



Internal Open Access Policies

Developing an open access policy for your organization

v 1.0 | October 2023



Table of Contents

Your Internal Open Access Policy	1
Types of Restrictions	2
Structuring Your Clearance and Review Process	2
Intellectual Property, Copyright, and the Public Domain	3
What Copyright Law Protects	4
Scope: What types of things does copyright protect?	4
Duration: How long does copyright protection last?	5
Beyond the Object	7
Special Topics	8
Photographs of architectural works, sculptures, and other artworks in public places	9
Country of publication	9
Reproductions - works made by employees	10
Non-Intellectual Property-Based Restrictions	10
Contractual Restrictions	10
Privacy	11
Other Legal and Ethical Restrictions	11

About the GLAM-E Lab

The GLAM-E Lab is a joint initiative between the Centre for Science, Culture and the Law at the University of Exeter and the Engelberg Center on Innovation Law & Policy at NYU Law to work with smaller and less well-resourced UK and US cultural institutions and community organizations to build open access capacity and expertise.

The GLAM-E Lab provides legal counsel to GLAM institutions and cultural organizations as they develop open access programs. The solutions created for those institutions are then integrated into model internal policies and external terms of service that can be adopted by others. The goal of this approach is to use lessons learned from directly representing individual institutions to create self-serve model policies that work “off the shelf” for as many organizations as possible. We supplement these model policies with additional guides and resources to address common challenges.

Acknowledgements

Andrea Wallace, Co-Director

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Your Internal Open Access Policy

This document sets out policies based on laws in the United States and United Kingdom that will help you identify works in your collection that may be good candidates for your open access program. This usually takes the form of a clearance process where institutions evaluate the suitability of works (or groups of works) to be included in an open access program. By "works" we mean objects in the collection, as well as any content created by or for your institution, like a photographic reproduction, descriptive text, or metadata.

As explained in the [GLAM-E onboarding document](#), the primary goal of this process is to help you identify works that are "easy" to include in the open access program. That generally means the works are in the public domain – that is, not subject to copyright restrictions – and the works that your institution controls the copyright for any reproductions or digitizations. It also means that they are not subject to other restrictions, such as those found in contractual agreements, data protection laws, or Indigenous rights claims.

It is important to remember that works falling outside of the scope of these policies may still be good candidates for open access. However, in line with the GLAM-E Lab's "do the easy things first" approach, we generally recommend building a foundation for your open access program with a selection of works that are as free of use as possible. Using a small selection of works with a common theme to pilot your program can help you identify and test open access workflows across your institution. For example, the pilot collection might include:

- A selection of historical watercolors, drawings, and prints of buildings located near your institution, and created by artists who died before 1950.
- A selection of 19th century archival materials that would be of benefit to an underrepresented group or community.

- A collection of scientific illustrations of endangered or extinct animals.

Once your pilot program is up and running, you can explore what it means to include other parts of your collection in the open access program.

Types of Restrictions

Broadly speaking, this document focuses on two types of restrictions that might make it harder to include a work in your open access program: Intellectual Property (IP) restrictions and non-IP restrictions.

IP restrictions, which are mostly based in copyright law, will tend to apply similarly across all institutions. This is because they are based on national laws, and many (although certainly not all!) aspects of those national laws have been harmonized internationally. That allows this document to provide relatively specific guidance when it comes to evaluating IP restrictions.

Non-IP restrictions tend to be more specific to individual institutions. They can be influenced by the nature of the collection, the institution's relationship to donors and communities represented in the collection, as well as a number of other factors. As a result, these policies tend to address non-IP sections at a higher level. You can think of these sections as invitations to discuss your institution's specific approach to each issue.

Structuring Your Clearance and Review Process

Your clearance and review process will progress through various stages. As you progress through the process, a work (or group of works) can either move on to the next stage or be pulled out for further review.

The IP and non-IP sections of this process are essentially independent, so there is no "right" way to sequence them. For example, some institutions find it easier to start by reviewing whether or not donor agreements would restrict an object's inclusion in an open access program, and then move on to evaluating the object's copyright status. Other institutions prefer to reverse the order.

