

# LEGISLATION. STATE OF THE ART

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## Introduction

Throughout the thirty years of conferences, the authors of the texts I consulted –indicated in the bibliography of this text– have reflected upon the relationship existing between technology, archives, images and legislation, focusing in particular on the topic of copyright. When consulting texts by authors of different nationalities, we see that while they comment on how their photographic heritage is managed in their home country, they also highlight very similar legal issues. Although sometimes the focus is different and naturally, they follow different legal and photographic administration traditions, archivists from all over Europe deal with the same controversial copyright issues: first, understanding how the law defines photography and then, resolving the legal questions raised by technology and new practices as they develop.

Despite this, some aspects which are currently key points in the discussions on law and archives have seldom been mentioned. One example of this is. the exceptions to and limitations of copyright law. This refers to the uses that can be made of the works and other protected materials without authorization. Perhaps it has been overlooked because the sector accepted that copyright was and should be complicated and that the archive centres should not be entitled to certain uses. Resigned to this legal framework, they may feel that they can't legitimately demand changes to the laws. On the

other hand, open access to the content that has grown so much due to new diffusion possibilities is perhaps an issue that is not often discussed since it's a more recent revolution that we didn't necessarily see coming.

In any case, all of the authors have agreed over time (which in the case of these texts stretches from the nineties almost up to the present), on the importance of change that drives technological evolution, as much for the archival holdings as for the profession. According to Roger Erlandsen «The new technologies force us to raise unprecedented professional issues». In 2000 they said that this revolution would inevitably bring with it radical and profound changes, and they emphasized the importance of being up-to-date in the cultural arena. The understanding was that it might provide solutions to important problems within the field of archival science, such as the preservation and dissemination of photographic images.

Other authors make less direct references to the technological change, but it is always present, for example, from a practical perspective. This is the case of the text written by José Antonio Millán regarding the Creative Commons Licenses, which were born of the diffusion of cultural content online. Another example of this is a text by Josep Cruanyes, which comments on photography in public spaces – a practice which has become quite significant with the universalization of photography.

In other words, when it comes to image files, technological changes exert twice the influence. Photography as an artistic or documental expression has moved from analogue to digital formats. Consequently, it has become cheaper, its use universalized, its production has increased and conceptually, it has come to be understood in a very different way. According to Roger Erlandsen, these changes re-frame the role that photography had or could have had in society. In 1990, Esteban de la Puente García commented that the generalization and vulgarization of photography had greatly

diminished its intellectual consideration. He explained that some saw it as the poor relative of intellectual property.

Aside from copyrights, there are many more issues regarding the management of photographic archives groups that need to be considered. One of these issues is personal data protection, which is even more prominent now due to the recent changes in legislation. Another consideration is image and personality rights. Nevertheless, these are issues that the authors of the texts do not really comment on. The archivist also has to understand this within the areas listed by Michael Harvey as relevant to the sector, such as legal deposit, exportation, health and safety. It seems like the profession has to manage extremely diverse legislative and ethical facets, intrinsic to the digitization and diffusion of the collections. In any case, copyright has always held a preeminent position because it directly impacts the possible uses of the heritage which is safeguarded by the archives and consequently, its mission. Thus, in this text, I will focus mainly on this branch of law.

In general terms, I will explain to the reader, the considerations surrounding the question that copyright obliges us to ask ourselves, for good or for bad, about whether or not a photograph should be seen as creative work. I will continue with how copyright impacts the administration of archival activities, such as the preservation of documents. Then, I will comment on relevant legislative changes, sometimes driven by the industry itself, and the direction they seem to be taking. Finally, I will finish up by taking a look at the role copyright plays in diffusion, now such a prevalent practice in archival activities. I will endeavour to create a common connection between the contributions of many authors from the Conference and my own opinion. Now and again, I will reference specific phrases from the authors, but in the rest of the text, they are also present, because, in large part, it is their writings that have prompted me to make these reflections. In any case, I recommend reviewing the heritage left us

by the Conference over the years and I hope that this text represents another contribution to that.

