

# **International Copyright Workshop: Providing Online Access to Art Historical Research Photography Collections**

**PHAROS Intellectual Property Working Group**

**October 2020**



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## **Abstract**

PHAROS, an international consortium of photo archive repositories, is a collaborative project among fourteen photo archives in North America and Europe established to create a freely available common digital platform for research on images of works of art in all media, both Western and non-Western, through comprehensive consolidated access to their collections.

The PHAROS group has been working towards its shared goals since 2013. In the Spring of 2019, a grant from the Andrew W. Mellon Foundation established a 30-month Pilot Project to create an online research platform that will make over 1.5 million images of works of art available with accompanying scholarly documentation from five of the fourteen PHAROS member institutions. A key aim of this pilot project is to establish a template and pathway to guide the remaining PHAROS members in their contributions to the research platform, realizing the full potential of access to the 25 million images from PHAROS institutions.

By the summer of 2019, most of the consortium members were actively digitizing or had completed digitization of their holdings, but rights issues - fundamental to the success of the initiative - were yet to be addressed. The group's Intellectual Property sub-committee called an extraordinary meeting, the aim of which was to explore the complexities involved and to begin to determine a path forward.

Supported by a grant from the Samuel H. Kress Foundation, the International Copyright Workshop brought together legal and cultural heritage experts and stakeholders from the United Kingdom, European Union and United States of America to discuss cross-border copyright challenges and their resolution in the context of a common digital platform for the PHAROS consortium. The workshop took place on 3 and 4 March 2020 at the Paul Mellon Centre for Studies in British Art.

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## Aims

The goals and proposed outcomes of the International Copyright Workshop were as follows:

- To develop an understanding of the cross-border intellectual property and copyright issues faced by PHAROS in the creation of an open access research platform (taking into consideration similar initiatives, copyright legislation and other political developments in PHAROS member countries)
- To agree the definition and principles of 'open access' in the context of the PHAROS project
- To develop an IP framework for the PHAROS consortium and the Pilot Project
- To make recommendations concerning tools and licenses the common PHAROS Platform should employ to communicate the rights status of digital objects
- To compile an agreement and statement concerning the consortium's position on open access, copyright and intellectual property, for institutional endorsement
- To begin to compile associated intellectual property policies and procedures for the pilot platform, which may include user terms and conditions, take down, and GDPR (General Data Protection Regulation) compliance
- To publish a report on the workshop, including a summary of key recommendations and next steps identified as a result of the proceedings

## Key questions

- Is there any degree of international consensus on the copyright status of photographs of works of art?
- Are there any models for an international image and data aggregation platform like that envisaged by PHAROS?
- How might we identify and mitigate against risk?
- How might we engage with stakeholders?
- How can we best communicate the rights status of images contributed to the PHAROS Platform?
- What copyright and licensing terms must we consider for the PHAROS Platform itself?

# Participants

## Experts

- Mikka Gee Conway, MA, JD, Associate General Counsel, J. Paul Getty Trust
- Greg Cram, JD, Director of Copyright, Permissions and Information Policy at The New York Public Library
- Julia Fallon, Community and Partner Engagement Manager, Europeana Foundation Netherlands
- Bernard Horrocks, Intellectual Property Manager, Tate Gallery, and executive member, Museums Copyright Group
- Carlo Eligio Mezzetti\*, LL.M, PhD, Partner, Nunziante Magrone, Milan
- Andrea Wallace, PhD, LL.M, JD, Lecturer in Law, University of Exeter, UK

## PHAROS partner representatives

- Robin Armstrong-Viner, Courtauld Institute of Art
- Tatjana Bartsch\*, Bibliotheca Hertziana – Max Planck Institute for Art History
- Tom Bilson, Courtauld Institute of Art
- Kraig Binkowski, Yale Center for British Art
- Charlotte Brunskill\*, Paul Mellon Centre for Studies in British Art
- Anne-Elisabeth Buxtorf, Institut national d'histoire de l'art
- Costanza Caraffa\*\*, Kunsthistorisches Institut in Florenz
- Emmanuelle Delmas-Glass, Yale Center for British Art
- Ute Dercks\*, Kunsthistorisches Institut in Florenz
- Rembrandt Duits, Warburg Institute
- Sonja Fessel, Deutsches Dokumentationszentrum für Kunstgeschichte - Bildarchiv Foto Marburg
- Caroline Fieschi, Institut national d'histoire de l'art
- Richard Gartner, Warburg Institute
- Melissa Gold Fournier\*, Yale Center for British Art
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- Lukas Klic, I Tatti, The Harvard University Center for Italian Renaissance Studies
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- Gregory Most, National Gallery of Art
- Kerri Pfister\*, Frick Art Reference Library
- Emily Pugh, Getty Research Institute
- Maisoon Rehani, Paul Mellon Centre for Studies in British Art
- Michael Roche\*\*, I Tatti, The Harvard University Center for Italian Renaissance Studies

- Johannes Röll\*\*, Bibliotheca Hertziana – Max Planck Institute for Art History
- Tom Scutt, Paul Mellon Centre for Studies in British Art
- Anne Marie van der Torren, RKD – Netherlands Institute for Art History
- Louisa Wood Ruby^, Frick Art Reference Library
- Reinier van't Zelfde, RKD – Netherlands Institute for Art History

## Facilitators

- Kathy Oldridge, Barnstorm
- Sarah Snoxall, Barnstorm

*+ Due to precautions introduced in response to the COVID-19 pandemic, some representatives were unable to attend the workshop in person, but observed and offered their formal presentations remotely.*

*\* Member of the PHAROS Intellectual Property Group*

*^ Chair of the PHAROS consortium*

## Methodology

The PHAROS consortium initially focused on the logistical issues surrounding cataloguing and the creation of digital facsimiles in photographic archive materials. As this work progressed, complex rights issues emerged. It soon became apparent that within a single photograph a number of rights - including but not limited to IP, commercial, contractual, data protection and moral - might subsist. Furthermore, these rights might be held by more than one rightsholder including, but not limited to, photographers, creators and owners of either the photograph or the object depicted. It also became apparent that the legal protections afforded by these rights holders varied depending on the jurisdiction in which the holding repository was located. The Kunsthistorisches Institut in Florenz, for example, may be subject to EU law, Italian federal law, city by-laws, and also potentially by policy decisions determined by its parent organization, the Max Planck Society, based in Germany.

In order to begin to unpick these concerns, six individuals - each with expertise of intellectual property law in the US, EU, or UK - were invited to discuss the issues with PHAROS members at an intensive one-and-a-half day workshop. These experts included both qualified legal practitioners as well as rights managers with practical experience of equivalent initiatives. Each expert was provided with a brief and asked to consider the international similarities and differences present in the jurisdictions they were tasked with representing, and to prepare a formal presentation on this topic.

Sarah Snoxall and Kathy Oldridge (Barnstorm) were invited to act as independent facilitators for the workshop. This offered all PHAROS representatives an opportunity to participate in the proceedings equally, and a neutral voice to push towards conclusions. Barnstorm conducted interviews with both the invited experts and also a range of individuals from the

PHAROS partner organizations prior to the event. Following these interviews, and working with the PHAROS IP sub-committee, they compiled an intensive workshop program.

The workshop program included formal presentations, question and answer sessions, practical handling sessions, case studies and consultation sessions. Additional opportunities for feedback were offered by means of brainstorming tasks with Post-its allowing participants to share their views anonymously and encouraging them to respond openly and honestly. Discussion took place within an all-group environment as well as - in order to tease out particular issues - within smaller groups, often with participants organized according to their broad legal jurisdiction.

During the planning process a number of stakeholders were identified. These included, but were not limited to: PHAROS institutions, photo archive users, photographers, owners, creators/artists, auction houses, GLAM (galleries, libraries, archives and museum) institutions and archival donors. The tasks and questions of the workshop program - while not scientific data-gathering exercises - were designed to elicit information, experience and opinion about the behaviors, activities, needs, expectations and goals of these different stakeholder groups.

## Summary of Workshop Proceedings

The workshop was composed of eight topically focused sessions of presentations and exercises. Each session concluded with discussion between experts and attendees, facilitated by Barnstorm, to identify commonalities and concerns.

### Day One

#### Session One: Ambitions

Exercise: What does the PHAROS project look like in practical terms in 5- or 10-years' time?

