

# **'Participation', Intellectual Property and Informed Consent**

## **A Literature Review**

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## **Introduction: The Consent Form**

The institutional management of participation has coalesced around the consent form. Some are framed as copyright forms, others as release forms. Some use quasi-legal language, others are focused on accessibility. But all represent a manifestation of an institutional protocol, a 'form' both of desired clarity and ethical guarantee.

This is a literature review. But in order to identify the key debates informing approaches to participation, intellectual property and informed consent in Museums and in University-based research I begin by reflecting on the significance of the consent form as it is used in practice.

I wanted to begin with this 'thing' (the form) and this act (of it being signed) in order to keep in mind the messiness, negotiation and between-peopleness of *what happens* as I review and identify what is at stake in conceptions of intellectual property, copyright and informed consent in academic and practice-orientated analysis and relevant law and policy.

### ***Awkward moment***

I've been involved in the design of many consent forms, each form has been passed through various bodies (UK University ethics committees, UK local authority under the Research Governance process<sup>1</sup>; US Institutional Research Board). I've then used the forms, got them signed, kept them safe and then (where appropriate) destroyed them according to Data Protection requirements.

As anyone who has done it knows, getting the form signed is an awkward moment.<sup>2</sup> Awkwardness evokes a sense of something not being quite right socially. It is the inability to make things flow, the inability to make sure everything just feels good between you and someone else. Awkwardness is felt because, and as, other things, other truths beyond the meeting are somehow called in. Awkwardness is therefore not something which should just be 'passed over' and if it is, as it often is, then 'not too quickly' (Ahmed 2007, p. 165).<sup>3</sup>

One reading of the awkwardness of the consent form is that it creates a moment of formalization. It newly visualizes the power relationships between 'the professional' and that other person. It calls forth the institutional frame where we are situated differently and which can seem to be semi-lost in the fun, flow and enjoyment of collaboration.<sup>4</sup>

The consent form derives from a need to translate the specific and personal interactions between staff and those involved in a project into a de-personalized form which can prove – for audit – that institutional protocols have been followed. The form represents the institutional insistence on a 'moment' of transparency, where all the conversations, discussions, negotiations, questions and jokes which go on between staff and those with whom they are working are re-focused through approved language.

More specifically the consent form evokes, through not always very clearly, the law around intellectual property and copyright. It makes semi-visible – though not always – the fraught issue of ‘authorship’ and therefore ‘ownership’ in the context of institutionally-mediated projects. It also represents a complex moment of mediation between an institution’s imagined relationship to specific people and a wider or future public or publics and between duty – sometimes framed as ‘duty of care’ to that individual – and duty to the ‘public’ as both funder and beneficiary. In museum contexts where co-produced objects are both publicly funded and then accessioned, the consent form is also a mechanism of limiting ongoing costs in line with ideas of ‘public value’, as securing consent in the present means (potentially) that time and resources need not be spent re-negotiating again and again in future.

But back to the awkward moment. Having passed the consent form to one person I worked with on the Art on Tyneside project, he very deliberately teased me before signing. His comment – said in the style of a serious joke – was that he wanted to be paid. Even at the time I knew that the joke was a way of drawing attention to the complexity of the interactions we had had as part of this ‘participatory project’. The joke was a mode of response which was true to the relationship we had developed which was full of him teasing me about my accent, lack of local knowledge and general poshness and was an unending working through and drawing in of the institutional, cultural and economic inequalities which informed (though not fully determined) everything that passed between us.

Muddling through both the flow of the teasing and the awkwardness of his request, I took him seriously and explained that no one – not the museum or the University – was making money out of his oral history. But, and very much in line with the jokey nature of our relationship, I more flippantly advised him to post it on You Tube and wait for it to go viral and/or (as the joke was played out multiple times) that I didn’t deal directly with ‘the talent’ and that he should get his agent to give me a ring. What I didn’t understand at the time was how precisely his joke and my response were revolving around the very particular interrelationship between the legal, ethical and *in practice* issues of navigating intellectual property, copyright and informed consent. Specifically 1) that is it not strictly true that his story did not secure money for the University and Museum (in the form of project funding); 2) that in order to have a ‘contract’ with him we would indeed have to offer him some kind of compensation and 3) that – as my ‘talent’ joke unwittingly implied – it was possible that he might legally be understood not as an ‘author’ but as a ‘performer’. It was, in other words, an ‘awkward’ moment for more reasons than either of us understood.

## Part 1: Participation as a 'Good' – but who for?: Good for 'Us', Good for 'Them', Not Good the Anyone, Good For Us All

### What is participation?

The idea of 'participation' is being used with increased frequency. While it has a political heritage associated with 'democratic maximalists', who see representational democracy as failing the promise of democracy as government by the people (Pateman 1976), today 'participation' can also be found in policy and writings associated with the right (Cameron's Big Society; Cameron 2009)<sup>5</sup> and the left of centre (e.g. writings by Compass; Demos). Reflecting these wider shifts, 'participation' has, as this review will show, also become an increasingly used term in research and arts, museum and heritage contexts.

The new frequency in the use of the idea of participation reveals much about what participation is – even as it used to describe such different political philosophies (Pateman 1976, p.1; Cornwall 2008, p. 19).<sup>6</sup> Specifically, the multiple uses of 'participation' from the right and left come as the relationship between the individual and the state is being renegotiated. With this renegotiation the legitimacy of organizations described as public and funded with public money is at stake. 'Participation' is a key mode of engagement through which a new legitimacy is being sought.

Because of the way 'participation' is bound up with questions of the relationship between the individual and the state and questions of institutional legitimacy, for the most part 'participation' is a word used to describe the act of involvement in what Andrea Cornwall calls 'invited spaces':

These institutions – spaces into which citizens are invited to participate – form part of an expanded 'participatory sphere' that lies between the formal institutions of state bureaucracy and service delivery and the kinds of associations, organisations and informal institutions that exist within society at large. (2008, p. 19)<sup>7</sup>

Bernadette Lynch and Sam Alberti have pointed to the dangers of *the invitation* in terms of museums, arguing that it means the space remains shaped by museum staff and that this sense of control must be relinquished to realize a museum of both 'collaboration and contestation' (2010, p. 16).<sup>8</sup>

However, a central argument of this literature review is that the ambivalence of power created by *the invitation* being extended by the state (as it is formed by various institutions) to 'society at large' is absolutely core to what 'participation' is. 'Participation' is, as has been argued by theorists working with Michel Foucault's theories of governmentality such as Mitchell Dean and Nikolas Rose, *both* voice and possibility *and* a way of directing people's actions and behavior (Dean 1999, p. 71; Rose 1999, p. 4).<sup>9</sup>

This does not, of course, mean that participation is ‘bad’, only that it is conducted in a world of ethical greys. Cornwall argues that in the context of so many different uses of participation – by the right and by the left – that what matters is the specificity, what is done (2008, pp. 19, 20). It is the link between conceptualizing participation and *doing* participation which I seek to explore.

Both Universities and Museums are increasingly being understood as places of participation and there are growing bodies of literature exploring the implications of participation in both contexts. Before approaching the literature which is specifically relevant to copyright and consent, I first review the wider debates about participation. I suggest that there are effectively three arguments put forward by institutions or researchers seeking public participation: ‘**Good for “Us”**’, ‘**Good for “Them”**’, or a ‘**Good For Us All**’.<sup>10</sup> There is also a counter argument which we frame as ‘**Not Good for Anyone**’.

In gathering together the literature in this area I deliberately use the idea of ‘good’ because it both indexes the distinct dynamics (*for us/for them/for all of us*) in the literature and points to the ambivalences in the notion of ‘good’ and, therefore, also (*pace* governmentality above) that each mode may not be as distinct as they are sometimes hoped to be by their proponents.<sup>11</sup>

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

In the mode of **Good for ‘Us’**, museums and universities want people to participate because it leads to two, sometimes linked, outcomes which benefit the institutions. The first is the persistent concern about **making museums and universities relevant** and the second is **better knowledge**, including better exhibitions and programmes or better research.

The concern about **museums** continuing **purpose, relevance or legitimacy** is writ large in the museological literature. Where the late-nineteenth century vision of museums had a specific kind of ‘political rationality’ and imagined themselves as both pedagogic and reforming of public behaviour (Bennett 1995), the current museological literature is concerned both with reimagining a museum which has a clear place in today’s society and questioning the assumption that museums improve the public rather than vice versa.

Stephen Weil, who worked for many years at the Smithsonian Institution in Washington D.C., argues ‘museums matter only to the extent that they are perceived to provide the communities they serve with something of value beyond their mere existence’ (2002, pp. 4-5). Weil directly ties this to public funding of museums:

The emerging public service museum must see itself not as a cause but as an instrument. Much of the cost of maintaining that instrument is paid for by the community: by direct support, by the community’s forbearance from

collecting real estate, water, sewer, and other local taxes, and by the considerable portion of every private tax-deductible contribution which constitutes an indirect public subsidy from the community. For that reason alone, the community is legitimately entitled to have some choice – *not the only choice, but some choice* – in determining how the instrument is to be used. (2002, p. 49, emphasis added).

Participation has been a popular solution for this problem of relevance and/or legitimacy. For example Nina Simon, blogger, consultant and now Director of the Santa Cruz Museum of Art and History has argued strongly that cultural institutions should reconnect ‘with the public and demonstrate their value and relevance in contemporary life’ through ‘inviting people to engage as cultural participants and not as passive consumers’ (2010, p. ii). Influenced by the possibilities of Web 2.0 logics and possibilities, Simon reads participation broadly as ‘beginning with me’ and then moving from ‘me to we’ to include ‘access to a broad spectrum of information sources and cultural perspectives’, the expectation to be able to ‘respond and be taken seriously’ and to ‘discuss, share, and remix what they consume’ (2010, p. ii) as well as more formal collaboration, co-creating and hosting of community projects (2010, Ch.7, Ch.8, Ch.9).

In his reference to community choice, Weil’s inserts a caveat – ‘the community is legitimately entitled to have some choice – not the only choice, but some choice’. Simon too also draws attention to constituencies beyond those directly participating, ‘Participatory projects aren’t just about empowering visitors. Every participatory project has three core stakeholders: the institution, participants, and the audience’ (Simon 2009, n.p.). Here both Weil and Simon evoke the politics bound up with ideas of ‘participation’. In the ‘Good for “Us”’ mode the museum may work in participative ways with individuals, groups and ‘communities’ but, as the Museum Association Code of Ethics puts it, also accept that the museum has broader responsibilities to strike a ‘balance’ in the ‘public interest’ (MA 2008, 7.0). The ‘balances’ are most obviously between individuals, groups and communities in the present in terms of reflecting diversity, between those directly involved in producing content for the museum as participants and those visiting the museum (Simon 2009) and between the public now and the future public (MA 2008, 3.12; 6.4).<sup>12</sup>

One very clear way in which participation has been framed as ‘Good for “Us”’ in both museum and research contexts has been in terms of **better knowledge**. Associated with radical epistemologies (e.g. Women’s Liberation Movement) and radical pedagogies (Friere 1969), participation questions traditional and researcher-driven definitions of the ‘quality’ of knowledge and, it is hoped, leads to more responsive and therefore legitimate knowledge is a trajectory. In its contemporary iterations it can be found in participatory action research (Development Studies; Geography), emancipatory research (Disability Studies), inclusive research (Learning Disabilities) and collaborative anthropology. There is sometimes a difference of emphasis within these literatures, with some writers emphasizing a better outcome within existing criteria and the existing worlds of academia, and with others – often under the label

Participatory Action Research – seeing the process as producing an extra-academic outcome in terms of action/activism.