## **According to the Law, is photography art?**

Copyright has an important impact on the fundamental activities of the archives, like dissemination and preservation. This is because the elements that make up the heritage body are, in many cases, considered protected *works*. When this is the case, the author possesses exclusivity to decide if they are reproduced, disclosed to the public, distributed or transformed, just to name a few. Though copyright has mainly centered on protecting artistic expression, its scope of application has expanded and currently also protects creations that are not necessarily artistic, through the so-called *related rights*.

In the field of photography, the opinions of legislators have fluctuated over time: Is it necessary to consider it an artistic creation and protect it with related rights, or instead, not to protect it at all? Let's remember that the term "photograph" can refer to very diverse materials. These range from technical photographs, artistic photographs, family photographs, the product of photojournalism, to the purely practical photographs— like the one taken of the password under the *router* or of the price of a product we are interested in. It is considered just as much a photograph when taken by a professional photographer who earns a living that way, as it is when taken by an amateur.

Esteban de la Puente starts off his text in 1990 warning the reader that «The world of protection of works of literary and artistic creation, is showing a tendency, in our time, to become progressively more complicated», mainly due to technological changes. According to the author, regarding photography, the opinion was divided. There were those who understood it as a form of artistic expression, and others who argued that it couldn't be considered art because the result was a consequence of chemical combinations and not the author's personality. According to Esteban de la Puente, from the legislative viewpoint, the photograph found itself in a state of *unstable equilibrium*. Many European countries

identified attributes that could make the photograph deserving of protection. For example, they spoke of certain standards of quality or particular purposes of the photograph.

Previously, some countries had established an obligatory registry without which protection was not granted. If this system had continued, we probably wouldn't need to bring up the matter of orphan works, a category which is so problematic in the management of the archival holdings of an institution. The main issue here is that, if the author of a work is unknown or uncontactable, how does one obtain authorization for its use, even for archival purposes? Without an obligatory registry, copyright has had to define a series of objective criteria in order to determine what deserves protection. This means determining what is or may be artistic and clarifying its scope of application. This may seem relatively easy when dealing with paintings, sculptures, a novel or a musical composition, but, in essence, deciding what constitutes artistic expression is a subjective matter, and so, practically impossible to treat objectively.

The consolidated text of the Spanish Law on Intellectual Property Rights (Llei de propietat intel·lectual espanyola) contains an indicative and non-exhaustive list of types of works that can be considered original, among which the photograph is currently included, though it hasn't always been there. In addition, copyright law makes frequent reference to originality or the intellectual expression of the author. The judges, whom I imagine must have often cursed the legislator, have gradually interpreted these concepts, developed examples we can use for reference and proceeded to refine the guidelines over time. Nevertheless, the criteria being developed must be broad or vague enough so as to not exclude possible artistic creations. This means that deciding that it is a work, and thus protected by copyright, continues to be a complex issue.

In 1987 Spain passed the law that serves as the basis for the current regulation. It includes the photograph among the works deserving of copyright protection, as I mentioned above, and at the same time, the Spanish legislator introduced the protection of mere photographs. This made reference to non-original photographs, which means non-artistic. These photographs are guaranteed some intellectual property rights, but fewer. (for example, moral rights are not recognized) and receive an inferior protection term (from creation for twenty-five years). This concept co-

exists within the intellectual property law alongside the photographic work, which is protected for sixty years dating from the death of the author. So, if a photograph is a work of intellectual creation and reflects the author's personality, it deserves *the maximum level of protection*, and if it is only a simple photograph that is not creative, it deserves less protection. The way the Spanish law contemplates it, the protection of the mere photograph is recognized by default when the *superior* level of protection is not applicable. With that, the Spanish legislator affirms that some photographs cannot be considered artistic, but that even so, they deserve to be protected.

When speaking of the Austrian example, Werer Matt commented that «All photographs are endowed with protection that guarantees the related rights». In Spain, the two categories of protection for the photograph and the jurisprudence criteria, which have been developing over time, would make it very difficult to encounter a photograph that doesn't benefit from any protection at all. This would even include the photograph that is taken of the password located on the back of the *router*, which we used as an example above. With the simple act of pressing the button, content with rights can be generated. In any case, there seems to be a relatively large gap between what and how copyright is regulated, and the current practices of production and use of a photograph. When the mere photograph was granted protection, there was surely no intention to protect these other, more instrumental materials. Perhaps the Law should be simplified in order to regulate it, but, in any case, this is a classification that would need to be reviewed.

