

Final Report and Links to Toolkit Deliverables

Submitted by Group 3:

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The primary goal of Group 3 was to facilitate secondary uses for the records and material that would be hosted in the proposed Stacey L. Kirby Archive (the “Kirby Archive”). Assuming those are the materials that are available on her current [webpage](#) (the “Kirby Material”) this group anticipates interdisciplinary education as the primary secondary use of the Kirby Material.

Educational toolkits, such as those produced by [NASA](#)¹ for pre-university education and the [Washington & Lee University Collection of Art and Art History](#)² for more advanced education, would leverage the Kirby Materials to teach modules in such subjects as psychology, sociology and theater. These toolkits would not only serve to utilize art as a medium for teaching, the deliverables would also serve to promote Kirby’s work and reach a greater audience than just art enthusiasts.

Currently, the homepage for Kirby Material is hosted on the cargocollective.com domain, while the videos are linked to and hosted from vimeo.com. It is advised that Kirby license a domain that is controlled by her and is subject to routine automatic backup of the content, via either an external USB hard drive or in the cloud, perhaps both. As of 25 April 2021, the following domains are available for yearly licensing: “staceylkirby.net” and “staceylkirby.com”³. It is important to recognize that is just the domain name registration. Hosting of the website content, including sufficient storage and bandwidth to play videos, would require additional funds for the yearly subscription⁴ for the proposed Kirby Archive. If the chosen web hosting service provider does not have native tools to permit analytics of visitor data, to ascertain how many people (or unique IP addresses) have visited the site in a month, as well as determine the U.S. state or country of origin of the site visitors, and number of downloads of particular toolkit materials, then it is advised that the webmaster of the Kirby Archive engage an appropriate web analytics service provider, perhaps from this list: https://en.wikipedia.org/wiki/List_of_web_analytics_software.

The following links represent the toolkit deliverables produced by Group 3. The intellectual property rights in each toolkit resides in the individual who created the content. Notwithstanding the foregoing, the toolkits are being provided for free under a Creative Commons Non-Commercial license, specifically the Creative Commons Attribution – NonCommercial - ShareAlike 4.0 International License.⁵ This license was chosen as it is the same being used by the Washington & Lee University Collections of Art and Art History

¹ Wild, F. (2016, November 30). NASA Modern Figures Toolkit. *NASA*. <http://www.nasa.gov/stem-ed-resources/nasa-modern-figures-toolkit.html>

² Washington & Lee University Collections of Art and Art History. (n.d.). Building Visual Literacy: A Toolkit for Interdisciplinary Teaching from University Art Collections. Retrieved from <https://teachingwithucah.academic.wlu.edu/>

³ <https://wordpress.com/start/domain/domain-only?new=staceylkirby&search=yes>

⁴ <https://www.top10bestwebsitehosting.com/>

⁵ <https://creativecommons.org/licenses/by-nc-sa/4.0/>

toolkits⁶. However, it is perfectly permissible for the authors of the toolkit to be contacted by an interested party to ask if the toolkit could be licensed under a more compatible open-source license.

The Toolkit homepage is located at <https://uncgeducationaltoolkit.github.io/index.html>. That domain hosts the following educational toolkits⁷:

- [Gender Identity and Expression Training](#)
- Tara's [Toolkit](#)
- Austin's [Toolkit](#)

As the Kirby Material includes images of individuals, issues regarding privacy should be taken into consideration. Generally, privacy rights apply to protect individuals from the public disclosure of private facts although exceptions, such as “fair use” when the object is newsworthy, depend on the jurisdiction.⁸ In the United States of America the only true federal, national statutory law binding non-governmental organizations or individuals is currently dictated by industry, for example, the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) contain laws related to the privacy of an individual’s health information, while the Family Educational Rights and Privacy Act of 1974 (“FERPA”) contain the laws related to the privacy of an individual’s educational information. Non-statutory national federal law resides in the U.S. Constitution where there is tension between the artist’s 1st Amendment rights to freedom of expression and a person’s 4th Amendment implied right to privacy. Additionally, in absence of national law, individual states are enacting legislation protecting the right to privacy⁹ and rights of publicity¹⁰. Given laws related to privacy are pending in several state jurisdictions and an artist’s work can be displayed, via the internet, to reach across jurisdictions, it is recommended that all participants in a Kirby work sign a release from liability for the broadest possible use (commercial/non-commercial; artistic/education purposes) of their image (“Liability Release”).¹¹ As for the records generated from the performances, since they are for symbolic purposes, it is recommended that the participants do not use their real name or personally identifiable information (“PII”). However, If the participants do use PII it is recommended that Kirby take steps to store the original materials in a very secure space with access only on a need-to-know basis. If surrogates of the records need to be accessible, perhaps for analytical metric purposes, then redaction of the PII parts be implemented before processing. Those persons involved in the redaction process should sign a non-disclosure agreement with Stacey L. Kirby to help ensure that the sensitive information remain confidential.

