



The Centre for Science, Culture and the Law at Exeter

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To: UN Expert Mechanism on the
Rights of Indigenous Peoples
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Re: Report on Repatriation of
ceremonial objects and human
remains under the UN Declaration on
the Rights of Indigenous Peoples

Submission of The Centre for Science, Culture and the Law at the University of Exeter

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1. INTRODUCTION

We bring the Expert Mechanism's attention to the importance of **intellectual property and related rights** (IPR) to the repatriation of ceremonial objects and human remains, and to the implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, articles 11, 12 and 31).

With this in mind, this submission outlines **key aspects of IPR** for states, cultural heritage institutions and Indigenous peoples to consider in the context of repatriation. This submission also proposes a **step-by-step strategy around IPR repatriation**.

IPR may come in the form of copyright (or authors' rights), performers' rights and other neighbouring rights, database rights, patents, plant breeders' rights, rights associated with traditional cultural expressions (TCE), traditional knowledge (TK) or sui generis protection of genetic resources.¹ This list is not exhaustive and further protection may be implemented by national jurisdictions in addition to the conventional IPR listed above.

It is important to highlight that IPR in heritage collections subsist in layers. Two main layers may be relevant in the context of repatriation. First, the underlying object (or manifestation

¹ See World Intellectual Property Organization, Traditional Knowledge, Traditional Cultural Expressions & Genetic Resources Laws Database <<https://www.wipo.int/tk/en/databases/tklaws/>> accessed 10 April 2020; see also Molly Torsen and Jane Anderson, 'Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archives' (World Intellectual Property Organization 2010) <https://www.wipo.int/edocs/pubdocs/en/tk/1023/wipo_pub_1023.pdf> accessed 10 April 2020.

of cultures) captured may be protected according to domestic law. Older and non-qualifying objects may fall within the public domain when the IPR term of protection has expired or never applied in the first place. This can depend on a number of factors such as the date of creation, subject-matter, date and place of publication, or nationality of the creator.

Second, IPR may also extend to reproductions, inventions, creations or registrations based on data about, or extracted from, those objects. For example, reproductions, such as a digital photograph or audio-video recording, may attract IPR protection separate from the object or manifestation it captures. Whether this is the case has been subject to much contention between experts, scholars, courts, and heritage communities of practice.² Another example includes the isolation or digital sequencing of genetic resources which may be subject to IPR protection, which can be similarly controversial.³

Claims to IPR in ceremonial objects, human remains and associated materials (such as archives or digitized collections) can be used to mediate access to such content and/or to the knowledge it holds. In this regard, IPR claims can directly affect the rights of Indigenous peoples “to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures” guaranteed by articles 11, 12 and 31 of UNDRIP, particularly when IPR claims are not made by Indigenous peoples themselves. For this reason, IPR must be addressed alongside any repatriation process to comply with the legal and equitable standards set by UNDRIP.

In this submission, we argue that **IPR claims and management in repatriated ceremonial objects, human remains and associated materials should belong to Indigenous peoples**. This approach should be adapted to each case of repatriation and may involve implementing flexible strategies whereby Indigenous peoples and institutions share the responsibility of managing IPR, where appropriate.

IPR considerations in objects and materials designated for repatriation are especially relevant to reproduction media. In an increasingly digital environment with instant and widespread access to data, only a comprehensive, IPR-minded approach will support the **integrity, sustainability and future-proofing** of complex (and often costly) repatriation efforts carried out by states, institutions and Indigenous peoples.

This submission is informed by our response to the Sarr-Savoy Report on the Restitution of African Cultural Heritage. Submitted to the French Ministry of Culture on 25 March 2019, our response highlights the aspects of IPR and digital cultural heritage that must be

² Andrea Wallace and Ellen Euler, “Revisiting Access to Cultural Heritage in the Public Domain: EU and International Developments,” SCuLE Working Paper No. 20-1 (under review) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3575772> accessed 14 April 2020; Kenneth D Crews, “Museum Policies and Art Images: Conflicting Objectives and Copyright Overreaching” (2012) *Fordham Intellectual Property, Media, and Entertainment Law Journal* 22, 795-832.

³ Chidi Oguamanam, “The Protection of Traditional Knowledge: Towards a Cross-Cultural Dialogue on Intellectual Property Rights” (2004) *Australian Intellectual Property Journal* 15(1), 34-59.

considered during restitution efforts.⁴ The response is available online and was republished in open access by the Journal of Intellectual Property, Information Technology and E-Commerce Law (2019, volume 10, pp 115-129), in both English and French.⁵ This submission expands on these recommendations and adapts them to UNDRIP.

2. KEY ASPECTS OF IPR IN REPATRIATED MATERIALS

This submission and the strategy outlined below are informed by the following baseline considerations:

- **IPR claims mediate access and use.** A claim to IPR in the knowledge held in ceremonial objects, human remains, or associated media, carries the ability to mediate public access, use, and engagement, which is especially relevant for Indigenous peoples.
- **IPR subsistence in reproductions is contested.** The validity of IPR claims to reproductions of ceremonial objects and human remains is contested and subject to increasing global legal and social controversy. Even in jurisdictions with high levels of harmonization on IPR (e.g., EU member states), national responses to the subsistence of authorship in digital reproductions currently vary.⁶
- **IPR management is a cultural and curatorial prerogative.** When IPR arises, its management is a cultural and curatorial prerogative, as is the initial decision about whether and what materials to extend access to and/or reproduce. These prerogatives should belong to the Indigenous communities of origin.
- **Digital reproduction and open-access policies may not be appropriate.** The current practice of Western policy-makers, governments and heritage institutions campaigning for and leading digitization projects according to Western values and priorities, such as open access, may be appropriate for their own cultural heritage. As applied to Indigenous cultural heritage, it carries the potential to sustain the very approaches the UNDRIP takes great care to remedy.
- **IPR management impacts the implementation of UNDRIP.** Noting the above, the prerogatives or rights granted via intellectual property law overlap significantly with rights guaranteed by articles 11, 12 and 31 of UNDRIP. As such, it is critical that repatriation processes include IPR in agreements made between states or institutions and Indigenous peoples.
- **Flexibility of IPR.** IPR are flexible and can be tailored to accommodate nuanced approaches to caring for ceremonial objects, human remains and associated materials. The private law nature of IPR allows rightsholders to address IPR

⁴ Mathilde Pavis and Andrea Wallace, "Response to the 2018 Sarr-Savoy Report: Statement on Intellectual Property Rights and Open Access relevant to the digitization and restitution of African Cultural Heritage and associated materials," (2019) Journal of Intellectual Property, Information Technology and Electronic Commerce Law 10(2), 115-129 <<https://www.jipitec.eu/issues/jipitec-10-2-2019/4910>>; French version available at <<https://www.jipitec.eu/issues/jipitec-10-2-2019/4911>> accessed 10 April 2020.

⁵ Felwine Sarr and Bénédicte Savoy, "The Restitution of African Cultural Heritage: Toward a New Relational Ethics" (November 2018) <www.restitutionreport2018.com> accessed 10 April 2020.

⁶ Wallace and Euler, n. 2.

concerns and align with UNDRIP principles prior to, or even without, legislative implementation by states. Institutions and Indigenous communities of origin should be encouraged to take advantage of this flexibility to devise strategies for the equitable management of repatriated materials, including IPR.

