

‘Participation’, Intellectual Property and Informed Consent: A Literature Review

Synopsis

Introduction

Participation has become a crucial concept in policy, academic and activist writing and museum practice precisely because it is a means of demanding more of institutions set up in the name of public interest and public access.

Yet – as the review of literature shows – ‘participation’ is caught between different political logics. Participation is often seen as ‘never enough’ *and* potentially dangerous and manipulative; it is a tool of government and represents a route to a small state (Big Society) *and* it holds the hope of subversion and resistance. It is all of these things because participation is intimately bound to questions of institutional legitimacy and the limits of institutions’ ability to claim legitimacy.

In this literature review, the different logics of participation are delineated not through the lens of the extent to which ‘participants’ have *control* (which is the traditional means of delineation through the ‘ladder of participation’) but in terms of how *benefit* is understood as flowing.

The review then goes on to locate wider configurations of participation within the specific legal, technical and ethical issues of **intellectual property** and **informed consent**. It is argued that tracing the logic of ‘who benefits’ from participation has had an impact on how ideas of ownership, consent, agency and ethics have been thought about and practiced. It is concluded that actively considering questions of benefit might help inform and develop practice at the intersection of participation, intellectual property and informed consent.

Part 1: Participation as a ‘good’ – but who for?

From an institution’s perspective ‘participation’ has generally been seen a ‘good’. However, understandings of ‘good’ have varied and are caught up in different understandings of institutional legitimacy. The literature on participation can be grouped into four modes:

***Good for ‘Us’*: Better knowledge, relevant institutions**

In the **Good for ‘Us’** mode, the museum or research benefits because participation is seen as leading to more relevant knowledge, collections and displays and in turn better and, crucially, more legitimate museums/universities.

***Good for ‘Them’*: Policy and Government**

In contrast in the **'Good for 'Them'** logic participation is seen as benefiting the individual or the group. This logic has been used most specifically in relation to policy ideas such as health, wellbeing and employment skills, but arguably could be extended to notions of supporting citizenship skills. The museum understands itself as working for public good but via the direction set by government policy.

Not Good for Anyone: Oppression and Manipulation

There is also a strong counter argument to both – ***Not Good for Anyone*** – which claims that **participation is itself a form of exerting control**. As a result it fails to produce better knowledge or displays because it can only imagine knowledge in certain ways (and is in constant danger of fetishizing authenticity) (Cooke and Kothari 2001); because of the dangers of group-think in group work (Cooke 2001) and the limitations in the way participation images 'subjectivity' and 'agency' (Gallagher and Gallagher 2008).

Good for Us All: Society and Solidarity

Under the logic of **Good for Us All** the role of participation in social and political change is emphasized. Rather than a notion of benefit going primarily in one or the other direction (as in *Good For 'Us'* and *Good for 'Them'*), a notion of solidarity is evoked. In this view, the museum/university might be a focus for critique but there is also an optimism that institutions/research might act as a site from which broader social and political change might be initiated. The 'Good for Us All' logic imagines democratic participation variously as a form of activism through influencing government and/or governance structures (e.g. of museums), invigorating a grassroots democracy through solidarity between people otherwise separated or generating its own bottom up and alternative reading of 'legitimacy'.

What's Foucault got to do with it?

It may seem as though the four approaches are distinct. However, a Foucauldian reading of power – which is used in aspects of the literature on participatory research and participation and museums – helps us test this. Foucault saw power as not 'one thing' and the kind of power we often think of as power (top down) as only one form of power (domination). Another form of power Foucault was interested in was 'governmental' power, which works not through domination but through acting on people's actions. In this view, facilitating wellbeing and facilitating active agency or citizenship are not completely distinct but are, rather, two iterations of governmental power (Bennett 1998; Dean 1999; Miller 1993; Rose 1998).

Recognizing the not-fully-distinct nature of the four approaches allows us to reimagine participation not as judged in terms of *how much* but in terms of *how* participation happens. The governmental view doesn't close down possibilities – as is often charged – but draws attention to them and requires

that we work within ‘compromised forms and ideals’ (Rose 1999, p. 196).

Good for Us All 2.0: Self-generating networks, Multitude, Commons

But something new is also emerging into the literature around participation. While participation is a dominant contemporary idea, new logics of association (articulated through terms such as networks, self-generating associations or multitude) are emerging via web logics and logics of associative democracy (Benkler 2006; Bulter online). Key to these logics is the idea that – in contrast to ‘participation’ – there is no need for central or hierarchical organization. Indeed, these logics could be read as post-public (Hardt and Negri 2005): the logics of institutions legitimately mediating individual needs in the interests of public as a whole – the very basis, for example, of the Museum Association Code of Ethics (2008) – are being questioned. This is highly relevant to how participation might link to intellectual property, as ideas of ‘commons’ are inflecting activist approaches to copyright (Creative Commons).

Part 2: ‘Participation’ in the context of intellectual property rights and consent

Perhaps the key insight from the review of literature related to intellectual property, copyright, research and museum ethics and informed consent is that while there clearly is law and policy relating to ownership and consent its consequences are not as clear cut as it might be imagined. Indeed, the greys in the law has been used for political activism, especially by indigenous peoples.

Intellectual property rights: Ownership and Agency

Drawing on UK examples and international examples relating to the UNESCO and WIPO dealings with indigenous people in Australia and Canada, the literature suggest that the variations in provisions relating to ‘expression’, ‘performers rights’ and ‘moral rights’ has created scope (and holds the potential for further scope) for activists defending their own cultural expressions.

However, this politics of ownership must also be seen in the context of activism contesting copyright which (as with self-generating networks above) questions the logics of property in the context of media which is nonrival (can be enjoyed simultaneously by lots of different people and isn’t used up through its use) (Benkler 2006; Lessig 2008; Creative Commons online). This is especially relevant in the context of the Web where the literature in this area stresses the way value is created through ‘commons’ values of dissemination, use and re-mixing rather than institutional control.

Informed Consent: Clarity and Capacity

Informed consent is intimately bound both with management of intellectual property (through waivers/licenses and contracts) and research ethics. Many have questioned whether the documentation of consent is driven more by 'audit culture' than ethics and so there is an increased focus on the negotiated development of shared understandings as a means of securing informed consent.

This has been seen as especially important for those perceived as vulnerable, such as people with profound and multiple learning disabilities (and covered by the Mental Capacity Act) and supported decision making models have been developed (Paradigm 2008, Mencap 2011, Ledger unpublished).

Attribution and Anonymity

The tradition ethical guarantee of anonymity is being substantially questioned for a range of reasons (including its impossibility in internet contexts and its undesirability in terms of loss of accountability). Again, a brokered approach is most often recommended within the literature.

Ethics as politics

Clear trends in the literature include seeing ethics within a much bigger political and social context and to see it as a negotiated process: an 'ethic of care' – 'deep respect for relationships and humanity – rather than a 'duty of care' (Pain et al. 2008, p. 306).

Conclusion

Participation, and the copyright and consent forms which its management has generated, derives from anxieties surrounding institutional legitimacy, accountability, transparency and ethics. However because of this 'participation' and questions of copyright and consent are good places to go in search of the limits of current practices as new ways of working and being together emerge – whether through institutions or otherwise.