

2. Challenges at the Europeana Space project

Dance and the intersections between copyright and intangible cultural heritage

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Digital technologies enable us to visualize dance in new ways and to capture recordings of dance which may be preserved and handed down to future generations. In this way, dance starts to become part of our intangible cultural heritage. But capturing dance also raises questions of authorship and ownership of copyright in both the dance and the recording of the dance. Challenges arising at the intersections between the legal frameworks of intangible cultural heritage and copyright have surfaced in an EU-funded project, Europeana Space. This contribution describes the E-Space project and the place of dance within it, and it introduces work being done at the Centre for Dance Research at Coventry University on dance and examines the intersections of copyright law and the international legal frameworks applicable to safeguarding intangible cultural heritage.

Dance has significant social importance and leaves traces in many different ways. But because it is an embodied, ephemeral practice, it does not easily produce hard copies for preservation and circulation. Digital technologies have offered opportunities to visualize dance content in new ways and to develop new creative expressions and cultural artefacts. These changes have also led to questions about the place of dance within our cultural heritage milieu, and about the interplay between the intangible nature of the dance which, when captured by digital technologies, comes under the mantle of copyright protection. Europeana Space (E-Space), an EU-funded project, has been addressing just some of these issues through working with our digital cultural heritage with a view to creating new opportunities for employment and economic growth within the creative industries sector.

E-Space and dance

E-Space received funding from the European Union's Information and Communication Technologies Policy Support Programme (ICT-PSP) as part of the Competitiveness and Innovation Framework.¹ The E-Space project is working with our digital cultural heritage with a view to creating new opportunities for employment and economic growth within the creative industries. The E-Space consortium has 29 partners from 13 European countries. The consortium includes representatives of creative industry and technology-based small and medium-sized enterprises (SMEs), cultural bodies, memory institutions, broadcasters, national cultural agencies and centres of excellence in multidisciplinary research. The project's partner organizations have skills in areas relevant to the project's objectives: the building of technology platforms, intellectual property rights management, content provision, management of major digital cultural collections and of digitization programmes,

¹ Grant agreement number 621037.

online publishing, games development and the use and reuse of cultural objects for commercial exploitation purposes.²

E-Space is one of a family of projects designed to support the work of Europeana, an online portal to digital cultural content held within cultural institutions throughout the EU. The Europeana mission is as follows: “We transform the world with culture! We want to build on Europe’s rich heritage and make it easier for people to use, whether for work, for learning or just for fun” (Europeana, 2017). The EU has funded numerous projects designed to support the work of Europeana. These include Europeana Food and Drink, Europeana Labs, Europeana Creative and Europeana Fashion.³ E-Space is different from these other projects because it focuses on how the reuse of digital cultural heritage can contribute to the economy – in other words, for E-Space the focus is on commercializing our digital cultural heritage.

The cultural industries being piloted in E-Space are dance, television, open and hybrid publishing, games, museums and photography. Teams of experts within the E-Space pilot projects have developed tools and applications using digitized cultural heritage artefacts which have been made available during project-specific hackathons. The three best ideas to emerge from each hackathon have been supported through a business-modelling workshop. The project thought to have the most potential overall enters a phase of incubation and is supported with expert business advice. As the intangible art form within the group, dance poses its own copyright and cultural heritage challenges.

The aim of the E-Space dance pilot is to create a general framework for working with dance content. In so doing it has produced two innovative models of content reuse, one for research purposes and one for leisure. Two applications were developed based on these models: DancePro and DanceSpaces.

The DancePro prototype 2.0 was developed by the Universidade NOVA de Lisboa (FCSH-UNL) by programmer João Gouveia under the direction of Carla Fernandes. DancePro focuses on the needs of researchers and dance experts (e.g. dance artists and choreographers) who require a set of powerful tools for accessing dance content and creating extensive metadata (Fig. 1). The tool enables recording and annotation of videos in real-time, and annotating of previously recorded videos. It allows several types and modes of annotation and is designed to support

the creative and compositional processes of professional choreographers and dancers. It also has an analytic and scholarly use in any domain where the performance of the human body is at stake.