3. STRATEGY AROUND IPR DURING REPATRIATION

This section provides a step-by-step strategy for institutions and Indigenous peoples to integrate key aspects of IPR in their repatriation process. This might include, inter alia:

- (1) An inventory of IPR, sui generis rights, and related questions with the physical and digital collections;
- (2) Agreements to transfer existing rights, where possible, to Indigenous peoples as part of the repatriation process (or waive rights completely);
- (3) For materials remaining in custodial care, agreements regarding rights management during the term of protection and after its expiration (including where rights are transferred to the community);
- (4) For materials remaining in custodial care, agreements to allow or prohibit future reproduction and rights management;
- (5) Level(s) of access permitted to all materials in question.

Each aspect is addressed below.

3.1. Inventories

Any inventory process around repatriation should explore IPR, sui generis rights, and ethical questions:

- (1) With respect to physical collections, whether any IPR or sui generis rights exist in:
 - (a) the ceremonial objects and human remains; or
 - (b) the associated documentation or archival materials; and
 - (c) who holds the rights.
- (2) With respect to digital collections, whether any IPR or sui generis rights exist in:
 - (a) the digital surrogates (i.e. facsimiles or reproductions); or
 - (b) other digital media held in collections (e.g. metadata, paradata, digital sequencing, or database); and
 - (c) who holds the rights.
- (3) With respect to existing IPR or sui generis rights in digital collections:
 - (a) whether the IPR claim is, in fact, appropriate for the digital heritage collections from an ethical standpoint; and
 - (b) who may be the most appropriate rightsholder.

As discussed above, the validity of IPR claims in certain digital materials is subject to increasing controversy. These materials should be thoughtfully considered during inventory and fully integrated within restitution policies. This process should inform points 2-5 as discussed below.

3.2. Agreements to transfer or waive rights

IPR and sui generis rights can be transferred or waived by the person or organisation who holds them.⁷ IPR transfers and waivers are important to repatriation. They are the legal vehicles through which an institution materializes their wider commitment to article 31 by securing Indigenous people with the IPR that mediates use and control of manifestations of their cultures.

Transfers can be flexible and tailored to the needs of a particular repatriation project. They are governed by contract law (applicable to the agreement) and intellectual property laws (applicable to the repatriated materials).

Transfers operate on the premise that IPR subsists in material, like a photograph of a sacred object, and that the institution is the legal owner of these rights. First ownership of IPR is determined by international and national legislation. No individual agreement or contract can declare that IPR exists or that one party is the first author, inventor or owner of the material as a contractual term.

Assignments, licences and waivers

IPR transfers generally occur via assignments or licences. Assignments transfer IPR from an owner to a receiving party, who becomes the (new) IPR owner. Assignments can be limited in scope and time. This means that the owner can assign certain rights while retaining others, or agree to the assignment for a limited period of time.

By contrast, licences are permissions granted by an owner to a receiving party (licensee) for limited use of IPR protected material. Licences can be limited in scope, in time, and by geographic territory. Licences can also be exclusive, meaning that the owner grants permission(s) a single licensee. In doing so, the owners forego their right to allow third parties to use the protected materials in ways covered by the exclusive licence.

Not all jurisdictions allow for the assignment or licensing of future IPR (i.e. rights arising after a transfer agreement has been concluded).

Some IPR cannot be transferred, but can be waived. By waiving IPR, the rightsholder retains the protections but agrees to not exercise them. For example, this is relevant to authors' moral rights in jurisdictions that permit waiving moral rights but prohibit their transfer.

Agreements in writing

In most jurisdictions, assignments and waivers must be made in writing to be legally binding. Some jurisdictions implement more onerous formal conditions for assignments and exclusive licences by requiring the agreement to list each right transferred and the associated remuneration. Failing to comply will void the agreement.

Even where it is not legally required, it is good practice to record such agreements in writing. When doing so, parties must specify:

- (a) **whether the party or parties intend to assign, licence or waive** the IPR. Because the term 'transfer' can be interpreted to mean 'assignment' or 'licence', it is best avoided when drafting.

⁷ Ownership of IPR is determined by the law(s) who provide for the protection.

- (b) **the party or parties benefitting** from the assignment, licence or waiver. In case of a licence, whether the licence is exclusive.
- (c) **the financial compensation** associated with the assignment, licence or waiver of IPR (if applicable).
- (d) **whether the assignment or licence is partial** or extends to all uses in the IPR bundle of rights.
- (e) **whether the assignment, licence or waiver is limited in time**, such as in perpetuity or for a limited period.
- (f) **whether the assignment, licence or waiver is geographically limited**.
- (g) In the context of a licence, **whether the licensee may transfer the licence** to third parties with or without the consent of the owners.
- (h) **whether the IPR may ever revert back to the owners**.

In this way, IPR transfers can provide flexible and creative measures for more equitable management of cultural materials. First, IPR can be transferred even prior to repatriation of the physical object. Second, IPR can be transferred as a symbolic gesture when the law does not permit repatriation of the physical object. Finally, where appropriate, IPR can be transferred to Indigenous peoples while managed by the institution. Any economic benefits from the IPR commercialisation may go to the Indigenous peoples themselves.

Ethical guidelines for management of non-transferable or unwaivable IPR

As mentioned above, some international and national laws specify that certain IPR may not be transferred or waived. For example, countries differ on authors' and performers' moral rights management. In common law jurisdictions, moral rights legislation may prohibit the transfer but allow for their waiver.⁸ By contrast, civil law jurisdictions may prohibit both transfer and waiver.⁹

Institutions who are regarded as the legal owners of non-transferrable or unwaivable rights in repatriated materials (physical and digital) should co-develop, with Indigenous peoples, guidelines for the ethical use of such IPR. While the guidelines could be approached as a contractual agreement, they are unlikely to be legally binding. Guidelines should be treated as a moral or ethical pledge to appropriate IPR management taken by the institutions in recognition of the repatriation process.

The remaining sections address the need to develop comprehensive permissions and access policies for materials (physical and digital) remaining in custodial care.

⁸ See for example in the United Kingdom, Copyright, Designs and Patents Act 1988, s. 87 and s. 205J <<http://www.legislation.gov.uk/ukpga/1988/48/contents>> accessed 10 April 2020.

⁹ See for example in France, Code de la propriété intellectuelle (Intellectual Property Code), Articles L 121-1 and L 212-2 <<https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006069414>> accessed 10 April 2020. It should be noted that the moral right provision may vary within jurisdictions of common or civil law tradition. Further, in jurisdictions where moral rights survive the death of the author or performer, the rights may also be transferred via testamentary dispositions.

3.3. Agreements around IPR management for materials (physical and digital) remaining in custodial care

In some cases, institutions may continue stewarding objects for Indigenous peoples either with their consent or due to inflexible national legal rules around repatriation. They may also retain copies of associated materials for catalogue or research purposes with consent.

Wherever possible, agreements should consider appropriate IPR management for materials remaining in custodial care, including when the IPR is transferred to Indigenous peoples. The agreement should cover whether existing or future IPR in those materials can be subject to registration, transfer or waiver, and how. Any policies must be developed in tandem with Indigenous communities.¹⁰

This agreement should also consider appropriate reuse of materials once rights expire and pass into the public domain. This may be more relevant to documentation and associated materials remaining in custodial care.

3.4. Agreements to allow or prohibit future reproduction and rights management for materials remaining in custodial care

Where institutions continue stewarding cultural materials of Indigenous peoples, they should determine, with Indigenous peoples, whether digitization (even for preservation¹¹) is appropriate. This assessment is particularly important in the context of ritual or funerary objects and human remains. Such materials (including their documentation and archival materials) might embody a spirit, personhood or life. For this reason, institutions should seek permissions from Indigenous peoples prior to digitization, wherever possible. Such permissions should be obtained even if the materials are part of the public domain according to international or national laws.

