sup>45</sup>

It is not always clear whether a cultural heritage institution is claiming the application of cultural heritage rules, or is instead invoking copyright law as a ‘privilege’ to allow or prohibit (at its almost unquestionable discretion) the reproduction of the permanent collections in its possession, or the re-use of digitised materials, up to the extreme strategy of recognising image rights with respect to mere goods, in such a way that the resulting protection can be claimed not only by natural persons, but also by legal persons and even by CHIs.

These rules and their interpretation by the courts need to keep pace with contemporary developments, and it is only by taking account of new meanings and subversive practices such as hacking, copying, modifying, tuning and remixing that an appropriate legal framework can be established. Despite legal constraints, experimentation with the reproduction, re-use and remix of cultural heritage continues. A broader understanding of ‘accessibility’ as the free re-use of digitised materials is being sought. Practices of reproduction and re-use are at the forefront of our current century in many different disciplines and fields, as our environments, economies and communities depend on a nurturing relationship of care between people and things.<sup>46</sup> From architecture to design and the arts, the creative industries are exploring copying and re-use, developing fascinating practices that engage closely with our heritage, and re-imagine fundamental notions such

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45 Cf. Eleonora Rosati, “Is it a breach of the Italian Cultural Heritage Code to feature on GQ a model posing like Michelangelo’s David? Yes, says Florence Court” (*The IP Kat*, 6 June 2023) <<https://ipkitten.blogspot.com/2023/06/is-it-breach-of-italian-cultural.html>> accessed 6 November 2023.

46 Gramer Brooker, “50; 50 Words for reuse– a Minifesto” (Canalside Press 2021).

as adaptation, alteration, intervention, insertion, installation, collage and remix. Today there is a 'neurosis' about originality,<sup>47</sup> the fear of being seen to copy can prevent a good idea from taking shape, and the 'tyranny of invention' makes the history of things opaque. In fact, reproduction is central to our material culture, embedded in almost all creative practices: change happens through small tweaks rather than disruptive leaps of invention: literature, music, painting, video, performance love the "perpetual reinvention of the copy". From this perspective, re-use is a deliberate and selective process in which existing elements are borrowed and taken out of their environment to be applied in new contexts with a disruption of meaning: a creative combination of old and new elements to develop the meaning of the object or concept. Hybridity, syncretism, and pluralism can be used alongside the term re-use. They build a bridge between different traditions, and different identities, not seen as antagonistic (one dominating the other) but as mutually influential.

Remix practices also need to be reassessed, because they maintain a syncretic relationship between the original and the remixed version: this is the feature (and measure of success) of the remix, which does not destroy the original but "appropriates" it, quoting and situating the new in its place, ensuring that it can be understood; in certain cases, the reference can also be "decoupled" from the original, and the process becomes regenerative, emphasising the work of the remixer rather than the authorship of the referent.<sup>48</sup> Among other things, we observe that remixing is an activity that relies on and is closely linked to adaptive and assistive technologies: not only do they help people with disabilities to perform tasks with greater ease and independence, but more generally they offer us different ways of interacting with technology, improving our lives in the contemporary digital turn. Against the contemporary culture of licensing and permission, we

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47 Gramer Brooker cit. Latin *copia* as plenty, abundant [*cornucopia* the horn of plenty].

48 For the re-reading of basic notions such as adaptation, alteration, intervention, insertion, installation, collage, and remix cf Gramer Brooker, cit.

then advocate a new sensibility in working with everything we find around us, from monuments and spolia to paintings, videos, comics and documents. While it is true that cultural heritage is a complex construct – the expression of social and cultural values through artistic, historical and scientific artefacts, both tangible and intangible, that have solidified over time and connect the past to the present for future generations<sup>49</sup> – it is equally true that the narrative of heritage construction could benefit from new practices and a renewed vocabulary capable of shaping a re-use mindset. Further clarity is needed on both sides of the fence – on what CHIs can do with the tangible and intangible objects they hold in their permanent collections, both as creators and copyright holders themselves, and as users of works in the public domain, or copyrighted works of others, and on what CCIs and users of apps and social platforms can do with the same objects and artefacts.