Exercise: Aligning the perspective of different institutions

#### Session Two: A Common Terminology

Presentation: Stakeholder groups, Tom Scutt

Presentation: Defining the types of rights, Andrea Wallace

Exercise: Identifying rights in images

#### Session Three: Context: International Jurisdictions

Presentation: US, Mikka Gee Conway

Presentation: UK, Andrea Wallace

Presentation: EU, Carlo Eligio Mezzetti

#### Session Four: Risk management case studies

Case studies: UK, Bernard Horrocks

Case study: US, Greg Cram

Case study: EU, Julia Fallon

Session Five: Identifying and managing risk

Exercise: Creating a risk register

Exercise: Mitigating risk

Session Six: Statements and Licenses

Presentation: Creative Commons, Julia Fallon

Presentation: Rights Statements, Greg Cram

Breakout discussions by jurisdiction

## **Day Two**

Session Seven: PHAROS case studies

Presentation: Paul Mellon Centre, Tom Scutt and Charlotte Brunskill

Presentation: Pilot study of rights holders, Hubert Locher and Sonja Fessel  
(Bildarchiv Foto Marburg) BILDINDEX der kunst & architektur

Presentation: Getty, Emily Pugh

Session 8: Defining a set of principles

Presentation: Drafting terms of a PHAROS Contributor Agreement, Carlo Mezzetti

Presentation: Drafting terms of a PHAROS Contributor Agreement, Mikka Gee Conway

# Findings and Recommendations

## Delineating Rights

An analog object in a photo archive collection generally consists of far more than a single photograph. Rather, it is a compound and complex layered object, whether considered before or after its digitization. Rights may subsist or arise at any level, including the underlying work of art, the photograph of the work of art, the archival mount with its associated text and data, the digital reproduction of the photograph and/or the digital facsimile of the archival mount in full, and the data in the catalog record describing the object. In addition to copyright, which may apply to one or more of these layers, additional considerations include contractual restrictions, privacy implications, cultural permissions, and other ethical concerns. Appendix E illustrates this complexity.

## Rights in Reproductions Across Jurisdictions

A key issue identified during the workshop was the clear difference among US, UK, and EU jurisdictions concerning rights in reproduction layers, and specifically any claim to copyright in photographic reproductions including digital reproductions of analog photographs (whether or not the underlying material is in-copyright or in the public domain) and how PHAROS institutions should approach this.

The excerpt below, quoted directly from formal recommendations received from Andrea Wallace, post-workshop (see Appendix D), gives some explanation of the issue:

- **US.** The prevailing opinion was that copyright is not warranted in faithful and other non-original reproduction media, which is informed by case law from 1998, 1999, 2008, and 2016. These cases support the premise that no new rights should arise in faithful reproduction media of 2D and 3D works. Accordingly, this interpretation applies to both the digital reproduction layer *and* the underlying analog reproduction layer. Although these cases do not bind parties outside of their respective jurisdictions, the doctrine has been increasingly embraced by US GLAMs, and particularly by those in the PHAROS consortium who were early to voluntarily adopt the doctrine and have become leaders in the open GLAM movement.
- **UK.** The prevailing opinion is that copyright is an operational decision to be taken by each institution, which is informed by case law from 1869. This opinion is primarily practice-led and is not supported by leading UK copyright academics. The result is that UK institutions will recognize rights in the digital reproduction layer *and* the underlying analog reproduction layer, which can implicate two different rights holders during rights management. In general, UK GLAMs are less active in the open GLAM movement. Four institutions have adopted open access as a matter of policy for digital collections. Each institution takes a different approach to rights in the reproduction media. Some apply the Public Domain Mark. Others claim copyright and release media CC BY. The majority of UK institutions who participate in open GLAM release limited amounts of reproduction media under open licenses and tools. UK PHAROS Partners apply non-open licenses or claim copyright in digital reproduction media.

- **EU.** EU member states are in a period of transition on this topic. In 2018, the highest court in Germany held faithful photographic reproductions of public domain paintings do not satisfy the EU standard for copyright protection, and recognized lesser related rights protections specific to German Law. Not only does this decision bind German heritage institutions and owners, but it suggests that all faithful reproductions of 2D public domain artworks fail to attract copyright across the EU, including in the UK. A 2019 Directive formalized this principle in EU copyright law. Article 14 of the Copyright in the Digital Single Market Directive prohibits anyone from claiming new rights in any media that is generated during an act of reproduction of a visual work unless the EU copyright threshold is clearly met. In effect, Article 14 overrules the German decision, which recognised lesser related rights protections, and eliminates similar rights from being recognised in reproduction media by other EU member states. EU PHAROS Partners take different approaches to rights in reproduction media, informed by national, regional, or other legal obligations. Article 14 should introduce greater consistency to these practices, but other jurisdiction-specific obligations may need addressing (e.g., *domaine public payant* in Italy).

## Assessing Risk

Discussion at the workshop revealed that - in practice - stakeholder relations often played the most important role in determining an institution's appetite for risk in relation to this issue. Specifically, while all PHAROS members were happy not to assert their own rights in digital reproductions of images, they were far more hesitant to adopt this practice with regard to images where copyright in a reproductive layer might be asserted by another institution. The scale of the project was also a significant factor: publishing a handful of images was not seen to be particularly problematic, but publishing thousands where copyright might be asserted by a third party was felt to present a significant concern.

PHAROS members agreed that while digital reproductions made available through PHAROS project interfaces should be high resolution by default, where underlying works of art or original photographs remain under copyright, lower resolution images or other restrictions on display and download may be appropriate or required.

Discussions further revealed that the most significant risk associated with this issue was damage to key stakeholder relations. For a sector that relies on mutually supportive relationships to operate successfully, this was clearly a concern. Various means of mitigating this risk were discussed. Engagement was identified as a significant mitigating factor: communicating the aims of the PHAROS project to third party rights holders would be key (it would also bring associated benefits such as promotion of the platform; ready-made-audiences, et cetera).

## Agreements

By the close of the workshop proceedings, PHAROS members had agreed upon the following:

### General

- If the aims and ambitions of the PHAROS consortium are to be achieved, the constitution of the initiative needs review, perhaps with a view to establishing it on a more formal legal basis
- PHAROS members must work harder to share institutional experience with fellow consortium members
- PHAROS must ensure it keeps a careful record of all discussion and decisions
- PHAROS must ensure that lessons learned, and the best practice and procedure developed as a result of developing the PHAROS Platform are shared with external audiences. This is as important as developing the shared platform itself
- To request a set of formal recommendations from the six experts who had attended the workshop (four of these can be found in the Appendices)

### Rights and Responsibilities

- The risk surrounding rights was generally low, but the risk concerning damage to stakeholder relationships was a bigger concern
- Transparency, engagement and outreach are important factors in mitigating risk and promoting the PHAROS Platform
- Prudent management of the assets proposed by the PHAROS Consortium for indexing in the PHAROS Platform is unmanageable centrally. A model whereby responsibility (and therefore liability) rests with the contributor was felt to be sensible. A mechanism by which to contact the contributing repository directly from the PHAROS Platform would be ideal
- The adoption of standardized tools to communicate rights for all images available through the pilot project portal is important and essential. The partners agreed that Rightsstatements.org and Creative Commons tools and licenses can be used

### Definition of Open Access

The PHAROS consortium's definition of Open Access with respect to its website and the pilot project platform is **Gratis Access, or, free to access**. There will be no financial or technical barriers to the PHAROS Platform and its records, assets and metadata, which will be accessible free of charge, with no fee or paywall.

However, discord between the regions within which the PHAROS partners operate afford different rights to photographs and digital reproductions. In addition, the assets contributed may be vested with multi-layered rights.

Contributing PHAROS members must clearly communicate when material available via the platform may not be free to reuse. Contributing PHAROS members will be required to assign a Rights Statement or Creative Commons license to appropriately communicate the particular rights status and extent of reuse permitted for any digital asset submitted to the platform.

Partner metadata must be designated as reusable without restriction under the Creative Commons CC0 tool. Metadata that cannot be labelled as CC0 may be excluded from the platform.

## Implications for PHAROS Partners and Pilot Project Contributors

Exercises undertaken as part of the workshop offered a set of tools and principles that each partner organization might take back to their internal team. Discussions revealed that greater homogenization and consistency of language and policy would be necessary to achieve the end goals of the PHAROS consortium. This will mean, by necessity of the devolved management structure of the group, that individual members will need to undertake the following steps:

- **Undertake risk assessments and carry out due diligence** with regard to rights issues before submitting assets and data to the PHAROS Platform. This is necessary because individual institutions will be responsible (and therefore liable) for any assets supplied to the PHAROS Platform. Risk assessment exercises undertaken during the workshop provide a clear framework for this activity, maximizing awareness of potential hazards, identifying stakeholder concerns and how best to mitigate against risk. Maintaining a register of such risks will not only guide each individual project through to completion but also allow individual institutions to confidently submit images and data to the PHAROS Platform.
- **Re-assess licensing practices** with a view to updating legacy licenses so that they align with Creative Commons, Rightsstatements.org or other internationally recognised standards approved by the PHAROS consortium. This is necessary because rights and usage statements have been applied to digital resources produced by the partner organizations in an organic manner over time and may not always conform to current internationally recognized standards.
- **Ensure that any metadata submitted to the platform can be offered under a single CC0 1.0 Universal (CC0 1.0) Public Domain Dedication**. This is necessary because the ResearchSpace software from which the PHAROS Platform will be developed handles submissions in a manner that means it would be impossible to attribute ownership or usage restrictions to individual data points. As such, all data contributions describing the work of art or the archival collection will need to be made with a CC0 1.0 Universal (CC0 1.0) tool.
- **Determine institutional policy with regard to claiming or relinquishing copyright in faithful reproductions of public domain works**. The approach to copyright in reproductions was split across jurisdictions (particularly with regard to the

UK). While most PHAROS institutions are keen to make images available under the least restrictive terms, it was recognized that there were often 'layers' of rights to be considered, and – particularly where the underlying work is owned by another institution – public domain tools might not be appropriate.