If suitable, the agreement should consider the purpose and formats for digitization. Institutions should extend principles of dignity and respect to any digital and associated materials.

3.5. Level(s) of access permitted to all materials in question.

Finally, agreements should consider whether future access is appropriate and, if so, to whom and for what purposes.¹² This might include parameters defining onsite access by Indigenous peoples, curatorial staff, researchers, and/or the general public; or parameters defining wider online access to and reuse of digital materials and IPR. This latter consideration is especially relevant in light of growing “open access” movements like Open GLAM (Galleries, Libraries, Archives, and Museums), in which the institution waives (or already has waived) IPR in digital materials and releases them online. Open access and open

¹⁰ Some initiatives have been developed to support cultural permissions labelling and intellectual property rights, like RightsStatements.org and Local Contexts. See ‘RightsStatements.org,’ <<https://rightsstatements.org>> accessed 10 April 2020; see also ‘Local Contexts,’ <<http://localcontexts.org>> accessed 10 April 2020.

¹¹ T-Kay Sangwand, “Preservation is Political: Enacting Contributive Justice and Decolonizing Transnational Archival Collaborations,” (2018) KULA: knowledge creation, dissemination, and reservation studies 2(1).

¹² Powell, S, Moriarty, A, O’Donovan, M, Sanderson, D. The “Open by Default” Journey of Auckland Museum’s Collections Online, SocietyByte 2017 <<https://www.societybyte.swiss/2017/08/21/the-open-by-default-journey-of-auckland-museums-collections-online/>> accessed 10 April 2020.

licensing may not be appropriate for Indigenous cultural materials as it impedes their “right to maintain, control, protect and develop their cultural heritage” as guaranteed by article 31. Indigenous peoples should enjoy full autonomy in devising any access strategies to cultural objects and associated materials, both physical and digital.

4. FUTURE-PROOFING IPR DURING REPATRIATION (AND LIMITATIONS)

These recommendations aim to establish baselines for good practice but are not exhaustive. Approaches will be highly-specific and designed on a case-by-case basis according to a particular object, community, decision-making and/or belief system. Blanket or comprehensive anticipatory policy design may therefore be impracticable or impossible, aside from policies that transfer decision-making authority to and seek informed consent from Indigenous peoples. In this sense, future-proofing IPR in repatriation will come from ongoing, reiterative approaches that grant full autonomy and agency to Indigenous communities to control that process. We recommend taking a reiterative approach to IPR agreements around repatriation materials, which will support maintaining the integrity and sustainability of IPR repatriation policies going forward.

Certain limitations may impact the integrity or durability of IPR agreements in repatriation in practice. First, some IPR has already been inserted into the market (e.g. products developed using TK or genetic materials) or released online (e.g. digital reproductions and metadata associated with ceremonial objects and human remains). In some cases, reuse is permitted under open licenses and public domain dedications. Such content is unable to be recalled and is already being incorporated into new cultural goods and products. Accordingly, articles 11 and 31 rights and any exercise of sovereignty over these materials and future manifestations of culture have already been compromised. IPR considerations during repatriation processes are therefore urgent to avoid further harm.

Second, the law in this area is also subject to change, which may impact agreements on IPR made between institutions and Indigenous communities. This is because the repatriation of cultural heritage and associated materials implicates a range of legal areas from IPR to contract, employment, property, public and private international law, and so forth. As reform proceeds on a (relatively) incremental basis, parties may need to monitor impacts and effects to accommodate new legal and ethical standards. Updating contracts under changing regulatory landscapes is routine under current IPR regimes.

Finally, technologies will progress and new challenges may arise. Information management and participation by Indigenous communities and organizations within institutional heritage management must similarly adapt and grow.¹³ Agreements to co-manage any physical and digital heritage remaining in custodial care should be updated accordingly and receive full consent of the relevant communities prior to implementation.

¹³ See “Indigitization - Toolkit for the Digitization of First Nations Knowledge” <<http://www.indigitization.ca/>> accessed 10 April 2020.

5. CONCLUSION

Legal paths to repatriation may take time to materialize and be implemented. However, institutions can engage in this process now by repatriating IPR. Institutions and Indigenous peoples can rely on the private and flexible nature of IPR to tailor repatriation strategies that transfer, set aside, or waive rights in the relevant materials. Copyright permissions can be adapted or reformed by institutions and Indigenous communities to accommodate ethical and cultural permissions around heritage management, access, and reuse.

The above recommendations will need to be revisited and informed by ongoing repatriation projects, evidence-based good practices, and the goals and belief systems of the respective Indigenous communities.

Should the Expert Mechanism on the Rights of Indigenous Peoples require any additional or clarifying information, please do not hesitate to contact The Centre for Science, Culture and the Law at the University of Exeter.

Sincerely,

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RESPONSE TO THE 2018 SARR-SAVOY REPORT

Statement on Intellectual Property Rights and Open Access relevant to the digitization and restitution of African Cultural Heritage and associated materials

Dr Mathilde Pavis and Dr Andrea Wallace | 25 March 2019

EXECUTIVE SUMMARY

This response challenges the recommendations made by the Sarr-Savoy Report to systematically digitize and make available online as “open access” all of the African Cultural Heritage designated for restitution. Instead, we write to acknowledge the complex issues regarding intellectual property rights and open access policies around these materials, and we call on the French Government to dedicate further resources to researching and co-developing digitization solutions with African communities of origin. Accordingly, we advise against adopting the Report’s blanket recommendations on digitization and open access for many reasons:

- First and foremost, the Report’s recommendations, if followed, risk placing the French Government in a position of returning Africa’s *Material* Cultural Heritage while retaining control over the generation, presentation, and stewardship of Africa’s *Digital* Cultural Heritage for decades to come.
- Second, and related to this, the validity of intellectual property claims in certain digital materials and the implementation of open access policies are contested and subject to increasing global legal and social controversy. In France, open access to digital heritage collections is almost nonexistent, thus the French Government should refrain from taking any position that creates a double standard by requiring African Cultural Heritage to be digitized and made available when the same demands are not made of its own national institutions.
- Third, restitution must not be conditioned upon any obligations to allow the digitization of materials held in France and open access commitments. Such decisions around digitization (including the waiver of any rights for open access purposes) are cultural and curatorial prerogatives. Accordingly, they must be made by African communities of origin, as they impact how heritage may be represented, preserved, and remembered. African communities must therefore enjoy full autonomy in devising any access strategies for restituted material *and* digital cultural heritage.
- Finally, attempts to truly decolonize French institutions of African *Material* Cultural Heritage must carry through to the treatment of archival and digital materials, including those remaining in France. Digital heritage today is as important as material heritage and should be thoughtfully considered and fully integrated within future restitution policies and collections management. The restitution of African *Digital* Cultural Heritage therefore cannot be treated as an afterthought. With this in mind, France should consider the opportunity to aid African communities in this process, both practically and financially, alongside other forms of reparation.

For these reasons, we urge the French Government to pursue further research and consultation with the key stakeholders around these issues prior to and during the processes designed for restitution of African Cultural Heritage. The French Government is uniquely positioned to explore equitable practices for how these discussions should proceed and the methodology that follows. The outcomes co-developed through such an opportunity will aid other governments and institutions attempting to tackle similar long-overdue restitution initiatives.

RESPONSE TO THE 2018 SARR-SAVOY REPORT

Statement on Intellectual Property Rights and Open Access relevant to the digitization and restitution of African Cultural Heritage and associated materials¹

25 March 2019

INTRODUCTION

We write in response to the Sarr-Savoy Report entitled “The Restitution of African Cultural Heritage: Toward a New Relational Ethics”. We note the Report’s sensitive, informed, and nuanced review of the complex restitution process, as well as its acknowledgement of the considerable efforts and cooperation required from all stakeholders involved.