The aim of our research and education project is to empower people to explore and access our cultural heritage in new ways that our laws have not yet considered – ways that are less about the economic exploitation of material, even that in the public domain (a ‘game’ that only companies with deep pockets and innovative proprietary technologies can win), and more about the sharing of memories and imagination. Our proposal aims to promote people’s experiences by drawing on the interconnected narratives of diverse communities of practice. It provides sustainable employment opportunities by enabling local communities and people in general to access cultural heritage, while balancing competing interests in cultural heritage and intellectual property rights. Our proposal would recognise specific cultural rights, including the possibility of participating in cultural life through artistic production, reproduction and re-use.

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49 See the Convention on the Value of Cultural Heritage for Society, known as the Faro Convention, 2005.





# READING 'OPEN MUSEUMS' THROUGH A COPYRIGHT LENS: A PRIMER ON EVIDENCE-BASED LEGAL RESEARCH

*Giulia Dore*

The last few years have seen a significant interest in the making and developing of the 'open museum', encompassing innumerable settings and disparate knowledge fields. The concept is noticeably complex, multidimensional, and ambiguous. Depending on context, it can have different meanings and implications, which may lead to confusion. However, despite its limitations, it is a powerful term that can instantly evoke, *inter alia*, the idea of ready accessibility and, more broadly, freedom. Its significance also varies in relation to other terms it can be associated with. In this chapter, the concept is explored through the lens of copyright, and the term 'open' is implicitly coupled with the notion of 'access'. Therefore, in this precise sense, open museums can follow Open Access (OA) and Open Data (OD) principles, providing unrestricted access to and – to the extent possible – reuse of their collections.

Driven by the swift course of digitisation, museums have been releasing ever larger numbers of objects from their collections in OA.<sup>1</sup>

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1 A phenomenon that is evidenced in the Europeana platform hosting millions of digital resources, as recently documented by Mirko Duić, "A Treasure Trove at Your Fingertips: Analysis of Contents from Europeana with Regard to their Copy-

The rate of their digital transformation accelerated precipitously after the mandatory closure of their physical spaces during the Covid-19 pandemic.<sup>2</sup> Just in Europe, it is worth mentioning the examples of the Wien Museum,<sup>3</sup> the MKG in Hamburg,<sup>4</sup> the Nasjonalmuseet in Oslo,<sup>5</sup> the Paris Musées,<sup>6</sup> and, of course, the Rijksmuseum, which collectively made thousands of works available online, with a more pronounced commitment to open data.<sup>7</sup>

The phenomenon of openness in museums appeared in a nascent form even earlier, if somewhat ambiguously, elsewhere in the world.<sup>8</sup>

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- right Status" (46th MIPRO ICT and Electronics Convention, Opatija, Croatia, 2023) 578 <<https://ieeexplore.ieee.org/document/10159823>> accessed 6 May 2024.
- 2 Among the projects mapping this trend, see the report by Giovanna Fontanelle, "Lessons from cultural institutions and libraries that went open access in 2020-2021" Diff Wikimedia community blog, 18 May 2021 <<https://diff.wikimedia.org/2021/05/18/an-overview-of-open-access-among-glams-in-2020-2021/>> accessed 6 May 2024, who started exploring how different museums responded to the need to reconsider their priorities and explore new means of reaching their audience. Others have described in more detail the experience of specific museums. About the network of Paris Musées see Douglas McCarthy and Philippe Riviere, "Paris Musées embraces open access" (Europeana pro blog, 9 January 2020) <<https://pro.europeana.eu/post/paris-musees-launches-its-open-access-initiative>> accessed 6 May 2024.
  - 3 Wien Museum Online Sammlung <<https://sammlung.wienmuseum.at/en/>> accessed 6 May 2024.
  - 4 The online collection of the Museum für Kunst und Gewerbe Hamburg (MKG), launched in 2015, sets the example for other German museums willing to open up their collections and follow an OA policy. This case is specifically illustrated in Antje Schmidt, "MKG collection online: the potential of open museum collections" (2018) 7 *Hamburger Journal für Kulturanthropologie* 25, who explores the opportunities of OA for digital collections but also the challenges and broader implications of openness in the museum sector.
  - 5 Nasjonalmuseet <<https://www.nasjonalmuseet.no/en/collection/>> accessed 6 May 2024.
  - 6 Paris Musées <<https://parismuseescollections.paris.fr/en>> accessed 6 May 2024.
  - 7 Rijksmuseum <<https://www.rijksmuseum.nl/en/research/conduct-research/data/policy>> accessed 6 May 2024. The leadership of Rijksmuseum in the making and development of open museum strategies is documented by many, e.g. Viola Rühse, "The Digital Collection of the Rijksmuseum" in Oliver Grau (ed), *Museum and Archive on the Move: Changing Cultural Institutions in the Digital Era* (De Gruyter 2017) 37.
  - 8 For instance, the National Palace Museum in Taiwan has released selected im-