In structuring this process, the sequence of the IP and non-IP sections is less important than the conversation you have about establishing that order. For example, if your

collection is generally free of restrictive donor agreements, your first step could be to set aside any objects that are restricted. You could then focus your efforts on the copyright clearance process for the rest of the collection. Conversely, if researching donor agreements will be complicated, it might make sense to start with your copyright review and then only focus on exploring agreements for works that you determine are in the public domain.

Similarly, institutions treat what it means for an object to need “further review” differently. Some institutions treat “further review” as synonymous with “exclude from the open access program.” Others bring a more nuanced approach. For example, they might automatically exclude a work created in 2005 from the open access program because it is still protected by copyright. However, they might dedicate staff time to following up on copyright edge cases, such as older works that were never publicly published.

Finally, don’t be surprised if some of the elements included below simply do not apply to your collections, whether in part or in whole. This policy is designed to include the most common restrictions that an institution might need to consider as it creates an open access program. While many restrictions are likely to be relevant at first glance, it is entirely possible that after reviewing a restriction category you conclude that it simply does not apply to your collection or the specific group of works you are working with.

Intellectual Property, Copyright, and the Public Domain

This portion of the review is designed to identify two aspects of a work in your collection:

- First, it examines if the work itself is in the public domain. That would allow you to include it in your open access program without needing to get permission from someone outside of your institution.
- Second, it examines if rights in other collections materials – like the digital reproduction or metadata associated with it – are controlled by your institution. If so, your institution will have the ability to license or publish them under open terms.

Copyright law is designed to control how copies of artistic works and objects are made and distributed. This includes making digital copies of works in your collection, whether as photographs or complex 3D scans. It also includes making those copies available to

the public, including by publishing them for any type of reuse as part of your open access program.

The public domain is an important concept when reviewing what objects and collections to include in your open access program. Your public domain collections will include works that were never eligible for copyright protection, as well as works with expired copyright protections.

The public domain is important because anything in it is free of any copyright restrictions. That makes works in the public domain good candidates for your open access program. One way to think of this part of the review is as a search for works in the public domain.

Although it can be complicated to calculate the copyright status of works made in recent decades, it is safe to assume that works are in the public domain if:

- They were created before 1928, if you are based in the United States.
- The author of the work died more than 70 years ago (before 1953), if you are based in the United Kingdom.

This rule of thumb can make it easy to identify the works in your collection that are good candidates for open access distribution.

What Copyright Law Protects

Works that are not protected by copyright are in the public domain. That means it is important to understand exactly what is protected by copyright. Copyright provides limited protections to an original creative work that is fixed in a tangible medium of expression.¹ There are two major limits to that protection: its scope and duration.

Scope: What types of things does copyright protect?

What is “creative” is an important limiting principle to the scope of copyright protection. Copyright only protects the category of works that are considered “creative” or “original”

¹ The Copyright Act of 1976, codified in Title 17 of the United States Code, grants copyright protection in the United States. See 17 U.S.C. § 102. One unique feature of U.S. copyright law is that works of the United States Government are categorically excluded from copyright protection. This rule does not apply to works of state governments, and is not mirrored in the UK or other jurisdictions. The Copyright, Designs and Patents Act 1988 grants copyright protection in the United Kingdom. In the U.K., government works are protected by Crown Copyright. See § 163.

under copyright law. Anything that is not sufficiently creative or original is categorically ineligible for copyright protection. That means it is in the public domain by default.

Keep in mind that the law's definition of what is creative or original does not always align with how the terms are used elsewhere. The concept of a creative work is mostly grounded in traditional concepts of artistic creativity. In contrast, purely functional objects (even those that result from "creative" engineering) are not creative in a way that makes them eligible for copyright protection. Similarly, works that do not have a human creator because they are the results of natural processes – fossils, minerals, and specimens of creatures – are not eligible for copyright protection.