We seek to bring the French Government’s attention to issues regarding any intellectual property rights and open access policies designed during this restitution process. The Sarr-Savoy Report only briefly addresses this topic. The Report recommends systematically digitizing and making available online all African Cultural Heritage designated for restitution. While it suggests a dialogue with other involved institutions and parties is necessary, the Report advocates in favor of “a radical practice of sharing, including how one rethinks the politics of image rights use” and sets a firm objective for “free access to these materials as well as the free use of the images and documents”.²

We would advise against adopting a blanket recommendation of free and open access for digital materials. We suggest the same nuanced attention the Report pays to objects of African Cultural Heritage and their histories be paid to the digital reproductions (hereafter “digital surrogates”), documentation, and associated archival materials. We ask the French Government to consider the following context motivating this response:

- Digital heritage today is as important as material heritage and should be thoughtfully considered and fully integrated within future restitution policies.
- The validity of intellectual property claims to digital cultural heritage is contested and subject to increasing global legal and social controversy. Within the EU, national responses to the subsistence of authorship in digital surrogates currently vary.
- A claim to intellectual property rights in digital surrogates carries the ability to mediate public access, use, and engagement, which is especially relevant for communities of origin. At present it remains unclear whether the Report recommends waiving any intellectual property rights arising or takes the position that such rights fail to arise in digital surrogates of public domain works.
- The management of intellectual property is a cultural and curatorial prerogative, as is the initial decision about whether and what materials to digitize. These prerogatives should belong to the communities of origin.

¹ Mathilde Pavis and Andrea Wallace, ‘Response to the Sarr-Savoy Report: Statement on Intellectual Property Rights and Open Access relevant to the digitization and restitution of African Cultural Heritage and associated materials’ (25 March 2019) CC BY 4.0 (<https://creativecommons.org/licenses/by/4.0/>).

² Sarr-Savoy Report, 67-68 in the English version (58 in the French version).

- Open access to digital surrogates of cultural heritage held by French institutions is almost nonexistent.³ The Government should refrain from taking any position that requires restituted cultural materials to be digitized and made available as open access, especially when the same demands are not made of its own national institutions.
- The current practice of Western governments and heritage institutions campaigning for and leading digitization projects according to Western values and priorities, such as open access, may be appropriate for their own cultural heritage. As applied to non-Western cultural heritage, it carries the potential to sustain the very colonial approaches the Report takes great care to denounce.

The lack of attention paid to digitization plans and intellectual property rights in the Report makes it difficult to critique these issues with any specificity. Despite this, we argue the current recommendations, if adopted, greatly undermine the Report's core aim to establish "new relational ethics" in the ownership and management of African Cultural Heritage. These same aims must be extended to Africa's archival and digital cultural heritage. It simply is not enough to return the material cultural heritage while retaining any potential right to digitize, commercialize, and control access (even by mandating "open access") to another community's digital cultural heritage.

For these reasons, the Sarr-Savoy Report's recommendations for the digitization and management of cultural content must be critically examined. We urge the French Government to do so before proceeding with restitution. Further consultation and research with the key stakeholders identified must be pursued prior to and alongside restitution efforts. Attempts to truly decolonize French institutions of African *Material* Cultural Heritage must carry through to the treatment of archival and digital materials. France therefore holds a unique position to explore equitable opportunities for how restitution will proceed and be integrated with the digital realm.

This response proceeds as follows: Section 1 provides an overview of the legal issues relevant to the discussion; Section 2 addresses the Report's framing of intellectual property rights and open access, while Section 3 speaks to the concerns it raises. Section 4 concludes with recommendations, but these are not exhaustive.

1. Overview of Intellectual Property Rights in Digital Cultural Heritage (and Open Access)

As an initial matter, it should be stressed that the legal issues implicated by digitization are worthy of their own report. This response does not attempt to accomplish this, but highlights the additional complex legal and social interrogations that are required. These include examinations of international and national legal measures, colonial systems of value, the complex nature of digital content and its production, and cultural attitudes toward the treatment of heritage.

First, the minimum standards required for copyright protection and related rights are set via national legislation, which is harmonized through international and regional agreements that bind a wide range of countries. Having said that, not all countries are signatory to these agreements. As such, they may not implement the same level of intellectual property rights or associated standards of "open access" recognized by, for example, French law. Any restitution agreement must account for these variations.

³ See Andrea Wallace and Douglas McCarthy, 'Survey of GLAM open access policy and practice' <https://docs.google.com/spreadsheets/d/1WPS-KJptUJ-o8SXtg00llcxq0IKJu8eO6Ege_GrLaNc/edit#gid=1216556120>.

Second, the subsistence of “rights”, specifically “intellectual property rights”, varies according to the digitization processes involved. Two categories of digital materials are relevant for restitution purposes:

- (a) **Born-digital material** describes digital items of cultural heritage that are records of particular human or technological expressions, especially for intangible cultural heritage expressions. This can include photographic, audio, or audio-visual records of performances, rites, or oral traditions, or the metadata associated with the creation and manipulation of the digital item. For clarity, we will refer to this category as *digital records*.
- (b) **Digitized material** describes digital items of cultural heritage, which may or may not still exist, made for archival or reproduction purposes in a digital format. These digital items may range in quality depending on the purpose of digitization or the reproduction technologies at hand, but can include digital photographs or scans of two-dimensional and three-dimensional objects and associated archival materials. For clarity, we will refer to this category as *digital surrogates*.

An extensive ongoing debate surrounds the intellectual property protection available to digital records and digital surrogates (hereafter “digital heritage collections”). And, internationally, there is a lack of consensus on whether intellectual property rights subsist in such content and, if so, who owns them. This uncertainty cannot be resolved by establishing a blanket “open-access” policy for digitized African Cultural Heritage.

To further complicate the matter, not only might *layers* of intellectual property rights subsist in these digital heritage collections, but the heritage sector overwhelmingly adopts inconsistent and subjective definitions of “open” when enabling access. These policies are designed according to each institution’s needs and desires, revealing a wide spectrum of “open” and its interpretation among communities of practice.⁴

With regards to the *layers* of intellectual property rights, two primary layers might subsist in digital heritage collections.⁵ First, the underlying cultural heritage expression or object captured may be protected according to domestic law. By contrast, older and non-qualifying heritage may fall within the public domain when the term of copyright has expired or never applied in the first place. This can depend on a number of factors such as the date of creation, subject-matter, date and place of publication, or nationality of the creator.

Second, the digital material itself (*e.g.*, a digital photograph or audio-video recording) may attract copyright or a related right independent from the work it captures. Whether this is the case has been subject to much contention between experts, scholars, courts, and heritage communities of practice. Many argue that faithful reproductions of cultural heritage lack the necessary originality to attract copyright protection altogether. Others take the position that rights likely subsist, but encourage the release of digital heritage collections via open licenses, such as a Creative Commons CC0 dedication or CC BY license.⁶ Evidence

⁴ See Andrea Wallace and Ronan Deazley, *Display At Your Own Risk: An experimental exhibition of digital cultural heritage* (CREATe 2016) <<http://displayatyourownrisk.org/publications>>; see also Wallace and McCarthy (n 2).

⁵ Often, especially with archival materials, a work may sustain multiple format transfers before it is digitized and access is extended online. See Andrea Wallace, ‘Mona Lisa’ in Claudy Op den Kamp and Daniel Hunter (eds), *A History of Intellectual Property of 50 Objects* (Cambridge University Press 2019).