These efforts reflected the struggle of museums to pursue unrestricted use of cultural resources to foster education and knowledge sharing and to inspire creativity while keeping their alignment with the traditional mission of preservation and exploring potential new revenue streams. This allowed scholars to portray pioneering cases as models of democratisation of culture to be followed by other countries,<sup>9</sup> to explore prospects for reform at the highest policy level stemming from the consideration that cultural heritage belongs to humanity worldwide and should, therefore, be available for all,<sup>10</sup> and to reveal a special commitment to guide museums in their decision-making on OA.<sup>11</sup>

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ages for free and unlimited use since 2017, applying OGD and CC BY 4.0 licenses <<https://theme.npm.edu.tw/opendata/index.aspx?lang=2>> accessed 6 May 2024. The case is illustrated by James Quo-Ping Lin, Alan Chi-Gwong Cheung, Shao-Chun Wu, "Approaching a New Episode of Digital Content Creative Reuse at the National Palace Museum" *2017 Pacific Neighborhood Consortium Annual Conference and Joint Meetings (PNC)*, Tainan, Taiwan, 2017, 92-97, doi: 10.23919/PNC.2017.8203527 accessed 6 May 2024, who highlight how the endeavor to digitise and open up was boosted by the implementation of Open Data policy serving the mission of providing public-centric services.

- 9 A recent study of this kind is Paul Longley Arthur, Lydia Hearn Edith Cowan, "How 'open' are Australian museums? A review through the lens of copyright governance" (2023) *Internet Histories: Digital Technology, Culture and Society* <<https://www.tandfonline.com/doi/full/10.1080/24701475.2023.2268375>> accessed 6 May 2023, who underline the need to promote mechanisms of copyright flexibility.
- 10 The unique collection of the Kala Nidhi Division of Indira Gandhi National Centre for the Arts (IGNCA) illustrates the factors hindering access to Indian digitised cultural heritage, especially in terms of copyright barriers that call for universal policy guidelines, as discussed by Ramesh C. Gaur, "Facilitating Access to Indian Cultural Heritage: Copyright, Permission Rights and Ownership Issues vis-à-vis IGNCA Collections" in Tariq Ashraf, Sharma Jaideep, Anand Puja Gulati (eds), *Developing Sustainable Digital Libraries: Socio-Technical Perspectives* (IGI Global 2010), 235.
- 11 Former reports on the use of images of works of art in the public domain include Kristin Kelly, "Images of Works of Art in Museum Collections: The Experience of Open Access, a Study of 11 Museums" prepared for The Andrew W. Mellon Foundation. Council on Library and Information Resources, June 2013 <<https://www.clir.org/pubs/reports/pub157/>> accessed 6 May 2024 describing the multitude of OA applications to collections of eleven art museums in the UK and USA.

The EU's broader strategic plans for cultural heritage visibly support the expansion of digitisation in the museum sector, and the distinctive role of the digital cultural platform Europeana in facilitating open digital collections is well acknowledged.<sup>12</sup> Obviously, this process involves considerable cost, establishing a visible divide between institutions that are advancing in this area and those that have not yet started, exacerbating inequality and hindering social cohesion.<sup>13</sup>

The literature on open museums is growing and ranges across disciplines other than copyright law, occasionally with interdisciplinary approaches. Existing law-related contributions, however, are largely theoretical. The few that undertake thorough empirical analyses indeed demonstrate and further highlight the role of experiential evidence for understanding the issues and implications of open access policies in museums.<sup>14</sup> Such studies provide a basis for predicting the impact of copyright law on museums' digital transformation, often concentrating on the obstacles that copyright typically poses to access, use, and reuse of digital resources. They also particularly seek to evaluate the efficacy of regulatory frameworks in place, often im-

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12 The key mission statement of Europeana is to empower digital transformation of cultural heritage institutions through the development of expertise, tools and policies that embrace digital change and ultimately foster innovation <<https://www.europeana.eu/en>> accessed 6 May 2024.

