



Digital Restitution of Cultural Goods: In Search of a Working Model

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Abstract

The paper deals with the problem of digital restitution of art to post-colonial and postdependency countries. A new model of digital restitution composed of two elements: creation of a digital copy with a NFT attached and creation of new property right in a physical and digital object has been proposed. A system of balances between the rights and duties based on the prior user concept has been developed.

Keywords Restitution · Digital restitution · Property rights · NFT · Cultural property · Heritage · Law

1 The Problem

Restitution claims in the field of culture are usually strongly supported by moral arguments. In most cases, there is no doubt that items of a high historical or artistic value, important for any given group's cultural security, should be returned if taken from them without their consent. But, again, in most cases having a solid moral argument is not enough to ensure the desired result. Successful restitution also requires a legal title and a valid claim for the return of an object to its country of origin. This is where a restitution and return process may face its first hurdles [1–5].

Setting aside cases where the claim for restitution arises either from international rules on spoils of war (and the general prohibition of destruction and looting of cultural heritage), international conventions and other supranational instruments (for instance, the UNIDROIT 1995 or UNESCO 1970 Conventions; EU rules on the export, import and return of illegally removed objects), or, simply a civil law *actio*

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rei vindicatio (claim to return an object to its rightful owner), let us focus on cases where finding a legal basis for the restitution claim would be difficult, moot or outright impossible. In the non-virtual world, good examples of such cases would be, for instance, the case of Elgin marbles, which were technically (very technically) exported legally from Greece under Turkish rule [6]; the return of the Benin Bronzes from Germany, France and the UK to Benin [7]; and the return of Maori heads to New Zealand [8, 9]. In the first case, there is an ongoing legal dispute and tension between Greece and the UK. The other two have been settled amicably. However, these “early bird cases” do not necessarily serve as the harbingers of the new restitution era. For many countries, following their conscience would have meant leaving some of their museums empty, or at least with incomplete collections. So, they would opt for non-standard restitution options, with digital restitution understood as returning replicas and/or digital representations of cultural objects. Another group of heritage items subject to digital restitution is what Arthur Doodney calls “orphaned heritage” [10], objects with no political body interested in their return but possessing importance to humankind as a whole. They are “restituted” by making them digitally available to all interested stakeholders.

In addition to digital restitution being understood as a way of dealing with the aftermath of an unsavoury past, it can find its place in dealing with new challenges that arise in the geopolitical context. In recent practice, tools usually connected with digital restitution have become tools of heritage preservation. A good example is a Ukrainian project, sucho.org (Saving Ukrainian Cultural Heritage Online), which focuses on recording whatever information is possible for tangible and intangible Ukrainian heritage and collecting new, online artifacts such as memes. This project is a crucial tool for protecting Ukrainian cultural security because in the current state of affairs, Russian invaders are not only interested in military success, but also in the eradication of vestiges of Ukrainian culture. Furthermore, at least since WWII, we have witnessed the planned destruction of tangible heritage as part of war-related activities. Physical reconstruction of objects may not be feasible, so digital restitution remains the only sensible way of undoing the effects of hostile activities.

We assume that access to national treasures and objects of lesser historical value is an essential part of any community’s cultural security [11, 12]. In the case of vulnerable groups, post-colonial and post-dependency states or dispossessed minority laws currently in force do not provide adequate tools to enforce these rights, so the lawmakers, or, preferably, the international community, must act and create new restitution instruments.

In this paper we present an overview of what digital restitution can and cannot be used for and propose possible legal frameworks for digital restitution, based on balancing the interests of all parties involved.

2 NFTs and Property Laws

Although the concepts of property, ownership and possession seem to be common for the whole of humankind, the way lawyers understand them varies significantly. In most civilian jurisdictions, property rights are connected with tangible objects,

while *in rem* rights in intangibles are classed separately; for instance, in Polish law they are referred to as “resembling property rights” (*prawa rzeczowym podobne* in Polish [13]). Classical restitution proposals were made with tangible objects in mind. Even “digital” restitution often means making replicas using digital technologies. Surprisingly, the digital restitution debate has just recently entered a new stage with an attempt to use Non Fungible Tokens (NFTs), if not directly for restitution purposes, to promote the digital restitution of African art. This is the purpose of the Looty project - transforming photos of looted objects into 3D digital representations with NFTs attached. Project leaders plan, among other things, the creation of a digital museum with unique digital copies of the looted art [14].

At some point, NFTs could be all that remains of the artworks. As an example (and a provocation), a Banksy print was burnt so that a recording documenting the event could then be sold as NFT [15]. However, we are still convinced that the tangible carrier is of essence when it comes to cultural property (if one exists). A good example is the first auction of an NFT token for a sculpture by the well-known Polish artist Tomasz Górnicki. The 3D model of the sculpture entitled ‘Fortune’ was sold and the sculpture was donated to the Silesian Museum in Katowice, in accordance with the decision of the token’s buyer [16]. The combination of the auction and granting the buyer the right to choose the museum in which the carrier of the work (i.e. the tangible sculpture) would be displayed, in a way, constitutes a response and alternative to the burning of Banksy’s work. This proves that both property rights to the tangible carriers and NFTs can be separate and co-exist harmoniously.