Karl Griep describes very clearly the steps Germany followed. He comments that «Photographs were first legally protected in 1876, but the law of 1901 established a period of only ten years. Then, in 1940, it increased to twenty-five, dating from the act of creation». Later on, according to the author, an amendment defined three levels of protection; One stipulated seventy years of protection for artistic photographs, starting from the death of the author, the next ,fifty years for photographs that serve as information documents and sources for contemporary history, counting from publication or creation date, and finally, a protection term of twenty-five years for any other photograph.

As possible systems of protection that responded to the reality of the photograph were being explored, the recognition of the mere photograph as

a production different from that of a photographic work which is also assigned rights, began to develop in other European countries, such as Italy and the Scandinavian countries. Even though this concept has never been integrated on the European level, the Copyright Term Directive on the duration of copyright <sup>1</sup> recognizes that the member states can establish systems of protection for *other photographs*. Furthermore, the Directive on Copyright in the Digital Single Market <sup>2</sup> references this, indicating that it should not be used to claim protection on digitization of works, a topic I will explore further later on in the text.

If we apply this idea to the area of files, and in particular, to the image file, it feels as if we are addressing a major legal uncertainty. How do we decide if images are works of art or mere photographs – so we know which exclusive rights to apply to the archival content and starting when? How can we be sure that we are respecting the authors' rights? How do we avoid automatically seeing everything as a photographic work? In the archives sector, where alternatively, the photograph is considered and studied from many perspectives, the issue is even more complex. Copyright law has determined, in a slightly artificial way, that any photograph can be art, even when the logic of an expert would lead him to consider its documentary value and not view it as a creative work. Sylvie Henguely and Peter Pfrunder spoke of the tensions «[...] generated by the clash between the different functions and forms of expression of the photograph, from its documentary aspect to its importance as a means of artistic expression». In 2006, Werner Matt commented that until not too long ago, there were no art schools in Vienna that offered photography courses.

Beyond the exploitation rights, copyright law recognizes a series of moral rights, which may represent the most romantic side of this legislative realm. Although they don't generate much controversy, the authors of the Conference texts make reference to this from diverse perspectives. Karl Griep, for example, considered the moral rights an important part of copyright law and commented that «I wouldn't want to hear about any European initiative that intends to change or rectify this part of the law». He gave as an example, the right of the photographer to decide the moment and the specific publication medium of his work. Josep Cruanyes, in 1992, also made reference to the moral rights. He cited the right to the integrity of the

work and he emphasized the need to respect the name of the author, integrating it more pre-eminently into the management of the archive groups. According to the experience shared by Sylvie Henguely and Peter Pfrunder in 2002, in Switzerland, the Swiss Foundation for Photography treated photographs «[...] as something resulting from an act of individual creation, or rather like works of authorship and they classify them by author and not by topic». The emphasis that copyright places on the recognition of the author through moral rights, has a certain impact on the management of the archive groups and has influenced the perspective from which the document is considered and studied.

## **Consequences of Copyright law for the Archives Sector**

As we commented above, the archival holdings are often protected by copyright. In broad terms, copyright law is based on not permitting the dissemination and reproduction of protected content without possessing the rights, so the activities of the archives are often at odds with this branch of law.

Karl Griep explained that «The final objective of the archivist profession is to facilitate access to the historical source and that «If the historical source, represented by a specific document, has disappeared [...] the reason for being of the archivist and of the archive also disappears». Therefore, does a copyright law that doesn't permit preservation and divulgation, make the function of the archive disappear? The author comments that it is necessary to ask permission to make use of a work «[...] even for archival purposes». With this simple sentence, he highlights a fundamental question to which I have no answer: If the archive is unable to identify the copyright owner in order to try to reach an agreement with him regarding use of the photograph, what should be done? The copyright demands one thing and its function demands another, it's

essentially about choosing between respecting either one law or another when precisely that kind of institution has the legal obligation to preserve and diffuse heritage.