IN2, an Edinburgh-based media management and software publishing company,⁴ under the direction of Alexandru Stan, led development of the DanceSpaces prototype.

DanceSpaces focuses on the needs of the general public, dance enthusiasts and pre-professionals (e.g. dance learners and educators, those who participate in dance as a social and/or recreational activity, dance audiences/viewers and tourists) who want to share and explore content about a particular aspect of dance (Fig. 2). It allows a user to become a curator and create dance collections or narratives. Users can upload their own content via an intuitive web interface, or they can reuse content already available on DanceSpaces.

Digital dance content used for the pilot included that drawn from the regional, national and private archival collections of partners and from Europeana. It embraced contemporary dance, classical ballet and other theatrical dance forms, as well as social and popular dance; folk, national and indigenous dance forms; and more ancient dance forms, including those inscribed on historical artefacts (drawings, objects, paintings, texts and other kinds of inscriptions), notations and other forms of dance scores, books and other textual objects, publicity and marketing materials (posters, programmes), audiovisual recordings, photographs and digital visualizations using motion capture and other tracking devices.

Copyright and the dance pilot

Copyright has had to be considered for each of the E-Space pilot projects, including dance. As discussed below, copyright subsists in literary, dramatic, musical and artistic works and in their recordings – and this includes dance. As mentioned, the prime goal of E-Space is to commercialize tools and/or content, and any ultimate investor in a dance project or digital tool would want to know who the owner of the copyright is in the dance and its recording. Careful thought therefore had to be given not only to existing copyright in content and tools used in the pilots and during the hackathons but also to new copyright arising (1) in content and tools developed by the pilots (2) during the hackathons and (3) during the incubation process – and how these copyrights were to be owned and managed.

Copyright law has been around for more than 300 years since it was first put on statutory footing in today’s United Kingdom of Great Britain and Northern Ireland in 1709 in

² Full details can be found at www.europeana-space.eu/partners/.

³ For a full list, see <http://pro.europeana.eu/structure/project-list>.

⁴ See <https://in-two.com/>.



FIGURE 1. Screen shot of DancePro tool. Image courtesy of KoZin Photography



FIGURE 2. A user engaging with the DanceSpaces tool. Image courtesy of Alexandru Stan

the Statute of Anne.⁵ The impetus for this statute came from the development of the printing press: suddenly it was possible to publish books and put copies into circulation, but it was difficult for either the author or the publisher to exert any form of control over circulation of these copies. The statute therefore granted the author the sole right and liberty of printing books – a right that could be assigned to

the publisher – for a period of 14 years from first publication. If the author was alive at the end of that period, it was renewed for another 14 years. From then on, copyright was considered to be a creature of statute, the parameters of which are set by the legislature. Over the ensuing years copyright law was extended in response to new developments and technologies, including art and drama, sound recordings, films and photographs, and the term of protection was extended (in Europe) for authorial works to 70 years after the death of the author. Although

⁵ The text of the statute is available online at <http://archive.org/stream/thestatuteofanne33333gut/33333.txt>.

copyright is territorial, which means that the law extends to the territory in which it is enacted,⁶ a series of international conventions and agreements,⁷ to which the majority of countries in the world have signed on, means that copyright is recognized and can be enforced in many territories around the world.

Because dance and other creative works such as books, software and photographs are both non-excludable and non-rivalrous, which means that individuals cannot be effectively excluded from use and that the use by one individual does not reduce availability to others, a mechanism is needed to enable the owner to exert control over copies of the works. And this is what copyright does: it gives to the owner of the copyright in the work a number of exclusive rights: to control copying, issue copies to the public, rent or lend the work, perform, show or play the work in public, communicate the work to the public and adapt the work (CDPA, 1988, ss 16–21).⁸ The owner maintains these exclusive rights, so she can license or assign them to others who can, in turn, exercise them.