13 Such a divide is illustrated, among others, by Ross Parry, *Museums in a Digital Age* (Routledge 2010) who insists on the pervasive and profound influence of digital media on cultural heritage. This is confirmed by many further studies such as Deepanjali Mishra, Sasmita Rani Samanta (eds), *Digitalization of Culture Through Technology: Proceedings of the International Online Conference On Digitalization And Revitalization Of Cultural Heritage Through Information Technology* (Routledge 2022).

14 The first reference is to the Open Glam survey: Douglas McCarthy, Andrea Wallace, Survey of GLAM open access policy and practice, Wikidata <<https://www.wikidata.org/wiki/Q73357989>>. For a country-specific overview, see the commissioned report on open GLAMS in the United Kingdom by Andrea Wallace (2022). A Culture of Copyright: A scoping study on open access to digital cultural heritage collections in the UK (Towards A National Collection, 2022), <<https://doi.org/10.5281/zenodo.6242611>> accessed 6 May 2024. Following empirical studies include Mirko Duić, "A Treasure Trove at Your Fingertips" (see n 1) who undertook quantitative content analysis of the data on the Europeana platform.

plying the need for legal reforms or for leveraging new technologies to develop novel sharing approaches.<sup>15</sup>

The scope of this short contribution is thus to summarise the principal characteristics of the 'state of the art', exploring the many opportunities and challenges for making and sustaining open museums as here construed. It is not a comprehensive literature review but rather aims to inspire one. It is not an exhaustive overview of the questions tied to the construal of open museums but rather hand-picks some problematic issues, arguably the most contentious ones. This said, most of the scholarly discussion seems to revolve' around three macro categories tentatively labelled as legal uncertainty, copyright overreach, and OA prospects.

### ***Legal uncertainty***

The first and wide-ranging category comprises the challenges posed by the current legal landscape on prospective open museums, starting with the typical unawareness and uncertainty of copyright law. Here, the emblematic opacity of its rules and language is paired with the lack of clear policy guidelines, exacerbating the obstacles to using digital cultural heritage resources. Copyright is considered one of the main obstacles to the unrestricted use of digital collections,<sup>16</sup> but it fits in a broader ambiguous regulatory framework comprising other legal grounds that create fears of infringement. The legal challenges are many and the literature began to explore their different

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15 The latter is, for instance, explored by Yuha Jung, "Current Use Cases, Benefits and Challenges of NFTs in the Museum Sector: Toward Common Pool Model of NFT Sharing for Educational Purposes" (2023) 38(4) *Museum Management and Curatorship* 451, who hints how museums could use non-fungible tokens (NFTs) widely to share their collections through a model for a common pool of NFT sharing based on OA and the fair use doctrine.

16 Still, the role of copyright as a tool for museums to explore digital opportunities is undisputed. On this, see Mateusz Klinowski, Karolina Szafarowicz, "Digitisation and Sharing of Collections: Museum Practices and Copyright During the COVID-19 Pandemic" (2023) 36 *International Journal for the Semiotics of Law* 1991, who conclude that even the most recent EU legal framework still lacks effective legal tools.

dimensions starting from the analysis of pioneering projects of mass digitisation.<sup>17</sup> Wallace and Euler elucidate this point by stressing how, despite the prominent open approach of EU law, there is a strong need for legal guidance on national implementation and interpretation of norms beyond copyright.<sup>18</sup>

The impact of the law on the museum's digital journey, especially in terms of intellectual property rights (IPRs), including copyright, cultural heritage laws, and data protection regulations, is widely acknowledged. Scholars have pointed out that the legal framework significantly hampers the evolving role of museums as knowledge custodians now adapting to digital culture. Several have therefore suggested that reforming the existing system of norms to strike an adequate balance among multiple, often jarring, rights and interests<sup>19</sup> will facilitate museums in fulfilling their mission.<sup>20</sup>

### ***Copyright overreach***

The second but interrelated issue of copyright overreach concerns the inevitable conflicts stirred by the increasing influence of

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17 See Vagelis Papakonstantinou, Paul de Hert, "Legal Challenges Posed by Online Aggregation of Museum Content: The Cases of Europeana and the Google Art Project" (2012) SCRIPTed <<http://script-ed.org/?p=713>> accessed 6 May 2024.