The focus on participation as producing better knowledge can also be found in **participatory museum practice** where knowledge and displays are co-produced (Shelton 2003; Lynch and Alberti 2010; Lynch 2011a; 2011b; CultureUnlimited 2011), with certain museums famed for this work (e.g. Glasgow's Open Museum; New Zealand's Te Papa Tongarewa). This – as with participation in general – has often explicitly been linked to securing legitimacy for museums. Indeed, when James Clifford made his much quoted prescription for museums to become 'contact zones' where 'their ongoing structure as a collection becomes an ongoing historical, political, moral relationship – a power-charged set of exchanges of push and pull' (1997, p. 192) – it was precisely so that museums might become more responsive (1997, p. 213; see also Tapsell 2003, p. 250).<sup>13</sup>

In context of museums' work with First Nation peoples the epistemic significance of collaborative work is often highlighted precisely because it is felt that the objects can only be legitimately interpreted in this way. As a result it is argued that collaboration necessarily leads to better knowledge and better exhibitions (Tapsell 2003; 2011).<sup>14</sup> This is of enormous relevance in Canada because policy and funding contexts (following the Canadian Task Force on Museums and First Peoples, 1992) requires First Nation support and involvement in exhibitions including their heritage.<sup>15</sup>

For Michael Ames, who was Director of the Museum of Anthropology at the University of British Columbia (1974-1997) – an epistemic commitment is key in terms of better knowledges and exhibitions. Ames' describes the process of collaboration, reflecting on the question of the kinds and quality of the knowledge produced: and how this knowledge has radically improved the quality of the display:

When the Vancouver-area First Nations gave their support to the two exhibits, which they did willingly and out of natural interest in the subject matter, they were not attempting to deny the principle of free enquiry. They wanted to define for what purposes inquiry should be free. . . [they asked] MOA that this expertise better serve their own educational priorities, concerning which they are the experts. (2003, pp. 174-175)

The exhibitions which came from this work were, as a result, completely different than anything the museums could have produced on their own, with one First Nation person offered 'the analogy of decorating a home':

Most museum exhibits of his heritage, he said, through dealing with familiar matters, never seemed to be quite right. It was like having a stranger decorate his house, he said. He would recognize all the furniture and the settings. Everything would be familiar. Yet somehow the resulting assemblage wouldn't convey the right feeling. It would not be the way *he* would furnish his home. These two exhibits, did feel right to him [...] Thus,



the extended process of negotiation and consultation – the to-ing and fro-ing which at times made museum staff impatient and worried – taught the exhibition teams how to do a better job of decorating a home. (2003, p. 177)

Ames' argument is of special relevance for this literature review because he re-contextualizes the criticism that 'political correctness' took 'precedence over intellectual integrity' – that the participative process came before quality of knowledge – by drawing in research ethics of University of British Columbia. Ames suggest that the techniques the museum used in collaborating with the First Nation group reflected research ethics requirements set up the University, both in terms of informed consent – which was relevant because of the contemporary significance of the objects – and the standard commitment of research to not cause harm, including a twelve month embargo on publications where this is deemed appropriate (2003, p. 178). In other words, Ames argues that while the approaches taken might have seemed to some as overly-tailored, the process was, in fact, fully in accordance with general and widely accepted research ethics.

The 'Good for "Us"' logic has also led to a position which emphasizes using museums' authority as an institution. Research with visitors conducted by Fiona Cameron suggests that a desire for museums to exercise a cultural and moral authority remains:

Museums have a strong moralizing and reforming task to perform as a system of social, cultural and self development. On the other hand, audiences want open debate and a range of perspectives, but on the other hand require museums to set moral standards and reforming agendas that can be used to understand and evaluate societal conduct. (2007, p. 240)

These are findings which chime strongly with Richard Sandell's argument that museums should play a 'moral leadership role' in 'combating prejudice' (2007, p. 186). In this imaginary of the museum's role participation is less important than museums securing their relevance by reimagining their authority to address the key issues of the day.

### **Good for 'Them': Policy and Government**

When seen as 'Good for "Us"', participation is understood as improving the museum and research, in the 'Good for "Them"' logic it is the public who are being improved. The '**Good for "Them"**' mode can be traced to desire for museums to offer education and the reform of public manners in the 19<sup>th</sup> century (Bennett 1995; O'Neil 2002) but became newly articulated in a UK context under both New Labour cultural policy and the new focus on 'impact' in UK research institutions (Research Councils UK, 'Excellence with Impact').<sup>16</sup> There is a complex 1980s political heritage to the New Labour articulation which derives both from uses of heritage for economic regeneration under Thatcher and Major Conservative governments (Gray 2008a, 2008b; Hewison 1987) and the use of grant aid to support community arts organisations under the Labour-run Glasgow City Council, Greater London Council

(before Thatcher abolished it) and Tyne and Wear (Fleming 2001; O'Neill 2001; Spalding 2010, p. 121; see also Hooper-Greenhill et al. 2000). Here the overt focus on participation is not to ameliorate the institution as such but to demonstrate 'public value' by positively affecting those involved (see Grey 2008a).<sup>17</sup> The foci of this mode have varied but certainly include well being, happiness, skills development, self-confidence, social capital and citizenship (Dodd et al. 2001; Newman et al. 2011, MLA 2005; Graham, Mason and Newman 2009; Culture:Unlimited 2011).<sup>18</sup>

It is clear is that the 'museum as intervention' logic is nevertheless directly tied to the same concerns of legitimacy of the museum outlined by Weil (see also Dodd et al. 2001; Dodd and Sandell 2002). When reading through this lens it is the museum securing its relevance and legitimacy: **Good for 'Us' by being Good for 'Them'**. However, in this context rather than seeking legitimacy (as in Simon's model of relevance) through appealing than directly to visitors themselves, this legitimacy secured through appeals to a political order who control museums' public funding via a promise to 'act on' its 'citizens' on their behalf. In other words, participation carries value – including monetary value – which does not come directly from the individual (as in the Good for 'Us' mode) but via the imagined aggregate governmental value of lots of individuals' engagement (healthy population; more skilled workforce).

However, the other key iteration of the 'Good for "Them"' mode relates to a serious consideration of 'benefit'. The framing of 'benefit' has been a key ethical issue for participatory or inclusive research. The US Institutional Review Board has a specific focus on both 'beneficence' and 'justice':

Beneficence. Persons are treated in an ethical manner not only by respecting their decisions and protecting them from harm, but also by making efforts to secure their well-being. [...] (1) do not harm and (2) maximize possible benefits and minimize possible harms.

Justice. Who ought to receive the benefits of research and bear its burdens? [...] There are several widely accepted formulations of just ways to distribute burdens and benefits. Each formulation mentions some relevant property on the basis of which burdens and benefits should be distributed. These formulations are (1) to each person an equal share, (2) to each person according to individual need, (3) to each person according to individual effort, (4) to each person according to societal contribution, and (5) to each person according to merit.

(The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research (1979))

If read through the 'Good for "Them"' lens, then the benefit of involvement in research is often understood, for example, in terms of skills development or well being. However, and reflecting the Art on Tyneside serious joke about being paid,

this has raised significant questions about issues such as payment for involvement in research and museum projects. This has been a particular concern in inclusive work and research with people with learning disabilities where numerous attempts have been made to build in posts for people with learning disabilities within funded projects (e.g. Grant and Ramcharan 2007, pp. 23-24, 116-118; CHANGE online). In the UK the issue of payment affecting people's Department of Work and Pension benefits is often used as a reason for not doing this. However, ways around this have been found, through whether this will be a good financial option for individual researchers on benefits will vary from person to person (Walmsley and Johnson, 2003, p. 156).

In research contexts, others have framed benefits in terms of covering expenses and social occasions to express thanks, though this raises just as many awkward issues about debt and gratitude which also inflect relationships between those working in institutions and those they are working with (Swartz 2011, pp.58-59).<sup>19</sup> Others have also made arguments focusing on the 'two-way process', 'you give something of yourself so in that sense you are negotiating both personal and professional boundaries' (Jamieson 2010, p. xi), or have drawn attention to mutual interpersonal benefit and 'becoming friends' (Townson et al. 2004, p. 75). In museum terms, it has been argued that if a particular course of action such as repatriation of objects belonging to indigenous peoples does offer something specific to a community then it is acceptable for the museum to consider getting something back in return (Pickering 2007, pp. 256-257) precisely because of their responsibilities and accountability to a 'broader public'.<sup>20</sup>

While there is a wide recognition that academic careers are built through participative research projects (Swartz 2011, p. 59; Johnson and Walmsley 2003, Ch. 2) – which expands the meaning of 'Good for 'Us'' to include a personal dimension – the issue of working across substantial economic and material inequalities does pertain. While one approach to this has been motivated by 'Good for "Them"' benefits for individuals such as job skills or payment, in the more Marxist-orientated Participatory Action Research the *benefits* are usually framed in terms of collective political intervention and political change – which take us to 'participation' as ***Good For Us All***.

### **Not Good for Anyone**

There have, however, been a number of **critiques of participation** both within research and within the literature on museums. A key critique has been to question whether participation really does produce better knowledge or better exhibitions. In disciplines with a longer trajectory of participation and where the power relations are most visible it has, in addition, been suggested that **participation is inherently problematic and a means of exerting control** and/or that participation is **redeemable as really empowering only if practiced differently**.

In a seminal collection *Participation: The New Tyranny?* (2001) edited by Bill Cooke and Uma Kothari (both researchers in Development Studies) numerous authors take

apart the assumption that participation produces better knowledge. A strong theoretical trajectory in the book is the Gramscian notion of power operating through consent.<sup>21</sup> In this view, participation – following its use in management and Human Resources contexts – is ‘good for business’ (Taylor 2001, p. 127). Indeed, rather than suggest that ‘participation has become deradicalised’, Taylor argues that ‘participation has never been radical’ (2001, p. 136):

To be genuinely radical, I argue, it is necessary for there to be a ‘challenge from below’ and spontaneously coming together of different individuals and groups who see their common subordination to the social and economic power relations of capitalism. (2001, p. 136)

Taylor develops his argument to suggest that because those facilitating participation retain control over the terms of participation, participation therefore fails to live up to the claims to produce better knowledge. David Mosse argues that one of the effects of how participation is facilitated in the context of ‘development’ is that people only ask for what they think the development agency can provide (2001, p. 24). Building on this position in terms of research, Kothari suggest that **participation is a model which already imagines knowledge in certain ways**. Specifically, participation and the knowledge it produces is imagined as ‘bottom up’ not ‘top down’ and in terms of a celebration of local or indigenous knowledges (Henkel and Stirrat 2001, pp. 170-171). Participation is, therefore, always in danger of fetishizing authenticity, for example, Kothari argues: ‘Participatory methodologies . . . require the formulation and adaption of a framework in which the micro is set against the macro, the margins against the centre, the local against the elite, and the powerless against the powerful’ (2001, p. 140).

The very methods of participation – which have sought to use group dynamics (following Freire and radical pedagogy) or to use accessible and engaging techniques (especially with children) – have also been seen as flawed means of producing knowledge. Cooke suggests how social psychological approaches point to the **dangers of group work** (‘public social events’ (Mosse 1994, p. 497)) as they act effectively as an ‘intervention’, defined as the desire ‘to enter into an ongoing system of relationship, to come between or among persons, groups or objects for the purpose of helping them’ (Argyris 1970 cited Cooke 2001, p. 103). He suggests that group work fails to produce better knowledge because of dynamics within the way groups themselves work. Cooke delineates four possible barriers: ‘risky shift’ (where groups of people take more risks than individuals would on their own); the ‘Abilene paradox’ (where all agree to a course of action believing that’s what everyone else wants, even if they don’t); ‘Groupthink’ (where groups define themselves against others and take decisions on this basis); ‘Coercive persuasion’ (where an individual’s mind is changed through a process of unfreezing their current sense of what is right and then reprogrammed through group dynamics and positive reinforcement) (Cooke 2001, pp. 106-120).

In different disciplinary contexts some of the same arguments have emerged. For example in the context of research with children, it is argued that ‘children’s and

citizen's rights have produced a political and legal environment which encourages more participative approaches' (Holland et al. 2008, p. 3; see also Kellett 2005, p.18). Key writers in this areas, such as Mary Kellet, while a strong advocate for research by children and seeing it as 'a natural progression accompanying the shifting changes in adult-child power and participation agendas', nevertheless draws attention to the 'pitfalls to avoid, tensions to address and dilemmas to deliberate over' (Kellett 2005, p. 31). For example, 'Who takes ethical responsibility for a child-led study? The child? The supporting adult? An independent body? And should the ethical standards be designed and policed by adults or by children? Would children regard adult policing as interference or a necessary framework in which to operate?' (Kellett 2005, p. 22).

While noting the 'attractiveness' of aims of participation, Lesley-Anne Gallagher and Mike Gallagher, argue that 'this attractiveness may obscure the problems of these approaches' (2008, p. 499) in producing successful research. They do so by questioning key concepts underpinning participation – **empowerment, intentionality and agency** – and argue that taken together these logics imply a Cartesian subject (conscious, intentional and sovereign over themselves) rather than reflecting theories of subjectivity more associated with post-structuralism which emphasises that we are made through interactions and always in the process of 'becoming' (2008, p. 502).