## Implications for the Pilot Project Platform

Discussions on many issues were influenced by the technical infrastructure currently under development as part of the PHAROS Pilot Project. The following key issues were identified as requiring further exploration in the course of the workshop:

- **Reassess data model in light of contributor requirements.** This is necessary because discussions revealed that curatorial interpretative texts attached to some images may require attribution (and therefore cannot be made available with the [CC0 1.0 Universal \(CC0 1.0\)](#) tool used for other data). A secondary schema submitted in conjunction with the core object data will therefore require further exploration in order for this data to be included. This work should be undertaken by the PHAROS Data Modelling Group.
- **Rights-related data must be intelligible to humans and machines.** This is necessary because clear and unambiguous statements will help our users undertake their work effectively. We must acknowledge rights holders in a way that is recognizable beyond our platform, and in line with the broader gallery, library, archive and museum sector.

Existing tools, licenses and statements from [Creative Commons](#) and [RightsStatements.org](#) will make it easier for users to understand what they can do with those digital objects they discover. Additionally, these are provided in a “machine readable” format that software systems, search engines, and other kinds of technology can understand, allowing them to be effectively indexed and searched.

This work should be undertaken by individual PHAROS organizations in consultation with the IP Working Group, the Data Modelling Group, and the Pilot Project team.

## Post Workshop: Next Steps

The next steps outlined below were identified following post-workshop discussion between PHAROS members. They also draw heavily from the formal recommendations made by experts. The full text of these recommendations - received from four of the six experts who attended the event - can be found, in full, in the appendices to this report.

### Governance

Discussion confirmed that PHAROS continues to be an ambitious and potentially ground-breaking initiative. To date, it has achieved a huge amount while operating within a relatively informal structure. However, if it is to realize its ultimate aims and objectives it will need to:

- Review its current **legal status and financial arrangements**, with a view to establishing both on a more formal basis. Resolving PHAROS' status as a legal entity should be done prior to drafting legal documents governing participation in and use of the platform by contributors and researchers (See Conway, Appendix A.)  
*This work will be undertaken by the PHAROS Executive Steering Committee.*
- Ensure that there is **continued provision for addressing and resolving IP issues** after the PHAROS resource is published. (See Horrocks, Appendix B.) This might be achieved by re-constituting the existing IP working group, or establishing a paid position. The existence of this group/role would provide reassurance to rights holders and owners. It would need to facilitate continued dialogue across the consortium and might also be responsible for:
  - explaining and championing IP rights to existing and potentially new PHAROS members
  - monitoring and actioning any take-down notifications
  - acting as custodian of IP records, amending a particular asset's copyright status should, for example, a copyright owner change or a term of copyright expire (e.g. on 31 December in a given year).

*This issue will be considered by the Executive Steering Committee*

### Statements, Agreements and Documentation (internally facing)

- Ensure that **language and terminology employed on the PHAROS platform is uniform, centered on users and conforms to internationally recognized standards and schemas**. (See Wallace, Appendix D.) This is particularly important with regard to use and access, rights and licenses. It is recommended, for example, that the term 'gratis access' is employed for the PHAROS website; 'gratis reusable' is used for the metadata. Digital objects will require appropriate Creative Commons licenses, tools or rights statements.

- Develop and implement **contributor agreements** that define the expectations and responsibilities of the PHAROS platform operation and those of PHAROS member organizations. This will also open the possibility of contributions from outside the founding consortium. The contributor agreement will need legal expertise and must cover at least the following areas (see Conway, Appendix A):
  - Liabilities
  - Technical specifications
  - licenses and rights (see above)
  - Use and access (see above)

*This work will be undertaken by the PHAROS Executive Committee*

- Develop a **workflow tool** to facilitate a more homogenous approach to the application of rights and licenses across PHAROS members. (See Wallace, Appendix D.) This should clarify the appropriate application of licenses versus rights statements, including which of these are 'open' by international standards.

*This work will be undertaken by the IP Working Group*

## Statements, Agreements and Documentation (outward facing)

- Agree, compile and **publish a coherent statement** regarding PHAROS' overall stance and approach to copyright and intellectual property. (See Conway, Appendix A, Horrocks, Appendix B and Wallace, Appendix D) This should be written in easy-to-understand language with the user audience in mind. It should outline the high-level decisions PHAROS has made regarding the consortium's approach to copyright and open access. It might address, in particular, PHAROS' position regarding copyright in faithful reproductions (both those where members hold copyright themselves and those where copyright might be claimed by other parties.) This statement will require legal expertise.

*This work will be undertaken Executive Steering Committee in consultation with the IP Working Group*

- Compile and publish a **diagrammatical 'map' explaining the multi-layered complexities of IP** – and other – rights within a single digital image or asset. This will help users better understand the resource. (See Horrocks, Appendix B.)

*This work will be undertaken by the IP Working Group.*

- Develop and publish a **terms of use** document which outlines for researchers/users what they are allowed to do with the content; how to report copyright violations; how they are permitted to use the platform; privacy policy; cookies etc. (see Conway, Appendix A.) This document will require legal expertise.

*This work will be undertaken by the Executive Steering Committee, the IP Working Group, and the Pilot Project team.*

- Develop and publish a transparent **Take-Down Notice** that provides a mechanism to report copyright and intellectual property issues, and outlines the steps the platform operators and/or consortium members will undertake to respond. The statement and

the consortium's management of responses to reports will need careful consideration. This statement will need legal expertise. (see Conway, Appendix A, and Horrocks, Appendix B.)

*The work will be undertaken by the IP Working Group and the Pilot Project team.*

## **Acknowledgements**

This workshop was made possible with a grant from the Samuel H. Kress Foundation. It was hosted by the Paul Mellon Centre for Studies in British Art, with additional financial support from the Yale Center for British Art, Kunsthistorisches Institut in Florence, Deutsches Dokumentationszentrum für Kunstgeschichte – Bildarchiv Foto Marburg, and Bibliotheca Hertziana Max-Planck-Institut für Kunstgeschichte. The PHAROS consortium especially wishes to thank Greg Cram, Mikka Gee Conway, Julia Fallon, Bernard Horrocks, Carlo Mezzetti, and Andrea Wallace for their support and participation.

# Appendix A

Post-IP workshop recommendations

Mikka Gee Conway, Associate General Counsel, J. Paul Getty Trust

**N.B.: The recommendations here are not meant, and should not be relied on, as legal advice. Each consortium member will need to make its own determinations, as will any future legal entity that the consortium may form. Consortium members should consult knowledgeable counsel in their respective jurisdictions regarding their specific situations.**

1. **Each consortium member must take full responsibility for the material that it contributes to the platform.** This means having conducted sufficient due diligence around rights to have made an informed decision, advised by counsel where necessary, about the risks, if any, of publishing the materials online and potentially granting others a right to reuse them.
2. The consortium must **determine whether it will seek to form a legal entity** separate and distinct from the individual member institutions. This should be done before it creates the two legal agreements contemplated below.
3. The consortium must establish a **uniform set of terms to govern contributions** to the platform. The Digital Public Library of America's [standard contributor agreement](#) is an excellent model, and a simplified version of it may work for this group. Among the key terms of such an agreement would be (this list is not exhaustive):
  - a. Technical specifications and minimum metadata for assets contributed, including adoption of any useful standards such as the rights statements developed by Europeana and DPLA)
  - b. Required license terms (or minimum standard of openness) for contributions (CC0 for data, TBD for images)
  - c. Details regarding how the consortium/platform/users may use assets contributed
  - d. Representations and warranties regarding the contributor's legal authority to contribute and the copyright/non-infringing status of the contributed material
    - i. In particular the consortium needs to find a way for members to avoid liability related to another member's copyright problems. Usually this is handled by having the contributor indemnify the platform. Relatedly, this is also why incorporation may be desirable, as an additional shield protecting the members from liability relating to the non-profit's activities.
  - e. Reservation of the right NOT to include any contributed assets, and to remove assets from the platform.

