

1. Debates on archiving

Due to recent advances in digital technology such as scanning, and information technology such as the internet, there has been lively dispute concerning digital archiving of cultural resources such as text, audio recordings, photographs, footage and 3D model data, and of records of historical events.

The debates concern a wide range of topics, from the definition of the polysemous term “archive” to the very purpose of archiving. Furthermore, it is often argued that archiving is useless unless the archives are put to actual use. Although no-one would contest that actual use is a positive, it seems as though the discussions often run without a clear idea of what is meant by the phrase “use” (for example, “use” might take place with limited access, be released online for public access, and so on).

On the other hand, however we set the scope of archives, the issue of rights management always emerges. In whatever form or fashion we put archives of cultural resources to use, legal knowledge on matters such as intellectual property rights, proprietary rights, portrait rights, contracts, is indispensable. In particular, with the IT environment changing at a rapid rate, these legal systems and practices are changing too. For this reason, future archivists will be required to possess both practical legal knowledge that is always up-to-date, and insight regarding future trends.

This author is a lawyer and not an expert on Archive Studies or Archival science, and as such, this present essay will forego the

abovementioned complex discussions on archives. The author would instead like to use his experience as a legal expert who has been involved in rights management for archiving, to outline the kind of rights management necessary for archiving, and if possible, to propose a conception of an ideal archive.

2. Rights management for analog archives

Nowadays, the word “archive” usually brings to mind digital archiving. However, there is also analog archiving—collection, preservation and restoration of archive material such as artworks, objects and so on, which is a task that has traditionally been the responsibility of museums. This analog archiving can be divided into three processes: collection (preservation), maintenance/restoration, and exhibition (publication).

For collection of material for analog archives, sometimes cultural facilities purchase artworks, and sometimes acquire them through donations. However, recently these institutions are reaching physical and economic limits of their capacity to preserve archives, and there is an increasing number of cases where they are forced to reluctantly turn down donations.¹

A particular issue in rights management for analog archives is the proprietary rights of archive material. Here, it is important to make it objectively clear that the rights have been obtained, by exchanging contract documents. Moreover, for works where past contractual relationships are obscure (there

are many cases where it is difficult to distinguish whether proprietary rights have been obtained, or the material is just on loan), it is preferable that the cultural facility obtain a document confirming that the rights have been passed over to the facility, from the supposed previous owner. However, in reality there are hurdles, such as unknown whereabouts of the said owner.

With regard to copyright, as long as the proprietary rights have been obtained, it is not necessary to acquire extra permission from the copyright owner to collect or maintain material, for example through physical relocation of material. For exhibiting material too, Article 45 (1) of the Copyright Act of Japan states that permission from the copyright owner is not required. Moreover, in the case of works that have already been released publicly, permission is not required for the right to make the work public, which is one of the moral rights of authors. However, there are cases where the copyright owner decides after time that he/she does not wish to make the work public, triggering problems. For this reason, considerations such as contacting the owner as early as possible are required.

With analog archiving, copyright only becomes an issue with restorations. Restorations beyond a certain extent may infringe the copyright owner’s rights of adaptation, and the author’s right of integrity.² The best course is for cultural facilities to undertake the restoration with permission from the copyright owner. There are some cases where the copyright owner and author have concluded a contract stipulating that the relevant cul-

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tural facility can perform restorations within the scope necessary, with supervision from experts such as curators; however, there are also cases where the rights holder cannot be contacted, for example because he/she is no longer alive. Similar problems as those with restorations arise when updating works such as media art, which are more dependent on technology: how to preserve such technology-dependent works; how to update software and equipment without disturbing the integrity of the work; who will take care of this task, and so on.

Inheritance is another issue that often accompanies analog archives. Donations often arise at times when works have been inherited, when its original owner or copyright owner has passed away. For this reason, it is better for archivists not just to obtain a transfer contract for the archived work, but to confirm whether the inheritor of said work owns the right of disposal, by requesting issuance of a copy of the record of the consultation regarding division of inherited property, or similar.