Reflecting the fact that participatory techniques often used in research with children are also standard teaching approaches, Gallagher and Gallagher suggest that calls for 'empowerment' through participatory research imply the necessity to structure engagement – or 'intervention' – to enable agency. Instead they note how when using traditional participatory techniques they, as researchers, were pushed into teacherly and even disciplinary roles, including getting children to focus which, therefore, limited the kinds of contribution children could make. Instead Gallagher and Gallagher argue for broader definitions of agency and show how the children intervene in the researcher's ethnographic observations in their own way, through, for example, confiscating the researcher's note pad (2008, p. 509).

There is a strand which, while engaged with these critiques, nevertheless sees these **participatory methods as redeemable** using what we will term, in a later section, 'Good for Us All' logics. Kindon, Pain and Kesby argue that they recognize that 'while participatory approaches seek socially and environmentally just processes and outcomes they nevertheless constitute a form of power and can reproduce the very inequalities they seek to challenge', but 'rather than abandon participation, our response is to look for ways in which such a critique can fortify and transform our practice (2007, p. 2). Indeed, they specifically accept the post-structuralist critique of subjectivity, evoked by Gallagher and Gallagher, as key to this – also using ideas of 'becoming' and 'betweenness' to evoke the sense that 'knowledge, analysis and action emerge between co-researchers and participants' (Kesby, Kindon and Pain 2007, p. 29). Yet, arguably, Gallagher and Gallagher's substantive critique does remain significant as the same authors also describe the subjectivities implied within

PAR as 'dynamic agents capable of reflexivity and self-change' (Kindon, Pain and Kesby 2007, p. 13).

This concept of subjectivity is significant in terms of approaching issues of intellectual property and informed consent as the weight placed on agency versus 'betweenness' obviously has implications for perception of the institutional role in navigating between enabling authorship and ensuring 'duty of care'. However, the broader question at this point in the story of participation is whether participation is seen as redeemable.

### **Good for Us All: Society and Solidarity**

As with 'Good for "Us"' and 'Good for "Them"', the **Good for Us All** logic also derives from the fraught question of the purpose and legitimacy of museums. In this mode the focus becomes the impact of the museum on wider society (Sandell 2001). There is, in this view, a sense that the museum is well placed to take on this kind of role and the imagined amount of active participation by non-staff varies. As a result the museum has been imagined as a safe space (Heumann Gurian 2006, p. 94), training site for citizenship (Lynch 2011b), a social enterprise (MEAL/Mb Associates 2011) or as an activist on disability issues or issues of sexuality (Sandell 2007). As such writing in the 'Good For Us All' mode derives from a strong commitment to the political basis of participation and therefore tends to revolve around concerns over the extent to which participation is enabled. A concern which has led Lynch to strongly criticize museums for only offering delimited involvement and therefore 'empowerment-lite' (Lynch 2011, pp. 6-7).

A very influential way in which this has been articulated has been through Sherri Arnstein's 'ladder of citizen participation' (1969), which has been adapted by Roger Hart in terms of children's research (1997). The logics of the ladder of participation have been very persistent in research. The question therefore has often returned to an issue of amount: *How much* participation? How far up the ladder does this project go? In the ladder of participation model (as introduced above) it is full involvement in all aspects of research or exhibition which is understood as the desirable end point. However, in their work on inclusive research with people with learning disabilities research, Walmsley and Johnson question this: 'To expect all people with learning disabilities to be involved in every aspect of the research undertaken about them is in our view both unrealistic and oppressive' (2003, p. 207). Instead they set out three possible models of interaction which have the potential to stop the unhelpful 'blurring of the boundaries between roles of researcher and those involved in research who are not by training or experience researchers in the formal sense' (2003, p. 193):

We [...] need another sort of language. [...] The binary divide, the polarizing of the non-disabled and the disabled, the researcher and the co-researcher, the inquirer and the expert, is perpetuated, not dissolved through inclusive research.

People with learning disabilities have made and will continue to make valuable input to research. They do not need obscurantist language to prove that. Rather they need the contributions they make to be named and described and recognized for what they are, not for what we would wish them to be. (2003, p. 223).<sup>22</sup>

Or, in other terms and as Holland et al. argue, 'it is more important to pay close attention to *how* participation is enacted (at a range of levels, including participant–participant, participant–researcher, groups of participants–groups of workers, participants–end-users of research, including policy makers and academic audiences) than to focus on *how much* participation was achieved' (Holland et al. 2008, p. 25, emphasis original).

Responses to ladder of participation have led to two – very often linked – approaches to **naming power**. In a critical tradition you have some authors who are very clear about inequality and label it firmly and see it flowing in broadly predictable ways through interactions. In a heritage context, a key proponent of this would be Laurajane Smith (2006; 2010 and Smith and Waterton 2009; Waterton and Smith 2010). The second is also in a critical tradition, but a critical tradition which links critique to optimism about change. In this mode you therefore have a desire to find new ways of expressing the relationship between collaborators as a way of expressing a commitment to equality. For example in a museum context, Lynch and Alberti have argued:

These encounters still resonate with the museum's role in essentialising difference. Western institutions continue to maintain borders and to privilege particular ways of knowing. Consciously or not, those who staff museums and galleries have been trained and socialized to think and know in these ways, and museums are not set apart from global economic injustice and the reality of racial conflict and prejudice. In Britain, this reality has its roots in empire. Encounters between museum professionals and external individuals, particularly those from Diaspora communities, still bear traces of colonizer meeting colonized. (2010, p. 14)

Yet Lynch and Alberti also see possibilities for museums to change:

Contact zones, instead of being regarded by museums as their space into which citizens and their representatives are invited, are rather places not only for collaboration but also for contestation. Different participants bring diverse interpretation and agendas that are not homogenized into a seamless product, but rather remain distinct. (Lynch and Alberti 2010, p. 16)

In a museum context, a key issue has been whether institutions have imagined themselves as a **neutral mediators, active and political agents** or **open spaces of pluralism** which are taken over by various individuals and communities. One of the interesting differences here is whether writers have focussed **on process** (how much

participation) or **on intellectual content** (the social and political change which is made possible by the displays and programmes).

Lynch – through reflections on her own practice and through working with the UK-based Paul Hamlyn trust – has focused (like the ladder of participation) on the extent of participation and empowerment and imagined this at institutional level in terms of ‘radical trust’ and ‘reciprocity’. Lynch’s argument has been/is being developed over a number of different kinds of publications (academic articles; reports) but at its core is the argument that museums have generally practiced only ‘empowerment-lite’ because they have retained control (2011, p. 148). As her and Alberti’s description of the museum as colonizer suggests, Lynch argues that ‘conflict’ emerges in part because museums are still structured by inequality. However, for Lynch conflict is not simply something which may well emerge and something, therefore, for which museum staff should therefore be prepared. Rather Lynch locates conflict (following Chantal Mouffe) as the mode of interaction which *guarantees* reciprocity and trust: ‘conflict must be allowed to be central to democratic participation if museums are to view participants as *actors* rather than *beneficiaries*’ (2011, p. 160, emphasis original).

Lynch’s argument draws attention precisely to the ambivalence at the heart of participation and at the heart of all ‘invited spaces’. On one hand Lynch seems to advocate handing over power (not being in control). However – on the other – ‘conflict’ is sustained precisely because the question of who legitimately controls the space remains. If museum staff simply agreed that they shouldn’t be in control then there wouldn’t be any conflict. Given that this issue of ‘balance’ between specific participants and publics of today and tomorrow is precisely seen as the site for ethics (Museum Association 2008), this raises the question of over which issues museum staff can legitimately intervene.<sup>23</sup>

To draw out this point further one of the issues Lynch raised in an earlier article (with Alberti) is that of how pragmatic considerations (timeframe, budgets) but also institutional priorities take over. An example given was that of museum access guidelines, developed for, and probably with, people who are blind or partially sighted. Reflecting Simon’s point – that there are three consistencies (participants, museum, visitors) – here is an arguably classic example of an issue which does require mediation between the needs of different people. Simon’s pragmatic suggestion is that the museum plays the role of the client for the outcomes of co-production work (which, therefore, locates the institution as very much still in control). However, even if this is too blunt manifestation of institutional power, clearly one of the significances of emphasizing the ‘co’ in co-production is that there are ways of knowing, professional skills and knowledge about audience needs which the museum should make available to those involved in developing displays. The question here is on what basis the involvement is imagined – are those people involved because of unique knowledge or their critical view, because they will know how to communicate best with specific target audience or to affect institutional change – in each case a different assertion of the museum’s policies and ‘expertise’ may be more or less appropriate.



This relates to Cornwall point that that there is an extent to which rules of invited space are pre-set (and, she suggests, for good reason):

Rather than simply calling for 'communities' to decide for themselves what their priorities are, using the principles of human rights to guide deliberations provides a way of grounding participation and empowerment in an approach that is consistent with the government's broader commitment to social justice. It enables government to defend the rights of minorities against the prejudice and discrimination of society at large, and to assert their rights to participate, as well as to support and resources. In a society like that of the UK, with homophobia, racism, prejudice against asylum seekers and Islamophobia evident in many parts of our society, this is increasingly important. (2008, p. 40)

This human rights basis for participation is a position which is also reflected in approaches associated with the 'conscientization' of Friere and the more radical strands of PAR. Precisely because participation is bound up in the animation of legitimacy there are nevertheless always going to be claims to legitimacy which exceed the site of participation, whether that evoking specific values (such as human rights) or calling in practices determined by law (e.g. Disability Discrimination Act 2005). In other words, what is done in co-production projects does not exist in a vacuum.

One of the features of work in this area – and especially in examples where there is blurring and use of each of the three modes ('Good for "Us"'; 'Good for "Them"'; 'Good for Us All') – is the very slight rhetorical difference between an effectively liberal position and an effectively radical position. Authors making much of the difference for example between 'enabling' and 'leading' visitors (Hooper-Greenhill 2007, p. 375) or between 'tolerance' and the 'framing and facilitation of ongoing and *unresolved* conversations about difference' (Sandell 2007, p. 185, emphasis original). Indeed, the end point for Lynch and Alberti's robust critique is effectively optimistically drawn to a close with a form of liberal pluralism (2010, p. 16).

In Participatory Action Research associated with Geography there are numerous statements about the interlinking of knowledge production and political change, 'PAR involves researchers and participants working together to examine a problematic situation or action to change it for the better (Kindon, Pain and Kesby 2007, p. 1). The knowledge produced through this process is believed to be more responsive because it recognizes 'the existence of a plurality of knowledges in a variety of institutions and locations' (Kindon, Pain and Kesby 2007, p. 9) and, more over, that 'PAR stands on the epistemological grounds that persons who have historically been marginalized or silenced carry substantial knowledge about the architecture of injustice, in their minds, bodies and souls; in ways which are conscious and floating; individual and collective' (Fine 2008, p. 223). To link this directly to intellectual property, copyright and informed consent there is, in effect, a logic of solidarity at work here. This is quite a different imaginary from that we have

labeled 'Good for "Us"' and 'Good for "Them"' which would see the 'duty of care' towards participants as more significant. In the solidaristic logic of 'Good For Us All' it is implied that if everyone involved genuinely are co-authors of the research or exhibition then issues of institutional management of the ethics of informed consent and copyright are less relevant.

### ***And what's Foucault got to do with it?***

The key contribution of a Foucauldian view in this debate is that these three logics – 'Good for "Us"', 'Good for "Them"' and 'Good for Us All' – are far from being fully distinct. In fact, they could each be seen in the context of museums, as Ben Dibley has, as 'redemptive' narratives: 'almost all the museum's analysts argue that, in some way or another, the institution can be reformed so that it can overcome the exclusions of the past and realize its true democratic vocation' (2005, p. 6).

Michel Foucault's approach to power is that power is not only one thing (I have it, you don't have it) and, unlike Gramscian ideas of hegemony, doesn't always operate top-down. Rather power is exercised in specific places and through specific interactions and can be best understood in the specific actions and encounters of daily life. The kind of power we usually think of as power – acts of violence, bullying – he called 'domination'. But Foucault sees domination as only one form and he was especially interested in power as it operates in less obvious and direct ways, especially as actions on actions and 'conduct of conduct', sometimes known as 'liberal government' or 'governmentality'.