⁶ Creative Commons, ‘CC0 “No Rights Reserved”’ <<https://creativecommons.org/share-your-work/public-domain/cc0/>>.

shows these licenses may be inaccurately applied when they fail to account for the status of the underlying work.⁷

This doctrinal uncertainty carries significant weight for digitization campaigns to enable the access and dissemination of knowledge, hence the critical nature of the issue for the heritage sector. On the one hand, digital heritage collections are costly to produce, maintain, and make available to the public. Claiming copyright can therefore enable cultural institutions to support digitization efforts by recouping the costs associated,⁸ or at least prevent third-parties (*e.g.*, commercial organizations) from freeriding on their investment.⁹ Other considerations might also impact whether heritage institutions claim or disclaim copyright in digital heritage collections.¹⁰ On the other hand, claiming copyright in digital surrogates of public domain works essentially diminishes the public domain and privatizes its contents,¹¹ which is of increasing importance today in an information society.

Heritage institutions, experts, and policymakers can be found on either side of this debate. To satisfy increased expectations to digital access, institutions have adopted “open access” policies ranging from simply making collections visible online to disclaiming copyright altogether and releasing high-resolution digital surrogates to the public domain. Many institutions restrict reuse of digital heritage collections to personal or non-commercial purposes, a premise that is noncompliant with the Open Knowledge International definition of “open” allowing free use of open data and content by anyone for any purpose.¹²

The situation of copyright in digital surrogates made in the European Union (EU)¹³ or Africa can vary considerably from one country to the next. Rights defined by geographic boundaries will apply according to the location in which digitization occurs. At present, we assume digitization will occur according to processes defined by the institutions of possession. This would implicate French and EU law, with a digital copy generated and retained by the institution and deposited in the open access portal, while the material African Cultural Heritage is returned to the country or community of origin.

⁷ Judith Blijden, ‘The Accuracy of Rights Statements on Europeana.eu’ (Kennisland 2018), <<https://www.kl.nl/wp-content/uploads/2018/02/The-Accuracy-of-Rights-Statements.pdf>>.

⁸ However, research shows the “level of revenue raised by museums through imaging and rights was small relative to the overall revenue earning capacity of the museum from retail, ticket sales, membership and fundraising” with most rights and reproductions services operating at a loss to museums instead of a profit. Simon Tanner, ‘Reproduction charging models & rights policy for digital images in American art museums’ (A Mellon Foundation Study 2004) <<http://msc.mellon.org/msc-files/Reproduction%20charging%20models%20and%20rights%20policy.pdf>>; see also Effie Kapsalis, ‘The Impact of Open Access on Galleries, Libraries, Museums, & Archives’ (Smithsonian Archives 2016) <http://siarchives.si.edu/sites/default/files/pdfs/2016_03_10_OpenCollections_Public.pdf>.

⁹ It should be stressed this choice should not be a discretionary operational matter if the legal threshold of originality is not satisfied.

¹⁰ For example, the donor restrictions might also define how access is extended and digitization proceeds.

¹¹ Guy Pessach, ‘[Networked] Memory Institutions: Social Remembering, Privatization and its Discontents’ [2008] 26 *Cardozo Arts and Entertainment Law Journal* 71. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1085267>.

¹² Open Knowledge International, ‘The Open Definition’ <<https://opendefinition.org/>>.

¹³ This is especially relevant when anticipating necessary accommodations following any copyright reform currently being considered by the European Parliament. Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market COM/2016/0593 final - 2016/0280 (COD). Other accommodations raised by the European Orphan Works and Public Service Information Directives must also be considered. Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works; Directive 2013/37/EU of the European Parliament and of the Council of 26 June 2013 amending Directive 2003/98/EC on the re-use of public sector information.

Moral rights must be considered as they may also pose a legal obstacle to digitization. This can manifest in two ways: first, with regards to moral rights in the material cultural heritage located in France, digitization requires consent from authors of the communities of origin; second, where digitization has occurred, moral rights may arise in the digital materials attracting copyright. Under French law, these rights provide authors with legal protection regarding the attribution (or paternity), integrity, disclosure, and withdrawal of the work. In practice, this means that an author or their estate could: object to the digitization or distribution of digital heritage collections; request that a work be attributed, anonymised or pseudonymised; or require the withdrawal of a work (physical or digital) from a collection.

A precondition of moral rights is that copyright must first subsist in the work. It is important to stress that France defines moral rights to be perpetual, inalienable, and imprescriptible. As such, moral rights survive copyright and continue to apply to many heritage collections passing into the public domain.¹⁴ A number of African countries, and, notably, many that were previously colonized or occupied by France, have implemented similar moral rights regimes. This is the case in Mali,¹⁵ Chad,¹⁶ Cameroon¹⁷ and Madagascar,¹⁸ to cite a few examples of the Sarr-Savoy Report. Regardless of a work's origin, French courts have declared moral rights enforceable during cross-border litigation held in France.¹⁹ Moral rights therefore have strong implications for digitization and open access.

Finally, other rights may subsist via related or *sui generis* rights due to national or regional legislation. For example, some African countries grant *sui generis* protection in traditional knowledge or traditional cultural expressions.²⁰ These rights will reside with the country or communities of origin and add another layer for consideration.

Consequently, "open access" policies will be contingent upon the various layers of protection discussed above. The next section examines the Report's minimal recommendations made in this respect.

2. Report's Discussion of Intellectual Property Rights in African Cultural Heritage and Open Access

As mentioned, the Sarr-Savoy Report takes great care to lay out the history and responsibility of France in relation to exploited African cultures and the challenges that underlie physical restitution and its administrative processes. Thus, a foundation has already been laid for an informed application of the Report's recommendations concerning memory work and reparations around archival materials and digital heritage collections.

We argue these interrogations are similarly crucial when examining the management of archival materials and digital heritage collections. The Report does not clarify a number of terms key to undertaking this

¹⁴ See Mathilde Pavis, 'ICH and Safeguarding: Uncovering the Cultural Heritage Discourse of Copyright' in Charlotte Waelde and others (eds), *Research Handbook on Contemporary Intangible Cultural Heritage Law and Heritage* (Edward Elgar 2018).

¹⁵ Loi n° 08-024 du 23 juillet 2008 fixant le régime de la propriété littéraire et artistique en République du Mali, Articles 12 and 16.

¹⁶ Loi n° 005/PR/2003 du 2 mai 2003 portant Protection du Droit d'Auteur, des Droits Voisins et des Expressions du Folklore, Articles 3, 22, and 23.

¹⁷ Law No. 2000/011 of December 19, 2000, on Copyright and Neighbouring Rights, Article 14.

¹⁸ Loi n° 94-036 Portant sur la propriété littéraire et artistique du 9 décembre 1994, Articles 20-22, 24.

¹⁹ Cass. 1re civ., 28 May 1991, Huston, n 89-19.725 and n 89-19.522; Bulletin 1991 I N 172, p 113.