18 Andrea Wallace, Ellen Euler, "Revisiting Access to Cultural Heritage in the Public Domain: EU and International Developments" (2020) 51 IIC International Review of Intellectual Property and Competition Law 823. As the authors note, the dearth of solid practical legal guidance facilitates the extension of improper claims, which are also advanced by contractual agreements and terms of services (at 835-836).

19 This balance has been consistently discussed in the literature. See, for example, Pamela Samuelson, "Justifications for Copyright Limitations and Exceptions", in Ruth Okediji (ed), *Copyright Law in an Age of Limitations and Exceptions* (Cambridge University Press 2017) 29.

20 Questioning a reform to overcome the legal 'obstacles' to mass digitization projects: Lois F. Wasoff, "If Mass Digitization Is the Problem, Is Legislation the Solution – Some Practical Considerations Related to Copyright" (2011) 34(4) Columbia Journal of Law & the Arts 731. On the prospective changes in the law, see also Andrew F. Christie, "Cultural Institutions, Digitisation and Copyright Reform" (2007) 12 Media and Arts Law Review 279, 290-291.

copyright exclusivity on museum activities.<sup>21</sup> Since museum practices are heavily influenced by copyright rationale, scholars pinpoint the dangerous trend of museums failing to resist the enticement of exclusivity and going even further by applying other legal tools, such as licensing agreements. In this setting, museums are arguably challenged to seek (especially economic) sustainability in their digital operations.<sup>22</sup> However, Sappa describes such a trend as 'a control-based approach' shifting to a purely market-driven dimension, which diminishes the mission of access and education to knowledge that should define museums while dissuading businesses from entering the market.<sup>23</sup>

Such circumstances support the idea of a 'culture of hyper ownership', where copyright claims hinder others from using cultural resources, harming the progress of art and science that is indeed one of the primary scopes of copyright.<sup>24</sup> This approach reflects the current conduct of museums asserting ownership even beyond copyright subsistence, i.e., claiming rights on public domain works, which confuses users and deters them from rightfully participating in culture. Indeed, by imposing unnecessary restrictions on works not subject to copyright law, museums freeze the ability of the public to

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21 On this specific aspect, see, among others, Kenneth D. Crews, "Museum Policies and Art Images: Conflicting Objectives and Copyright Overreaching" (2012) 22 *Fordham Intellectual Property, Media & Entertainment Law Journal* 795.

22 This is for instance noted by Guy Pessach, "Museums, Digitization and Copyright Law: Taking Stock and Looking Ahead" (2007) 1 *Journal of International Media & Entertainment Law* 253, who looks at museums as both users and owners of copyright works that are continually required adjust their role.

23 Cristiana Sappa, "Actions and reactions in commodifying cultural heritage hosted in museums" (2023) 14 *Journal of Intellectual Property, Information Technology and e-Commerce Law* 161.

24 An argument that is well articulated in Amy H. Blackwell, Christopher William Blackwell, "Hijacking Shared Heritage: Cultural Artifacts and Intellectual Property Rights" (2013) 13(1) *Chicago-Kent Journal of Intellectual Property* 137, who (at 137-138) expose the risk of protecting something that has little or no value from an economic perspective, but has an enormous value for the knowledge of humankind.

use these works legitimately.<sup>25</sup> This indeed has dubious legal standing,<sup>26</sup> let alone moral standing.<sup>27</sup>

### **Open Access prospects**

The third and final category addresses the prospects and deficiencies of open strategies that respond to the challenge of increasing access to digital cultural resources and encouraging their reuse,<sup>28</sup> with explicit benefits for communities.<sup>29</sup> Frequently encouraging open culture initiatives,<sup>30</sup> the literature emphasises the importance

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25 See Linnea Dale Pittman, "Combatting Copyright Overreach: Keeping 3D Representations of Cultural Heritage in the Public Domain" (2020) 95(4) NYU Law Review 1192, who also advocates the opportunity to implement an analogue version of Article 14 DSMD.