In addition, the work must also be "original." The legal concept of originality also differs from how the term is used elsewhere. An original work is one that was not copied from another, and it must also require some level of creative effort rather than technical input to produce. For example, many reproductions of public domain artworks do not qualify as original even though they require technical skill to produce. No matter how much effort is required during reproduction, copies are not original expressions and are therefore ineligible for copyright protection.

Duration: How long does copyright protection last?

Even works that are eligible for copyright protection are not protected forever. Once a copyright expires, the work enters the public domain. Because copyright is rooted in national legislation, countries may take different approaches to how long a work is protected by copyright.

In the United States, this is generally calculated based on the year of creation using a rolling 95-year term. For example, for 2023, the general rule is that copyright protection has expired for any work created before 1928. This line advances every year. In 2024, works created before 1929 will enter the public domain, in 2025 works created before 1930 will enter the public domain, and so on.

There are some exceptions to that general rule. Unpublished works enter the public domain 70 years after the death of the author (if the author is known) or 120 years after the date of creation (if the author is unknown).² When the publication status of a work is

² Peter B. Hirtle, *Copyright Term and the Public Domain in the United States*, CORNELL UNIV. LIBR. (Mar. 17, 2021), https://copyright.cornell.edu/publicdomain - Footnote_2.

uncertain and the author is not known, the museum can use the 120-year rule to determine if the work belongs to the public domain. As of 2023, works by authors who died before 1953 are part of the public domain, and anonymous works created before 1901 are part of the public domain. Works published between 1926 and March 1, 1989 may also belong to the public domain, depending on when the work was first generally published, whether notice of copyright was attached to the work, and if the copyright protection has expired.³ Lastly, works published after March 1, 1989 will not enter the public domain until at least December 31, 2047,⁴ unless they are dedicated to the public domain by the copyright owner.

In the United Kingdom, this is generally calculated based on the author's death using a rolling 70-year term. For literary, dramatic, musical or artistic works, this means the author must have died more than 70 years ago. For example, for 2023, the general rule is that copyright protection has expired for authors who died before 1953—that is any year up to and including 1952, but not in 1953 itself. This line advances every year on 1 January. In 2024, copyright expires for authors who died before 1954, and so on.

There are some exceptions to that rule.⁵ Works created by an officer or servant of the Crown are protected by Crown Copyright, which expires after 50 years. Copyright for the works of joint authorship produced by two or more authors are calculated based on the year in which the last surviving author dies. Other exceptions apply to orphan works, films, sound recordings, typographical arrangements of published editions, and broadcasts and cable programmes. Lastly, pre-1989 unpublished works are subject to the “2039” rule, which recognizes copyright until December 31, 2039.⁶

In both the U.S. and the U.K., because the rules for determining copyright for these categories of works are more complex, your institution should seek legal advice before including them in the open access program.

³ See *generally* Id; MENESHA A. MANNAPPERUMA ET. AL., IS IT IN THE PUBLIC DOMAIN? (2014), [https://www.law.berkeley.edu/files/FINAL_PublicDomain_Handbook_FINAL\(1\).pdf](https://www.law.berkeley.edu/files/FINAL_PublicDomain_Handbook_FINAL(1).pdf).

⁴ Hirtle, *supra* note 2.

⁵ CDPA 1988, c. 46, sections 12-15A; see also UK Intellectual Property Office, [Copyright Notice: Duration of copyright \(term\)](#) (2021).

⁶ UK Intellectual Property Office, [Copyright Notice: Duration of copyright \(term\)](#) (2021).

Beyond the Object

In many cases, an object in a collection is just part of a larger record. Each layer or part of that record may have a different relationship to copyright protection.

For example, physical objects in your collection may be protected by multiple layers of copyright: copyright in the object itself (1st layer), copyright in the digitized object (2nd layer), and copyright in the metadata (3rd layer). A painting in an institutional collection may be protected by a copyright that is owned by the original artist (1st layer); a digital image of that painting may be protected by a different copyright owned by the person or company that made the photograph (2nd layer); and the museum's description of the painting and its provenance (metadata) may be protected by another copyright owned by the museum (3rd layer).

