

Claiming Surrogate IP Rights: When Cultural Institutions Repossess the Public Domain

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With the digitization of collections becoming the new norm, Cultural Institutions are faced with increasingly difficult problems. Copyright-imposed obligations make digitization astonishingly expensive, from seeking an author's permission to locating an author, or even determining whether a work falls in the public domain.

In theory, the legal issues become more manageable when Cultural Institutions digitize public domain works. In reality, gray areas perplex many of these works, such as what quality to make the works available and whether the digital reproductions are protected by copyright or fall in the public domain. Even if a work has no legal strings attached, financing digitization remains problematic.

Through efforts to find sustainable solutions for these issues, two trends are starting to emerge that reveal 'an item in the public domain remains in the public domain' is increasingly not the case. First, to offset costs, many Cultural Institutions condition permission to use reproductions of public domain works through certain restrictions or revenue producing agreements. Some agreements function as licenses while others resemble a claim to copyright-by-contract through online terms and conditions. Second, others are turning to orphan works licensing legislation, like in the UK. Interestingly, several works have begun to appear on these schemes' registries as licensed, though they clearly fall in the public domain.

In both cases, practices are becoming accepted that reassign certain rights to a work that have long expired—and which are claimed through a surrogate party. This paper explores such trends and addresses the relevant implications they have on the public domain.