

A Study on Public Domain of Museum Image Licensing Policy

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Abstract

Image licensing originated in the 19th century with the proliferation of photography. Museum put a lot of funds and resources to digitalization program in 21th century, it lead digital image license issues in museum community. Museum's digital archives are more than photographs—they are cultural carriers, enabling greater access to museum collections. Therefore, balancing the economic and cultural uses of an image has always been a key issue in museum image licensing policy, and consideration of the public domain is another issue that easily gives rise to controversy.

The digital image licensing policy of museum in Taiwan is still protective. This has caused we to reflect—how can digital image licensing policy of museum continue to develop in a way that is in line with the fast-paced changes of our generation? How can museums' collections of cultural heritage reflect the core spirit of sharing to public that our society has come to value so much? The digital images of plane collections under public domain were the bridge for the open access in Taiwan.

It is hopeful that Taiwanese museums can change their stance of license policy towards to not-for-profit purpose use of plane collections that are under public domain. Non-profits use of digital images through license such like Creative Commons are another option for museums to create more accessibility for outreach and educational purposes. At the same time, museums in Taiwan ought to change the conception of public domain practices from combating a purely focus on property right and economic value to cultural rights for public benefit. This would change the position of public domain of digital licensing policy in Taiwan, paving a way for more accessibility to digital images.

Keywords: copyright, image license, public domain, creative commons, digital archive

I .Introduction

“The Book, in and as a book, belongs to the author, but as a thought, it belongs—and I am not overstating—to all humanity. All sentient beings have a right to that thought. If one of these two rights (the author’s right to the book and the people’s right to the thoughts) has to be sacrificed, this should be, for sure, the rights of the author. This is because the public good is our primary concern, and I declare this [as an author], the people’s rights come before ours.”¹

Digital images are able to attain economic value because of the copyrights that protect them; this is one of the primary concerns and values of intellectual property rights. Many museum images are part of a digital imaging collection that also possess value as a unique cultural carriers beyond their economic value. As such, balancing the economic and cultural uses of an image has always been a key issue in museum image licensing policy, and consideration of the public domain is another issue that easily gives rise to controversy.

In October of 2013, the Rijksmuseum in the Netherlands made their high quality digital images under public domain open to the public, a bold policy which gave rise to much debate and demonstrated two difficulties that museums face with licensing policies. First, the maintenance and production costs of these digital images are very high and donors to these digitization projects often request payback for their investments. In addition, as the cultural economy becomes financially tighter by the day, revenue generated by digital images can be an important source of income for museums. One example is V&A Enterprises which founded the international magazine License! , one of the 150 largest copyright entities in the world with an output value of 68.5 million US dollars. These earnings are directly used to pay for the museum’s operating fees. This economic output can lessen the museum’s financial qualms—in this case, the economic value takes precedence over the cultural value in determining copyright policy.

Digital images for collections under public domain can be “released” by museums, but releasing digital images of public domain for freely use is still not common practice in Taiwan, nor are there specific guidelines for policies regarding public releasing of public domain digital images. This has caused we to reflect—how can digital image licensing policy of museum continue to develop in a way that is in line with the fast-paced changes of our generation? How can museums’ collections of

¹ Mélanie Dulong De Rosnay, and Juan Carlos De Martin, *The Digital Public Domain: Foundations for an Open Culture*, Digital Humanities Series (2012). Translation quote from COMMUNIA.

cultural heritage reflect the core spirit of sharing to public that our society has come to value so much? Therefore, we ask some questions on the development of Taiwanese museums' digital image licensing policy, then find out what the position of digital image licensing policy for the public domain is, and how can digital image licensing policies reflect the spirit of public sharing?

