

# 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

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### EXECUTIVE SUMMARY

1 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.
- 2 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 materials<sup>1</sup>

25 March 2019

## INTRODUCTION

- 3 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.
- 4 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”.<sup>2</sup>
- 5 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.

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).

- 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.
  - Open access to digital surrogates of cultural heritage held by French institutions is almost nonexistent.<sup>3</sup> 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.
- 6 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.
- 7 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.
- 8 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)**
- 9 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.
- 10 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.
- 11 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

<sup>3</sup> See Douglas McCarthy and Andrea Wallace, 'Survey of GLAM open access policy and practice' <<http://bit.ly/OpenGLAMsurvey>>..

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*.

- 12 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.
- 13 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.<sup>4</sup>
- 14 With regards to the *layers* of intellectual property rights, two primary layers might subsist in digital heritage collections.<sup>5</sup> 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.
- 15 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.<sup>6</sup> Evidence shows these licenses may be inaccurately applied when they fail to account for the status of the underlying work.<sup>7</sup>
- 16 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,<sup>8</sup> or at least prevent third-parties (*e.g.*, commercial organizations) from freeriding on their investment.<sup>9</sup> Other considerations might also impact whether heritage institutions claim or disclaim copyright in digital heritage collections.<sup>10</sup> On the other hand, claiming copyright in digital surrogates of public domain works essentially diminishes the public domain and privatizes its contents,<sup>11</sup> which

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

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](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](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1085267)>.

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 McCarthy and Wallace (n 3).

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).

is of increasing importance today in an information society.

- 17 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.<sup>12</sup>
- 18 The situation of copyright in digital surrogates made in the European Union (EU)<sup>13</sup> 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.
- 19 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)

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 reuse of public sector information.

from a collection.

- 20 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.<sup>14</sup> 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,<sup>15</sup> Chad,<sup>16</sup> Cameroon<sup>17</sup> and Madagascar,<sup>18</sup> 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.<sup>19</sup> Moral rights therefore have strong implications for digitization and open access.
- 21 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.<sup>20</sup> These rights will reside with the country or communities of origin and add another layer for consideration.
- 22 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.

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](https://www.wipo.int/edocs/pubdocs/en/tk/1023/wipo_pub_1023.pdf)>.

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

23 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.

24 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 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.

25 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"

26 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)<sup>21</sup> 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.<sup>22</sup>

27 With this in mind, it should be acknowledged that intellectual property is a Western construct which carries its own colonial bias.<sup>23</sup> 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.

28 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 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.

29 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"<sup>24</sup> 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".<sup>25</sup> 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

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. McCarthy and Wallace (n 3).

23 See Pavis (n 14).

24 Sarr-Savoy Report, 31.

25 Sarr-Savoy Report, 9.

the same historical annexation and appropriation of cultural heritage that this Report seeks to dismantle.

- 30 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.<sup>26</sup> 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”

- 31 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.
- 32 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.<sup>27</sup> 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.<sup>28</sup> 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”.

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).

- 33 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.<sup>29</sup> A real opportunity exists here, as the Report notes, to “invert the colonial hegemonic relationship”<sup>30</sup> around the treatment of African Cultural Heritage (and the heritage of other communities), including the heritage remaining *in situ* with French institutions.

- 34 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”.<sup>31</sup> 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”

- 35 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:

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.

- 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;<sup>32</sup>
- a) 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;
- a) 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*.

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

37 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”.<sup>34</sup> 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”

38 With regards to the “systematic digitization”, we repeat the concerns previously expressed. We

suggest taking a “slow digitization” approach,<sup>35</sup> 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.*<sup>36</sup>

39 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”<sup>37</sup> imposed on the material objects by the culture in possession.

40 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.”

41 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.

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

42 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

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

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*.



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.

- 43 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

- 44 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.
- 45 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”.<sup>38</sup> 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.
- 46 This is because just as there are “different interpretations or conceptions of cultural heritage”,<sup>39</sup> 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”.<sup>40</sup>

- 47 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.

- 48 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.<sup>41</sup> The 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.

- 49 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

- 50 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.

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 National de la Danse; (8) Lo CIRDÒC (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. McCarthy and Wallace (n 3).

38 Sarr-Savoy Report, 18.

39 Sarr-Savoy Report, 29.

*Digitization and African Cultural Heritage*

- 51 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.**
- 52 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.
- 53 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,<sup>42</sup> 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*

- 54 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.**
- 55 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.<sup>43</sup>

- 56 As an initial matter, the Report suggests undertaking an inventory of all pieces of African Cultural Heritage conserved in French collections.<sup>44</sup> 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,<sup>45</sup> 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).
- 57 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.<sup>46</sup> Such adjustments should be reflected in any bilateral agreements envisioned by the Report.<sup>47</sup> 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*

- 58 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"**.<sup>48</sup> 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").

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).

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.

- 59 In creating any portal,<sup>49</sup> 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.
- 60 The Government should explore to the greatest extent possible how it might collaborate with ongoing African digitization initiatives.<sup>50</sup> 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”.<sup>51</sup> 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.
- 61 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.

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.

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](http://www.disa.ukzn.ac.za/About_Us)>.

51 Sarr-Savoy Report, 85.

## CONCLUSION

- 62 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.

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**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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