On the other hand, technological evolution has facilitated the preservation as well as a broader and better diffusion of heritage. Today, for example, technology would allow a digital copy to be sent to an investigator so that the documents could be studied from home, even in another country, or accessed from the archive but with his or her own device. It would also allow an archive-directed educational activity to display the digitized heritage body projected on a screen during a presentation. Likewise, documents could be sent to another country to be digitized if lack of the necessary technology necessitates that, or an archive could use certain images on-line as a more pleasant way of informing users about the archive groups that are available instead of using a description. Even so, if the copyright does not stipulate an exception or express limitation for these uses, authorization from the copyright owner, which is often so difficult to obtain, would be necessary.

The possibilities of using the archive holdings multiplies, but in order for this to occur with complete legal certainty, copyright law has to advance at the same rhythm. Nevertheless, in many countries, the legislative changes necessary for adapting the copyright laws to the technological evolution, have either not occurred, or have been almost imperceptible. For the heritage institutions that have shown so much interest in adapting to the digital world, this has been a major barrier. Karl Griep summarized it very well in 1998 talking about digitization: «What an amazing success for restoration. What a disaster for historical veracity. What a great advantage for access by way of e-mail, internet, online... What an enormous difficulty for copyright and license laws». He believed that the heritage sector could have a new role with the technological changes and that, for

example, audiovisual archives could acquire a very important role in the coming developments.

The impact of the technological changes on the sector and possible issues related to copyright law have also been a topic addressed by Roger Erlandsen in 2002 when he summarized the discussions he had had in Norway in order to define the areas in which the electronic image could substitute the physical one. He understood that «The use of digital images will have unavoidable consequences, both for the technical aspect and for the legal framework which regulates copyright law». He spoke of a change in paradigm.

So, in order to carry out preservation and dissemination activities, the archive has to know the protection status of the heritage body that it administers by way of the copyright law. It must identify whether or not it is protected, perhaps by evaluating the originality, and, in the affirmative case, to determine if it is in the public domain. If the content is protected, the copyright owner must be identified and contacted, in order to ask permission for the uses they wish to make of it. Often, the results are inconclusive; there is not enough information available to know if the work is in the public domain or not or to identify and locate the copyright owner. In general, it's a difficult process that requires legal counselling and a significant investment of time and personnel, which many archives cannot undertake.

Michael Harvey aptly pointed out that in England «[...] there is certainly material, like movies, about which it is often impossible to be sure that all aspects of their production are outside of copyright law. There are also movies where a soundtrack is later added, which, essentially, means the creation of a new work - for example, adding music to a silent film classic». Karl Griep shares the example of Germany and comments on the changes in the duration of copyright protection over the years. He explains that, as a

consequence, «Photographs that had been in the public domain, today, are once again protected». Speaking of Austria, Werner Matt comments that copyright law can also hinder changing the vertical or horizontal format of a photograph, for example, or applying certain colouration techniques to it, activities which may be necessary during the restoration of photographic content.

The phenomenon of orphan and declassified works illustrated the absurdity of the situation very well. According to the European guidelines, which are gradually resolving these issues, orphan works are works whose author is either unknown or known but unlocatable, and declassified works are those works which are no longer available on the commercial market. This is despite the fact that the archives, libraries and museums that have them in their archive groups and collections are often the only institutions with copies, despite the fact that they are often of great cultural value, and despite the fact that, in many cases, they have never been marketed or created with that intention, the rights do not permit their diffusion without authorization.

On the other hand, and especially in the digital realm, a lot of document usage takes place in more than one country, across borders and with different jurisdictions. Each country has a way of defining many of the exceptions or limitations that authorize the use of works without needing permission in order to facilitate activities of public interest, such as teaching. The degree of protection is also very different if we consider that there are countries which protect the mere photograph and others that don't and that the protection term is not concurrent. As Karl Griep also pointed out, the same photograph can be protected differently from one country to another.

If the objective is to preserve and disseminate heritage, in most cases, the archive's activities will not be harmful to the author - quite the opposite. A copyright that considers by default that any use without permission is an exploitation that harms the author or rights

holder, completely disregards the fact that the archives contribute to the creation, innovation and respect of the authorship, which, in theory, is the same objective pursued by copyright laws.