The issues approached in this essay are all recent. Moreover, in the space of this essay it is impossible to speak at depth about the contributing factors. As such, this investigation breaches these complex issues in a series of case studies. First, this study investigates why Taiwanese museums have taken such a great interest in licensing policy and how two national digital archive projects and an accumulated number of digital images with museums as authors of these images, and has led to this increased interest in policy of museum. Following this, the essay investigates the development and definition of copyright under public domain and the current developing direction and possible future of museum digital imaging copyright policy in Taiwan. Since copyright law varies by country, this study cannot be used to make general claims about copyright policy, but its analysis of international trends in public domain of copyright policy may be a useful resource for the international policy makers and for museums.

II Open the cabinet

Image licensing originated in the 19th century with the proliferation of photography. The British Museum began to receive donations for pictures of museum works as well as requests from photographers who wished to photograph the museum's collection in the middle of the 1800s. The head of the printmaking department at the museum, Anthony Panizzi, also believed that photographs of the museum's images could help preserve fragile prints and would be helpful to researchers. Upon recommendation of Sir Charles Wheatstone, Roger Fenton (1819-1869) began to make photographic records of the museum's collection and on October 8, 1853, he became the museum's first official photographer². Around this time, Great Britain also began selling photographs of collections, this was the beginning of museum photographic recording and image licensing.

21st century digital technology has been immensely important for the development of digital image copyrights. In the 1960s, museums began digitization projects, and since the 1990s, museums and governments have carried out mass digitization projects to preserve museum collections and promote cultural activities. This has led to the accumulation of many digital image resources and has increased

² South Bank Board and author, *Roger Fenton - Photographer of the 1850s*(1988), 11.

the way of museums conservation and changed the way of image copyrights. As museums entered the digital age, the production of digital images has given these museums copyrighted ownership over their digital collections.

i. Museums as important producers of digital images

Museum put a lot of fund and resources to digitalization program before decades ago. For example, J. Paul Getty Trust of Getty Museum put 4.2 million U.S. dollars to support "Electronic Cataloguing Initiative" program, to help digitalization of 21 museums that collect visual art works in Los Angeles in 1997-2002;³ The Department for Culture, Media & Sport (DCMS) support Culture Online Project in 2002⁴; The British Museum establish Merlin Project which was held by Documentation Section in 2006.

Taiwan e-learning and Digital Archives Program was one of the first and biggest digital program in Taiwan which initiated in 2002, The purpose of this program have been digitized various kinds of archives and collections kept in Academia Sinica, and many other public and private cultural institutions in Taiwan.⁵ Government invested over 300 million U.S. Dollars to digitalization and system preservation. This program hold digital archives over 4,033,803 images and interpretation data⁶. Another important national digitalization program in Taiwan was National Repository of Culture Heritage which was started in 2002,⁷ the number of interpretation data was 682,228, and number of digitalization was 1,556,804.⁸

These programs establish a surprised amount for museums in 21th century. Museums are different from for-profit photo agencies in that their mission is not to make money, but to share and provide access with a spirit of equality through their production of digital images.⁹ Their goal, with the help of government support and funding, is to completely digitize their collections so that objects not directly on display can be shown to the world.

ii. Museum Without Walls: The Significance and Function of Digital Imaging

³ 蔡昭儀著,《全球古根漢效應》,台北市:典藏藝術家庭,2004年,頁94.(in Chinese)

⁴ R. Parry, *Recoding the Museum: Digital Heritage and the Technologies of Change*(Taylor & Francis, 2007).

⁵ <http://www.teldap.tw/Introduction/introduction.php>, 2014/11/1.(in Chinese)

⁶ <http://digitalarchives.tw/>. 2014/06/13. 2014/11/1.(in Chinese)

⁷ 郭鎮武,〈行政院文建會數位文化政策規劃初探〉,《中華民國圖書館學會會報》(2005年第75期):97。(in Chinese)

⁸ <http://nrch.cca.gov.tw/ccahome/index.jsp>. 2014/05/31. (in Chinese)

⁹ 林崇熙著,《跨域建構·博物館學》,台北市:臺灣博物館,2009年,頁47。(in Chinese)

The museum determination to digitize comes from their charitable spirit and goal of benefiting society. Museums see digitization projects as serving three main functions: to improve the collection's archival quality, to outreach, and for economic benefits.