'Governmentality' is key to questions of participation. Where some writers see being (say) taught to be healthy and being given the tools for empowerment as two completely different political instances, Foucault's reading of power as acting on actions/conducting conduct – or governmentality – show that they are connected. Mitchell Dean in his work on the history of social policy has demonstrated that terms such as 'empowerment, agency, activity and resistance, as much as dependency, passivity and subordination' are key aspects of our contemporary vocabulary of rule' and are 'constituted in relation to definite regimes of government and power relations' (Dean 1999, p. 71). Toby Miller, for example, sees governmentality as working through an ethical incompleteness (1993, p. xiii):

This encouragement takes the form of a series of exercises of the mind, dedicated to understanding both the maintenance of boundaries and the means to cross them via a debate about through and feeling, desire and action, structure and agency, and the publicly concerned versus the privately concerned self. [...] these exercises of the mind are seen to be the substance of the connection between government and culture. (1993, p. xiii)

Those using a Foucaultian lens to look at participation tend to two distinct end points. The first is based in a hope for resistance to hegemony. Kothari, for example, locates possibilities in ideas of subversion and critiques 'a general failing among development practitioners to recognize or acknowledged the capacity of individuals

to resist inclusions, resist projections about their lives [...] and represent themselves in a variety of ways (2001, p. 151).<sup>24</sup>

An alternative response is that taken by Judith Butler, where agency and power are inextricably connected:

The subject might yet be thought of as deriving its agency from precisely the power it opposes, awkward and embarrassing as such a formulation might be, especially for those who believe that complexity and ambivalence could be rooted out once and for all. If the subject is neither fully determined by power nor fully determining of power (but significantly partially both), the subject exceeds the logics of non-contradiction, it is an excrescence of logic, as it were. To claim that the subject exceeds either/or is not to claim that it lives in some free zone of its own making. Exceeding is not escaping, and the subject exceeds precisely that to which it is bound. (1997, p. 17)

One of the implications of this is to recognize that it is not possible for the space of participation – because of its intrinsically invited nature – to transcend its conditions of possibility. ‘Participation’ is, by definition, an ‘invited’ place of ambivalence, inequality and messiness. However, the governmental view does not – as is often charged – close down possibilities but draws attention to them and requires that we ‘work within compromised forms and ideals’ (Rose 1999, p. 196). A second implication to draw from Butler’s analysis is that while ‘Good for “Us”’, ‘Good for “Them”’ and ‘Good For Us All’ are intimately connected the precise permutation and spirit of that nuance is significant. Part of the ‘co’ in ‘co-production’ is how these different elements become configured (Graham 2012), which takes us back to Cornwall’s focus on practice.

To read this argument in the context of museums where Lynch distinguishes between ‘agents’ and ‘beneficiaries’ (2011, p. 160) (and argues that museum should understand people the work with as the former), a governmental reading would see both as them not qualitatively different and conjured by as, in Tony Bennett’s terms, by ‘a program of the same type’ (1998, p. 212). In response to Clifford’s notion of the contact zone Bennett argues:

For what is the perspective of museums as contact-zones if not a proposal that, by tinkering with a range of practical arrangements, the inherited form of the museum might be refunctioned in a manner calculated to bring about redirection – indeed, reversal – of its reforming potential in accordance with a multicultural civics premised on a need for greater cross-cultural understanding and tolerance? (1998, p. 212)

This does not mean that nothing can be done, but rather it is a form of ‘tinkering’ which is the work of the museum practitioner. Or as participatory action researcher Frances Cleaver puts it:

In normative attempts to find transformatory prospects in the politics of

participation and representation, we tend to look at social process and highlight the potential of the bits we like: the transformation rather than the tyranny, the solidarity rather than the conflict, articulation rather than mutedness, the enablement of agency rather than constraint of structure. However, the nature of these social processes is that the duality is inherent to them, and cannot be done away with. In thinking through the participation, we do ourselves no favours in wishing away the potentially negative aspects of representation. Our challenge is to use an understanding of the dynamic nature of such duality to identify opportunities for change.

However, we have to reconcile ourselves to these only ever being partial, intermittent, involving winners and losers, not entirely controllable or predictable. Recognizing the limits of the makeability of social life is as important to achieving something in development as over-optimistic faith in the possibilities of participatory politics.  
(2004, p. 276)

### ***Good for Us All* reprise: Self-generating networks, Multitude, Common/s**

At this point it is important to remember why ‘invited spaces’ of participation exist. They are not only ‘invited’ because other people simply want more power (though this is of course sometimes part of it). Rather power is, a lot of the time, about control over resources and representational democracy has developed out of a perceived need to legitimately (again, or otherwise) manage decision making. The invitation into these spaces of participation whether by a development agency in African (the focus of much of Cooke and Kothari’s book *Participation: The New Tyranny?*) or a UK museum or research project are, therefore, only a *supplement* to other logics of legitimacy in operation.

The reason there has been a perceived need for the organizational management of resources comes from what Garrett Hardin famously termed ‘the tragedy of the commons’ (1968). Hardin argues that we live in a ‘finite world’ – a world of finite resources. What this means is that if all ‘men’ [sic] are ‘rational actors’ they can be expected to want to ‘maximize their gain’. Using the example of a herdsman who grazes his herd on common land shared by many other herdsman, Hardin argues that each herdsman will simply add more and more livestock to the herd he because it benefits them as an individual:

Each man is locked into a system that compels him to increase his herd without limit – in a world which is limited. Ruin is the destination towards which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all. (1968, p. 1244)

In an example, perhaps, more relevant to museums he evokes the US national parks:

The National Parks present another instance of the working out of the tragedy of the commons. At present, they are open to all, without limit. The parks themselves are limited in extent – there is only one Yosemite Valley – whereas population seems to grow without limit. The values that visitors seek in the parks are steadily eroded. Plainly, we must soon cease to treat the parks as commons or they will be of no value to anyone.

What shall we do? We have several options. We might sell them off as private property. We might keep them as public property, but allocate a right to enter them. The allocation might be on the basis of wealth, by use of an auction system. It might be on the basis of merit, as defined by some agreed upon standards. It might be by lottery. Or it might be on a first-come, first-served basis, administered by long queues. These, I think, are all reasonable possibilities. They are all objectionable. But we must choose – or acquiesce in the destruction of our nation parks. (1969, p. 1245)

Hardin's point is that if there are finite – or 'rival' – resources, some legitimate way needs to be found to ration their use. What counts as legitimate is, of course, the question.

As Hardin notes, private property has been one means of doing this. Yochai Benkler argues that the notion of private property became so significant because it aimed to provide 'security of material context – that is, it allows one to know with some certainty that some set of resources, those that belong to her, will be available for her to use to execute her plans over time' (Benkler 2006, p. 143). Benkler argues that the shift today is not simply to argue for a more legitimate means of rationalising resources – the classic argument for greater participation. Rather today and in the context of digital and the web different logics of resources and production are, it is argued, leading to new modes of association and, therefore, of politics.

The first point, which is highly relevant to the issue of copyright, is that while we globally have very urgent issues in terms of unequal access to material resources many of the things we think of as resources today are not 'rival' in the way the herdsman commons are:

In the context of information, knowledge, and culture, because of the nonrivalry of information and its characteristic as input as well as output of the production process, the commons provides substantially greater security of context than it does when material resources, like parks or roadways, are at stake. (Benkler 2006, p. 146)

Benkler emphasizes the increasing autonomy offered by the web – we each have capacity to produce and distribute in a way we didn't in a non-information and pre-web age. This, he argues, has led to new modes of sharing and what he calls 'common-based peer production' (2006, p. 60). Benkler sees this as highly significant because rather than being built around the 'asymmetrical exclusion typical of

property', 'the inputs and outputs of the process are shared, freely or conditionally, in an institutional form that leaves them equally available for all to use as they choose at their individual discretion' (2006, p. 62).

A number of commenters have drawn attention to the different logic of value that are created both by 'commons-based peer production' but also more commercially orientated websites such as Amazon or Google. Some have come out of a political desire to share and create commons (e.g. the General Public License created for the GNU project) and rooted in the political belief in collective knowledge production.<sup>25</sup> Scott Page has argued open source software is more successful than proprietary software because it is the product of many minds (Lessig 2008, p. 165) and it is the same diversity of input which makes wikipedia just as reliable as professional produced and published Encyclopedia (Benkler 2006, p. 71). However, as Lawrence Lessig argues, new possibilities of linking mutual need and commercial value are being created too, a phenomenon he calls the 'hybrid economy'. For example, Google works because we get what we want (usually!) and through the choices we make Google itself improves (2008, p. 128). Skype gives us what we want – free internet phone calls – but uses our computers while we are on the phone to improve the functioning of its system. Lessig calls this a 'thick' and 'thin' sharing economy: "'thin-sharing economy' those economies where the motivation is primarily me-regarding; "thick-sharing economies" are economies where the motivations are at least ambiguous between me and thee motivations' (2008, p. 152). Where the thin sharing economy is based on altruism and community spirit, the thick sharing economy does not rely this. Rather, Lessig argues, we get what we want and Google, Amazon, Skype get what they want.<sup>26</sup>

Philosophers Michael Hardt and Antonio Negri have also registered a shifts in the mode of production, which they refer to as 'biopolitical labor' (2005, p. 109). What this means is today 'labor creates not only material goods but also relationships and ultimately social life itself' (2005, p. 109). Hardt and Negri give as an example 'affective labor', which is 'labor that produces or manipulates affects such as a feeling of ease, well-being, satisfaction, excitement, or passion. One can recognize affective labor, for example, in the work of legal assistants, flight attendants, and fast food workers (service with a smile)' (2005, p. 108). This means, Hardt and Negri argue, that along with traditional work-personal life boundaries 'the traditional distinctions between the economic, the political, the social and the cultural become increasingly blurred' (2005, pp. 111). They develop this point into an argument for new political possibilities because the products of biopolitical 'are themselves, in many respects, immediately social and common. Producing communication, affective relationships, and knowledges, in contrast to cars and typewriters, can directly expand the realm of what we share in common' (2005, p. 114). Their ultimately argument is that political change come about through this. As a result 'participation' is not part of this political logic. Social and political change doesn't come through meetings but through what we all do:

The fact that biopolitical production is at once economic and political, that it directly creates social relationship, and that it poses the bases for a

constituent power helps us understand that the democracy of the multitude we are dealing with here bears little resemblance to 'direct democracy' traditionally understood, in which each of us would take time out of our lives and our work to vote continually on every political decision. Remember Oscar Wilde's ironic remark that the problem with socialism is that it would take to many evenings. Biopolitical production presents the possibility that we do the political work of creating and maintaining social relationships in the same communicative, cooperative networks of social production and not at interminable evening meetings. Producing social relationships, after all, not only has economic value but is also the work of politics. (2005, p. 350).

The trends in modes of working on the Web and in philosophical theory are worth noting here because they are directly pertinent to current debates in copyright activism as we will see in the next section but also because they point to the reasons why so many are dissatisfied with 'participation' within organizational structure. This dissatisfaction may not only be because there is a constant sense of it *not being enough* (not far enough up the 'ladder'), but also because the logics which have supported organizational structures – their relevance and legitimacy – are themselves under strain.

This strain is coming from the left as discussed here, but the argument against public institutions is also come from those who want to privatize them and create new opportunities for profit. What looks 'local' when seen from an anti-big state perspective can quickly aggregate into multinational conglomerates (see Unison 2011).<sup>27</sup> Both routes are currently possible and academics and practitioners debating 'participation' are doing so within this bigger picture of both radical and neoliberal projects which exceed participative logics.

### **The Participation Paradoxes?**

When taken as a whole and cutting across 'Good for "Us"', 'Good for "Them"' and 'Good for Us All' there are three apparent paradoxes in the literature:

- 1) Personhood is the locus of authentic, local knowledge *and* locus of improvement or change (skills, self-confidence, empowerment).
- 2) Institutions are sites which are characterized by inequality and conflict *and* sites which always have the potential for transparency, trust, reciprocity and radicalism.
- 3) The knowledge or institution can be improved through participation yet there are persistent pulls of the institution as locus of rigour and/or authority.