- f. Governing law/dispute resolution procedures. Given the multi-jurisdictional nature of the group, it is probably advisable to either require mediation in good faith before proceeding to litigation, or to require disputes to be resolved through binding mediation (as DPLA does).
4. The consortium must develop a set of **terms to govern use of the platform by researchers**. Key terms would include (the list below is not exhaustive):
  - a. What users are allowed to do with the content
  - b. Explanation of the intellectual property rights in the content (platform overall and contributed content)
  - c. How to report copyright violations or other intellectual property issues. The U.S. notice and takedown process under the Digital Millennium Copyright Act has its flaws but, at least from the service provider's perspective, has the benefit of placing the burden on the aggrieved party to object, rather than on the platform to clear rights before publishing. The DMCA's protections will not necessarily be available to this platform and the consortium, but it is good policy to give people a mechanism to report issues and to respond promptly to them
    - i. This means of course the consortium will need to determine how these notices will be handled.
  - d. An acceptable use policy covering permissible general use of the platform (e.g., prohibiting circumvention of security measures or use of the platform for any unlawful purpose, or scraping of the site)
  - e. How the platform/consortium/future legal entity can use any user-generated content, if the platform contemplates such functionality
  - f. A privacy policy and any legally mandated disclosures regarding use of user's personal information and placement of cookies or other tracking tools.
  - g. Disclaimer of warranties to the full extent permitted by applicable law
  - h. Indemnification
5. I second Bernard Horrocks' recommendation that the consortium **develop a coherent and consistent copyright stance** explaining how the consortium is balancing the educational and scholarly purpose it serves against the rights of copyright holders.
6. Related to 5, the consortium should **consult communications professionals** on the rollout of the platform and the messaging that surrounds it.

I hope these recommendations are useful, and thank the consortium for the opportunity to participate.

## Appendix B

### Pharos - next step IP recommendations - Bernard Horrocks, July 2020

- 1) The default should be to show **high-resolution images** unless this conflicts with a Pharos member's commercial obligations, contractual agreements, or wider relationships. A mix of different image resolutions will therefore result in as much content being shown online as possible. This includes 'text-only' entries where a particular asset cannot be illustrated for a particular reason – again with the overarching aim of getting as much online as possible. In this case, my view is that a 'greyed-out box' is better than no entry at all for this scholarly resource.
- 2) **Owners of underlying artworks** – who are sometimes also copyright holders of the photographic material – should be informed of Pharos's plans wherever possible. Privacy and anonymity regarding ownership should, of course, be observed at all times.
- 3) Across the Pharos platform and on individual consortium members' websites there should be a **common take-down notice**, translated accordingly via professional specialists, and constructed of simple wording, such as:

*If you think this image / asset / content infringes any rights, please email us at XXX [give clear email address] so we may investigate. We usually\* remove images / assets / content whilst we look into claims. Please allow 10 working days for us to respond. Thank you.*

\*We should say "usually" because we do not want the entire platform to be hijacked by someone maliciously questioning every single asset.

- 4) **The IP Working Group must remain in existence all the while Pharos is extant.** It might be renamed the IP Monitoring Group. In addition to being of reassurance to rights holders and owners, it can also explain and champion IP rights to Pharos's users, as well as monitoring and actioning any take-down notifications. It must continue to have a regular dialogue right across the Pharos consortium. It would also act as a custodian of IP records, amending a particular asset's copyright status should, for example, a copyright owner change or a term of copyright expire (e.g. on 31 December in a given year).
- 5) There should be a clear note saying that "**Pharos is global, copyright is local**", to indicate that copyright and other laws are territorial and that what goes in one jurisdiction may not apply in another.
- 6) We should publish a clear and simple account of our reasoning – **what we are doing is in the public interest, is non-commercial, educational, and will facilitate hitherto unimagined connections to be made** from the vast swathes of data relating to 25M images. We should be up-front that granular clearances would simply not be possible with a project of this scale – although we have focussed our efforts in that regard whenever we have been able to. We should also acknowledge that, whilst Pharos content might be freely available, other heritage organizations may not necessarily be in a position to also grant free content.

- 7) There should be **no visible watermarking**, as this would hinder scholarship.
- 8) Add a **diagrammatical ‘map’ explaining the multi-layered complexities of IP** – and other – rights within a single asset as per Andrea Wallace’s excellent presentation from the March 2020 workshop:

- the work itself
- copyright in the work
- the photo of the work
- copyright in the photo of the work
- the details of owner of the work
- the details of owner of the photograph of the work of art
- the details of the owner of the copyright of the photograph of the work of art
- the photograph of the exhibition of the work of art
- the vendor of the work
- the owner of the curatorial interpretive texts
- the owner of the typographical layout (if any) in the mount
- the trade mark of the Pharos member or asset owner
- etc,

by way of a transparent explanation of the complexities of the apparently simple assets we are digitising. Get a professional designer to create a clear diagram (perhaps interactive) to show all this. Road-test the diagram on somebody from completely outside the sector to ensure it makes perfect uninitiated sense to an ordinary non-expert user.

- 9) For the UK organizations, formally adopt the excellent **Copyright Risk Acceptance Framework** developed by National Library Scotland and National Library Wales. This will not only guide our actions but also demonstrate the sensible and pragmatic approach we are taking. See here for more details:  
[https://cdn.ymaws.com/www.cilip.org.uk/resource/resmgr/cilip\\_events/Fred\\_Saunders\\_slides.pdf](https://cdn.ymaws.com/www.cilip.org.uk/resource/resmgr/cilip_events/Fred_Saunders_slides.pdf)

## Appendix C

Carlo Mezzetti

### Copyright: a Tricky Issue

Copyright consists of *iura excludendi alios*: for this reason it is also defined as an exclusive right. However, copyright traditionally enjoys a special treatment compared to other intellectual property rights (patents, trademarks, design, etc.):

- the exclusivity arises immediately and automatically, at the very moment of the creation of the work, regardless of formalities and checks on the existence of the protection requirements. Among the consequences of this principle is the lack of a legal notice regime that allows us to know in advance whether a certain work is protected and who owns the relevant intellectual property rights. All this, of course, entails, for the owner of the work understood in its materiality, a considerable level of uncertainty.
- of the requirements for protection, novelty is required on a subjective level (independently of creation) and not on an objective-extrinsic one, so that even almost identical works are individually protected, provided that they are result of the autonomous work of their respective authors;
- since protection arises independently of an administrative act, protection is automatically universal (or at least extended to all the countries which have joined the Berne Convention and today the TRIPs Agreement); except, however, that there are very significant differences between the various systems, even if they are within the European Union; In this regard, reference must be made to *lex loci protectionis* ("the *an* and the *quantum* of protection are determined by the laws of the country in which the intangible asset for which protection is invoked is located"— see art. 5.2 CUB, art. 8 Reg. 864/2007 "Rome II").
- the exclusivity remains for a rather long time, again regardless of formality or costs for its maintenance, and its duration is uncertain *a priori* (starting from the death of the author);
- the exclusivity is intrinsically ultra-merceological, thanks to the right to authorise subsequent elaborations or adaptations of the work, as well as thanks to the principle of independence of the various possibilities of economic use, so that the exclusive right can extend to various independent markets (e.g., publishing, apps, merchandising, etc.); the owner of the work as a materiality can thus discover that the author has authorised the production of posters and postcards, that it has been reproduced on stationery and various objects, and so on;
- by virtue, finally, of the link between the expressive form and personality of the author, copyright confers a power over the use of the work that is very broad, which includes the ability to prevent third parties from obtaining from it "dependent" works (creative elaborations) and which also affects non-patrimonial aspects (moral right). It is precisely the right to prohibit third parties from obtaining new works from a pre-existing one that has, in recent times, given rise to an interesting legal case: think of the cases Fondazione

Giacometti/Fondazione Prada, Sanguinetti/Venice Biennale, Isgrò/ Waters, which I mentioned during my speech.

The archive, as the owner of a "material" photographic heritage, could therefore be subjected to a whole series of economic exploitation activities carried out by the author or his successors in title (heirs, assignees, licensees); conversely it may find himself playing the role of the aspiring user of an "*intangible asset*" belonging to someone else, in need of the authorisation of the intellectual property rights holder to carry out a wide range of activities and exposed, in the absence of such authorization, to his actions (in particular, to those of an injunction nature).

This applies not only to activities for profit, but also to activities with purely cultural, scientific or educational or preservation purposes. For example, the simple digitisation of photographs for preservation purposes can, in abstract terms, be legally classified as an act of reproduction, and as such falls under the scope of the author's (or his successors in title's ) exclusive rights, not under that of the owner of the photograph understood as a material asset, unless the legal system provides that it may be freely used.

### **Ownership (public and private) of the work photographed *versus* public domain**

The owner of an asset can *enjoy and dispose of it in a full and exclusive way* (art. 832 Italian Civil Code): he can use it, also in order to obtain economic utility from it; selling it, donating it, setting up rights over it in favour of third parties, etc.; and can exclude anyone else from enjoying and disposing of it. The exclusive nature of the right of ownership, the *ius excludendi alios*, has an obvious implication: the power to regulate access to and use of it by third parties. Does this power extend to the representation of the asset, to its image?