(a) Digital Imaging as a Cultural Carrier

The phrase “Museum without walls” comes from the former French Department of Culture's Director Andre Malraux in a work from 1947. The term was coined to explain museums' digitization, virtualization, and new promotion efforts of the day. After he observed the great influence of reproduction in museum practice, he explained that when reproduction of a secondary collection item occurs, these duplications highlight the object's intrinsic value and makes its unique characteristics shine and even eliminates the elitist tendency of museum culture¹⁰. The collection is the heart of the museum¹¹, so a museum's digital archives are more than photographs—they are cultural carrier, enabling greater access to museum collections and a greater variety of ways of approaching these cultural carrier.

(b) outreach

“Outreach”, in the world of museum studies, usually refers to education, promotional development, art marketing, and economic efficiency¹². After museums opened their doors to the public in the 17th century, they have not since closed them. Generally, visitors are not restricted from entering museums but instead are themselves not willing to visit them. As a result, museums to this day are highly invested in creating exhibitions and programming that will bring visitors to explore the museum. The access provided by digitization efforts has made the public more willing than ever to come into contact with museum collections. Image licensing makes reproduction of images legal and accessible—with this development arose the need for outreach. Andre Malraux believes that duplications will not make us forget the original, but rather inspire us to understand and research the original. Duplicating techniques have helped spread knowledge about collections and also provide access to viewers who normally would not be able to see the collections, spreading

¹⁰ André Malraux 著，李瑞華、袁楠譯，《無牆的博物館：藝術史：插圖珍藏本》，廣西師範大學出版社，2001年，頁93。(in Chinese)

¹¹ American Association of Museums. Commission on Museums for a New Century, *Museums for a New Century: A Report of the Commission on Museums for a New Century*(American Association of Museums, 1984).

¹² 黃心蓉著，〈意外的獨行者：台灣私人美術館經營闖徑〉，《典藏今藝術》，〈2012年第234期〉：112。(in Chinese)

understanding and interest in these objects.

(c) A source of museum revenue

A guiding principle behind museums is that their “purpose is not to generate profit.” This by no means suggests that museums do not have a need to generate a certain amount of funding¹³—indeed, making a certain amount of income is an economic necessity for non-profit museums¹⁴. Government spending cuts on museums is a reality that compels museums to face funding challenges and forces them to search for creative ways to generate revenue¹⁵.

The pressure to generate revenue with imaging rights places museums into a quandary of over-commercialization. As a result, they do provide services such as discounted image use or free licensing in order to distinguish themselves from ordinary businesses. But does this alone qualify museums as striving for a spirit of “open to public”, or do modern museums tend to favor economic benefits over public and cultural benefits? Digital image licensing policy for public domain images is an important point of inspection for the balance and compromise between societal and economic benefit.

III. The intersection between digital imaging and public domain

The third president of United States, Thomas Jefferson wrote a letter to Isaac Mcpherson to mention the idea of copyright, “Inventions then cannot, in nature, be a subject of property. Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from anybody.”¹⁶ It proclaim the purpose of copyright law “protect the right of authors, adjust the social benefit, promote the development of country” that were revealed by the article 1 of copyright law in Taiwan.

i. The Developing Thread of Public Domain

Copyright first became law in the 18th century following transformation from

¹³ 張婉貞，〈論博物館學〉，台北市：典藏藝術家庭股份有限公司，2008年，頁7。(in Chinese)

¹⁴ T. Ambrose, *Money, Money, Money, & Museums*(Bernan Press (PA), 1991), 21.