## **Legislative tendencies: more exceptions and limitations**

This tension between the copyright law and the archival activities, caused by a legislation sometimes a bit inflexible or detached from reality, exists in many other sectors. Copyright law often clashes with uses on the web, with educational uses or with the enjoyment of basic rights such as freedom of expression. Ultimately, it determines how and if something as basic as information circulates. Authors and activists around the world have emphasized the consequences that a copyright law that is too rigid or with a term that is too long can have on information access, particularly when only analogue and not digital uses are permitted.

In my opinion, demanding copyrights of the heritage centres is excessive, and it is completely normal to clearly manifest these difficulties. This is a legitimate complaint that isn't made out of self-interest, but rather, to alert the lawmakers that a fundamental public service is at stake. It's not about lack of resources: the undertaking that copyright law requires is sometimes impossible to carry out. Many legislative changes have occurred without taking into account the specificities of the archival holdings, either due to lack of awareness or because other priorities took precedence. Copyright is a human-produced product and there is no right or wrong solution. It just needs to be defined and refined over time, while learning about the practical impact it has.

In order to minimize the consequences too much protection could have, whilst maintaining respect for copyrights, many countries have developed a series of exceptions and limitations to this protection.

These are provisions in the law that identify situations, often justified due to their public interest, in which it is possible to use a protected work or creation without receiving authorization from the rights holder. Exceptions and limitations exist for lending, preservation, investigation and education, for example.

While most European countries have defined exceptions and limitations with concrete objectives and specific conditions, other countries, such as the United States, Canada or England have systems in place -fair use and fair dealing. According to these, use may be carried out, even without authorization, providing it is fair. Of course it demands diverse considerations and the evaluation of use according to a set of criteria, combined on occasion with a limitation regarding the intended purpose. However, it grants much more flexibility than the concrete exceptions and limitations that we have in Spain. As Michael Harvey describes, fair use in England «[...] grants a reasonable margin of freedom when it comes to permitting copies of materials intended for use in education and research. However, more and more, the institutions want to exploit their material more extensively. One example of this is by using the internet to permit on-line access to their collections». In many cases, the set of exceptions and limitations is insufficient, even when it comes to fair use or treatment.

The archives sector has often mobilized alongside the documentalist and librarian sectors, in an effort to explain to lawmakers around the world the difficulties faced by the profession. They will address the need for broader limitations and exceptions that are flexible enough to respond to the technological changes and are harmonized with other countries so as to eliminate the artificial borders set by the jurisdictional limits. For example, the International Council on Archives has repeatedly asked the member states of the United Nations, through the World Intellectual Property Organization, for the creation of an international treaty on the exceptions and

limitations which establishes an obligatory minimum regarding these aspects in all of the signatory states. The sector also mobilized on the European level during the adoption of Directive on Copyright in the Digital Single Market, and nationwide there are groups of professionals that request necessary legislative changes.

In 1998, Michael Harvey commented that «Contrary to popular belief, the measures adopted by the European Union won't lead to the creation of valid copyright laws for the entire Union, and there is no way they will lead to abrogation, but instead, only a harmonization of the national laws» and that was done by way of the directives. The author already predicted the importance that closing the distance between European legislatures would have. In 2011, the European Commission indicated the importance that digitization of cultural memory had for Europe. Among other things, it recognized the need for legislative changes to resolve difficulties at heritage institutions in managing the rights of copyright-protected content.

This milestone was followed by a failed attempt, important all the same because of what it represented, by European lawmakers to resolve the problem of the orphan works, which I mentioned in the section above. By way of a Directive, an exception to the copyright was proposed, now applicable in Spain and in the rest of the member states, which permits the digitization and divulgation of these works to the public, even without the permission of the author. That said, it imposes many conditions that must be fulfilled before being able to carry out these activities. One condition is to recognize rights holders who reappear, the right to compensation for the use carried out up until then, and it excludes photographs from its scope of application, except when they are part of another work. Unfortunately, for all these reasons, it has been a failure when put into practice. Even so, the last directive adopted regarding copyright, the Directive on Copyright in the Single Digital Market, defines an exception, combined with a licensing system for resolving the

problem of the discontinued works, which to a large extent, also include the orphan works.