The question is a delicate one if the asset in question is the result of original and creative work, because the legal system contains special rules in this regard – those on copyright – according to which, within a certain period of time – in principle, 70 years after the death of the author – a work of ingenuity falls into the public domain. To recognise that the right of ownership can extend to the representation of asset which is the object of it - that, therefore, the owner of the asset has an *erga omnes* right to prohibit its reproduction - would then be tantamount to acknowledging that on a certain work, after the author's exclusive rights have ceased, there will an exclusive right of the owner of the work.

This could, in some cases, be in the general interest, with the need to protect the work both from the standpoint of preservation and of the "decorum" of the use of its image.

And so public law has laid down specific disciplines, like within the context of the Italian Code of Cultural Heritage for the reproduction of cultural goods for which the Ministry, the regions and other public bodies are responsible. This is generally subject to a discretionary grant of the body that has the asset in its possession (Art 107-109 Code of Cultural Heritage and Landscape). The granting of the right to reproduce (and the determination of any fee or consideration) is in particular subject to an assessment of the intended uses, which must be the subject of the applicant's declaration and commitment to the Administration, so that the granting measure normally limits the further usability of the images. No fees are due, but only reimbursement of any expenses, for the reproductions requested by private individuals

for personal use or for study purposes, or by public subjects for the purpose of enhancement.

Law decree no.83/2014, converted by Law 106/2014 in force since 31 July 2014, has made some changes to the Code, in the sense of partial liberalisation in the use of images of cultural heritage. In particular: (i) whereas in the past an exemption from the payment of the fee was envisaged only for those public entities wishing to carry out enhancement activities, now that exemption is also granted to private parties whose enhancement activities are carried out not-for-profit; (ii) it is now permitted to carry out freely and without authorisation – provided that certain requirements are met, and provided that non-profit activities are carried out – some activities for the reproduction and dissemination of cultural assets for the purpose of study, research, free expression of thought or creative expression, or promotion of knowledge of cultural heritage. As has been observed in doctrine, "*certain firm points remain as limitations on free reproduction: the need for the physical preservation of the asset, the discipline of copyright, the non-profit nature of the activities liberalised (because if anything it is the public owner who will be able to market the images or at least it is up to him to grant any use of them for profit)*".

The subject has recently attracted the attention of the public due to an order of the Court of Florence of 25 October 2017 issued on the interlocutory application of the Ministry of Cultural Heritage against a Florentine travel agency, Visit Today snc, which – in the absence of a grant and the payment of the relevant fee – used the image of Michelangelo's David to advertise the offer of tickets and guided tours to various museums, including the Gallery of the Academy. The Court enjoined Visit Today "*in Italy and throughout Europe, against reproducing for commercial purposes the image of Michelangelo's David*" and ordered "*the immediate withdrawal from commerce and the destruction of all advertising materials reproducing the image ... both at the defendant company and at third parties...*", and also ordering the publication of the injunction and penalties for the delay in its execution: all civil sanctions typical of intellectual property law, which certainly does not apply to a work that has fallen for centuries in the public domain. Although this was an urgent measure, issued in a case in which the defendant was in default, the reasoning, which in substance was based upon stating (without arguing) that the breach of art. 108 of the Code of Cultural Heritage constitutes an unlawful (civil) act under art. 2043 Italian Civil Code was, to say the least, laconic; also on the subject of the existence of the *periculum in mora*, the Court used in a lapidary way a wording – "*the indiscriminate use of the image ... capable of debasing its force of attraction*" – which is typical of intellectual property measures protecting trademarks.

The law does not provide a single answer to the issue, which remains disputed.

Certainly, the private owner of an asset has the power, as already said, to prevent or regulate access to it, either materially or by unilateral acts or negotiable instruments. The problem arises, however, when the aspiring user of the image has already come into possession of it regardless of the intent of the owner of the asset, or whether he has had the opportunity to legitimately access it without the reproduction and/or disclosure being excluded by the legal act governing access to the asset itself.

The Court of Cassation, with reasons that were not crystal clear, has in one case recognized to a legal entity the right to the economic exploitation of the image of a corporate asset (a boat, in this case: Cass. 11.8.2009 n. 18218); the (more dated) case law of the lower and higher courts appears divided.

Legal writings are equally divided. According to a first opinion, *"it is not possible to see on what basis one could even doubt that the right of ownership over an asset extends to its image, as it is evident that it invests the asset as a whole and with respect to all its aspects, among which the exterior part certainly plays a non-secondary role if nothing else than because it is essential in order to identify the asset itself to the outside world"*. To this it may be objected that Article 832 c.c. limits *"the powers of enjoyment and disposal included in the right of ownership to the assets that form the object of the law, without contemplating the relative incorporeal projections"*. According to an interim position, two hypotheses should be distinguished: that of the unauthorised exploitation of the image of the asset or of its being made available to the public, which as it interferes *"in a significant way with the chances [of the owner] to obtain profit from the authorisation to use the asset granted for consideration"*, harms the right of ownership; and reproductions made exclusively for the private use of the party making it (or for preservation purposes) which *"seems, on the one hand, to be able to be considered as implied by the act (unilateral or contractual) granting access to the asset and, on the other, does not affect to an appreciable extent the power to enjoy it exclusively of the owner who has authorised such access"*. According to another opinion, *"the granting to the owner of all rights also to a simple image of the asset is well based"*, as long as infungible and specific benefits are concerned goods (as in the case of works of art), but without, however, prejudice to the freedom of expression of thought and the right to information, and limiting the actionability of that right to the case of the exploitation for profit of the image of the asset.

This last position seems to me to be preferable, because it emphasises a necessary balancing out between interests protected by the Constitution : the right of ownership, on the one hand, and freedom of expression and information, on the other, to which there should also be added those of teaching and research .

## Appendix D

### Report for PHAROS, Andrea Wallace

#### Summary

There are various issues the PHAROS Partners will have less control over with respect to the range of rights that can limit both institutional and user engagement with photo archive repositories. These issues require risk assessments and will impact aims to develop shared approaches to cross-border intellectual property and copyright policies.

Even so, there are two clear areas where PHAROS Partners do have control. These include: (1) the layer of rights that PHAROS Partners might claim in reproduction media; and (2) the terminology and tools used to communicate any reuse parameters to user groups.

On these, this Report recommends the following:

- PHAROS should push for consensus among Partners on the position that no new rights should arise in reproduction media contributed to the PHAROS platform.
- PHAROS should center users during the development of rights management policies and practices by aligning terminology with international standards and definitions to improve legal certainty on cross-border reuse.

As detailed below, this Report uses “open access” as defined by international open access initiatives that require commercial use permissions. It also proceeds on the basis that no new rights arise in faithful and other non-original reproduction media.

#### Workshop Reflections

**Rights in reproduction media.** There were clear differences among US, UK, and the respective EU jurisdictions on how PHAROS institutions should approach rights in reproduction media, and specifically any claim to copyright in a digital reproduction of an analogue photograph (despite whether that photograph is in-copyright or in the public domain).

- **US.** The prevailing opinion was that copyright is not warranted in faithful and other non-original reproduction media, which is informed by case law from 1998, 1999, 2008, and 2016.<sup>1</sup> These cases support the premise that no new rights should arise in faithful reproduction media of 2D and 3D works. Accordingly, this interpretation applies to both the digital reproduction layer *and* the underlying analogue reproduction layer. Although these cases do not bind parties outside of their respective jurisdictions,<sup>2</sup> the doctrine has been increasingly embraced by US GLAMs,

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<sup>1</sup> *Bridgeman Art Library, Ltd v Corel Corp*, 25 F. Supp. 2d 421, 426 (S.D.N.Y. 1998) (“copied from the underlying works without any avoidable addition, alteration or transformation.”); *Bridgeman Art Library, Ltd v Corel Corp*, 36 F. Supp. 2d 191, 197 (S.D.N.Y. 1999) (“the point of the exercise was to reproduce the underlying works with absolute fidelity.”); *Meshwerks, Inc, v Toyota Motor Sales USA, Inc*, 528 F.3d 1258 (10th Cir. 2008) (“the putative creator who merely shifts the medium in which another’s creation is expressed has not necessarily added anything beyond the expression contained in the original”); *President and Fellows of Harvard College v Steve Elmore*, No. CIV 15-00472-RB/KK, 19 (D.N.M. 2016), available at <https://www.courtlistener.com/recap/gov.uscourts.nmd.320645/gov.uscourts.nmd.320645.165.0.pdf> (extended this logic to 2D reproductions of 3D works when the photographer’s choices are “utilitarian” and “made to best copy the three dimensional artifact.”).