I would suggest these three paradoxes are more accurately contradictions which define 'participation'. They set out the politically ambivalent boundaries within which participation takes place. The concept of participation would not exist without questioning of the legitimacy of institutions. Indeed participation would not exist as a concept without the recognition of inequality and power imbalances. It is

most helpful to see these as active and animating conditions within which decisions of intellectual property, copyright and consent take place.



## Part 2: 'Participation' in the context of intellectual property rights and informed consent

While not mutually exclusive, the three modes of 'Good for "Us"', 'Good for "Them"', 'Not Good for Anyone' and 'Good For Us All' have implications for the kind of approaches *in practice* which have been taken and might be taken to intellectual property rights and informed consent. In other words, *how* you conceive of the relationship between the institution and the individual – and the flow of benefit – has had implications for the navigation of issues of ownership and consent.

There are a number of laws which have an impact on participation in research and in museums and heritage in the UK. These include:

- Data Protection Act (1988)
- Defamation Act (1996)
- Copyright, Patents and Designs Act (1988)
- Freedom of Information Act (2000)
- Mental Capacity Act (2005)

In the context of the debates around participation outlined above what is significant about the legal context is the way the different laws imagine differently understandings of the 'individual'. In some cases as in need of protection from institutions/others (Data Protection 1988; Defamation Act 1996); in other cases as an active agent in relation to institutions/commercial bodies (FOI Act 2000; Copyright, Patents and Designs Act 1988) or at the cusp of both; needing time and support to be an active agent yet potentially needing protection (Mental Capacity Act 2005).

However, as Alan Ward points out in an overview of the law relating to oral history, 'while oral history work must comply with the law, legal requirements alone do not provide an adequate framework for good practice' (Ward n.d., p. 12), the issue of '**reputational risk**' is a greater threat than litigation in most cases of public participation. For Universities, for specific research associations (e.g. British Sociological Association), professional associations (e.g. Museum Association, National Press Photographers Association) and funders (Economic and Social Research Council), codes of ethical practice have, therefore, been developed precisely to go beyond specific legal responsibilities and to encourage reflexivity and to link ethical practice to professionalism.

When considered at the intersection of both legal and ethical issues 'participation' has given rise to critical contributions in relationship to four key areas: 1) Intellectual property rights; 2) informed consent; 3) anonymity and 4) locating practice in broader ethics and politics.

*Intellectual Property Rights: Ownership and Agency*

Intellectual property is ‘a range of legal protections for things created by the human mind’ (Web2Rights, ‘IP and Web 2.0 factsheet’, online) – intellectual property rights do not extend to ideas themselves only their expression.<sup>28</sup> In the UK, this means that literary work or performances have to be written down or recorded in some way in order for them to be ‘fixed’ as an expression.

The aim of ‘property’ in law, as cited above, is to provide ‘security of material context’ (Benkler 2006, p 143). In terms of intellectual property, the stated aim is to provide incentives for people to produce work by making it possible to secure profit.

There are four legally determined areas of IP: Patents, Trade Marks, Designs and Copyrights (See Office of Intellectual Property, ‘Types of Intellectual property’ online). For this literature review on the intersection of participation and intellectual property rights we focus only on copyright as the IPR most relevant to participation in both museum and research contexts.<sup>29</sup>

The UK Copyright, Designs and Patents Act (1988) sets out issues of ownership for a range of cultural and intellectual products:

The owner of the copyright in a work has, in accordance with the following provisions of this Chapter, the exclusive right to do the following acts in the United Kingdom:

- (a) to copy the work (see section 17);
  - (b) to issue copies of the work to the public (see section 18);[F1(ba)to rent or lend the work to the public (see section 18A);]
  - (c) to perform, show or play the work in public (see section 19);[F2(d)to communicate the work to the public (see section 20);]
  - (e) to make an adaptation of the work or do any of the above in relation to an adaptation
- (Ch2 (1))

Copyright can be given to someone else or to an institution through being assigned. (1998, 1:V:Section 90).

In addition to the author there is another key figure in the 1988 Act which complicates notions of authorship – that of the ‘performer’. Performers do also have ‘rights’. Specifically, performers have rights in terms of reproduction (Section 182A), distribution (Section 182B) they also have rental rights and lending rights (section 182C). The Act, therefore, makes it clear that performers must give consent for a recording to take place and give permission for it to be reproduced and distributed (1998, Part 2, Chapter 2, Section 191A).

In addition the Copyright, Designs and Patents Act (1988) does allow for a range of rights to be produced through collaborative work. This has obvious implications for participatory work in Universities and Museums. Alan Ward in his reading of legislation for oral historians, reads this as meaning that when an oral history is

recorded that two separate copyrights are created; 1) 'the words spoken' and 2) 'the recording' (Ward online, Section 2). Whether an interviewee is seen as a performer or author (or both), it is nevertheless clear that consent from the interviewee would be required both for recording, copying and distribution.

The Act leaves room for the possibility of joint authorship'.<sup>30</sup> Indeed, there is a sense of a continuum of authorship and rights at work in the Act and certainly in its interpretation. This is covered in the Act by the phrase 'arrangements necessary for work to be undertaken'. In terms of participatory projects if someone has come up with the idea for a film, has written a script, has performed it but had input and support with realizing this on screen in terms of filming and editing then clearly there is strong case for 'authorship' being shared. However, it could be argued that this is less legally clear when someone has been interviewed and their words edited, even if a rough cut was shared and then edits made at the interviewee's request.

Copyright has limits to it under current law. For literary, dramatic or artistic works (including photograph) it is the author's life plus seventy years. For sound recordings it has just been extend from 50 to 75 from the end of the year they were made, released or first broadcast. After this period, works are seen as falling into the 'public domain', which means they are free of copyright restrictions.

While the legal status of 'authorship' is open to interpretation, the Act is very clear about issues of '**Moral Rights**'. This means that even if copyright is assigned to an institution, attribution and acknowledgement of the work's authors and/or performers are required. This gives the author or performer the ongoing right – as long as they assert it (through a credit or through a consent form) – to have their work attributed to them and to object to the derogatory treatment of the work. Institutions wishing to have more control over the object – to do what they want with it – need to ask individuals to waive 'moral rights' too (Part 1, Ch IV). In the context, of the democratic deficit discussed above, this seems to be a move museums would be unlikely to make. The legal status of 'moral rights' also puts the idea of anonymity in research in a different light. In effect, by automatically assuming anonymity you are forcing interviewees to 'not assert' their moral rights – giving interviewees the option of being named in this context could be read as an assertion of 'moral rights' with all the responsibilities this carries (an issue returned to in the section on anonymity below).

In Ward's account of the legal context of oral history, he states that in the case of those conducting interviews as employees copyright lies with the institution. However, it clear that in the case of freelancers special contractual provision does need to be made to secure this and to specify their right (or otherwise) to reproduction and commercial exploitation (Business Link online; Own It online). There is also disagreement over the extent to which funders might be said to hold copyright. For Ward:

In a typical case both the institution and the funding body will have contributed significant resources to the interview programme, resulting in

joint copyright ownership. It is essential that both parties agree the terms of their joint ownership, preferably before the programme starts. Alternatively the copyright can be assigned to one of the parties, or to a third party. (Ward online Section 8)

However, other readings do not see this as likely unless funders – again evoking this continuum of control – ‘make all the arrangements’.

There are a number of other checks on the free use of copyrighted objects which relate to ‘**third party rights**’ – that is people mentioned by the author or performer or also filmed, photographed or recorded. This includes the Defamation Act (1952; 1996), which is in place to give legal remedy relating to ‘derogatory’ treatment or ‘harm’. Indeed, in the context of broadcast media there is a strong emphasis not simply on ‘author’ and ‘performance’ consent but clearance of ‘third party rights’. For example if real people are mentioned in a fictional script then it is recommended that clearance be sought (BBC Rights and Clearance Checklist). Clearly, as with journalism it is possible to go ahead and then, if a case is taken, to defend yourself saying that the comment was justified (true) and that it was ‘fair comment’ (based on fact and in the public interest).<sup>31</sup> As with any of these issues, the issue often is not only legal but concerns **reputational risk** and the consequences of discussion of any third party who is named or is visible in research or a media object needs to be discussed with those involved.

The key point to take from the law and its current interpretation is that it is not simply the ‘law’ which determines authorship but the perceptions of all those involved. Who exactly counts as ‘author’ or ‘performer’ is, in many cases, up for negotiation and being the ‘author’ doesn’t automatically give you sole copyright (if there was anyone else involved at all). It is, of course, clear that waivers or release forms have to be signed so that whoever is understood as the author of the production as ‘object’ can then copy and distribute. However, whether this is framed as a copyright release form or as a license – and therefore recognizing the individual’s IP in their words – or as a waiver varies. As such it is not simply a point of law but rather reveals a great deal about institutional perceptions of agency and control.

- Copyright criticisms: inefficiencies, new enclosures and criminalizations

Under copyright law, even if you don’t hold the copyright, you can still do certain kinds of copying. This is known as ‘fair dealing’. However, the limitations of ‘fair dealing’ have often been seen as too limited and especially in digital contexts. The most wide ranging concerns relating to copyright law is the validity of its restrictions. An often made argument is that its restrictions are only valid in so much as they are necessary to enable the production of creative work. One of the reasons for this argument is because all creative work, research or journalism relies on access to work that has gone before. A much quoted truism being ‘if I have seen further it is because I stood on the shoulders of giants’ (Isaac Newton see Benkler

2006, p. 37; Wealde and McGinley 2005). Which makes all restrictions a 'necessary evil' which should be as time limited as possible (Lessig 2008, p. 90).

Where private property (land) – in contrast to commons – was meant to avoid the 'tragedy of the commons' (Handin 1969), information is 'nonrival': 'We consider a good to be nonrival when its consumption by one person does not make it any less available for consumption by another. Once such a good is produced, no more social resources need be invested in creating more of it to satisfy the next consumer' (Benkler 2006, p. 36). Information can be in numerous places at once, is not 'used up' by someone using it and, in many cases, has no use unless it is circulating in this way. As a result, as Benkler argues, 'On any given day, enforcing copyright leads to inefficient under utilization of copyrighted information' (2006, p. 37).

Copyright in the digital age, it has been argued, is a 'new enclosure' movement (Lessig 1999) because of the new significance of 'copying' in ordinary uses of digital objects:

In the physical world, copyright law gives the copyright owner of a book no legal control over how many times you read that book. That is because when you read a book in real space, that 'reading' does not produce a copy. And because copyright law is not triggered, no one needs permission to read the book, lend the book, sell the book, or use the book to impress his or her friends. In the physical world, the law of copyright is triggered when you take the book to a copy shop and make fifty copies for your friends – no doubt a possible use, but not an ordinary use. Ordinary uses of the book are free of the regulation of the law. Ordinary uses are unregulated. (Lessig, 2008, pp. 99-100)

This changes, Lessig argues, in a digital world:

But in the digital world, the same acts are differently regulated. To share a book requires permission. To read a book requires permission. To copy a paragraph to inset into a term paper requires permission. All ordinary uses of a creative the work are now regulated because all ordinary uses trigger copyright law – because, again, any use is a copy. (2009, p. 100)

So we come up against this when you buy a television show from Itunes and it can only be authorized for five computers; or an e-book advises how much more of your 'fair dealing' 'copy allowance' you have left (e.g. in e-book readers such as Amingo).

It has therefore been argued that we need new ways of approaching copyright in a digital age, Lessig argues that 'it is crucial to recognize [...] that thus control is radically greater than the control of the law of copyright in an analogue world (2008, p. 29). Lessig also argues that the need to liberate copyright is especially important because we live in read-write world, where remixing, editing together digital content is key mode of expression (and, indeed, is key to participatory modes of learning, museum practice and research). A number of models of been suggested for example a 'collecting society' model for digital platforms (e.g. You Tube paying a

fee every time a copyrighted work is viewed) or flat fee to use copyrighted work (Lessig 2008, pp. 256).

Both Lessig and Benkler show new economies of value developing from free access where commercial benefits come further down the line. Lessig gives the examples of the 'Harry Potter wars' where it took Warner Brothers a long time to accept teen bloggers' arguments that fan use of Harry Potter was simply a part of Warner Brothers' marketing budget they didn't have to pay for (2008, pp. 206-212). An argument which clearly has relevance to museums whose legitimacy, after all, comes from how useful and engaging they are to their visitors and citizenry.