There has been a second attempt to resolve this issue that is so present in the heritage sector, by using an apparently improved formula. It is largely thanks to the cooperation with the sector and its conviction and insistence that it is not acceptable for copyright law to bury and ignore this heritage. So, just as Karl Griep announced years ago, the archives sector is facing common challenges too big to resolve individually, and cooperation between professionals is indispensable.

## **Tendencies in practice: open access and heritage diffusion**

By using the new tools, when copyright permits, the possibilities of disseminating the archival content has radically increased. The public that habitually consults the archival groups can now do it more easily and the heritage body can reach a very diverse public, facilitating remote access as well. The possibilities are such that currently, many institutions are present in repositories beyond the institutional one. That means that they search for the user wherever they navigate virtually, instead of waiting for the user to find and access the archival holdings at home. There are many examples of Wikipedia pages enriched with high-quality images from heritage institutions, an experience which also ends up being valuable for the archive. This is an advantage as it enables the archive, in turn, to enrich the institutional repository with the collaboration of other platforms and experts who have come to know of it through this medium. Michael Harvey commented that «As conservators and archivists, an important aspect in the creation of collections is being able to provide public access to the material we safeguard and that

this material is disseminated however possible». With the new technological opportunities, it becomes necessary to re-think the way cultural heritage is communicated and see which options contribute to the objectives of the archive. The institution can contribute even more by increasing knowledge and understanding of the past and the present.

In this sense, the big revolution has been to take the step that allows the archival holdings to be seen and used, in many cases without limits. It might be interesting for users interested in research or education to share their experience on social networks and transform as part of a creative process, perhaps even through a documentary, in a newspaper article or by some other means. A few years ago, at the Rijksmuseum in Amsterdam and at the Metropolitan Museum of Art in New York, they took the leap towards open access, indicating that a large part of their heritage holdings could be used freely. More and more institutions are adopting this standard with a growing inertia known as open GLAM. Authorizing the general use of the archive groups and collections means accepting the loss of control over who has access and how they use it, which is an idea that is still very hard to accept for some archivists.

Up until now, copyright has been a tool that the archive has had to manage in order to fulfil its function. In this scope, the role of the archivist will be to communicate to the user in an easy-to-understand way, the copyright conditions surrounding the documents so that they know if they can be used and how. The investment that the archive has to make to find out if the work is in the public domain or not, and to ask the rights holders for permission to use the work, is also useful to the final user, who possesses a lot less information than the archivist does to figure it all out.

Beyond these considerations, there are, of course, barriers established because of copyright, image and personality rights, or even ethical questions that can hinder diffusion. Even so, in certain

cases, such as some de-classified or orphan works, the chance of there being a rights holder who disagrees with the diffusion, is so remote, that there are institutions that also disseminate the works. They must carefully weigh the possibility of complaints being filed against them and be very diligent in removing the content, if necessary. The National Library of Scotland and the National Library of Wales, for example, have defined a framework which allows professionals from their institutions to evaluate as much as possible (within a reasonable effort) the rights pertaining to their archival holdings. With the information they obtain, sometimes incomplete (because completing it would mean either a disproportionate effort or a failed attempt), they can understand the level of risk they face. They do this taking into account the type of collection, the type of use, the possibility of removing the content immediately in case of a lawsuit, and many other factors, thus anticipating the possible consequences, and determining how to minimize them. When such is the situation, it is probable that in the majority of cases, if the rights owner or the heirs show up, they do so to express gratitude for the effort made to digitize and diffuse the content.

In order to resolve situations where the copyright stands in the way of diffusion projects, this fact should be kept in mind from the moment in which the archive group or collection arrives at the institution. As Michael Harvey reminds us, obtaining the physical support does not give us the right to make use of the object, except for its exhibition, or what some limitations permit. Josep Cruanyes recommends negotiating directly with the author of the photograph or with the heirs to acquire the necessary rights. Moreover, from the beginning, the archive can manage the identification of the rights and owners and obtain permission with a view to its possible future diffusion. What does the user need to know? What rights need to be solicited for the possible future uses?