<sup>2</sup> These jurisdictions include the Southern District of New York, the Tenth Circuit, and the District of New Mexico. Even so, a number of GLAMs in these jurisdictions continue copyright and licensing practices around faithful reproduction media, including the Frick Art Reference Library.

and particularly by those in the PHAROS consortium who were early to voluntarily adopt the doctrine and have become leaders in the open GLAM movement.<sup>3</sup>

- **UK.** The prevailing opinion is that copyright is an operational decision to be taken by each institution, which is informed by case law from 1869.<sup>4</sup> This opinion is primarily practice-led and is not supported by leading UK copyright academics.<sup>5</sup> The result is that UK institutions will recognize rights in the digital reproduction layer *and* the underlying analogue reproduction layer, which can implicate two different rightsholders during rights management. In general, UK GLAMs are less active in the open GLAM movement.<sup>6</sup> Four institutions have adopted open access as a matter of policy for digital collections.<sup>7</sup> Each institution takes a different approach to rights in the reproduction media. Some apply the Public Domain Mark. Others claim copyright and release media CC BY. The majority of UK institutions who participate in open GLAM release limited amounts of reproduction media under open licenses and tools. UK PHAROS Partners apply non-open licenses or claim copyright in digital reproduction media.<sup>8</sup>
- **EU.** EU member states are in a period of transition on this topic. In 2018, the highest court in Germany held faithful photographic reproductions of public domain paintings do not satisfy the EU standard for copyright protection, and recognized lesser related rights protections specific to German Law.<sup>9</sup> Not only does this decision bind German heritage institutions and owners, but it suggests that all faithful reproductions of 2D public domain artworks fail to attract copyright across the EU, including in the UK.<sup>10</sup> A 2019 Directive formalized this principle in EU copyright law.<sup>11</sup> Article 14 of the Copyright in the Digital Single Market Directive prohibits anyone from claiming new rights in any media that is generated during an act of reproduction of a visual work unless the EU copyright threshold is clearly met. In effect, Article 14 overrules the German decision, which recognised lesser related rights protections, and eliminates similar rights from being recognised in reproduction media by other EU member states. EU PHAROS Partners take different approaches to rights in reproduction media, informed by national, regional, or other legal obligations.<sup>12</sup> Article 14 should

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<sup>3</sup> These include the Getty Research Institute, the National Gallery of Art, and the Yale Center for British Art.

<sup>4</sup> *Graves' Case* [1869] LR 4 QB 715.

<sup>5</sup> Grischka Petri, "The Public Domain vs. The Museum: The limits of copyright and reproductions of two-dimensional works of art," 12(1) *Journal of Conservation and Museum Studies* 1-12 (2014); Lionel Bently, Brad Sherman, Dev Gangjee, Phillip Johnson, *Intellectual Property Law* (Oxford University Press, 2018), 112-117; Ian Macquisten, "UK Museums Right to Charge Image Fees is Called into Question: (The Art Newspaper, 28 November 2017), available at <https://perma.cc/XWK6-K57L>.

<sup>6</sup> See Douglas McCarthy and Andrea Wallace, "Survey of GLAM open access policy and practice," (2018) <http://bit.ly/OpenGLAMsurvey>.

<sup>7</sup> These include National Library of Wales, Brighton Museums, Wellcome Collection, and York Museums Trust.

<sup>8</sup> These include Paul Mellon Centre, the Warburg Institute, and Courtauld Image Libraries (copyright policies were difficult to locate online for materials on the Mellon Centre's Collections Database, the Warburg's Iconographic Database, and Courtauld's Image Libraries).

<sup>9</sup> German Federal Supreme Court, 20 December 2018, Case No. I ZR 104/17 – *Museumsfotos*, available at <https://perma.cc/Q68G-EKPR>. Less than a dozen other member states, including Italy, recognize related rights protections in technical photographs, with different terms and scope of protections.

<sup>10</sup> Due to harmonized copyright law and UK case law.

<sup>11</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, Article 14, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX%3A32019L0790&from=EN>.

<sup>12</sup> These include (in Germany) Deutsches Dokumentationszentrum für Kunstgeschichte – Bildarchiv Foto Marburg, (in Italy), Bibliotheca Hertziana - Max-Planck-Institut für Kunstgeschichte, Federico Zeri Foundation, Kunsthistorisches Institut in Florenz - Max-Planck-Institut, I Tatti, (in France) Institut National d'Histoire de l'Art, and (in the Netherlands) RKD – Netherlands Institute for Art History.

introduce greater consistency to these practices, but other jurisdiction-specific obligations may need addressing (e.g., *domaine public payant* in Italy).<sup>13</sup>

Even where underlying rights survive in an analogue reproduction or associated media, PHAROS consortium members can take a position on the layer of rights they *do* have control over. This Report recommends establishing consensus among Partners that no new rights should arise in the reproduction media contributed to the PHAROS platform. Two key developments inform this recommendation:

- **Article 14 of the Copyright and Related Rights in the Digital Single Market Directive.** As of June 2021, Article 14 prevents *anyone* in the EU from claiming copyright or related rights in *any* non-original media generated during the reproduction of a public domain work, including metadata, software, photography, 3D scans, and other various (and future) outputs. Given the size of the EU digital market, this will have significant impact on the global landscape for open access to digital collections. The Article has no impact on media generated during the reproduction of in-copyright works. In other words, rights will continue to be managed according to the in-copyright underlying work. With respect to the UK, Article 14 currently aligns with UK copyright law. During workshop discussions, it was expressed that Article 14 would not be implemented in the UK due to Brexit, and therefore UK GLAMs would not be affected by its implementation. However, there is no difference in substance between the text of Article 14 and current UK copyright law, which already requires materials to meet the UK and EU threshold of originality to be protected by copyright.<sup>14</sup>
- **Changes to a major UK funder's copyright policy.** On September 16, the National Heritage Lottery Fund announced a new policy that applies to all GLAM activities supported by the Fund.<sup>15</sup> The policy formally establishes that: (1) no new rights arise in faithful and other non-original reproduction media, and all such materials must be released via CC0 (1.0 Universal) Public Domain Dedication; and (2) all original media must be released CC BY. Given the size and reach of the Fund, this policy change will significantly impact GLAM digitization and rights management in the UK, pushing the needle further toward open access to digital collections.

A valid copyright is required to legally license reproduction media. The above developments not only call copyright in reproduction media into question or expressly require public domain dedications, but also the types of materials contributed to the platform are of limited licensing value for PHAROS consortium members (*i.e.*, reproductions of primarily black and white photographs of artworks and archival mounts). Moreover, by limiting the consensus to apply to only the materials contributed to PHAROS platform, Partners will not be required to conduct a major overhaul to general copyright and licensing policies.

Finally, establishing consensus on the layer of rights that PHAROS members do have control over will simplify future rights management of the photo archive repository. When rights in the underlying layers expire, the reproduction media can immediately be released via open tools that enable cross-border reuse.

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<sup>13</sup> See also the Institut national d'histoire de l'art 2018 Report by Martine Denoyelle, Katie Durand, Johanna Daniel, Elli Doulikaridou-Ramantani, "Image rights, art history and society: A report on the systems regulating the circulation of images of works of art and their impact on scholarship, teaching and the visibility of French public collections."

<sup>14</sup> For more on this topic, see Andrea Wallace and Ellen Euler, "Revisiting Access to Cultural Heritage in the Public Domain; EU and International Developments," 51 International Review of Intellectual Property and Competition Law 832-855 (2020), [https://link.springer.com/article/10.1007/s40319-020-00961-8?utm\\_source=toc&utm\\_medium=email&utm\\_campaign=toc\\_40319\\_51\\_7&utm\\_content=etoc\\_springer\\_20200828](https://link.springer.com/article/10.1007/s40319-020-00961-8?utm_source=toc&utm_medium=email&utm_campaign=toc_40319_51_7&utm_content=etoc_springer_20200828).

<sup>15</sup> Heritage Fund, Understanding our licence requirement, <https://www.heritagefund.org.uk/stories/advice-understanding-our-licence-requirement>

**Centring users in definitions, terminology, and communications.** It is important to highlight (both for the purposes of this Report, and via the platform to users) that significant portions of the PHAROS Partners' photo archive repositories cannot be made available under open licenses or tools due to the rights surviving in the underlying reproduction media or works, architecture, original text, etc., featured. This Report recommends centring users in definitions, terminology, and communications. On this, two points inform this recommendation:

- **The demonstrated variety of “open access” meanings and applications among attendees.** During the workshop, various framings of “open access” were used by attendees. This led to different conversations being had on the same topic, conflation, and conflicts among key contexts and attendees' understandings of *reuse* parameters as opposed to *access* parameters. To illustrate, there were strong desires to broadly frame the PHAROS platform as “open access” due the ability to view materials without paying a fee. However, when framing the materials made available via that platform, attendees conveyed different expectations and understandings of what “open access” should mean with respect to *reuse* of the materials. This variation is reflected across the GLAM sector through demonstrated evidence of subjective or inconsistent applications of “open access” being used to describe parameters around *reuse* of collections.
- **The desire to realize the full potential of access to the PHAROS platform.** Considering the aims and ambitions for cross-border reuse, the PHAROS consortium should strive to standardize and embrace terminology that centres the user and frames “open access” in terms of *reuse* of the materials. The PHAROS platform should align use of “open access” with international initiatives and definitions to clarify and communicate which materials are risk-free for reuse as opposed to the materials with reuse parameters defined by rights in the underlying work. This will: (1) harmonize the use of “open” among PHAROS Partners; (2) introduce a clear definition by which Partners may assess whether materials are fit for open access, or not; (3) provide legal certainty to the user around appropriate reuse parameters and their own risk involved; and (3) introduce clarity to the layers of rights management and encourage respect for the legitimate parameters that disqualify an image from “open access” frameworks yet permit its digitization and display online.