<Rights management procedure for analog archives>

■Collection

Proprietary rights: Make the acquisition of the rights objectively clear, by exchanging contract documents. If past contractual relationships are unclear, it is better to acquire documents confirming the transfer of the proprietary rights, from its assumed owner. Copyright: No special action required.

■Maintenance/Restoration

Restoration of a significant extent may infringe the copyright owner's rights of adaptation, and the author's right of integrity. It is better for cultural facilities to perform restorations with permission from the copyright owner. It is useful to conclude a contract in advance with the copyright owner and/or author, stipulating that the facility may perform restorations to the necessary extent.

■Exhibition

Copyright: Permission from the copyright owner is not required, according to Article 45 (1) of the Copyright Act of Japan. With previously released works, permission is required for the right to make the work public, which is one of the moral rights of authors. In some cases, problems arise when the copyright owner decides after time that he/she does not wish the work to be made public. For this reason, take measures such as contacting the owner in advance whenever possible.

3. Rights management for digital archives

It has already mentioned at the start of the essay that digital archives have been attracting attention in recent years, but digital archives can also be seen as being part of open data policy. By actively releasing the diverse data owned by organizations and agencies, rather than merely collecting digital information, and by encouraging its use and application, one can aim to secure transparency and promote innovation.

With digital archives, there are four phases: digitalizing the material to be archived, collecting digital data, releasing digital data, and encouraging secondary use of digital data. In each of these phases, rights management is required for copyright. For the phases after "releasing," there are some cases that require rights management for portrait rights and other rights. For potential archive material of which the right owner is unknown (so-called "orphan works"), various debates are currently going on, including on the validity of their use, and on legal amendments. The following is an overview of the actual phases.

First of all, for digitalization and collection, there are cases where the material to be archived is digitalized, and cases where already digitalized data is collected. In both of these, as a general rule, permission from the copyright owner must be obtained for the right of reproduction. However, for legally designated facilities such as libraries that fulfill certain requirements, resources may be copied without the copyright owner's permission, within an extent required for preservation (Article 31 (1.2), Copyright Act of Japan). For some years

now, it has been debated whether this regulation may be applied to cultural facilities other than libraries, and it is hoped that the regulation may be exercised more widely in the field of digital archiving.⁷³

In cases where the material to be archived is in the possession of a third party, and the cultural facility is unable to access the said material, permission of the owner of the proprietary rights or of the facility manager may be required, in order to photograph or scan the relevant material.

Next, releasing digital data involves various phases. When providing digitalized data for viewing at the cultural facility, then except in the case of non-commercial viewings (Article 38 (1), Copyright Act of Japan⁷⁴), permission must be obtained from the copyright owner regarding the right of on-screen presentation. To release digitalized data online, permission must be obtained from the copyright owner regarding the right to transmit to the public.

In addition to the above, when allowing secondary use of released digital data, permission to allow secondary use must be acquired from the copyright owner. When doing so, it is advisable to clarify the extent of secondary use—whether to allow commercial use, whether to allow modifications, and so on.

Finally, with regard to portrait rights, there are cases when rights management becomes necessary in phases after releasing. However, if use is limited to cultural purposes, and there is not a high level of need to protect the privacy of the photographed subject, it is likely that the use will be deemed within socially acceptable limits. As such, this author believes that it is not necessary to be overly wary.

<Rights management procedure for digital archives>

■ Digitalization, collection

Copyright: As a general rule, right of reproduction must be obtained with the copyright owner's permission. However, there are exceptional cases that do not require permission, for reproduction for preservation purposes by cultural facilities such as libraries (Article 31 (1.2), Copyright Act of Japan).

Proprietary rights: If the material to be archived is in the possession of a third party, there are cases where permission must be obtained from the owner of the proprietary rights or the facility manager, in order to access the said material.