¹⁵ 林玟伶著，〈補助、不補助？博物館補助的辯論與審思〉，《博物館學季刊》，〈2010年第24卷第3期〉：48。(in Chinese)

¹⁶ Thomas Jefferson, "Thomas Jefferson Letter to Isaac Mcpherson," The University of Chicago Press, <http://press-pubs.uchicago.edu/founders/documents/v1ch16s25.html>. 2011/1/1.

copyright law. The first law promoting copyright, the Statute of Anne¹⁷, was enacted on April 10, 1710, made up of 11 articles¹⁸. The statute's first article explains that its goal is to both protect the author and promote public learning¹⁹. Copyright was meant to give incentive to authors and producers, while at the same time returning to the idea of public domain by making copyright a "time-limited right." This law prevented monopolistic activity and served as a model for modern copyright laws through its emphasis of "time-limited rights."²⁰

"Public domain" was a term to describe public lands that belong to Federal government in the United States. In a 1896 patent case, the Court use the term "public domain" to describe the invention work which was over the time limit;²¹ Berne Convention use "domaine public" for intellectual property usage via French in 1989.²² David Lange who is the pioneer of public research tried to use "no man's land" to descried the intersection between copyright law and public domain, other scholar of law Jessica Litman make a definition of the public domain: "commons that includes those aspects of copyrighted works which copyright does not protect".²³ After 300 years, the protection range of copyright is bigger and tighter than before, the power of intellectual property is at peak in 21th century.

Academic community began to introspect and debate about the public domain of intellectual property that narrow down. James Boyle brought up the conception "the second enclosure movement" to indicate the fact of public domain issue. The term "public domain" is commonly used in the realm of intellectual property to refer to works or bodies of information that are not considered "intellectual property." These include works whose copyrights have expired, or other types of information not covered by copyright, including ideas, procedures, or general facts²⁴.

¹⁷ The official name of "The Statute of Anne" is "An Act for the Encouragement of Learning, by vesting the Copies of printed Books in the Authors or Purchasers of such Copies, during the Time therein mentioned" .

¹⁸ The Art and Humanities Research Council(AHRC), "Primary Source on Copyright (1450-1900),Statue of Anne (1710)," http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/showTranscription/%22uk_1710_im_001_0001.jpg%22. 2014/5/25 .

¹⁹ Lyman Ray Patterson, *Copyright in Historical Perspective*(Vanderbilt University Press, 1968).

²⁰ Article 1 and 11 of the Statute of Anne , before the enacted day of the Statute of Anne, author's copyright had been protected for 21 years , after the enacted day, author's copyright had been protected for 14 years .

²¹ 黃泰然著,《智慧財產的他者及其抵抗：公共園地與創意共用》,國立台灣大學,碩士論文,2010年8月,頁3、4。(in Chinese)

²² James Boyle, "The Second Enclosure Movement and the Construction of the Public Domain," *Law and Contemporary Problems* 66, no. 1 (2003): 58.

²³ Jessica Litman, "Public Domain," *Emory Lj* 39(1990).

²⁴ According to the definition of The Europeana Public Domain Charter and Public Domain Manifesto. COMMUNIA, "Public Domain Manifesto," <http://www.communia-project.eu>; Europeana, "The Europeana Public Domain Charter," <http://www.europeana.eu/portal/>. 2014/10/12 .

Copyright laws as related to public domain in Taiwan do not yet have clearly defined guidelines. Their definitions and guidelines are usually negative, rather than having their own guidelines and procedures. Under the Taiwanese copyright law, “original creativity” is the key of concerning digital copyright. As such, According to the discussion of academic communities, the digital images of old collections which have flat surface were usually considered for public domain, as objects that the museums have open to public use. Whether these digital images of the old collections can actually be released to public domain are a grey area, museums still use these methods for guarding against privatization or business purpose. Also, it has yet to be seen if Taiwan will carry out such measures as “Exclusive control over Public Domain works must not be reestablished by claiming exclusive rights in technical reproductions of the works” in the future, as stated in the Public Domain Manifesto.²⁵

ii. The Public Domain of Digital Image Licensing Policy: Intangible Intellectual Property or Cultural Right?