There is one practice in particular, still widely used, that the advocates of free cultural heritage access are trying to correct: using the copyright as a way to maintain control of an archive group. It might be out of fear of not knowing who uses the content or how it is used, or fear of not being able to charge for certain uses. Copyright is being used as a kind of all rights reserved in order to prevent any user from using the content without permission. On some occasions, it is not up to the discretion of the institutions to authorize certain uses of the content because they don't possess the rights. However, when the content is in the public domain or they do possess the rights, why not permit its use in the manner that is most convenient for the user?

Specifically, there are many criticisms about reserving the rights to materials in the public domain. In countries that protect the mere photograph, such as Spain, some institutions, when considering the digitization of a work such as a mere photograph, have used this protection to once again submit the content to copyright protection, this time as rights holders. This means that content which was (finally) in the public domain and belonged to society in general, with all the benefits that this entails for innovation and creation, is once again privatized. In my opinion, the heritage institutions can play a crucial role by presenting themselves as guarantors of the public domain. There is practically no-one else who is concerned with ensuring that documents that are historically, culturally and socially valuable (though perhaps not economically), continue to exist and are accessible, regardless of their format, when the many years of protection have ended. Unfortunately, with this malpractice, a good opportunity is lost.

Throughout the Conference texts, it becomes very evident that this claiming of rights was a common practice for institutions that wanted to grant access while at the same time maintaining control over who used the archive groups and for what purpose. Josep Cruanyes, for

example, described the possibility of marking an image with a dry seal so as to avoid fraudulent uses and Andrea de Polo, for his part, made reference to the existence of technological solutions for safeguarding and protecting our rights and recommended ways to combine them in the case of copyright-protected photographs.

This claim to rights by way of the mere photograph has also occurred in other European countries, though it depends largely on how or if the mere photograph is regulated on a national level. Werner Matt considered that in Austria «[...] regarding mere reproductions (photocopies, etc.), even though, from a technical viewpoint they are photographic in nature, they do not possess any related rights; Taking advantage of this protection to claim rights besides is a malpractice that is affecting both photographic works and mere photographs ». On the other hand, the use of the protection depends largely on the knowledge of copyright law by the professionals in the sector. In countries where the protection of the mere photographs is not recognized, there are archives that claim rights to works that are in the public dominion, though there is probably no legal basis to do so. Moreover, just as Josep Cruanyes illustrated in 1992, it is necessary to consider and manage rights on two levels, which could exist if rights were claimed for digitization or other kinds of reproductions of the document or work. «In the case of photographs that reproduce works of art, it is necessary to consider both the rights of the photographer and those of the author of the work. If they are waived, if possible, the notice of copyright notice for the artist or heirs must be included ».

Although there are nuances to consider, like, for example, the private nature of a file, which may have interests that go beyond that of the public mission assigned to a public file, respect for the public domain is essential. So much so, that even the European legislator has made a pronouncement regarding this. The Directive on Copyright in the Single Digital Market, stipulates that for digitized

works in the public domain rights cannot be claimed due to the fact that the reproduction is a mere photograph.

One of the most important reservations that restrain some institutions from advancing towards open access seems to be the economic aspect. The significant investment made to digitize the heritage content does not always have the necessary financial backing. There is a certain pressure on some heritage institutions to ensure a financial sustainability that goes beyond public funding. As Michael Harvey commented regarding England, «In order to carry out their activities, no public archive can subsist exclusively on the money from subsidies. Moreover, organizations that are relatively small, like the regional film archives, simply do not have access to regular, foreseeable public funds». The author was of the opinion that «The tendency to use collections as a way to generate income is becoming an important aspect in the management of archives, as is the need to remain updated on the intellectual property law».

This topic could suggest that the economic incentives take precedence over the mission to preserve and disseminate. In 1992, Josep Cruanyes commented that it was necessary to consider what function the archives have when studying the intellectual property that will dictate its management, and that «We cannot approach these matters the way a commercial entity would. We must take into account that, as set forth in the Catalan Archives Law (Llei d'arxius de Catalunya,) that, as depositories of a cultural heritage of general interest, the objective of the archives is to conserve the cultural heritage and make it available to scholars for research». Opening up the archive group contributes to the dissemination of information, and that should not be overshadowed by the need to define a sustainable business model. In any case, it is necessary to ask ourselves, first of all: what economic loss would result from not charging for certain uses of the archival content? And secondly, is it worth sacrificing part of the archive's function, especially the one that

can harness what technology permits us to do today, and which is obtained by selling access to the content?