²⁰ See World Intellectual Property Organization, *Traditional Knowledge, Traditional Cultural Expressions & Genetic Resources Laws Database* <<https://www.wipo.int/tk/en/databases/tklaws/>>; see also Molly Torsen and Jane Anderson, 'Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archives' (World Intellectual Property Organization 2010) <https://www.wipo.int/edocs/pubdocs/en/tk/1023/wipo_pub_1023.pdf>.

initiative. The relevant portion has been included and annotated to aid the discussion. On pages 67-68, the Report states:

b. Sharing of Digital Content

A large number of photographic cinematographic, or sound documents concerning African societies once held by former colonial administrations have recently been part of the intensive campaigns for digitization projects (such as the “iconothèque” in the Musée du quai Branly-Jacques Chirac). Within the framework of the project of restitutions, [1] these digitized objects must be made part of a radical practice of sharing, including [2] how one rethinks the politics of image rights use. Given the large number of French institutions concerned and the difficulty that a foreign public has for navigating through these museums, [3] we recommend the creation of a single portal providing access to the precious documentation in the form of a platform that would be open access. After a dialogue with the other institutions and parties involved, [4] a plan for the systematic digitization of documents that have yet to be digitized concerning Africa should be established, including the collections of (Ethiopian, Omarian, etc) manuscripts from the Bibliothèque nationale de France. [5] It goes without saying that questions around the rights for the reproduction of images needs [sic] to be the object of a complete revision regarding requests coming from African countries from which these works originated including any photographs, films, and recordings of these societies. [6] Free access to these materials as well as the free use of the images and documents should be the end goal.

Below we have set out the questions raised by these recommendations and taken guidance from the Report in addressing them.

[1] “these digitized objects must be made part of a radical practice of sharing”

The Report fails to detail any intentions around this “radical practice of sharing”. We assume this recommendation references the OpenGLAM (Galleries, Libraries, Archives, and Museums)²¹ movement and its desire to make works in the public domain accessible to generate new knowledge and creative reuses. This recommendation is laudable for its commitment to the democratic principles supporting free access and reuse of the public domain.²²

With this in mind, it should be acknowledged that intellectual property is a Western construct which carries its own colonial bias.²³ It follows that the public domain and “open access” are components of this colonial thinking. We should therefore resist casually exporting our associated understandings of “sharing” to non-Western heritage. Here, two points are important to make.

First, we assume from the Report that digitization is expected to occur in France prior to any physical restitution. As addressed above, this is likely to trigger the application of French and EU intellectual

²¹ OpenGLAM, ‘Home’ <<http://openglam.org>>.

²² These principles are currently threatened by dramatic cuts to public funding. But despite the decreases in government funding, a growing number of GLAM institutions are opting to waive any economic benefits secured by copyright to share some or all eligible digital heritage collections for any purposes. Wallace and McCarthy (n 2).

²³ See Pavis (n 14).

property law. At present, the very decisions made about these digitization processes will and are proceeding under host communities' oversight, precluding alternative African conceptions of how its cultural heritage might be represented and then presented to the public. Accordingly, there is a real risk of digitally imposing Western perspectives of how intellectual property should be exploited (or not) and how access should be extended to Africa's cultural heritage.

A claim to intellectual property carries the ability to exclude others from accessing the digital heritage collections' embodied knowledge. It also fortifies the circumstances precipitating an "impeded or blocked memory"²⁴ by awarding the rightsholder with control over access and reuse. Notably, the Report explores the juridical effect of 19th-century courts legitimizing the "right to pillage and plunder what had belonged to the enemy" and "the right to appropriate for oneself what one had taken away from the enemy".²⁵ As applied here, the law and its formalities have the similar ability to legitimize French systems of intellectual property to Africa's *Digital Cultural Heritage*, which appropriate for communities of possession certain rights connected to the very heritage designated for restitution. Instead, we must ensure any intellectual property rights arising during digitization are not subjected to the same historical annexation and appropriation of cultural heritage that this Report seeks to dismantle.

Second, intellectual property rights may not be appropriate, legally or culturally, for the digital surrogates of some objects and archival materials. As addressed above, this is a cultural and curatorial prerogative belonging to the community of origin. This initiative presents a novel opportunity to begin viewing certain materials as falling outside of intellectual property (and digitization) frameworks entirely.²⁶ Thus, this "radical practice of sharing" must be defined according to a co-developed understanding and encompass *only* the works deemed appropriate for digitization, unfettered open access, and public reuse, and *only* after the key stakeholders and communities of origin are consulted as to how this should proceed.

[2] "how one rethinks the politics of image rights use"

The Report fails to detail any intentions around "how one rethinks the politics of image rights use". We applaud the recommendation and raise the following concerns identified by the Report as central to this inquiry. And, while closely related to the "radical practices of sharing" discussion, it is important to treat the "politics of image rights use" as a separate matter for the following reasons.

First, the digitization process can expose African Cultural Heritage to a secondary "system of appropriation and alienation" identified by the Report as the crux of the problem.²⁷ Appropriation can occur due to the authorship role recognized by copyright, which carries the ability to symbolically appropriate and control the knowledge, personhood, and objecthood embodied in the material object.²⁸ Alienation can occur due to the reproduction process in two ways: both *symbolically* when concerns around any sensitive treatment of the material object are not transferred to its digital version, and *physically* when the digital surrogate is alienated from the material object upon its physical return to the community of origin and digital deposit with the open access platform. Any cultural preferences by these communities of origin, whether historical or present-day geographical communities, must be accounted for in rethinking the politics embedded in "image rights use".

²⁴ Sarr-Savoy Report, 31.

²⁵ Sarr-Savoy Report, 9.

²⁶ For example, a community may have permitted the audio or video recording of a secret ritual for specific research purposes, but refused for such recordings to be made more widely available to the public. Such requests by communities of origin must be accounted for, regardless of whether any intellectual property or *sui generis* rights subsist in the content captured.

²⁷ Sarr-Savoy Report, 2.

²⁸ Pavis (n 14).

But this rethinking might also apply to objects *not* designated for restitution during the digitization of African Cultural Heritage (and the heritage of other communities) legitimately held by French institutions. Heritage institutions pursuing this path of rethinking have developed comprehensive cultural permissions policies in tandem with the communities whose objects remain in their care.²⁹ A real opportunity exists here, as the Report notes, to “invert the colonial hegemonic relationship”³⁰ around the treatment of African Cultural Heritage (and the heritage of other communities), including the heritage remaining *in situ* with French institutions.

Second, these politics are fraught with their own historiographies. Similar to the restitution process detailed by the Report, any digitization and exploration of image rights “implies much more than a single exploration of the past: above all, it becomes a question of building bridges for future equitable relations”.³¹ We encourage the Government to consider how the digitization policies designed for these materials might also contribute to future equitable relations around cultural heritage and its treatment in light of these politics of the past.

[3] “we recommend the creation of a single portal providing access to the precious documentation in the form of a platform that would be open access”

The Report lacks any definition or contextual information to clarify the meaning of “open access”. As detailed above, “open” often reveals a variety of subjective interpretations put to practice, but at the very least it includes making content available for viewing online fee-free to extend access to non-local audiences. We assume this recommendation may have been motivated by one or all of the following rationales:

- a) To improve education surrounding: the history and damaging effects of colonization; the power dynamics underlying Western narratives and knowledge generation, the curatorial care, and treatment of African Cultural Heritage; the pressing need for more attention paid to restitution globally; and the important goals driving this initiative;³²
- b) To ensure African countries, communities, or institutions provide access to digital heritage collections of African Cultural Heritage to the same individuals and communities who enjoyed access prior to restitution;
- c) To prevent French institutions in possession of African Cultural Heritage from exercising and enforcing intellectual property rights in the digital surrogates they currently hold and might generate, which would impede the restitution of Africa’s *Digital Cultural Heritage*.