Museums generate funding out of image digitization projects and use such projects for all sorts of museum promotion. Moreover, the cost of such duplication projects is very low, so digitized images have gradually developed as highly favored sellable goods for museums. In Taiwan, duplications of digital images are usually seen as the copyrighted image so that individuals who wish to use the image must deal with license procedures for legal use. But museum collections have already been considered part of the public domain; this range also includes works whose copyright protection has expired, works whose author has given up ownership rights, collections that are of great public benefit and not copyrightable, works under other types of contract, among other types of productions. How should these digitized images under public domain be appropriately used?

First, when interpreting legal rights and putting them into practice, museums encounter a number of practical problems. Before the widespread digitization of museum archives, museums were required to clarify each collection’s copyright situation and request rights from the author before placing the digital images on display. After digitization made such rights more complicated, there were numerous debates over the range and rationality of the idea of “public domain.” Beyond this, museums began to worry about whether or not opening up archives to the public domain would impact the institution’s operations by reducing the frequency of image licensing and by producing copyright controversies.

²⁵ According to the definition of Public Domain Manifesto COMMUNIA, "Public Domain Manifesto". 2014/10/12 ◦

Thus, in current Taiwanese museum image licensing policy, public domain and digital imaging copyrights have become opposing forces. While digital imaging was originally seen as a cultural right or public freedom, in current image licensing policy it has been negative as a resistance against copyright, a new type of interpretation of intellectual property rights. Moreover, It has been seen as the public domain's disappearance from image copyright policies. The current dividing line between digital images licensing policy of museum and public domain still determine on the side of the museum's standpoint, international copyright laws, and the museums' leadership style.

IV. The revival and possibility of public domain rights under museum digital imaging projects

The role of public domain rights under copyright policies is to adjust limits of the copyright laws to prevent excessive stretching of the range of copyright violations. Because of the existence of public domain, a raw material pool will be created, so that any individual could use these resources to create new works, serving as any person's cultural landscape—the culture resources all around them all the time.²⁶ Because museums use most image license for non-profit purposes, the images are usually used for cultural promotion and thus are in line with copyright laws. In recent years the international community has gradually come to recognize the importance of public domain rights and has loosened fully encompassing intellectual property laws of the past. Institutions leading the public domain rights movement like COMMUNIA, Europeana, etc., provide valuable reference information for museums with digital imaging copyright policies.

i. The balance between public domain and museum copyright—observations from the Creative Commons Movement

In 2001, the famous American lawyer Lawrence Lessig created the organization Creative Commons.²⁷ Through the public license clauses that it promotes, it gives another voice to the intellectual property rights from enclosure movement. Could Creative Commons provide a different, preferable choice for museums with copyrighting issues?

This question has not yet fully answerable. For museums, the fact that Creative

²⁶ Julie E Cohen, "Creativity and Culture in Copyright Theory," *UC Davis L. Rev.* 40(2006).

²⁷ <http://creativecommons.tw/explore>. 2012/09/15 ° (in Chinese)

Commons is free and extremely convenient could cut program costs and help with museum promotion. But the museum must obtain the artist or author's agreement in order to use Creative Commons' services if the item is still under copyright by law. In reality, all museums interested in contracting with Creative Commons license will have the adequate manpower to carry out the stipulated inventories. Moreover, once using CC license, one cannot cancel the contract or use different versions of the authorizing clauses. These various stipulations may seem like a step back for certain museums with high standards for protection of their collections. However, museums with archives that have already entered the public domain and do not have any copyright limitations from their producer can make use of CC license services for digitized images in order to lower costs and increase efficiency for museum outreach.