26 Among others, see Kenneth D. Crews, Melissa A. Brown, "Control of museum art images: the reach and limits of copyright and licensing" in Annette Kur, Vytautas Mizaras (eds) *The Structure of Intellectual Property Law* (Edward Elgar 2011), who specifically investigate the legal premises behind claiming copyright and otherwise imposing license restrictions on art images.

27 A moral dimension of the phenomenon is traced by Grischka Petri, "The Public Domain vs. the Museum: The Limits of Copyright and Reproductions of Two-dimensional Works of Art" (2014) 12(1) *Journal of Conservation and Museum Studies* 1, who argues that handling reproductions of works requires a consideration of museum ethics that arises from the tension of making collections accessible versus acquiescing to restrictive policies on the digital reproduction of works.

28 Discussing the increasing tension between the opportunity to broaden the scope of museums' public mission and the desire to securing revenue streams, see Merete Sanderhoff, "Open images. Risk or opportunity for art collections in the digital age?" (2013) 2 *Nordisk Museologi* 131.

29 On this, see Margaret Hedstrom, John Leslie King, "On the LAM: Library, Archive, and Museum Collections in the Creation and Maintenance of Knowledge Communities", documented in Organisation for Economic Cooperation and Development, "Innovation in the Knowledge Economy: Implications for Education and Learning" (2004) <<https://doi.org/10.1787/9789264105621-en>>

30 In particular, it is worth mentioning the advocacy role of the OpenGlam network, aimed at developing policies and practices on OA in the cultural heritage sector <<https://openglam.org>> accessed 6 May 2024; the Communia association, expressly targeting "policies that expand the public domain and increase access to and re-use of culture and knowledge" <<https://communia-association.org>>



of developing effective strategies and institutional policies to open digital collections, with an eye on the actual impact that the implementation of these strategies has on the cultural heritage sector.<sup>31</sup>

As Terras maintains, making and using digital objects can encourage research, thus justifying the endorsement of open cultural data and open licensing.<sup>32</sup> Furthermore, it is contended that open strategies can safeguard society's cultural heritage and expressly serve cultural preservation purposes<sup>33</sup> while making this heritage available to all. Still, the scholarly support for open culture and for museums to embrace such openness does not impede foreseeing the limitations associated with its evident advantages.<sup>34</sup>

The extensive literature confirms the significance of open practices in museums while acknowledging their manifest complexity. The task of museums to preserve and provide access to collections has certainly

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org/> accessed 6 May 2024; the Creative Commons' initiatives to support open access on cultural heritage <<https://creativecommons.org/about/arts-culture/>> accessed 6 May 2024.

31 For instance, this was foreseen by Effie Kapsalis, "The impact of open access on galleries, libraries, museums, & archives" (2016) <[https://siarchives.si.edu/sites/default/files/pdfs/2016\\_03\\_10\\_OpenCollections\\_Public.pdf](https://siarchives.si.edu/sites/default/files/pdfs/2016_03_10_OpenCollections_Public.pdf)> accessed 6 May 2024.

32 A key role in advocating for a clear open data agenda is played by Melissa Terras, "Opening Access to Collections: The Making and Using of Open Digitised Cultural Content" (2015) 39 *Online Information Review* 733, one of the first to review the literature on OA movements and digitization in the cultural and heritage sector.

33 To this extent, it safeguards collective memory for future generations and yet achieves the goal of cultural sustainability, according to Paula Fernández Valdés, "Achieving Cultural Sustainability through the Preservation of Video Art: Open Distribution Platforms" (2023) 31 *Artnodes* <[doi.org/10.7238/artnodes.v0i31.402845](https://doi.org/10.7238/artnodes.v0i31.402845)> accessed 6 May 2024.