The spirit and aim of creating the open access portal aligns with OpenGLAM principles to “support the advance of humanity’s knowledge” so users may not only “enjoy the riches of the world’s memory

²⁹ For example, initiatives undertaken by the Field Museum in Chicago, USA and the Auckland War Memorial Museum in New Zealand are recentering Indigenous perspectives in collections management. See Alaka Wali, ‘Making Room for Native American Voices’ *Field Museum Blog* (8 November 2018) <<https://www.fieldmuseum.org/blog/making-room-native-american-voices>>; see also Sarah Powell, Adam Moriarty, Michaela O’Donovan, Dave Sanderson, ‘The “Open by Default” Journey of Auckland Museum’s Collections Online’ *SocietyByte* (August 2017) <<https://www.societybyte.swiss/2017/08/21/the-open-by-default-journey-of-auckland-museums-collections-online/>>. Other initiatives have been developed to support cultural permissions labelling and intellectual property rights, like RightsStatements.org and Local Contexts. See ‘RightsStatements.org,’ <<https://rightsstatements.org/>>; see also ‘Local Contexts,’ <<http://localcontexts.org/>>.

³⁰ Sarr-Savoy Report, 38.

³¹ Sarr-Savoy Report, 2.

³² This assumption is also informed by the Report’s discussion of the online portal on page 86, discussed *infra*.

institutions, but also to contribute, participate and share”.³³ Yet it must be challenged whether this decision to digitize and create an open access portal should lie with the communities of possession.

In the section titled “A Long Duration of Losses”, the Report criticizes the legal structures in place which enabled African Cultural Heritage’s “economic capitalization (through the art market) as well as the symbolic capitalization (through the museum)” that went “hand in hand with the wars of that same era”.³⁴ As applied to our era, the legal structures in place supporting mandatory systematic digitization and open access policies have the potential to reinforce both economic capitalization (through the exploitation of intellectual property) as well as symbolic capitalization (through the open access portal), marrying the two practices renounced by the Report.

[4] “a plan for the systematic digitization of documents that have yet to be digitized concerning Africa should be established”

With regards to the “systematic digitization”, we repeat the concerns previously expressed. We suggest taking a “slow digitization” approach,³⁵ which involves paying the same attention to the processes of digitization as we pay to the objects themselves, instead of rapidly digitizing African Cultural Heritage to make it available online. This naturally requires an examination of who is best placed to undertake this task and the systems of values informing this answer. On this point, scholars warn:

Paradoxically, there is a risk that an emphasis on digitizing cultural treasures will undermine the claim that digitization opens up and democratizes access to cultural heritage. *If digital libraries merely reiterate and reinforce long-standing cultural narratives and stereotypes, rather than enabling the exploration of forgotten and neglected collections, then they can become agents of cultural exclusion.*³⁶

We must critically examine whose needs are served by systematic digitization and explore how more nuanced systems serving the historical and geographical communities of origin might be established through collaborative work. At present, the Report’s focus on systematic digitization and mandatory open access risks “reinforcing existing cultural stereotypes and canonicities”³⁷ imposed on the material objects by the culture in possession.

The remaining extracts are only briefly addressed as they build upon previous sentiments.

[5] “It goes without saying that questions around the rights for the reproduction of images needs [sic] to be the object of a complete revision regarding requests coming from African countries from which these works originated including any photographs, films, and recordings of these societies.”

With regards to the need for revising “rights for the reproduction of images”, we agree with its spirit and overall aim. But it remains unclear what this statement means or how it might incorporate the concerns expressed above. What is especially unclear is whether the African countries mentioned have any say in this revision or will simply receive digital copies of the works upon request.

³³ OpenGLAM, ‘OpenGLAM Principles’ <<https://openglam.org/principles/>>.

³⁴ Sarr-Savoy Report, 11.

³⁵ See Andrew Prescott and Lorna Hughes, ‘Why Do We Digitize? The Case for Slow Digitization’ [2018] *Archive Journal* <<http://www.archivejournal.net/essays/why-do-we-digitize-the-case-for-slow-digitization/>>.

³⁶ Ibid (emphasis added).

³⁷ Ibid.

[6] “Free access to these materials as well as the free use of the images and documents should be the end goal.”

With regards to the final statement, the end goal of securing “free access” via the open access platform and “free use of the images and documents” does not appear to have been set by the African communities involved, but rather by the Report’s authors. It remains unclear how the authors reached this conclusion to make this recommendation, and we would welcome clarification. As discussed further below, this position is problematic as it sets a double standard of imposing open and free access to digital heritage collections of African Cultural Heritage yet similar obligations are not expected of French national institutions.

Building on this discussion, the next section presents concerns on the Report’s current position and recommendations relevant to the generation and stewardship of digital heritage collections.

3. Concerns on the Report’s Current Position and Recommendations

This response argues that a critical reflection on the role of intellectual property is necessary to better inform these “new relational ethics”. Our concerns primarily center around the desire to systematically digitize (and what that entails) and any subsequent rights arising in the process. These are summarized below.

As an initial matter, the same principles of dignity and respect the Report recognizes surrounding the object and its restitution must be extended to the object’s digitization. The Report criticizes the situation in 1960s Europe for defaulting on its obligation to address colonial structures deeply embedded in the ownership and management of African Cultural Heritage. Yet the Report lacks the same “structured reflection devoted to the role [digital heritage collections] could play in the emancipation of formerly colonized African countries”.³⁸ Our concern is that an equally important part of this process is being neglected, and that genuine efforts to reconstitute African Cultural Heritage may therefore succumb to the same mistakes made during (and prior to) the 1960s.

This is because just as there are “different interpretations or conceptions of cultural heritage”,³⁹ there are different interpretations or conceptions of *digital* cultural heritage. Digital cannot be treated as an afterthought. Any rebalancing of global cultural heritage must anticipate these different interpretations or conceptions and, most importantly, be motivated by the interests of the relevant communities in documenting and sharing their own material heritage. This rebalancing must account for alternative conceptions of objecthood, authorship or personhood, representation and presentation, *and* digital heritage, thereby “releasing oneself from the lone framework of European thought”.⁴⁰

As a secondary matter, whether rights subsist in digital heritage collections, and who owns them, is a legal doctrinal question with no certain answer under French law, and one which is unlikely to be settled before restitution begins as outlined by the Report.

In the absence of any clear legal guidance, the French Government ought to, at least, formulate a politically-sound position in its stead. This position should consider that (a) French institutions claim intellectual property rights in digital heritage collections to the fullest extent, and (b) very few French institutions make some or all collections available under open-compliant policies for any purposes.⁴¹ The

³⁸ Sarr-Savoy Report, 18.

³⁹ Sarr-Savoy Report, 29.

⁴⁰ Sarr-Savoy Report, 33.

⁴¹ Those known to the authors of this response include: (1) Alliance Israelite Universelle; (2) Babord-Num (Université de Bordeaux); (3) Bibliothèque de l’Institut national d’histoire de l’art; (4) Bibliothèque de Rennes Métropole; (5) Bibliothèque municipale de Lyon; (6) Bibliothèque nationale et universitaire, Strasbourg; (7) Centre

Government should therefore avoid adopting any strict open access recommendation that creates a double standard whereby French institutions have no open access obligations regarding their own digital heritage collections, yet African institutions and communities do.

We understand the recommendations made by the Report regarding the rights vested in African digital heritage collections aim to promote the free circulation of information and knowledge. This is, undeniably, a laudable and defensible pursuit. However, in light of the complex legal loopholes framing digital heritage collections and mediating access today, the Report's recommendations risk placing the French Government in the position of returning Africa's *Material Cultural Heritage* while retaining control over the generation, presentation, and stewardship of Africa's *Digital Cultural Heritage*. This recommendation is therefore untenable in practice.

4. Alternative Recommendations

In light of the arguments presented, we make the following alternative recommendations, which are by no means exhaustive. Here, we choose to briefly address the preliminary decisions around digitization and access, stress the necessary adjustments to relevant legal frameworks to aid restitution, and highlight some further opportunities posed by open access policies and platforms.