The nature of "the object" can add additional layers to this analysis. For some institutions, "the object" in their collection might be a photograph of the painting. In that case, they will have to consider the copyright in the painting itself (0 layer), the copyright in the photograph (1st layer), the copyright in the digitization of that photograph (2nd layer), and copyright in the metadata (3rd layer).

While this can feel like a lot to keep track of, in many cases the copyrights in the digitization and metadata of public domain works will be within your institution's control. That gives you the power to include those digitizations and metadata in your open access program without having to seek permission elsewhere.

Furthermore, in the United States, courts have not recognized a new copyright to faithful reproductions of objects (such as 2D or 3D scans) unless sufficiently creative enhancements are made during or to the reproduction.⁷ For example, the 3D scan of a Greek sculpture would not receive copyright protection; but the 3D model that shows how it may have originally looked when painted would receive copyright due to creative choices made during its colorization. For the majority of faithful reproductions, however, a new or 2nd layer of copyright does not apply. This is also the case when there is a narrow range of artistic expression available to a person who photographs an object, like a

⁷ See *Bridgeman Art Library, Ltd. v. Corel Corp.* (Bridgeman I), 25 F. Supp. 2d 421 (S.D.N.Y. 1998); *Bridgeman Art Library, Ltd. v. Corel Corp.* (Bridgeman II), 36 F. Supp. 2d 191 (S.D.N.Y. 1999); *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*, 528 F.3d 1258 (10th Cir. 2008).

painting or a sculpture. While some of these photographs may be eligible for limited copyright protection, that protection may not grant the rightsholder a high level of control over how those images are used.⁸ However, digitized replicas of public domain works may be eligible for copyright protection in countries where copyright laws and originality thresholds are different. In any case, when your museum makes the photograph, it does not need to investigate this layer of copyright.

The 3rd layer of copyright applies to metadata, which can include anything that describes a work, from technical information to editorial narratives. Copyright will apply to metadata that is recently created and includes more than just factual information or short phrases.

To the extent that there is a copyright protecting the 2nd and 3rd layers of the record, you may be able to use tools like the [CC0 Universal Public Domain Dedication](#) to include them in your open access program.

Special Topics

Understanding the scope and duration of copyright protection will help you identify which public domain works in your collection are good candidates for an open access program. In many cases, understanding how rules about the scope and duration of copyright apply to your collection can be straightforward. Our work with individual institutions has helped us to identify the edge cases where additional details or support can be helpful. This section explores those cases.

There will be certain situations or types of works in your collection, including reproductions, that may require a closer look. This distinction may play out in different ways. For example, Institution 1 has a vase in its collection (the object) and makes a photograph of that vase for documentation purposes (the reproduction). Institution 2 also has a copy of the photograph (the reproduction) of the vase (the object). If Institution 2 digitizes the photograph, it will need to consider whether Institution 1 owns the copyright or has information on the rights status of that photograph before including the photograph in the open access program.

⁸ See *Ets-Hokin v. Skyy Spirits Inc.*, 323 F.3d 763 (9th Cir. 2003); *President and Fellows of Harvard College v. Steve Elmore* (Harvard I), No. CIV 15-00472-RB/KK 05-19-2016 (D.N.M. 2016).

Photographs of architectural works, sculptures, and other artworks in public places

There are special provisions of the U.S. Copyright Act that allows architectural works in public places to be photographed freely. Referred to as “freedom of panorama” in copyright laws, this provision defines “architectural work” broadly to include the building as well as architectural plans and drawings.⁹ If the work is an architectural work that is ordinarily visible from a public place, then photographs of the work are permissible, regardless of the copyright status of the work.¹⁰ Any building that is visible from a street, plaza, or other public place would qualify. Freedom of panorama under the U.S. Copyright Act does not extend to other artistic works still protected by copyright, including sculptures and two-dimensional artworks in public places.

The U.K. has similar provisions for “any fixed structure, and a part of a building or fixed structure,” without the requirement that the building be located in a public place.¹¹ It also permits photographs of certain artworks that are permanently situated in a public place or premises open to the public, like sculptures and works of artistic craftsmanship. However, it does not apply to two-dimensional works, like murals in public spaces or paintings in museums open to the public.