34 In this sense, Brian Kelly, Mike Ellis, Ross Gardle, "What Does Openness Mean to The Museum Community?" in Jennifer Trant, and David Bearman (eds) *Museums and the Web 2008: Proceedings (CDROM)* Toronto: Archives & Museum Informatics (2008) <<http://www.archimuse.com/mw2008/papers/kelly/kelly.html>> accessed 6 May 2024, who wonder whether an unconditional approach to openness can always be sustainable and therefore call for 'a flexible approach' to open culture.

been significantly impacted by digital technologies.<sup>35</sup> Digitisation may have facilitated the expansion of their public mission by expanding the possibilities of access to and participation in culture. Still, it has also made it more complex, especially when societal goals struggle to align with economic ones.<sup>36</sup> Furthermore, facing conventional copyright restrictions, the open strategies of museums have correspondingly shrunk, increasing the risk of ‘cultural distortions’.<sup>37</sup>

Empirical studies have focused on quantitative data,<sup>38</sup> and have analysed qualitative evidence,<sup>39</sup> especially through interviews.<sup>40</sup> These studies often investigate the phenomenon of museum open-

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35 See Melissa Terras, “The rise of digitization” in Ruth Rikowski (ed), *Digitisation Perspectives* (Sense Publishers 2011) 3; John H. Falk, Lynn D. Dierking, *The Museum Experience Revisited* (Routledge 2016).

36 On this, see Reimar Tausch, Matevz Domajnko, Martin Ritz, Martin Knuth, Pedro Santos, Dieter Fellner, “Towards 3D Digitization in the GLAM (Galleries, Libraries, Archives, and Museums) Sector – Lessons Learned and Future Outlook” (2020) 16 *IPSI Transactions on Internet Research* 45.

37 On this specific point, see Emily Hudson, Andrew T. Kenyon, “Without Walls: Copyright Law and Digital Collections in Australian Cultural Institutions” (2007) 4 *SCRIPT-ed* 197, 200, who describe the threat posed by the obvious prevalence of historic (public domain) works and the opposing scarcity of contemporary works.

38 See Alexander Cuntz, Paul J. Heald, Matthias Sahli, “Digitization and Availability of Artworks in Online Museum Collections” University of Illinois College of Law Legal Studies Research Paper No. 23-18 (2023) <<http://dx.doi.org/10.2139/ssrn.4544004>> accessed 6 May 2024, analysing the impact of the copyright status of museum collections on the availability of digital images of artworks.

39 For instance, see Julia Wiedemann, Susanne Schmitt, Eva Patzschke, “Responding to open access: how German museums use digital content” (2019) 17 *Museum and Society* 193, exploring the open culture strategies undertaken by German museums. See also Taylor A. Barrett, “Accessing Art Museum Archives: An Investigation of Remote Online Access to Art Museum Archive Collections” (2020) <<https://doi.org/10.17615/w8b6-wg15>> accessed 6 May 2024, acknowledging the lack of standardized approaches to making available digital images from art collections.

40 Among the latest contributions, see Peter Booth, Trilce Navarrete, Anne Ogun-dipe, “Museum open data ecosystems: a comparative study” (2022) 78 *Journal of Documentation* 761, who investigate the interaction of museums with the articulated open data ecosystem, illustrating the dynamics that may restrict its development.

ness through 'use cases',<sup>41</sup> by surveying user standpoints,<sup>42</sup> and by conducting value measurements.<sup>43</sup> In so doing, empirical analysis helps validate the theoretical postulations behind the development and making of the open museum model. However, the legal and policy aspects mentioned above and their associated arguments have been only partially investigated using empirical research methods. Furthermore, they tend to indulge the typical lack of standardisation in open-culture approaches and decision-making. They are often very narrow in scope, eschew interdisciplinary methodology, and tend to quickly become outdated, given the rapid pace at which digital technologies evolve. Finally, they only rarely investigate critical issues such as accessibility and inclusivity.<sup>44</sup>

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41 For example, the Saint-Raymond Museum in Toulouse is analysed by Alexandre Albore, Saverio Giulio Malatesta, Christelle Molinié, "Open Cultural Data and MediaWiki Software for a Museum: The Use Case of Musée Saint-Raymond" (2021) 1 Environmental Sciences Proceedings 10, one of the frontrunners on open cultural data.