Lessig argues that the concerns of reputational damage potentially caused by people remixing other people's material is actually created by the implied control of copyright: 'This problem comes not, paradoxically, from a lack of control. It comes from too much control' (2008, p. 257). This has led to initiatives such as Creative Commons, which effectively expands a kind of contingent public domain. For works otherwise in copyright, Creative Commons offers a number of off-the-peg licenses which specify how your work may be used by others without them having to come back and ask permission.

- *Not public nor commons: Indigenous people and knowledge in the era of intellectual property rights*

In contrast to the copyright activism exemplified by Lessig and Creative Commons, activism by indigenous peoples has focused not on open access but on the right to restrict public access. A strong tenor of work initiated by indigenous people in the area of IP has been to expand understandings of the law and to locate the law within a broader ethics which is responsive to cultural specificity.

In a submission to the fifth sessions of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (2003)<sup>32</sup>, the Tulalip Tribe of Washington strongly questioned the applicability of logics of ownership or the public domain to indigenous knowledges:

It would be useful to have the Secretariat prepare a summary of the history of the concept of the public domain and its relation to the development of intellectual property rights. We believe that it would show that the two developed hand in hand as a historical outcome of Western intellectual movements during the late Enlightenment and the Age of Reason, stemming from the ideas of philosophers such as English political economists John Locke and Jeremy Bentham. [...]

Indigenous peoples have their own sources of natural law, and the values of this secularized, individual property-based model are not the values that commonly move indigenous peoples.

In indigenous cosmology, knowledge is a gift from the Creator. There is no clear distinction between sacred and other kinds of knowledge of the kind made in the Secretariat's paper. Indigenous peoples have collective systems for using the Creator's gifts, and these generally have complex systems of regulating the use of knowledge, in which some knowledge may be held by individuals, clans, or other groups. Although sometimes superficially similar to Western concepts of property rights, they are not the same. (2003, pp. 2-3)

A key difference is the inapplicability of the idea of 'public domain' (Nakata and Langton 2005). Two distinct reasons for this are noted. The first is the significance of fully recognizing indigenous people's exclusion from ideas of the 'public' and lack of control that resulted from this:

'Indigenous peoples' historical exclusion from the broad category of 'public' feeds part of the differences in objectives. Indigenous peoples also present different perceptions of knowledge, the cultural and political contexts from which knowledge emerges, and the availability, or perceived benefits of the availability, of all kinds of cultural knowledge. For indigenous peoples, contests over access to knowledge arise because of the historical conditions that meant that indigenous people lost control over how and what knowledge was to be circulated. (Anderson 2010, p. 25)

This has led to indigenous people-led organisations such as the Aboriginal and Torres Strait Islander Library and Information Resources Network very strongly arguing that libraries and museums must become more welcoming places through employing indigenous people and recognizing that the validity of knowledge (that does not come in formal qualifications) (ATSILIRN protocols, 'Governance and Management', online).

The second reason for questioning the applicability of the public domain is that not all knowledge is legitimately public:

There is information that is restricted, that our children cannot learn about, there is information that is restricted even to adults, there is information that is of a secret or sacred nature, that many people have no knowledge of or access to. That knowledge is only there for certain people to have access to. (Galarrwuy Yunupingu, 1986, cited in ATSLIRN protocols, 'Secret and Sacred Material' online)

This means as Martin Nakata and Marcia Langton put it 'when we consider the challenges associated with Indigenous knowledge and libraries and archives, we are not talking solely about the liberal project of equality and inclusion' (Nakata and Langton 2005 p. 4).

Intellectual property rights have become key to these broader debates because there has been an assumption that knowledge associated with indigenous people is 'traditional knowledge' and therefore automatically in the public domain (Torsen

and Anderson 2010; see also Kirshenblatt-Gimblett 2006). This in part because it has been assumed to not pass the 'originality' test, bound up in IP law (Torsen and Anderson 2010, pp. 24-25). This has led to a number of legal cases where specific nations or communities have had to legally contest use of symbols or ways of knowing. For example the beauty manufacturers Aveda tried to trademark the word 'indigenous' and only backed down when firmly contested by indigenous peoples. As Aveda ultimately put it in a press release, 'we are discontinuing the Indigenous product line to demonstrate our ongoing support and respect for indigenous peoples in their efforts to protect their traditional knowledge and resources' (cited in Torsen and Anderson 2010, pp. 59-60).

Another crucial issue – prefigured in our discussion above of UK copyright law – is that IP has often been understood as lying with the individual ethnographer who has 'fixed' the cultural performance or knowledge through its recording at a time when informed consent was not of paramount concern (Torsen and Anderson 2010, pp. 30-31). The example they give by Molly Torsen and Jane Anderson is of the Djalambu [Hollow Log] Ceremony which was recorded by two researchers in 1960s:

In this case, the copyright owner, the wife, manages her rights in a strict manner. She fastidiously pursues any unauthorized use of her work. This presents considerable challenges for institutions that hold her work. She is reluctant to let communities reuse the material that she and her husband recorded, and it is often after extensive negotiation that copying permission is acquired. She has very firm ideas about who the material was made for, and who can access it – she has total control over the material. (Torsen and Anderson 2010, p. 10)

There is, however, has been enough legally ambiguity to give space for a concerted project of re-reading the law within a responsive indigenous-led ethics – a project that has been undertaken by indigenous people for over ten years now.

A key ambiguity comes precisely from the problem presented by the film of the Djalambu [Hollow Log] Ceremony. One of the potential problems of copyright, noted by Torsen and Anderson, is that it – as discussed above – does not protect the idea only its expression. While in some jurisdictions this requires fixing in some form (e.g. as a film or other media item) in other jurisdictions, fixing is not required (Torsen and Anderson, 2010, pp. 31) and the live performance itself can be seen as an 'expression' and therefore protected as intellectual property.<sup>33</sup>

Yet even in jurisdictions where fixing does appear to be necessary there are still the rights associated with 'performers' and 'moral rights' (Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961); WIPO Performances and Phonograms Treaty (1996)). Both sets of rights have been used by indigenous peoples and those working with them to lever copyright law into a broader ethical framework:



Performers' rights give the traditional performers the right to determine whether their performances should be fixed (e.g. recorded on tape, digitized), and how the fixation (e.g. recording) of the performance should be further disseminated and used.  
(Torsen and Anderson 2010, p. 51)

One way in which these possibilities have been expanded is through *sui generis* law – 'a unique law complete unto itself and often created when current and existing laws are inadequate' (Anderson 2010 p. 34). The other way is through protocols – such as those developed by the Aboriginal and Torres Strait Islander Library and Information Resources Network (ATSILIRN online; see also Nakata and Langton (2006)) – which emphasise on negotiation as not only ethically appropriate but also leads to better work (as Ames (2003)) argues) and better cultural institutions (archives/museums). It has been argued by Anderson that, 'it would be incredibly helpful to have Creative Commons develop a range of indigenous-knowledge-specific licenses' (Anderson 2010, p. 26). But, like all writing in this area, Anderson emphasizes that ongoing negotiation is crucial in the cultural and epistemological context where knowledge itself is not permanently yours:

Knowledge, lands and resources have been given to them for their collective, and sometimes exclusive, use, but only if they fulfill the obligations to their Creator, their ancestors and their spirits. In this sense, the rights are also not considered to be permanent, and are contingent on their continued stewardship and meeting of obligations by their indigenous custodians.  
(Tulalip Tribe, 2003, p. 3)

#### *Informed consent: Capacity and clarity*

The issue of assignment of copyright, licenses or waivers takes us back to the consent form with which we began. Informed consent entails both understanding the consequences of involvement in research, freely giving agreement and documenting this agreement. Or as Priscilla Alderson and Virginia Morrow define it, consent is 'the invisible act of evaluating information and making a decision, and the visible act of signifying the decision' (2004, p. 96). For example in the Economic and Social Research Council guidelines:

Informed consent, also known as *valid* consent entails giving sufficient information about the research and ensuring that there is no explicit or implicit coercion (see below) so that prospective participants can make an informed and free decision on their possible involvement. Typically, the information should be provided in written form, time should be allowed for the participants to consider their choices, and the forms should be signed off by the research participants to indicate consent.  
(ESRC 2008, p. 28)

In these guidelines, this is imagined as one-off agreement (though with reflection time built in for people to give involvement full consideration). However, some

disciplines have emphasized consent as ‘a process, not a one-off event, and may require renegotiation over time; it is an issue to which the anthropologist should return periodically’ (ASA 4(c) see also BSA, section 25). Understanding **consent is a process** – where and it is checked throughout (Scott et. al 2006) – is increasingly becoming the most widely held position in the literature.

The legal context for consent includes the Data Protection Act which requires that anyone who processes personal data must comply with eight principles, which make sure that personal data is:

- fairly and lawfully processed;
- processed for limited purposes;
- adequate, relevant and not excessive;
- accurate and up to date;
- not kept for longer than is necessary;
- processed in line with your rights;
- secure; and
- not transferred to other countries without adequate protection.

The issue of consent falls under the first of these principles (Wiles et al. 2005, pp. 8-9). As Judith Scott, Jennifer Wishart and Deborah Bowyer suggest ‘informed consent is now a legal requirement as well as a moral obligation’ (2006, p. 275).

Informed consent has been most written about in relationship to groups perceived as unable to give consent, specifically children and people with learning disabilities. Numerous guidelines specifically state that with all children under 16 parental consent should be sought (Ward online). However, this is not legally the case. Since the Gilleck ruling – deriving from a case of a parent trying to prevent under 16s being prescribed contraceptives – it has been argued that if it can be judged that a child can “understand” what participation in research will involve then **parental consent** is not necessary’ and that as long as ‘sufficient understanding’ is indicated that ‘a parent has no right to override their child’s wishes’ (Wiles et al. 2005, p. 9). While it is noted that in ‘England, Wales and Northern Ireland, children under 16 are now *automatically* presumed to be legally competent to give consent’,

Self-advocates with learning difficulties have long argued that treated as self-determining adults adults. This has led to a raft of research led by and authored by adults with learning difficulties (e.g. Townson et al. 2004; CHANGE online). However, legal requirements do exist in relationship to people with more complex learning disabilities. In 2009 England the Social Care Research Ethics Committee was set up to deal with ‘adult social care research study proposals, intergenerational studies involving adults and children or families, use of social care databases’ (for a full list see: <http://www.screc.org.uk/index.asp>). A particular group of people focused on by the SCREC is ‘Social care research that involves people lacking capacity in England and Wales and [which] requires approval under the Mental Capacity Act 2005’ (SCREC online).

The Mental Capacity Act has much relevance both for research and museum participation as well as it moves beyond proxy consent and assent (Wiles et al. 2005) and instead offers a framework for support capacity to consent where possible and ensure a 'best interest' decision where not. The Act's Best Interests checklist require multiple factors to be consider and potentially for the circle of decision making beyond either/to family/staff to be widened (Nind 2008, p. 9). However, there has been concern that the complexities of these process might deter people from working with people with profound and multiple learning disabilities and that this ignores the benefits such research can bring to the individual (Boxall 2010).

Innovative work has been conducted in this area. Sue Ledger has shown how a 'supported' decision making process enables people with high support needs to be actively involved in researching their life histories: 'Whilst it was important to ensure that people with learning difficulties were not excluded from participation due to their perceived degree of disability, it was equally important to establish that others were not included without their consent' (Ledger unpublished thesis). Ledger, in work done by the Open University-based Social History of Learning Disability group to underpin the development of an online digital archive, draws on recent guidelines of supported decision making which show how consent can be built and how others can be involved as appropriate in the process (see Paradigm; see Mencap Involve me project). In all cases, creative, responsive approaches are advocated, including the use of 'multi-media' both to record consent and to make more concrete understandings (see also The Rix Centre).

In other contexts, the limits of 'informed consent' have been very much emphasized as potentially more 'rhetoric than reality' (Wiles et al. 2005, p. 11). Michael Gallagher, Sarah L. Haywood, Manon W. Jones and Sue Milne in an important recent article show the unsafe assumptions on which ideas of 'informed consent' are based. A key issue for Gallagher et al. – reflecting Michael Gallagher and Lesley Gallagher's earlier critique of participatory research methods in general – is the model of subjectivity implied:

Such agents should be treated as although they are able, under the right conditions, to: (a) understand information about a research project, and in light of that information; (b) think rationally about the likely implications of their participation; (c) independently make a conscious decision as to whether they want to participate or not and (d) explicitly signal this decision in some way. (Gallagher et al, 2010, p. 479)

Instead they emphasize the social and contingent nature of consent. There is also a suggestion that far from empowering participants there is rather a sense of 'responsibilization' – making individuals responsible for the consequences of their involvement.