Although a country’s freedom of panorama law may permit photographs of a copyright protected work without infringing on the author’s copyright, it may limit how those photographs can be used by the photographer and others. This is important to consider when deciding whether photographs of these categories of works are appropriate for the open access program.

Country of publication

If the work was first published outside of the United States, and it was not published in the United States within 30 days of the first publishing, it is an international work.¹² Determining the copyright status of this work in the United States requires understanding the copyright status of the work in its country of origin. That may require additional research if the work was published after 1928. In addition, works by foreign artists that

⁹ 17 U.S.C. § 101.

¹⁰ 17 U.S.C. § 120.

¹¹ CDPA 1988, section 3(2).

¹² Copyright Office, *Circular 38B: Copyright Restoration*.

were created and first reproduced and published in another country between 1932 and 1978 must also be assessed by publication date and receive a 95-year term of protection.

If the work was first published outside the United Kingdom, the work will qualify for copyright protection so long as the country of publication also extends copyright protection to the works of authors in the U.K.

Reproductions - works made by employees

Your institution owns any copyrights in reproductions of works in your collection made by employees. U.S. copyright law refers to these as “works made for hire.” The U.K. refers to these as “works created in the course of employment.” In both countries, if the reproductions were made by outside contractors or other third parties, you may need to see if the contract with that person transfers the copyright to your institution.

Non-Intellectual Property-Based Restrictions

In addition to copyright restrictions, other legal and non-legal considerations may prevent your museum from including the work in your open access program.

Contractual Restrictions

Your institution may have acquired some works under contractual restrictions that would limit the museum’s ability to publish digitized copies of the work for open access. Some of the more common restrictions include a prohibition to use the work commercially, a requirement to obtain the creator/donor’s permission to reproduce the work, or a limitation on how the work may be changed. These may arise in the form of:

- Donor agreements
- Agreements with artists, heirs, or an estate, such as copyright or acquisition agreements
- Contracts with photographers, photo image libraries, and other third parties
- Restitution agreements with descendants and communities of origin

You should confirm if there are contractual restrictions before providing open access to these works.

Privacy

Your institution should avoid including works in an open access program if they:

- contain private personal information, such as identification numbers, bank information, medical or health records, or other privileged or confidential information;¹³ or
- may intrude upon a person's seclusion, disclose private facts, paint someone in false light, or appropriate someone's name, voice, or likeness.¹⁴

When a work may fall into this category, you should seek legal advice before publishing such works, let alone distributing such works on open access terms.

Other Legal and Ethical Restrictions

Some works relate to objects that are sacred to certain cultures (*i.e.*, objects subject to NAGPRA¹⁵ in the United States) and should not be digitized or distributed on open access terms without the permission of the affiliated descendants or communities of origin. If the museum has internal guidelines for the reproduction of this type of work, the museum should consult those guidelines. If providing access may lead to harm or exploitation of certain cultures, the museum should engage the relevant cultural communities to determine if the museum can provide public access in a responsible way.¹⁶

This portion of the review is also an opportunity to consider if [Traditional Knowledge \(TK\) Labels](#) might be a good fit for your open access program. TK Labels allow communities to express local and specific conditions for sharing and engaging in future research and relationships in ways that are consistent with already existing community rules, governance and protocols for using, sharing and circulating knowledge and data. TK Labels can only be applied by the respective community. If such consultation is not possible and the works are suitable for public access, consider applying the Rights Statements label to indicate that while the work itself is in the public domain, [other legal restrictions](#) might apply.

¹³ *Responsible Access Workflows*, BERKELEY LIBR. (JUNE 1, 2021), https://docs.google.com/presentation/d/1V66PGplq9xqXxdvngpD3rkAMolw2hlyVVDS4lv4VFOM/edit?slide=id.g56280a330b_0_0.

¹⁴ *Id.*

¹⁵ 25 U.S.C. §§ 3001-3013.

¹⁶ *Responsible Access Workflows*, *supra* note 13.