42 Looking into the barriers to non-commercial and commercial reuse of openly licensed art images, see Foteini Valeonti, Melissa Terras, Andrew Hudson-Smith, "How Open Is OpenGLAM? Identifying Barriers to Commercial and Non-Commercial Reuse of Digitised Art Images" (2020) 76(1) Journal of Documentation 1, who emphasize the difficulty users have identifying copyright status and distinguishing open images from those subject to copyright protection.

43 In particular, see Lorna M. Hughes (ed), *Evaluating and Measuring the Value, Use and Impact of Digital Collections* (Facet Publishing 2012); Melissa Terras, Stephen Coleman, Steven Drost, Chris Elsdén, Ingi Helgason, Susan Lechelt, Nicola Osborne, Inge Paneels, Briana Pegado, Burkhard Schafer, Michael Smyth, Pip Thornton, Chris Speed, 'The value of mass-digitised cultural heritage content in creative contexts' (2021) 8(1) Big Data & Society 1. See also Simon Cotterill, Martyn Hudson, Katherine Lloyd, James Outterside, John Peterson, John Coburn, Ulrike Thomas, Lucy Tiplady, Phil Robinson, Phil Heslop, "Co-Curate: Working with Schools and Communities to Add Value to Open Collections" (2016) 1 Journal of Interactive Media in Education, exploring the use of OA materials in co-curation within educational and cultural settings.

44 A prominent exception in this regard is the work by Léa Urzel Francil, Ann Leahy, Delia Ferri, "A Human Rights Approach to Accessibility for Visitors with Disabilities in Museums: Reflections from the DANCING Project" featuring in this book. More generally in the literature, special attention to accessibility in the open culture environment is found in Andrea Wallace, "Accessibility and open GLAM" in Jani McCutcheon, Ana Ramalho (eds), *International Perspectives on Disability Exceptions in Copyright and the Visual Arts: Feeling Art* (Routledge 2020), 46.

In general, the limited presence of empirical legal studies stems partly from a historical hesitancy among legal scholars to embrace experimental research. However, combining empirical methods with theoretical approaches yields significant value, particularly in intellectual property law, and especially in copyright. In this realm, characterised by blurred and ambiguous legal provisions, establishing a regulatory framework grounded in policies designed from the ground up appears achievable through empirical studies.

In conclusion, evidence-based research is key to supporting more informed policies and regulations. Still, it demands increasingly wide-ranging and robust data to support the arguments on and for openness,<sup>45</sup> corroborating the initial assumption that empirical analysis in this field is highly desirable. This often implies considering multiple subject matters and interdisciplinary interaction with disciplines other than law. Examining museum practices from a legal perspective might be persuasive, but it will be incomplete without examination of parallel standpoints, such as sociological or economic perspectives. Interdisciplinarity is crucial in guaranteeing the broadest perspective on openness that therefore strikes the proper balance between different and occasionally conflicting approaches. Future research, should contemplate all these aspects, repudiating a strictly legal-centric approach and pursuing a more far-reaching vision that goes beyond theoretical assumptions, effectively targeting a sustainable approach to openness: love can be blind, and so can be the law.

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45 A typical assumption could be that intellectual property, and specifically copyright, are the main barriers against the flourishing of the museum digital and social mission. Another assumption is that the 'average' museum may lack technical or technological digital capacity, or may lack legal knowledge and training.

Preface, *Roberto Caso*

Editors' foreword, *Giulia Dore and Marta Arisi*

Accessibility is not an option, it is a right to culture and the enjoyment of art, *Aldo Grassini*

Making museums accessible: best practices from MUSE, *Paolo Degiovanni, Patrizia Famà, Katia Franzoso and Romana Scandolari*

Accessibility and Inclusion at the MART, *Ornella Dossi*

Museo Egizio In & Out, *Alessia Fassone and Federica Facchetti*

Opening Up to the Community, *James Bradburne*

A Human Rights Approach to Accessibility for Visitors with Disabilities in Museums. Reflections from the DANCING Project, *Léa Urzel Francil, Ann Leahy and Delia Ferri*

Regulating Communities: Strategies for an Open Museum Sector, *Fiona Macmillan*

Reproduction, re-use and open access, *Barbara Pasa*

Reading 'Open museums' through a copyright lens: a primer on evidence-based legal research, *Giulia Dore*