In recent years Creative Commons has made contributions to the development of the public domain's goals. In attempts to make public domain information more accessible to users, Creative Commons announced its promotion of the Public Domain Mark on October 11th, 2010, to clearly mark information and images that are now part of the public domain. Currently, the first organization to widely use the public domain mark in Europe is the nonprofit Europeana.²⁸ This organization is a sort of mediator for digital images and archives, taking millions of images and documents from the public domain and placing them into its resource archive. In 2011, Europeana entered all of the millions of items in its catalogue into the public domain mark. This case shows another possibility of public domain image policy.

ii. A giant's shoulder within arm's reach: The Rijksmuseum image licensing policy

In 2013, the Rijksmuseum in the Netherlands made all of their public domain digital images completely accessible to the public, making it the first museum to completely open up its archives in such a way.²⁹ This bold move received international attention not only because it occurred simultaneously with the museum's grand re-opening, but also because it made some of history's most prized works of art available for full public use for the first time, including paintings by Rembrandt Harmensz and Johannes Vermeer.

This museum's most prized digital images what can now be repeatedly used and seen. This led to wide spreading of these images and unprecedented visibility for the museum, paired with overwhelming support from users.³⁰ This decision also gave users the cultural right to access these public domain images. In the digital age, the act

²⁸ Europeana, <http://www.europeana.eu/portal/.2014/11/10>.

²⁹ rijksmuseums, "Rijksstudio," <https://www.rijksmuseum.nl/en.2014/11/1>.

³⁰ Joris Pekel, "Democratising the Rijksmuseum," (Europeana Foundation).

of duplication is already extremely widespread and convenient, almost the same as retrieving information. Even if museums attempt to guard their images against illegal piracy, the internet still provides an easy way for users to gain hold of lower quality copies of these digital images. For these reasons, in 2013 the Rijksmuseum decided to make all of its digital images that are under public domain available on the internet for free unlimited access. The museum's authoritative reputation made the images spread across the internet at a rapid pace.

In addition to the outreach benefits of digitization, the open access of digital images does not present a financial burden for museums. According to the 2010-2013 annual reports of the Rijksmuseum, the museum's revenue for 2013 did not decrease after the images were made accessible, but in fact increased.³¹ This shows that making public domain images available to the public not only is helpful for the museum's mission of societal outreach, but also generates increased revenue for museums. The Rijksmuseum is a prime example of the win-win situation of a more open digital image licensing policy.

V. Conclusion

Copyright has been called the engine of free expression. Open public domain information thus is able to become a cultural landscape. Reducing the greyness of the term "originality" when referring to an author's work. Without this framework, the work's "originality" becomes infinitely complicated. Preserving the public domain to maintain the cultural rights of the public sphere.

From an economic perspective, the cost of digitization can be expensive, but proceeding duplication is extremely affordable and fast. Access and immediacy of these digital images, two traits that the digital age highly values, would be greatly increased and would have immense benefits for museums. As such, public domain information would become a resource that any person could freely use. Museums and the public would both have rights to use these digital images, museums would still gain revenue through museum products. Opening up public domain images to public access would not strip museums of their revenue; from the example of the Rijksmuseum, opening up public domain archives could lead to an increase in the use of digital images, and from this museum's statistics, it is evident that the largest problem with current digital imaging efforts is not image piracy, but a lack of use of digital archives.

It is hopeful that Taiwanese museums can change their stance of license policy

³¹ rijksmuseums, "Annual Report," <https://www.rijksmuseum.nl/en/organisation/annual-reports>. 2014/11/14 °

and public domain towards to not-for-profit purpose use of plane collections that are under public domain. For instance, digital images of low-pixel could be placed on the internet for free access, while high-profile digital images could be placed into the category of public domain, while asking for that users must cite the name of the museum from which the image was used. Non-profits use of digital images through license such like Creative Commons are another option for museums to create more accessibility for outreach and educational purposes. At the same time, museums in Taiwan ought to change the conception of public domain practices from combating a purely focus on property right and economic value to public benefit and cultural rights. This would change the position of public domain of digital licensing policy in Taiwan, paving a way for more accessibility to digital images.

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