Considerations for implementation of these recommendations are made below.

## **Considerations for Implementation**

### **“Open Access” and Definitions**

Despite the desire to frame activities as “open access,” a broad use of the term may generate confusion for users in a complex area that is already rife with misunderstanding when data is not “open” according to international definitions.<sup>16</sup> In light of Article 14 and the impact it will likely have on users' perceptions, it is increasingly important to establish clear standards and website policies that communicate which materials that are *not* open access by international standards.

- Center users and reuse in “open access” approaches and the technical and literal communication of rights and reuse policies (whether IP or otherwise).
- Avoid bespoke definitions, even those agreed upon by PHAROS Partners. Aim for standardization by harmonizing terms with definitions already in use by global open initiatives and movements.

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<sup>16</sup> With respect to the platform, “open access” may be appropriate. But the complexity and variety of the materials should be clearly communicated to users rather than broadly framed as “open access” because they may be viewed online for free. This conflates the status of the platform with the materials available, and can be important to messaging.

- Align “open access” with international initiatives and definitions. *Gratis* access signals free of charge and is now standard practice for most digital collections platforms and websites, while *libre* access is both free of charge and free of most copyright and licensing restrictions and permits commercial reuse. According to international initiatives and definitions, open access requires both *gratis* and *libre* access to materials. These include the 2002 *Budapest Open Access Initiative*,<sup>17</sup> the 2003 *Bethesda Statement on Open Access Publishing*,<sup>18</sup> the 2003 *Berlin Declaration on Open Access to Knowledge in the Science and Humanities*,<sup>19</sup> and standards adopted by the Open Access Scholarly Publishers Association.<sup>20</sup>
- Expressly clarify in policies that not all materials are open access. Using licenses and labels that reflect reuse parameters in the underlying work (rather than any rights claimed in the reproduction layer) will clarify and appropriately frame this material as *not* open access (*i.e.*, commercial and other use is prohibited). These restrictions are legitimate, legally enforceable (against PHAROS, GLAMs, and users), and should be clearly communicated to users.

*Recommendations regarding the definitions in the Executive Summary. It is unclear whether these will be formally adopted in the website policy. If so:*

**“Gratis Open Access:** There will be no financial or technical barriers to accessing the PHAROS Platform – it will be available free of charge with no fee or paywall.”

- Change to “gratis access” instead of “gratis open access.”

**“Freely available:** Metadata about our collections and the artworks represented in it will be available for use without restriction under a CC0 licence.”

- This definition is ambiguous:
  1. It could be read to apply to only metadata and the artworks represented in the metadata (*i.e.*, “the artworks represented in *it*,” with “it” being the “metadata about our collections”), and may therefore have limited effect if the intention is to extend access to artworks too.
  2. Alternatively, it could be read that the CC0 license also extends to artworks represented in the collections, and may therefore contradict intentions if the definition is meant to apply to only metadata.
  3. This definition describes reuse parameters rather than gratis availability.
  4. For this reason, “Freely available” could be exchanged with “Gratis access” to describe the previous definition (*i.e.*, “Freely available” could mean “There will be no financial or technical barriers to accessing the PHAROS Platform – it will be available free of charge with no fee or paywall.”)
- Consider changing “available” to “reusable.”
- If appropriate, clarify that this definition releases both metadata and artworks (where possible) for use without a restriction under a CC0 license. Otherwise, rephrase to apply to the metadata exclusively.

**“Reuse:** Legislative discord between the regions within which the PHAROS Partners operate afford different rights to the photograph. These restrictions hinder the adoption of *Libre Open Access* – unimpeded reuse – of all assets. Every digital image will be assigned a Rights Statement or Creative Commons licence that explains the extent of reuse permitted.”

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<sup>17</sup> Budapest Open Access Initiative, <http://www.budapestopenaccessinitiative.org/>.

<sup>18</sup> Bethesda Statement on Open Access Publishing, <http://legacy.earlham.edu/%7Eepeters/fos/bethesda.htm>.

<sup>19</sup> Berlin Declaration, <https://openaccess.mpg.de/Berlin-Declaration>.

<sup>20</sup> This is consistent with the Open Access Scholarly Publishers Association, which defines only CC BY, CC BY-SA and CC0 as open compliant. Open Access Scholarly Publishers Association, ‘Licensing FAQ’, Open Access Scholarly Publishers Association, <https://oaspa.org/information-resources/frequently-asked-questions/>.

- “Libre Open Access” is not equivocal with “unimpeded reuse.” Some parameters may apply to the materials made available via *libre* licenses and tools, such as attribution to the author (e.g., CC BY).
- Re: “rights to the photograph.” This definition of reuse can be read to center the rights of Partners to enforce any (alleged) rights in the photographs (and their layers), rather than to centre the rights of users to access and reuse the materials with greater legal certainty around cross-border risks. Consider acknowledging these layers more explicitly and in reference to the respective restrictions that may apply to each layer.
- With respect to the GLAM reproduction layer, this is increasingly a choice made by GLAMs and owners of cultural heritage, rather than the result of legislative discord.<sup>21</sup> This may seem harsh, but it’s true. Article 14 expressly intends to remove any discord among EU member states with this layer and already aligns with UK copyright law (despite how it is currently interpreted by GLAMs). Even where legislation does not permit copyright waiver (e.g., UK), various tools exist that enable the release of rights, or achieve the same result in combination (e.g., CC0 (1.0 Universal) Public Domain Dedication, contract law, work-for-hire doctrine, moral rights waiver). There may be judicial discord, at best. To be fair, this practice has been informed by decades of habit, risk, and uncertainty around rights management, now further complicated by digital technologies and decreased funding for heritage institutions. Even so, if there is a desire to embrace open access to public domain works, both judicial and legislative discord on rights in the reproduction layer do not necessarily prevent GLAMs from doing so.
- Following on this, the question of rights in the underlying photograph and any “originality” may pose risk, but no risk arises with respect to any alleged GLAM rights in the reproduction. GLAMs are in control of this risk. By contrast, if there *are* rights in the underlying layer of the analogue reproduction (or the GLAM interprets the law this way), then claiming new rights in the digital layer and licensing the image poses legal risk to the GLAM itself.
- In light of this, the PHAROS Partners could establish consensus on the specific layer of rights and media that they do have control over. This would move *libre* access to the default position, while acknowledging any legitimate rights arising in the underlying layers mediate the reuse of materials. Going further, Partners could also take the position that no intellectual property rights arise in the underlying analogue faithful reproductions in photo archive collections (non-IP related rights might restrict these materials given other areas of legislative discord, but not necessarily copyright discord). This is where Partners’ risk-averse considerations and comfort levels are most relevant. It may take time to establish this consensus, but EU legislative developments now support this position with respect to copyright and related rights and will likely be increasingly interpreted to apply to the analogue photographic materials going forward (as it already has in the US and in Germany, where the analogue photographs were made in 1994).

Setting aside the copyright and related rights issues, there is a significant need across the GLAM sector for additional data on the risks posed by non-IP related restrictions to digital collections management and open access goals. These include a number of the risks discussed during the workshop, such as donor restrictions, contractual obligations, relationships with other GLAMs and auction houses, etc. Work undertaken by the Paul Mellon Centre on donor relations is a prime example of the type of case studies needed by the GLAM sector that tease out, explore, and assess the risks that are not focused on

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<sup>21</sup> At the same time, this choice is made significantly more difficult by pressures from legislators and governments to generate revenue, no matter the business model. See Bendor Grosvenor, “‘Be commercial minded or lose future funding’: UK government’s threat puts museums in peril,” *The Art Newspaper* (28 August 2020), <https://www.theartnewspaper.com/comment/dcms-leaked-letter-museums>.

intellectual property questions. The PHAROS initiative could become a global leader on exploring these areas across various jurisdictions through research-led approaches and case studies.