■ Release

□ Viewing at facility

Copyright: Except for non-commercial viewings (Article 38, Copyright Act of Japan), permission is required to obtain the right of on-screen presentation. With regard to the right to make the work public, the same standards apply as for exhibiting archive material.

□ Online release

Copyright: Permission must be obtained from the copyright owner regarding the right to transmit to the public.

■ Secondary use

Copyright: When allowing secondary use, permission to allow secondary use must be acquired from the copyright owner. It is advisable to clarify the specifics of secondary use.

4. Opt-out and orphan works

The rights management detailed above is effective when starting to compile an archive, but does not apply when turning previously collected contents into an archive. The reason is that it is not financially realistic to confirm the rights-related relationships for every single object in a vast collection, to track down the rights owners, and perform rights management. Furthermore, works for which the owner of the copyright, proprietary rights, portrait rights and so on are unknown (orphan works) often end up stored without ever being used, because permissions required for digitalization, releasing and secondary use cannot be obtained due to the rights owners being unknown. Precisely for this reason, it is generally said that digital archiving should be started anew for material that is being currently generated, and that digitalization or releasing of previously archived material is difficult.

In such situations, a system named “opt-out” is sometimes chosen. Opt-out is a method by which releasing is suspended only in the case of an objection. For example, the Internet Archive's Wayback Machine has an opt-out system in place, by which collected contents are released online as a general rule, but removed from public release in the event of an application. Similarly, Google Books began its project to make publications from all over the world available for viewing, with an opt-out system. This took into account the regulations on fair use that are included in the Copyright Law of the United States. However, the Authors Guild and other parties

jointly filed a lawsuit against Google Books, sparking a fierce dispute. Globally too, there is strong reluctance concerning the forceful digital archiving methods that adopt the opt-out system.

Fair use regulations do not exist in Japan, and so digitalization, online releasing and secondary use by opt-out formally constitute an infringement of copyright. For this reason, public cultural facilities in particular, which place weight on compliance with laws and ordinances, usually cannot implement an opt-out system, which would formally constitute a copyright infringement. Having said that, there is already a system called the “compulsory license system” in the current Copyright Act of Japan, by which the Commissioner of the Agency for Cultural Affairs can grant proxy permission for use, if the owner of the rights is unknown, and if “considerable efforts” have been made to find the said owner. However, compensation has to be paid in advance, the standards for “considerable efforts” are high, and the process takes time; as a result, so far this system has only been used 15 to 30 times a year, and is becoming ineffective. Although efforts have been made to improve the system for the past few years in response to criticism, the fact is that the system is still not in as much use as was hoped.

In such a climate, there are growing calls for a legal amendment that would promote the use of orphan works, with certain requisite appropriate procedures, and with certain considerations for the rights owners. More specifically, possibilities include: permitting digitalization and release of orphan works for

non-commercial purposes without advance payment of deposits or similar; outsourcing the work related to compulsory licenses to management companies; and exemption or limitation of liability for cultural facilities that have completed the due process. The EU, which is the forerunner in digital archiving policies, has adopted the EU directive (October 25th, 2012) on limited use of orphan works, which stipulates that non-commercial use of orphan works is permitted after thorough investigation to identify and find the rights owner (however, this EU directive applies to previously released works of literature, audiovisual works, and audio recordings, but not to applied arts such as fashion and product design). By this system, use is stopped if the rights owner steps forward after the release, and an appropriate sum must be paid as compensation.

Concerning this matter, this author too is fundamentally in agreement about the need for a legal amendment that would loosen legal requirements regarding orphan works and so on. However, the discussions about this legal amendment have mainly targeted “public” cultural facilities. Regarding this point, the author believes that the cultural facilities to have looser requirements should be selected by objective standards that focus on the fairness of procedures, seeing as the need to use cultural resources does not vary depending on whether the use is public.