The law of copyright does not, however, give complete power over the work. The rights of the owner are curtailed through a series of limitations and exceptions built into the law, mainly for public policy reasons. These rights are said to balance the interests of the user with those of the owner of the copyright and generally allow the user to use parts of a work protected by copyright without payment or permission. While these are similar in most countries, there are differences. In the United Kingdom these exceptions include fair dealing for the purposes of non-commercial research and private study; criticism, review, quotation and news reporting; and caricature, parody or pastiche (CDPA, 1988, ss 29, 30, 30A). There are also measures in the British legislation that allow works to be used for those with disabilities (ss 31A–F), for the purposes of education (ss 32–36A), by libraries and archives (ss 37–40A) and for the purposes of public administration (ss 40B–44A). Each of these limitations is bounded by criteria that need to be followed if copyright is not to be infringed. In addition it should be remembered that copyright protects the expression of ideas but not ideas themselves. This can be a challenging distinction to grasp in some cases as the boundary between ideas and expression is opaque in law,

but it is an example of where the law balances those who have interests in the copyright framework.

It is also important to remember that in the United Kingdom the author is the first owner of copyright unless she is an employee and acting in the course of her employment. If this is the case, then the employer will be the first owner (CDPA, 1988, ss 9–11). In the United Kingdom the owner is free to license or assign her copyright to a third party. This often happens in the music business, where the musician, singer and songwriter will assign copyright to a record company. All of the copyright ownership is then consolidated in the hands of one entity. But the author does retain moral rights in the work (where applicable). The main moral rights in the United Kingdom are the right to be identified as the author of the work (s 77), and the right to object to derogatory treatment of a work (s 80). These rights last for as long as copyright subsists in the work (s 86). As with the exceptions and limitations to the copyright monopoly, these moral rights are limited in different ways, but their existence means that interests in a work protected by copyright can be split, as between the owner and the author.

Dance sits squarely within this copyright framework. In the United Kingdom the CDPA provides that dramatic work includes works of dance (CDPA, 1988, s 3) and that the author is the person who creates that work (s 9[1]). While United Kingdom case law on identification of a dramatic work is sparse, it seems that a dramatic work cannot be purely static and should have movement, story or action (*Creation Records v News Group*, 1997) and should be capable of being performed (*Norowzian v Arks Limited*, 2000). Although there is no requirement of fixation in the international framework for copyright to subsist,⁹ the law in the United Kingdom does require that the work be fixed in some material form.¹⁰ In the United Kingdom, copyright only arises on fixation. What form fixation takes is left open and needs only to be “in writing or otherwise” (CDPA, 1988, s 3[2]). For dance, one of the notation systems such as Labanotation or Benesh might be deployed; both have relatively modern origins, having been invented in the mid-twentieth century. More contemporary examples of dance fixation, and those relevant to the E-Space dance pilot, might include film, video and motion capture, each of which would have its own separate copyright – so there would be two copyrights in a recording of dance: one in the dance and one in the recording of the dance.

⁶ The British law, the Copyright Designs and Patents Act 1988 (CDPA), as amended extends to England, Wales, Scotland and Northern Ireland.

⁷ For example, the Berne Convention for the Protection of Literary and Artistic Works (1886) or the Agreement on Trade Related Aspects of Intellectual Property Rights (1994).

⁸ For secondary infringement, see ss 22–26.

⁹ Article 2.2 of the Berne Convention leaves fixation to members of the Union.

¹⁰ This is so the extent of the monopoly claimed may be known to others. See *Tate v Fulbrook*, 1908, at 832.

Within the dance community there is a belief that the author of the dance, and therefore the owner of the copyright in it, is the choreographer. This perspective has been challenged over recent years, most particularly where the dancer is closely involved in developing the originality of the dance, and in so doing stamps her personal touch on the dance. In these circumstances the dancer would be the author of the dance, either together with the choreographer or in her own right.