⁶ The NASA toolkit is in the public domain if used in the USA, as is all other copyrightable creations of the U.S. government (17 U.S.C. § 105), subject to certain exceptions.

⁷ As this domain is a free site, it’s continuation cannot be guaranteed. If a dedicated domain for the Kirby Materials is licensed, it is advised that [Chadwick Dunefsky](#) be contacted to assist in the transfer of the web materials to the permanent hosting site, where analytical data metrics tools and backup protocols can be instituted.

⁸ Torsen, M. (2008). The Artist, the Muse and the Audience: International Calibrations for Authorial Rights in Visual Works. *Art, Antiquity & Law*, 13(2), 115–132.

⁹ California Consumer Privacy Act of 2018; pending legislation in New York, Maryland, Massachusetts, Hawaii and North Dakota

¹⁰ Grant, D. (2016). Who’s Privy to Privacy? *Handmade Business*, 42(478), 32–34.

¹¹ Silbey, J. (2019). Control over Contemporary Photography: A Tangle of Copyright, Right of Publicity, and the First Amendment. *Columbia Journal of Law & the Arts*, 42(3), 351–364.

It must be recognized that Group 3 and this report is only able to provide abstract guidelines based on assumptions of what a Kirby Archive would contain and how the Kirby Materials would be accessed, licensed and utilized. Notwithstanding any warnings against misappropriation of the intellectual property that is inherent in the Kirby Material, Group 3 notes that once material is made openly available on the internet, without any registration or password protection, the artist can lose control over how far copies of her work will spread.^{12 13} In a practical sense any copyright notice that the artist is encouraged to add¹⁴ to the Kirby Material is only a recognition that someone else created and claims ownership of this material and, perhaps, it is being licensed for a specific purpose – like education only. It is unlikely the Kirby Archive would have the resources to pursue legal action for violation or misappropriation of the intellectual property inherent in the Kirby Material, without support by a patron or a legal consortium, such as the American Civil Liberties Union or an open source consortium (if the work was licensed under an open-source license but then used outside the conditions set forth in the license). But it does prove that the owner of the intellectual property tried to maintain control over it – didn't just send it out into the internet without care or conditions.

Other limitations on the recommendations in this report include a caveat that if the artist is not providing remuneration for an individual's participation in an art project it is possible the subject could claim the Liability Release contract is invalid for lack of consideration and later request that their name or image be removed from the work. As Kirby's projects are set in the moving picture medium, this could prove problematic, so it is advised that the artist or her representative specifically point out the possible uses and breadth of availability via the internet to each subject so that they are provided with full informed consent when they sign the Liability Release. Lastly, if Kirby performances may include bystanders, a release is not needed if the performances are happening in a public space when there is no reasonable expectation of privacy. However, again, best practices would recommend that there be signage located around the periphery of the performance space warning bystanders that the performance is being recorded on video and their image may be captured and become part of the artist's work given the public location of the space.

Given the scope and nature of the Kirby Materials, there is ample opportunity to utilize these materials for secondary purposes, such as the Toolkits recommended hereunder. This could provide a new audience and wider exposure to the work of Stacey L. Kirby. However, it must be kept in mind that wider exposure raises the risk that someone may misappropriate a copy of the work for purposes outside the control of the artist, especially if done by someone outside the reach of the U.S. legal system, and that there might be a risk that the participants are not comfortable with the wider exposure and may reconsider the use of their name and likeness in the Kirby Materials after-the-fact.

¹² Dalglish, P. (2011). The Thorniest Area: Making Collections Accessible Online While Respecting Individual and Community Sensitivities. *Archives and Manuscripts*, 39(1), 67–84.

¹³ Rubel, D. T. (2007). Accessing Their Voice from Anywhere: Analysis of the Legal Issues Surrounding the Online Use of Oral Histories. *Archival Issues: Journal of the Midwest Archives Conference*, 31(2), 171–187.

¹⁴ © Year, Stacey L. Kirby. With the year being the first year the expression was created or a range of years if the material is being continually updated (like a webpage).