Digitization and African Cultural Heritage

First and foremost, decisions regarding digitization and open access must rest solely with the country/ies, community/ies, or institution(s) to whom the cultural heritage is returned. **Put simply, restitution must come at no obligation to commit to or guarantee digitization and open access.**

Digitizing and managing rights in digital heritage collections is a curatorial process with an impact on how heritage is represented, preserved, and remembered. Communities of origin should be trusted to make these decisions about their own restituted heritage. The opportunity for France to aid African communities in this process, both practically and financially, should be considered alongside other forms of reparation.

Moreover, a curatorial decision to embrace open access is neither neutral nor insignificant. It can involve surrendering control over how heritage is presented, reproduced, and recorded once made available online. For communities seeking to first re-appropriate and reacquaint with their material cultural heritage, this sensitive decision cannot be rushed. This is not to suggest that digitization and/or open access are undesirable outcomes of any restitution agreement,⁴² but that such decisions must be made *solely* by the African country/ies, community/ies, or institution(s) to whom the cultural heritage is returned.

Necessary Adjustments to Relevant Legal Frameworks

Second, the status and management of digital heritage collections is a paramount issue in today's digital age. These collections hold an increasingly prominent place within our heritage institutions. **For this reason, consultation on the digitization process, including the intellectual property rights to be claimed, recognized, and conferred to African Digital Cultural Heritage is as important as the negotiations involving any property rights in the material objects designated for restitution.**

National de la Danse; (8) Lo CIRDOC (Occitanica); (9) Musée d'art et d'histoire de Saint-Brieuc; (10) Musée de Bretagne; (11) Musée de Die; (12) Musée des Augustins; (13) Musée Saint-Raymond. Wallace and McCarthy (n 2).

⁴² The Report highlights Achile Mbembe's framing of how "these societies generated open systems of mutual resource-sharing concerning the forms of knowledge at the heart of participative ecosystems, wherein the world is a reservoir of potentials". This is a meaningful framing of open access, but, importantly, it comes from the community of origin. Sarr-Savoy Report, 34 (quoting Achile Mbembe, *Notes sur les objets sauvages*, forthcoming).

Such a consultation must revisit and expand on the necessary adjustments to the relevant legal frameworks. While the Report’s final section entitled “Accompanying the returns” sets out the chronological, juridical, methodological, and financial framework for material restitution, it lacks any general framework for approaching questions of digitization and intellectual property management.⁴³

As an initial matter, the Report suggests undertaking an inventory of all pieces of African Cultural Heritage conserved in French collections.⁴⁴ We suggest that any inventory process should also explore: (1) whether any intellectual property rights exist in the *material* heritage, especially with regards to documentation or archival materials; (2) whether digitization (even for preservation) is appropriate and, if so, for what purposes; (3) whether access is appropriate and, if so, for what purposes; (4) whether any intellectual property rights, or other *sui generis* rights,⁴⁵ are (a) recognized in digital surrogates or other digital records *already* held in institutional collections, or (b) might arise in digital heritage collections during *future* digitization processes; (5) whether such intellectual property rights are, in fact, appropriate for the digital heritage collections; and, if so, (6) who may be the most appropriate rightsholder (and subsequently whether any assignment of rights can be arranged).

At the same time, any adjustments of French legal texts to adapt the public property obligations and inalienability posing the principal obstacle to restitutions must also consider intellectual property obligations and the implications of rights recognized in perpetuity.⁴⁶ Such adjustments should be reflected in any bilateral agreements envisioned by the Report.⁴⁷ Doing so will require more than the current cursory considerations of “image rights” and open access. Accordingly, deeper reflection and consultation is imperative before digitization proceeds.

Further Opportunities Posed by Open Access Policies and Platforms

Finally, we turn to the opportunities posed by open access policies and platforms. Relying on the Report’s own recommendations concerning material cultural heritage, **we call on the French Government to undertake a “structured reflection devoted to the role [digital heritage collections] could play in the emancipation of formerly colonized African countries”**.⁴⁸ For this structured reflection, we recommend focusing on two areas: the first regards the portal and the second regards the opportunities outlined in pages 85-86 (“Popular Appropriations”).

In creating any portal,⁴⁹ the Government might consider looking to existing models of digital heritage collections, cultural data aggregators, and online platforms designed by organisations that have successfully delivered similar portals. The Government could integrate models already developed by Europeana, Wikimedia, or GitHub to structure and host content to avoid the expense of commissioning redundant research. For example, projects, like Europeana, have developed processes by which standardized metadata and digital infrastructures enable the aggregation of content from different institutions of various sizes and structures. And many institutions use Wikimedia Commons and GitHub to host content and share it openly with a plural public.

⁴³ Sarr-Savoy Report, 71-86.

⁴⁴ Sarr-Savoy Report, 41-42, 67.

⁴⁵ See RightsStatements.org and Local Contexts (n 28).

⁴⁶ Sarr-Savoy Report, 75-76.

⁴⁷ Sarr-Savoy Report, 77-78.

⁴⁸ Sarr-Savoy Report, 18.

⁴⁹ The Report recommends: “The creation of an online portal around the theme of the circulation of cultural objects that would contain general information about the situation and redistribution of cultural heritage from the African continent outside of Africa, while also proposing detailed narratives of the trajectories of certain pieces (with the help of accompanying texts and multimedia documents) would be a creative and engaging way to create a pathway of discovery.” Sarr-Savoy Report, 86.

The Government should explore to the greatest extent possible how it might collaborate with ongoing African digitization initiatives.⁵⁰ This would facilitate building community-based solutions around digitization, access, and education (especially in native languages). As the Report highlights in “Popular Appropriations”, restitution “also implies working to ensure that the communities concerned as well as the public at large are able to claim ownership of this practice in all its aspects”.⁵¹ The Report’s subsequent discussion in this section provides an opportunity to put this goal into practice. It describes the potential for new collaborative networks in line with reparations leading to the production of new creative works and cultural goods.

We assume the Report only briefly addresses the portal and any related benefits for practical reasons. We suggest that when that exploration proceeds, these recommendations also be embedded in that process.

CONCLUSION

If pursued, the advantages of this ambitious Report will have long-standing global impact on our understanding of history and culture extending to multiple generations. For this reason, the initiative must anticipate and incorporate issues around digital. The communities of origin must enjoy full autonomy to carve out any open access paths to sharing their own digital cultural heritage. Policies enabling this should be designed in partnership with communities of origin, even if the general consensus aims to enable free and unfettered open access. The French Government is uniquely positioned to explore equitable practices for how these discussions should proceed and the methodology that follows. The outcomes co-developed through such an opportunity will aid other governments and institutions attempting to tackle similar long-overdue restitution initiatives.

We, the undersigned 108 scholars and practitioners working in the fields of intellectual property law and material and digital cultural heritage at universities, heritage institutions and organizations around the world, write in support of the ‘Response to the Sarr-Savoy Report: Statement on Intellectual Property Rights and Open Access relevant to the digitization and restitution of African Cultural Heritage and associated material’.

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⁵⁰ Examples might include: Cherry Leonardi, Zoe Cormack and Sarah Bevin, ‘New explorations into South Sudanese museum collections in Europe’ <<https://southsudanmuseumnetwork.com>>; Paul Basu, ‘Reanimating Cultural Heritage’ and ‘SierraLeoneHeritage.Org’ <<http://www.sierraleoneheritage.org>>; and ‘Digital Innovation South Africa’ <http://www.disa.ukzn.ac.za/About_Us>.

⁵¹ Sarr-Savoy Report, 85.

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