Given the complexity of copyrights surrounding dance, these considerations were an important part of the planning for the E-Space dance pilot project. It was decided to make the tools DanceSpaces and DancePro available at the pilot hackathon, but for demonstration use only and not to be built upon by the hackathon attendees. Therefore it was not critical that the owner of the copyright in the tools was identified – which may have been a challenge given that one was based on a pre-existing tool that used proprietary software and new copyright would have arisen as it was developed by the project team.

The digital dance content used during the hackathon was sourced from different repositories and came with a range of different licences for use. Some was in the public domain, meaning that the author of the dance and of the recording had died more than 70 years prior, and so the digital representation could be freely used without restriction; for other content, bespoke licences were negotiated to allow for use of the digital dance artefact during the course of the hackathon but not outwith the hackathon. Care had to be taken to ensure that the hackathon attendees knew of the licences attached to the content and understood that it was their responsibility to use the content within the licence terms.

Copyright also arose as participants developed new content during the course of the hackathon. The E-Space legal team had suggested two strategies for managing this copyright: one where it would be held in trust to be used for future hackathon events, and one where it would remain with the individual attendees but participants would enter into an agreement not to reuse ideas from other hackathon participants (a confidentiality agreement). In the event it was decided that too much emphasis on copyright could dampen the innovation the hackathon was designed to encourage. So for the dance hackathon, nothing was said about copyright, meaning that copyright arising in digital dance content generated during the hackathon would be owned by the author (or an employee acting in the course of her employment).

Dance and intangible cultural heritage

While the E-Space dance pilot did manage to source some images of dance from cultural heritage repositories, overall

there is a dearth of representations of dance in our memory institutions. One of the challenges has been around the ephemeral nature of dance along with the enduring view in the community that the dance should not be captured and ossified. Many dancers and choreographers are of the view that the dance is fixed or “set” in the “memories and bodies of the dancers” where the bodies are considered material objects (Traylor, 1981, p. 237). Any form of record would be an anathema: the dance is meant to be ephemeral, only to exist at the time of performance – fixation would ossify the work (Théberge, 2004, p. 140). In legal terminology, a dance is intangible. Such an approach means that a dance can draw an audience at the moment of performance, but not beyond. It is also likely part of a wider phenomenon, particularly in British heritage circles, in which intangible cultural heritage (ICH) has not been considered a part of our cultural heritage on its own terms. Where it is present it has tended to be as an adjunct to tangible objects (Smith and Waterton, 2009).¹¹ That view, however, is shifting, most particularly with the development of the international legal framework, notably in the form of the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (ICH). This convention, which places obligations on states that sign up to it to safeguard ICH, was the culmination of a protracted period of negotiations within UNESCO and beyond that sought to have ICH as a recognized part of our cultural heritage ecosystem.

Cultural heritage does not end at monuments and collections of objects [tangible cultural heritage]. It also includes traditions or living expressions inherited from our ancestors and passed on to our descendants, such as oral traditions, performing arts, social practices, rituals, festive events, knowledge and practices concerning nature and the universe or the knowledge and skills to produce traditional crafts [intangible cultural heritage] (UNESCO, 2003b).

The ICH defines ‘intangible cultural heritage’ as the practices, representations, expressions, knowledge and skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage (UNESCO, 2003a, Article 2.1).

¹¹ Smith and Waterton (2009, p.297) quote an extract from a 2005 interview with a representative from English Heritage as follows: “INTERVIEWEE: The UK has not said that it will ratify [the 2003 Convention] and I think it will be quite a long time before it does. INTERVIEWER: What are the reasons for that? INTERVIEWEE: It is just difficult to see how you could apply a convention of that sort in the UK context... it is not relevant... it just does not fit with the UK approach... I think it would be very difficult to bring in a convention that says we are actually going to list this sort of stuff and protect it. What are the obvious examples you come up with? Morris Dancing? As intangible heritage and so on? The UK has no intangible heritage.”

Article 2.1 of the ICHC goes on to state that this ICH is transmitted from generation to generation; is constantly re-created by communities and groups in response to their environment, their interaction with nature and their history; and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.