5. Releasing with accessibility in mind

In analog archiving, attention has generally focused on collection, and on maintenance and restoration. However, changes in the IT environment have made digital archiving possible, enormously facilitating collection and preservation (moreover, digital data does not deteriorate). In such a situation, it is obvious that people should turn their eyes to releasing archives.

Many digital archives are aiming for online release, but “release” comes in many forms. Why do people wish to release digital archives? The answer is simply to increase user accessibility (ease of access). Releasing in order to increase accessibility requires a search function and interfaces such as UI and UX.

For example, Google is operating Google Cultural Institute, which allows people to view tens of thousands of artworks, and the Historic Moments archive, which details significant moments in human history; when compared to Europeana, the digital archive portal for the whole of the EU, the Google archives are unequivocally more refined with regard to the search engine and the interface. When it comes to user-friendly search algorithms, tagging, and interface technology, American IT companies are unbeatable; there is also the factor of Europeana being a portal, and easily affected by the culture policies in each country, and by the methods of individual cultural facilities.

From this sort of thinking, there arises a question about the subject—about who will be performing the archiving. Digital archiving

will not be carried out by public institutions alone. As mentioned above, Google is advancing vast archive projects in parallel, such as the Google Cultural Institute, the Historic Moments, Google Books, which allows users to view books preserved by libraries, and Memories for the Future, which preserves records about the Tohoku earthquake and tsunami. Amazon also started the project *Kioku no Keisho* (the remembrance project) in March 2016, 5 years after the Tohoku earthquake and tsunami, releasing contents about the natural disaster for free.⁵ Although it was stated above that digital archives operated by these IT giants are superior in terms of releases with high accessibility, there is also a question of whether the role of archivist should be entrusted to a private company, which is subject to financial ups and downs.

6. Secondary use that unleashes the creative possibilities of archives

A great portion of the digital archives at Japanese cultural facilities has some sort of use restriction in place, even for content whose copyright has expired. There are also many cases where the situation regarding rights and the conditions of use have not been made clear, so that secondary use of the contents is difficult, even though the archives have been released. Of course, even just releasing the material serves a purpose; but in this author's opinion, archives show their true creative possibilities only when secondary use of the released material is allowed. To put it in extreme terms, the reason is that ar-

chives do not possess creativity themselves; the creative element of archives lies in bricolage. Information, once it becomes part of a database, loses its original context in society. Although this has both pros and cons, from a bricolage perspective, this is a pro. So how can we bring together people and things—both tangible and intangible—that have never been brought together before, through archives? For this, the key is to construct archives that emphasizes secondary use. Furthermore, allowing secondary use will increase the viewer and the user's engagement. Engagement conventionally means “promise,” “arrangement,” “job” and so on, but in online services and communicates, it is used in the sense of “connection” or “sympathy.” The possibility of secondary use—of giving the digitalized archive material a thorough workover, so to speak—can be said to be the great potential of digital archiving that was not possible with analog archiving. The author's theory is that the true potential of archives is being held back by the fact that people currently content themselves with just releasing the digital archives, and have not thought properly about secondary use.

In order to widely promote the secondary use of archives, instead of simply releasing them, it is desirable to adopt an internationally standardized open license, exemplified by Creative Commons, as Europeana and the Digital Public Library of America (DPLA) have done. When it comes to releasing digital archives, it can be said that the Creative Commons license (or the CC0) have become the de facto standard for open licenses attached to objects of the license. Europeana

also adopts the Creative Commons license and CC0. It is only by adopting internationally standardized open licenses like these that archives come “alive.”

What is distinctive is the approach to declaring rights called EDM. With EDM, based on the Europeana Data Exchange Agreement (DEA), a person who has provided data to Europeana is obliged to make one of four declarations about the situation regarding rights: (1) Public domain (not protected by copyright), (2) Creative Commons license/CC0, (3) Rights are being retained (with further choices, such as whether or not the person wishes for reuse), and (4) situation regarding rights is unclear. Users of Europeana can check this situation at any time. By having the data owner, who is likely to know most about the situation surrounding the rights to the data, declare the situation, Europeana makes the rights situations clear and transparent for as much data as possible, thus contributing to avoiding orphan works.