The big institutions that have headed the open movement pursue the objective of disseminating the collections and not creating a business model, probably because they enjoy a more privileged economic situation. They have demonstrated that the first doesn't necessarily exclude the second. Some have attracted more funding, others have attracted more public and, in general, they have been able to demonstrate the positive impact of their role in society. Some institutions that have followed their example have proposed the opening of the archive groups in phases, or by area, such as uses for research or education, or of groups that they consider to be especially apt for the general public. This allows them to make an initial evaluation of the effects before moving forward.

The step towards open access requires the archive to explore a new aspect: learning to communicate to the user, on-line and in general, if the content can be used and if there are any specificities they need to keep in mind. If this information is transmitted clearly, is easier to find and is standardized, all the better. This is why the use of the now well-known Creative Commons licenses and tools and its system of informing of the possibilities of carrying out certain uses or if the work is in the public domain, has increased in the heritage sector, just as José Antonio Millán set forth in 2008.

Even so, in their present state, the Creative Commons tools don't offer enough options for indicating some particularities common to this sector, such as the fact that the heritage institutions often don't possess the rights or don't know if the work is in the public domain or not. In order to deal with this situation, Europeana and the Digital Library of America created the Rights Statements Consortium, through which they have developed a series of declarations of rights for heritage institutions with the general idea of offering options when the possibilities of the Creative Commons just aren't adequate for

the context. Among the declarations, we find the following: the work is protected but its educational use is permitted (because the rights holder has authorized it), the work is in the public domain but it cannot be used commercially (due to the contract with the private entity that digitized the document), it is an orphan work or even that it has been impossible to determine what rights exist.

These two interoperable standards with their universal image and the legal code translated into so many languages, eliminate the difficulties that the specific, diverse and often complicated terms and conditions that had preceded them, represented for the users.

At the time of writing the text for the Conference, Andrea de Polo, showed some reticence about open access. This may have been due to the type of institution she worked with, or perhaps because of the common and accepted practice that was present in the sector at that time. Whatever the case, she considered, among other things, that: “The ethical aspect pertaining to the rights of the citizen who accesses the internet is leading to the growing belief by web users that they possess the right to use the internet and the multimedia world for free, with the conviction that everything found in digital format is, in theory, copyright-free». In any case, regardless of the user’s habit, perhaps it is more important to adequately inform them and gradually move towards developing a consciousness (if it still doesn’t exist) of respect for the author, the institution and the work. It mustn’t try to establish control, as that could end up limiting the possibilities of diffusion of the archive groups and collections and thus, the mission of the archive.

## **Conclusion**

The technological evolution has given rise to new ways of preserving and divulging archival content, and of serving the users.

Karl Griep said that he had no doubt about the advantages of being prepared as a sector «[...] so that our documents – that we must protect and preserve — but which on the other hand serve as documentation and sources of the past and serve as a way to intervene in the planning and determination of the future — may be accessed using the new technologies». The new technologies open up a series of possibilities, and it is up to the archivists to decide if and how they will contribute to their public interest mission. Today, we hear about artificial intelligence, text and data mining, and other possible ways to use technology to study and disseminate the archive heritage body - systems that the earliest texts of the Conference couldn't even imagine. It will be necessary to see the role copyright will play in all this and if the legislator will understand that creating obstacles to heritage doesn't help the authors, the industry, creation or innovation.

Looking back over texts from the Conference, it is evident that until a few years ago, sharing archival heritage content on-line was done very cautiously in order to control what the users did with the content they had access to. Now, with the current trend, the belief is that the more the archive shares, the more life the holdings acquire. If before we spoke of watermarks or of selling access to content, now, it's about how to simplify the conditions and even the legislation so as to eliminate as many barriers as possible. From the perspective of copyright, technology and the archives, the evolution is constant, and so, too, the adaptation. Collaboration between professionals is fundamental, in order to learn from one another and try to resolve complex questions that may not have answers, without perishing in the attempt.

This change is only possible with constant reflection, through opportunities like the Conference, and the legacy it has left behind.

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