Since its inception the ICHC has underpinned a growing body of knowledge and gathered examples of intangible practices from around the world. Many of these have been captured and documented in the formal lists of intangible cultural practices maintained by UNESCO,¹² which include such examples as ‘coaxing ritual for camels’ and ‘Tinian marble craftsmanship’. While what is included needs to meet UNESCO criteria, nomination is in the hands of each state: ‘Tibetan opera’ is, for example, on the list (Labadi and Long, 2010). In the majority of entries on the list the focus is on what might be called *traditional* forms of ICH: traditional cultural expressions, traditional knowledge and traditional practices.

The place of dance within the contemporary ICH ecosystem is starting to be recognized within the dance community. In a blog post for *The Guardian*, Judith Mackrell (2015) reported on discussions at a panel convened by Rambert, the dance company, to explore issues around if and how contemporary dance should become a part of our cultural heritage. Some choreographers and dancers remain adamantly opposed to the capture and preservation of dance, maintaining that dance is ‘of the present moment’; its ‘slippery’ nature resists commodification; and a slavish approach to reproducing the past could lead to a sacrifice of effectiveness of the work and of its integrity. For some on the panel the mere mention of the word ‘heritage’ conjured up images of ‘crumbling castles’. For others, safeguarding our dance heritage was as important as safeguarding classics from music, art and literature, although they recognized that there are significant practical and theoretical challenges.

The E-Space dance pilot has also challenged this focus on the traditional. It has shown that traditional forms of ICH – in the form of the digital representations of dance – are being adapted and remixed to be relevant for a changing society and to suit new generations, resulting in new contemporary forms of ICH in the form of new content to emerge from the pilot and the hackathons. This is part of a wider phenomenon which seeks to recognize the importance and relevance of contemporary forms of ICH. As has been argued by Richard Kurin (2004, p. 69), a leading heritage commentator, ICH could

include “rap music, Australian cricket, modern dance, post-modernist architectural knowledge, and karaoke bars”.

Some conclusions

The dance pilot within the E-Space project used content resources found within our cultural heritage repositories for which participants needed to deal with copyright, and it created new works and new forms of cultural heritage which, in turn, have their own copyright. This situation raises a range of socio-legal and political questions for dance (and other forms of ICH) around the interface between copyright and cultural heritage.

What makes it possible for dance to become part of ICH is its capture in some fixed form. But as the intangible dance becomes tangible and fixed in the records of our memory institutions, copyright questions are immediately raised: who has authored and who owns the dance and the recording of the dance, and who has the power to exercise the exclusive rights granted by copyright law?

At this juncture we return to the definition of ICH. ICH is “the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith” (UNESCO, 2003a). As has been described by one commentator, ICH “is an enactment of meanings embedded in collective memory” (Arizpe, 2007, p. 362). The legal framework seeking to safeguard ICH thus seeks to protect the intangible as essentially un-owned, but to be passed down by the communities, groups and sometimes individuals who practice the ICH. By contrast, the copyright framework ascribes property rights in the intangible to authors and owners, who can then exercise them within the marketplace.

This collision of legal frameworks is being recognized and increasingly explored in academia. It is one that the dance pilot within the E-Space project sought to negotiate as it used existing digital representations of dance from our cultural heritage and created new digital cultural (heritage) artefacts. It is a collision that raises great passion in heritage practice and critical heritage studies as the proponents of ICH seek to resist its ownership and commodification of ICH through copyright. It is one, however, that cannot be ignored if ICH in all of its manifestations is to be properly safeguarded into the future. To this end, the Centre for Dance Research (C-DaRE) at Coventry University is working on a number of new research projects that build on the experience gained in the E-Space project and elsewhere, and which seek to bring together law academics, heritage practitioners and critical heritage studies scholars to expose the challenges at the interface between ICH and copyright, and to negotiate new interdisciplinary understandings of the intersections between these areas of law.

¹² See www.unesco.org/culture/ich/en/lists.

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