Very little research has been done into research participants' experience of 'ethics' or consent. However, one study – commissioned by Government Social Research Unit– makes for interesting reading. While numerous articles suggest that people do

not read or fully absorb information, Jenny Graham, Ini Grewal and Jane Lewis note the role of different means of communicating information about research, with written information offering reassurance and formality and personal contact giving potential participants the chance to 'assess' the interviewer (Graham et al. 2007, p. 19). However, in terms of information there was no one-size-fits-all with some people welcoming multiple opportunities and others finding this 'irksome' (Graham et al., p. 20). Equally important was that participants did not feel pressured, a feeling which was signaled through them being able to control when and where to meet for the interview. However, Graham et al. show that people made decision very quickly to get involved in the project and once they had decided to get involved they felt 'a high degree of commitment' (Graham et al. 2007, p. 21).

This is significant when considered in terms of when to secure consent. There has certainly been different schools of thought on this issue (Ward online; Blake 2007). The Oral History Society's emphasis on securing consent in advance has been influential in the development of consent in heritage contexts. The Culture Shock! Project led by Tyne and Wear Archives and Museums did this at the beginning specifically so that people would develop their digital story with public display in mind. In a Participatory Action Research context, Blake argues for afterwards (2007, p. 418) because 'people know what they have said and have a better idea of the processes involved' (2007, p. 418). In Graham et al. study, when asked about formal consent at the beginning of the project, there was a feeling that 'the idea of written consent would have added to their sense of obligation' (Graham et al. 2010, p. 21). Indeed, 'people felt that written consent would have taken away from the voluntary nature of the study and made them feel that they could not choose not to answer certain questions'. Even where one participant thought a form would be beneficial, she saw this primarily in terms of the need to protect the researcher from 'come back' (Graham et al. 2010, p. 21).

In a museum and heritage context, informed consent has emerged most obviously in relation to accessioning. On one level there is a perceived need for legal clarity around ownership and the right to copyright. In the MA Code of Ethics, this is covered in relation to the balance between individual and 'publics' under 'public service' and that 'museum belong the everybody' and therefore, as Glasgow museum emphasizes, that the collection no longer belong to specific individuals but to the public. Indeed, the code specifically advises museums to 'articulate clearly intentions and expectations ...specify agreements over matters such as funding [and] copyright' (2008, 7.23). Yet, there is also a strong sense that this is not the end of the story as the Museum Association Code of Ethics also recommends that museum professionals must 'recognize that individuals and communities may have stronger claim to certain items than the museum' (2008, 5.8) and to 'recognize the interest of people who have made, used, owned, collected to gave items in the collections' (2008, 7) and to support involvement in decision making (2008, 7.5).

A very pertinent example of this has emerged through the Culture Shock! evaluation and draws attention to the limits to which ownership by a museum of a personal story can ever be achieved:

Although each participant was asked to sign a copyright waiver, which in a legal/technical sense gave control over their story to the museum concerned, this was not the way participants saw it in reality. Their view, instead, was that they had given something of themselves to the museum(s), and that it remained precious and they held a strong stake in how it was used thereafter. This project created a community of stakeholders, rather than suppliers of stories and, rather like the transformation of the music and publishing industries, the old structures for protecting assets and controlling their use (copyright, licensing, loan agreements, legal ownership) began to dissolve.

(Culture:Unlimited 2011, p. 7)

Indeed, while there is a general assumption that the copyright release forms and consent form we use have some kind of legal status and this is described as a waiver in Act (Ch 1 87 (3)), the precise nature of the waiver is questioned in some contexts. According to an advice sheet on the BBC website, the status of a contract is that it is 'consideration' specifically for 'something for something'. If it is simply 'something for nothing', then it is not a contract but rather a gift. So while some contracts seek to make the broadcast itself the 'something for' the public contributions, if their interview is not then used then the contract is broken and, therefore, reverts to a gift. The document describes that it has become common practice to pay contributors £1 so as to offer something clearly 'for' the contribution and therefore to make the contract legally binding.

However, in the of participation and ethics, it may well be that 'gift' with all the obligations it entails may characterize better dynamics consent.<sup>34</sup> It may be that the sense of being 'quits' offered by a contract is the wrong way to think about it and the consent form is much more obviously a contingent, rescindable memorandum of shared understanding.

The models of ownership and shared public use arising from Creative Commons, offer an alternative here. Rather than requiring participants to either sign over copyright over digital outcomes or for it to be perceived as a 'gift' – Creative Commons licensing might allow individuals to retain copyright but still give consent for it to be held and used by the museum in specific ways. This mode would be even more explicitly 'guardianship' than with traditional accessioning where title of ownership is usually a key legal requirement. This is especially relevant for 'nonrival' objects, such as media.

In the context of the difficulties of 'informed consent', Gallagher et al. conclude by drawing ethics back to the individual researcher (as does the MA Code of Ethics):

We would like to conclude with two very basic suggestions for researchers grappling with these issues in their own work. First, we propose that researchers begin by thinking about their own position: what do you think consent is? How do you think it operates? Do you believe it will possible to achieve in the context

of your own work? Caught in the midst of the various positions put forth by ethics committees, guidelines, colleagues, line managers and supervisors, not to mention the actions of one's research participants, it can be easy to lose sight of one's own convictions. Clarifying these at the outset will not resolve all subsequent problems, but it may help to provide a reference point for ongoing reflection. Second, we suggest that it may be useful to find out how your research participants relate to consent: do they understand the word? Is the activity of consenting part of their everyday lives? Do they believe that consent is possible within the research setting? (Gallagher et al. 2010, p. 479-480)

### *Attribution and Anonymity*

One widely shared critique has been of the **one-size-fits-all of research ethics reviews** associated with University Research Ethics Committees and, in the US, with the Institutional Review Board. A key issue here has been how researchers should practice a 'duty of care' towards research participants. Because those worked with are imagined as subjects, a key way in which this 'duty of care' is thought about is through protections such as **anonymity** (Martin 2007, p. 323; Blake 2007 p. 415). However, while it is the case that some guidelines still assume the anonymity should be a default ethical position (BSA 2004, Section 18; ESRC, p. 3; ASA, p. 4; AAA 2008, p. 3), there are growing signs of anonymity only being a starting point for negotiation between researcher and participants and that people also have the **right to be named** (ESRC, p. 28; British Educational Research Association, 2004, Section 23; AAA 2008, p. 3). While 'moral rights' do not tend to be mentioned in these guidelines, there is clearly some resonance with the legal provision for right of attribution and objection.

There have been a number of **critiques of anonymity** in recent years, specifically that anonymity is **neither possible nor desirable**. The argument that anonymity is 'not possible' is seen in context of internet where it very easy to find out where a piece of research has taken place:

Put simply, giving anonymity through pseudonyms to sites and people often does not work. It does not protect organizations from exposure if the reports have sufficiently significant or damaging findings. And, even where the location of the site can be concealed, it does not protect individuals involved from harm that might result from exposure to those with the most direct power over them. Ironically, pseudonyms only act to protect people and organizations where there is little to protect them from (Walford 2005, p. 88)

Also not possible because of increase need to link research to real life examples and make it policy relevant (Tilley and Woodthorpe 2011).

It has also been argued that anonymity is not only not possible but also not desirable:

Anonymity makes us unmindful that we owe our anthropological subjects the same degree of courtesy, empathy and friendship in writing as we generally extended to them face to face where they are not our 'subjects' but our companions without whom we quite literally could not survive. Sacrificing anonymity means we may have to write less poignant, more circumspect ethnographies, a high price for any writer to pay. But our version of the Hippocratic oath—to do no harm, in so far as possible, to our informants—would seem to demand this. (Walford 2005, p. 89)

### *Ethics as politics*

Finally, there are clear trends within the literature to locate ethics within a much broader political and social context and to see consent as a negotiated process. This formalization of ethics has not happened in the same way in the museum sector. Rather there are codes aims at helping 'museum professionals resolve the operational and management problems that they face day in, day out' (Trevelyan in MA Code of Ethics 2008, p. 3) with a recognition of the need for 'judgment' and that 'a number of sometimes competing considerations may need to be balanced' (2008, p. 4). In the MA Code of Ethics this is through constantly locating ethics within questions of public service and effectively of the public legitimacy of museums. In terms of participation of the MA Code of Ethics emphasizes strongly an ethical balance between 'the museums role in safeguarding items for the benefit of future users with its obligation to optimize access for present users' (2008, p. 12).

Caitlin Cahill, Farhana Sultana and Rachel Pain, in an editorial introduction to a special journal issue on Participatory Ethics frame this as an 'ethic of care' – 'deep respect for relationships and humanity – rather than a 'duty of care' (2007, p. 306). They do this by locating 'participatory ethics' within 'long-standing traditions of grassroots social movements, activism, critical race and feminist theories and the work of social justice advocates who strive to address unequal relations of power, open up new spaces for decolonized knowledge production and challenge the dominant hegemonic paradigm' (2007, p. 306). Therefore the site of research is itself a 'site of contestation':

This is not easy or 'safe' work; an ethical commitment to participation necessarily involves an explicit interrogation of power and privilege both within the research process itself and in terms of thinking through it's potential impacts. In practice this involves excavating disjunctures within collectives rather than smoothing over dissent in the interests of consensus. A participatory ethics suggests that we must 'remember' that which has been excluded or forgotten, that which lies at the margins, and that which disrupts the status quo. (2007, p. 311)

The special issue of participation and ethics came out of two distinct trajectories:

On the one hand, researchers seem increasingly subject to a restrictive, inflexible and top-down view of what 'ethics' should be, via codes of human subject panels which we are expected to adhere to. On the other hand, debates about what participatory ethics might be emphasize an emergent process of negotiating research ethics with participants based on their concerns. (2007, p. 307)

Reflecting this Askins argues, ethics is 'emergent through social relations in place' (2007, p. 351) and that academics interested in participatory research should be actively get involved in research committees. (2007, p. 358).

## Conclusions

Participation is a crucial concept in contemporary research, museum and heritage practice because it is being used as a way of demanding more of institutions set up in the name of public interest and public access. Yet, and because of this, 'participation' is caught between different political logics. Participation is always, and always at the same time, never enough *and* potentially dangerous and manipulative. Participation is a tool of government and represents the hope of a small state (Big Society) *and* it holds the hope of subversion and revolution. Participation is all of these things because participation is intimately bound to questions of institutional legitimacy and the limits of institutions' ability to claim legitimacy. This is why we organised the literature in this area into the four areas: *Good for 'Us'*, *Good for 'Them'*, *Not Good for Anyone* and *Good for Us All*.

In this literature review, I have delineated different logics of participation through the lens not of control (which is the traditional means of delineation) but in terms of how 'benefit' is understood as flowing. '*Good for "Us"*' is used as a way of locating the logics of participation bound up with ensuring an institution's ongoing relevance and legitimacy and explores 'better knowledge and programming' as a key aspect of this logic. '*Good for "Them"*' is deployed to delineate the logics associated with government and specifically how institutions again secure legitimacy but this time through working on individuals and communities in service of policy aims such as 'well being', job skills or 'citizenship'. '*Good for Us All*' is used as a way of evoking both the arguments for the museum or research as having aggregate societal benefits but also the logics of solidarity and activism, particularly associated with participatory action research.

Perhaps the key insight from this review of literature related to intellectual property, copyright, research and museum ethics and informed consent has been that while there clearly are legal aspects to ownership and capacity these are not as clear cut as it might be imagined. In terms of intellectual property there is enough scope in the definitions of 'author' or 'performer' plus 'moral rights' for First People activists to force the law into a broader ethical and political frame based on a critique of western logics of property and epistemology. In terms of consent the trend is towards an ongoing negotiated ethics, and this is equally true in the context



of people deemed without capacity to consent on as specific issue (Mental Capacity Act 2005; Paradigm 2008, Mencap 2011).

The argument of the literature review has had two strands. The first is – drawing on Foucault’s reading of power – is that these three logics are not quite as distinct as they might first appear. This is in large part because each have a shared motivation in terms of political and institutional legitimacy – whether that is the publically-funded museum or publically-funded research. The second is that how benefit is understood as flowing has determined (and indeed might help determine) how ideas of ownership, consent, agency and ethics have been thought about and practiced.