Rather than simply creating an archive, Europeana's vision is to build a different kind of copyright system to that in the USA, which companies such as Google follow. In other words, Europeana focuses more on due diligence, rather than the drastic opt-out system adopted by Google and others, which is based on fair use regulations. It is telling that Europeana was born as a reaction to Google Books scanning and releasing all kinds of text, out of concern that Google might monopolize Europe's information, which is its cultural resources.

7. Inspirational archives and a rich inheritance

This essay began with the practical work involved in rights management for analog and digital archives, then went on to consider the issues of orphan works and the opt-out system; finally, it proposed that releasing archives to improve accessibility, and secondary use were the keys that would unlock the creative possibilities of digital archives.

We are living in an age when Google is archiving wisdom and knowledge (Google Books) and sceneries (Google Street View, Google Map or Google Earth) from all over the world. If archiving, to put it in abstract terms, is physically or electronically handing down cultural resources, and supplying society with their values, then what Google is doing is without doubt archiving. How should we perceive the relationship between digital archives like these, and analog archives?

Since the beginning of the internet, the value of experience is certainly being recognized afresh. An experience on a browser is not of the same level as an experience in the real world. In this particular sense, digital archives are currently seen as subordinate and supplementary to analog archives.

On the other hand, while analog archives are finite with regard to quantity and durability, digital data can be copied infinitely without deteriorating. Moreover, if creative digital archives with high level of engagement emerge in the future, then there is possibility of an entirely new archive experience, in which viewers and users interface extensively with the contents, triggering new

creativity. When that happens, digital archiving and analog archiving will be regarded as different acts. When this writer tries to hypothesize what a Japanese style of digital archiving might be like, he recalls that Hatsune Miku and Nico Nico were products of Japan, and he feels almost able to see a rough sketch of this future form of digital archiving. The jury, however, will still be out.

Furthermore, when one reconsiders digital archives with focus on creativity, the method requires consideration. With archiving, it is considered best to collect as much amount of information as possible—video rather than photographs, 3D rather than 2D, and so on. Although this may be right when one considers the archives themselves, this may be less appropriate with bricolage and the creative possibilities of archives in mind. Why western music is passed down in the form of scores, and drama in the form of plays, why Japanese dance is handed down orally—might these not be chance operations intended to leave room for other fields and genres to infiltrate it by coincidence? Is the approach to archives that favor large amounts of information always right for creativity? However far information technology advances, as long as we cannot leave *the things themselves* permanently as they *are*, perhaps we will always continue to consider this question.

(translated by KAWATA Yasumasa [Art Translators Collective])

- *1 Although not discussed in this essay, there is also the aspect of selecting what to preserve in archives and what to dispose; so the disposal of collected works also becomes a significant practical issue.
- *2 There was an incident in a town in northeast Spain called Borja, in which Cecilia Jimenez, a complete amateur, “restored” *Ecce Homo*, a century-old Fresco of Christ, which was painted on a church pillar. The Christ ended up looking like a monkey, and the incident caused hilarity around the world, attracting an endless stream of tourists from across the globe. This is a nightmare incident from an archivist’s point of view, and cannot be simply laughed off when one regards it in terms of use and application of an artwork.
- *3 Pursuant to Article 1-3 (1.6) of the Enforcement Ordinance of the Copyright Act of Japan, museums and other such institutions by general incorporated associations, etc. are also applicable with designation by the Commissioner of the Agency for Cultural Affairs; however, there are no such designated institutions at present (Agency for Cultural Affairs, “Key Issues Regarding Promotion of Archiving of Works, etc. [Draft]”).
- *4 Previously released works may be performed, screened or read aloud, if it is not for a commercial purpose, and if
- *5 the project Kioku no Keisho
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