### **Use of Licenses and Rights Statements**

Based on workshop discussions, there is need for clarification around the appropriate application of licenses versus rights statements, including which of these are “open” by international standards.<sup>22</sup> Reducing this to a PHAROS workflow or policy will aid Partners (and the global GLAM sector, if published under open licenses) in the application of tools, licenses, and labels, as well as how they are understood and respected by users. To summarize:

- **Applying a License versus a Rights Statement.**
  - Licenses may only be applied when rights arise in (1) the reproduction layer and/or (2) survive in the underlying work and are owned by the GLAM (or the GLAM receives express permission from the rightsholder to apply a license). In other words, the GLAM must own or clear all rights in all layers to apply a license.
    - *Example: Analogue photograph of architecture held by YCBA.* This type of photograph is sufficiently original for copyright protection in all jurisdictions.
      1. If YCBA **owns or clears the rights** in the analogue photograph (e.g., a YCBA photographer took the photograph, someone assigned their copyright to YCBA upon donating the photograph, or the rightsholder has consented), YCBA may:
        - (a) Apply a license. The license does not relate to the digital layer, as rights arise only in the analogue layer (e.g., CC BY-NC);
        - (b) Apply a rights statement. The statement does not relate to the digital layer, as rights arise only in the analogue layer (e.g., In Copyright); or
        - (c) Release the materials via an open tool, such as CC0.
      2. If YCBA **does not own the rights** in the analogue photograph (e.g., the rights are held by a third-party whether known or unknown), YCBA may only apply a rights statement (e.g., In Copyright).
      3. Even if rights did arise during reproduction, rights in the underlying work will prevent any license from being applied (see #1). Only a rights statement can be applied (e.g., In Copyright).
- **Closed Licenses and Rights Statements.**
  - Creative Commons provides various licenses that release *some* rights in the bundle, but are not open under international standards due to restrictions on commercial use. These include CC BY-NC, CC BY-NC-SA, and CC BY-NC-ND. While the CC BY-ND license allows for commercial use, it is not open according to the Budapest Open Access Initiative and its 2012 recommendations because it prevents modification, translations, and other useful activities, including how subsequent research might be shared.
  - Rights Statements provides a number of labels to signal the underlying work is rights restricted and cannot be used for commercial purposes.

<sup>22</sup> This is evident across GLAM practices. See Judith Blijden, “Research Paper: The Accuracy of Rights Statements on Europeana.eu,” (Kennisland, 2018), <https://www.kl.nl/publicaties/research-paper-the-accuracy-rights-statements-on-europeana-eu/>.

- **Open Licenses.** Open Licenses are appropriate only if (1) IP arises in the reproduction media *and* no rights survive in the underlying work or (2) the GLAM owns the rights in the underlying work.
  - Creative Commons provides two open licenses for releasing original materials: CC BY (Attribution) and CC BY-SA (Attribution-ShareAlike).
- **Open Tools and Rights Statements.** Where *no* rights arise in any layer, materials may be released under open tools or rights statements. In general, CC0 is preferred, as it provides greater certainty for cross-border reuse.
  - Creative Commons provides two tools for releasing original, non-original, or public domain materials: the Public Domain Mark and CC0 (1.0 Universal) Public Domain Dedication. Creative Commons recommends CC0 for the release of faithful reproductions of public domain materials for cross-border reuse.<sup>23</sup> This is because, just as there are territorial differences among copyright legislation, there are similar differences to how the public domain or the term of copyright may be defined. CC0 reassures users that if rights *should* arise in their jurisdiction of use, the rightsholder will not enforce them.
  - Rights Statements provides three labels for releasing non-original or public domain materials: No Copyright, No Copyright – United States, and No Known Copyright. Compared to the first two, the last statement is not a legal assertion. It signals clearance has been attempted, but there may be inadequate information to make a conclusive statement on whether rights survive in the underlying work. The onus remains on users to ensure any reuse is legally compliant.

### Take Down Policy and Notice

A short note on the take down policy and notice. Depending on the platform’s functionality, it is worth considering whether: (1) the policy will be included on the website’s terms of use page and/or its own policy page; and/or (2) including a notification function on each image page view to submit a request with respect to a specific record for administrative efficiency.

### Qualitative Aspects of Access

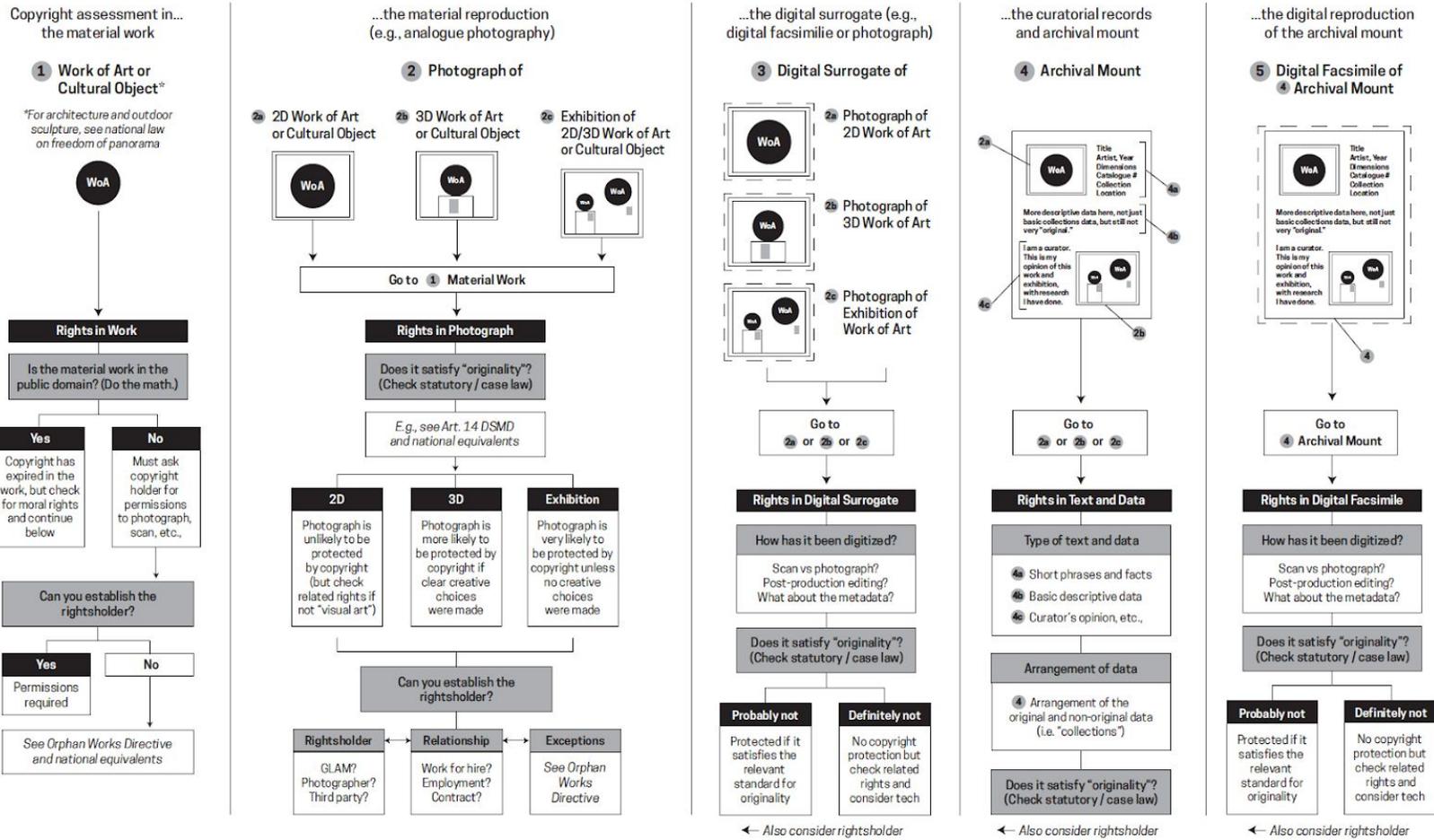
One final note on qualitative aspects of access and reuse. The workshop discussions raised whether there may be technical standards for images (per jurisdiction or for the consortium as whole) that are suitable for: (1) the display of non-open materials (*e.g.*, thinking about the CAA fair use dimensions for images of in-copyright works online); versus (2) meaningful access to open materials (*e.g.*, thinking of the various dimensions for download enabled by the YCBA website).

These standards could be used to both limit the risk perceived by enabling access to restricted in-copyright materials *and* enable greater access to and reuse of non-restricted materials.

<sup>23</sup> Jane Park, “For Faithful Digital Reproductions of Public Domain Works Use CC0,” Creative Commons (blog), 23 January 2015, <https://creativecommons.org/2015/01/23/for-faithful-digital-reproductions-of-public-domain-works-use-cc0/>; “CC0 PDM Comparison Chart,” Creative Commons Wiki, 2011, [https://wiki.creativecommons.org/wiki/CC0\\_PDM\\_comparison\\_chart](https://wiki.creativecommons.org/wiki/CC0_PDM_comparison_chart).

# Appendix E

## Draft Rights Assessment Flowchart (UK)



Draft flow-chart for discussion at PHAROS consortium workshop on international copyright | Andrea Wallace, CC BY-SA | a.wallace@exeter.ac.uk