When taken together it is possible to understand how the perceived flows of benefit have led to different interpretations of law and ethics. When considered through *Good for Us*, logics of ownership and consent can be read as tending towards assigning individuals authorship and capacity but formalizing this through employment contracts and payment. In the view of *Good for Them*, the purpose is the process so issues of consent and duty of care have loomed larger than ownership, although ownership is increasingly imagined as one means of securing positive individual outcomes (pride, self-expression, self-esteem). *Good for Us All* with its logics of solidarity and a broader political frame is likely to be less concerned with fixing ownership but very attentive to building shared ownership and shared attribution.

What can be seen – and came in the literature review under the section titled ‘Good for Us All reprise’ – is that new logics of association (articulated through terms such as networks, self-generating associations or multitude) are emerging via web logics and logics of post-property and post-commodity production. Crucial to note here is that these logics are, in effect, post-participation because they are also extra to hierarchical organization but also (especially significantly) because they are about associations – Hardt and Negri’s ‘affective labor’ – rather than institutions.

Participation, and the copyright and consent forms which its management has generated, derives precisely from these anxieties surrounding public legitimacy, accountability, transparent and ethics. But – and because of this – remains a good place to go in search of the limits of current practices as new ways of working and being together emerge.

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<sup>1</sup> The Department of Health developed guidance around research governance in 2005 (DoH 2005) and this has influenced the development of local authority research governance both in relationship to adult social care but also Children's Services (Boddy and Oliver 2010).

<sup>2</sup> The idea of awkwardness in heritage and participation was explored by Natalie Brichet at the 'Re-visiting the Contact Zone: Museums, Theory, Practice' Conference held in Linköping, Sweden 17-21<sup>st</sup> July 2011.

<sup>3</sup> Sarah Ahmed in a series of books and articles has shown the desire for 'white agency' to be restored in the wake of critiques of racism. Ahmed notes that 'white agency' is articulated in academic contexts via a theoretical desire to draw on understandings 'of power that shows that things don't always hold; that shows the cracks, the movement, the instabilities and that appreciates how much things have changed, even whilst recognizing that there is much left to do' (Ahmed 2007, p. 165). Ahmed argues, 'both desires can involve a defence against hearing about racism as an ongoing and unfinished history that we have yet to describe fully. We still need to describe how it is that the world of whiteness coheres as a world, even as we tend to the "stresses" in this coherence, and the uneven distribution of such stress' (Ahmed 2007, p. 165).

<sup>4</sup> As Megan K. Blake writes 'the challenge for copyright and informed consent involves retaining the easiness of friendship, clarity over ownership, and understanding' (2007, p. 418).

<sup>5</sup> The Big Society website hosted by the Cabinet Office defines the Big Society as 'about helping people to come together to improve their own lives. It's about putting more power in people's hands – a massive transfer of power from Whitehall to local communities' (online).

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<sup>6</sup> Cornwall argues: 'Like "empowerment", "community" and "democracy", the word "participation" is a normative term. It evokes and embodies ideals of how society and the polity ought to be, and of the role that people can play in government. Because there are so many different ways of thinking about these ideals, and the role and relationships of people and government, "participation" means different things to different people. For some, it is about efficiency and the neoliberal mantra of choice; for others, it is about giving ordinary people the democratic right to contribute to decisions that affect their lives and about voice. Qualified with "citizen", participation has a definitively democratic ring to it; coupled with "community", it evokes a warm, inclusive feeling of people working together for the common good' (2008, p. 19).

<sup>7</sup> Cornwall's focus in terms of 'invited spaces' is on 'the dynamics of inclusion and exclusion, representation and voice in institutions that have become commonplace on the institutional landscape of many countries: citizens' councils, user groups, and other kinds of co-management institutions. These institutions – spaces into which citizens are invited to participate – form part of an expanded 'participatory sphere' that lies between the formal institutions of state bureaucracy and service delivery and the kinds of associations, organisations and informal institutions that exist within society at large' (2008, pp. 17-18).

<sup>8</sup> Lynch and Albert argue, "'Invited spaces" in museums are forever permeated with the power effects of difference' and that "'discourses of participation" offer a limited number of subject positions for participants that delineate the available level of inclusion and agency, sometimes in very subtle ways. Welcomed to the invited space, participants are subtly encouraged to assume the position of 'beneficiaries' or 'clients', which influences what people are perceived to be able to contribute, or entitled to know and decide' (2010, p. 14). They go to suggest – reflecting in James Clifford's notion of the contact zone – that there is specific danger with any notion of invitation, 'Contact zones, instead of being regarded by museums as their space into which citizens and their representatives are invited, are rather places not only for collaboration but also for contestation. Different participants bring diverse interpretations and agendas that are not homogenised into a seamless product, but rather remain distinct' (2010, p. 16)

<sup>9</sup> In a touchstone text on the implication of Michel Foucault's governmentality for social policy, Mitchell Dean argues for shared significance of 'terms such as empowerment, agency, activity and resistance, as much as dependency, passivity and subordination' as 'key aspects of our contemporary vocabulary of rule' which are 'constituted in relation to definite regimes of government and power relations' (Dean 1999, p. 71).

<sup>10</sup> These subtitles are a reworking of Sally Holland's et al. title of their review of young people's participative engagement in social work research *'Rights, 'right on' or the right thing to do* (2008).

<sup>11</sup> 'Good' can (if you want it to) evoke the classical reference to the good life which is virtuous and implicated in community: which evokes 'doing well' (contributing to society: 'Good for 'Us''/'Good for Us All') and 'faring well' (being successful : 'Good for 'Them''). However, it also carries the sense of the do-gooder, the slightly patronizing air of the philanthropist or social worker; a gloss of inequality and guilt which is not without relevance to the way these debates have gone on (Good for 'Them'). The idea of 'Good' is also very pertinent to current UK debates on both the left and right about the 'Good Society' (Rutherford and Shah 2006; Lucas and Lawson n.d.) and the 'Big Society' (Cameron 2009). In both cases the relationship between the individual and state and individual and community are being reformed and reimagined.

<sup>12</sup> For example, the Museum Association Code of Ethics states, 'Reconcile the museum's role in safeguarding items for the benefit of future users with its obligation to optimise access for present users' (2008, 3.12, p. 12).

<sup>13</sup> Paul Tapsell argues, 'Today's leading museums are shifting from colonial upholders of the world captured ad made miniature for all to behold, to institutions seeking to share responsibility and become meaningful to tomorrow's generation of globally connected descendants. Failure to recognize the importance of making this shift is likely to result in some institutions taking their place beside the empires they once championed: historical curiosities representative of a time and place since made extinct' (2003, p. 250).

<sup>14</sup> This includes being attentive to the disruptive logics of preservation and display as Evelyne Tegomoh explores in her account of a community member who became a 'cultural entrepreneur' and demonstrated the need for cultural attentive forms museology (2007, pp. 228-249).

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<sup>15</sup> In fact it is notable in Anthony Shelton's writing that 'politics' is firmly located within the epistemic and the desired impacts of that epistemic shift – in terms of rhetorical claims to democracy or transformation – are not (need not?) specifically be evoked (2003, p. 192). This is in contrast to the logics of Participatory Action Research where research gains legitimacy through its connection to 'action' (e.g. Cahill 2004; Chatterton, Fuller and Routledge 2007) which is conceived as happening both *through* and *after* research.

<sup>16</sup> O'Neill shows that the interest in museums being for all and interested in education should not be thought of in teleological terms, rather there were various points – such as the early 20<sup>th</sup> Century – where more exclusive readings of the purpose of the museum were in evidence (2002, pp. 26-27).

<sup>17</sup> Sometimes 'public value' has an audit aspect to it, however it has also been widely used to contrast with technical of management associated with New Public Management (Lee et al. 2011).

<sup>18</sup> There is a particular focus on the shift in rhetoric surrounding the role of museums might play in contributing towards cultural tolerance or respect of cultural diversity (e.g. Bennett 2006, p. 59; Casey 2007, p. 298). Tony Bennett reflects on his notion of the 'exhibitory complex' (developed in relation to the nineteenth-century museum) in the context of the contemporary museum as 'differencing machine': 'The emphasis here is on developing the museum as a facilitator of cross-cultural exchange with a view to taking the strong out of politics of difference within wider society' (2006, p. 59).

<sup>19</sup> Swartz reflects on her position as a white South African working with a group of Black young people and discusses the extent to which her gifts of food (lunches during interviews), adventure camps and even paying for school fees inflected what the young people were prepared to talk about. 'One afternoon after a trip to Robben Island, Andile told me that he had not told me his views of Apartheid and 'race' because Xolile (age 20), another research participant, had told them not to talk about Apartheid in front of me because 'we mustn't offend you because you were being so nice to us and we didn't want it to stop' (2011, p. 59).

<sup>20</sup> Pickering argues, 'Because of these responsibilities (to broader public), the museum has a right to a degree of 'self-interest' to ensure that its capacity for delivery of all things to all clients is facilitated and continued. Museums therefore have a right to expect some return through their financial and moral, logistical, intellectual and philosophical investments in the repatriation process' (2007, p. 257).

<sup>21</sup> The Gramscian notion of hegemonic power is that it operates through consent.

<sup>22</sup> Walmsley and Johnson identify three models: 1) Researcher as teacher and coach/person with a learning disability as learner or student; 2) Consultant/employer relationship (where a self-advocacy organization commissions research and therefore controls the research) and 3) Co-researching relationship (2003).

<sup>23</sup> It was the sheer diversity of the different communities being represented which led to Nick Merriment justify the lack of co-production in the People of London exhibition (p. 356).

<sup>24</sup> Indeed, Dibley ends up the with the resistant Foucault, which arguably ends up being just as redemptive (Graham forthcoming).

<sup>25</sup> For the General Public License see <http://www.gnu.org/copyleft/gpl.html>

<sup>26</sup> Or as Jimmy Wales, founder of Wikipedia says, when people ask why they would contribute to Wikipedia for free, 'Why do people play baseball?' (cited Lessig 2008, p. 159).

<sup>27</sup> For an account of the effective on these policies on the UK public sector see

[http://www.unison.org.uk/asppresspack/pressrelease\\_view.asp?id=2156](http://www.unison.org.uk/asppresspack/pressrelease_view.asp?id=2156)

<sup>28</sup> While this is an oft-stated fact about intellectual property there are arguments to say that it has changed with the inclusion of database within copyright law under 1997 Copyright and Rights Database Regulations (Bainton 2007). I.e. that the facts and data noted in a database are subject to the same protections as is the academic paper that comes out of analysis the database.

<sup>29</sup> That's not to say that participation might produce other forms of IP but in museum projects copyright is the most obviously relevant.

<sup>30</sup> The precise qualification for 'joint authorship' is unclear as two provisions leave room for different interpretations:

Joint ownership:

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‘[...]means a work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors. (10 (1))

‘A broadcast shall be treated as a work of joint authorship in any case where more than one person is to be taken as making the broadcast’ (Ch 1, 10 (2)).

In other words, under Ch 1 10 (1) joint ownership is when there is not a clear distinction between contributions (e.g. individuals did not contribute distinct aspects of the production) and under Ch 1 10 (2) that even if there were distinct contributions (‘more than one person’) joint ownership nevertheless pertains.

<sup>31</sup> The final defence is ‘privilege’ but this pertains to parliament and court proceedings.

<sup>32</sup> There has been a range of activities and reports initiated by the WIPO over the past 10 years. For example Malia Talakai (2007) *Intellectual Property and Safeguarding Cultural Heritage: A Survey of Practices and Protocols in the South Pacific*.

<sup>33</sup> As Torson and Anderson put it, ‘Many national laws, particularly those of common law countries, do require fixation, because this may facilitate establishing the existence of the work and provide a clear and definite basis for rights. Conversely, many countries, in particular countries with a civil law tradition, in Africa, Latin America (Brazil), and Europe (including Belgium, Spain, France, Switzerland, Italy and Germany) do not require fixation. These countries accord protection to a work as soon as it is in a form in which others can perceive it’. (2010, pp. 30-31)

<sup>34</sup> The notion of gift economies within western academic theorizing has its origins in Marcel Mauss (1923) *The Gift* which explored reciprocity in nonwestern societies. However, it remains a significant notion for considering alternative understandings of ownership and reciprocity in other contexts.