Some authors indicate that there has been a noticeable increase in digital repatriation/restitution [17]. Even if we do not fully agree, we believe that the issue needs more attention from lawyers, especially when it comes to fitting the problem into the property rights system. Simply providing copies and material (by this we mean the technical dimension) is not what e-restitution is about. It reflects the broader concept. The problem arises with digital born art and with the twofold art life cycle - when we have tangible carriers and NFTs or just an e-version signed by the author. In this article, the Authors aim to juxtapose current challenges and show possible solutions with the aware use of e-restitution in the property law context.

By creating digital representation items with NFTs we would create a new type of goods, culturally and economically tied to a tangible original. These two artifacts exist independently of one another on the legal plane, so they can have two different owners. For instance, the returning country and the country of origin. It would be possible to exchange shares on both, i.e. giving each of the countries a 50% share in a tangible object and the NFT, which would at least partially help overcome what Mathilde Pavis and Andrea Wallace call the weak point of the traditional understanding of the digital restitution: The fact that the “returning” country retains “control over the generation, presentation, and stewardship” of a cultural object [18]. In other words, what post-colonial countries obtain is a species of symbolic title, having limited use in countries where a large part of the population has no access to the internet [19]. It should be noted that all these arguments are purely doctrinal and not based on data regarding how affected communities perceive digital restitution of their historical and religious treasures. In this particular field, lawyers tend to neglect the

evidence-based approach, although there is research on the subject done by anthropologists; for instance, for the Melanesian community [20].

The equal shares solution is simple but not sufficiently effective, so in the following sections of this paper we propose the creation of a new type of property rights for digitally restituted objects.

3 Digital Restitution as a Conservation Sciences Concept and Its Application to Law

The law is not exclusively about words, but it is about words. Legal concepts must be defined, and precise terminology is a must-have in law. That is why we will make a short interlude here and deal with digital restitution as understood by non-lawyers, in particular by archaeologists and conservation scientists. Then, we will analyze the possibility of utilizing this concept to enable digital restitution through its proper, legal meaning.

Digital restitution and digital archaeology are relatively new concepts connected to the development of digital technologies and their application in research. The definition of digital restitution can be summed up as an attempt to reconstruct places and objects (both movable and immovable) of historical value. Digital archaeology is a wider concept, including digital tools for finding and presenting archaeological sites.

The tools used for this purpose are, for instance, modified CAD (computer aided design) software used as “imagination enhancers” [21], or reconstruction of architectural objects with the use of IT technology [22]. In this context, it is not about returning objects, but about restoring them to their original shape. Nonetheless, these methods can also be used for digital restitution purposes, in the legal sense of this term.

These techniques produce results that may or may not be protected by intellectual property rights. For instance, a pure reconstruction of an existing object as it was originally will not be copyrightable, but the dataset used for such reconstruction may constitute a database protected by a *sui generis* right. More complex restitution attempts may include options for copyrightable add-ons, like attempts to make the scene more comprehensible to non-specialist audiences by adding animated personalities, other objects, or simply a description, in addition to the possibility of viewing the heritage items as they changed over time (e.g. the original version of the Parthenon and the one without colours, just before Lord Elgin removed the marbles).

As the Parthenon Marbles case filed to the Intergovernmental Committee for Promoting the Return of Cultural Property (ICPRCP) in 1984 was recently heated up at the international level, it is worth mentioning in the context of the core issue presented in the article. At the 22nd session of ICPRCP in 2021 a Recommendation was adopted encouraging States to “intensify their efforts with a view to reaching a satisfactory settlement of this long-standing issue, taking into account its historical, cultural, legal and ethical dimension” [23]. At the 23rd session, ICPRCP encouraged Parties “to continue making all necessary efforts in order to find an equally acceptable solution” [24]. Obviously, e-restitution could constitute an additional solution to be included in the debate.

How can these techniques be used for the purpose of digital restitution, particularly in the case of postcolonial and post-dependency countries? There are several possibilities we would like to discuss here:

The most obvious and simple possibility is the use of digital technologies to make replicas of cultural objects, either virtual or physical ones. This means of restitution was proposed years ago, and seems to be the simplest one from the technical perspective. The strong point of this proposition is that it enables wide access to objects and allows the possibility of enabling digital access to culture in remote territories without the risk of losing artifacts. Creating replicas could also facilitate access, but we think that although it is simple, this is not the best possible solution. For one, it does not safeguard the cultural security of postcolonial and post-dependency nations and cultures. We realize that in museums the general public sees often replicas in lieu of masterpieces, mostly for security reasons, but appreciating a replica is not the same as having an original object in a national museum. The intrinsic value of an artifact lies not only in its shape and material. The fact that it was in possession of various historical personages and that the object is a material witness to an ancient culture makes it unique, and part of national heritage and identity. The fact that having access to originals makes it possible to perform research on national culture and history is also worth mentioning [25]. And, last but not least, countries in possession of post-colonial heritage items usually offer affected countries digital restitution and intend to keep the originals for themselves, rather than the other way around. So, if no one is interested in keeping digital replicas and returning the originals to their countries of origin, it is ostensibly not the best possible deal on offer.

The above is in line with the definition proposed by Michael Pickering in the *A Repatriation Handbook. A guide to repatriating Australian Aboriginal and Torres Strait Islander Ancestral Remains*. He suggests that digital restitution could be considered as “the providing of copies of documentation and/or images to communities of origin. It does not include the original materials” [26]. According to the glossary, the term “repatriation” should only apply to the return of ownership of the original item. It is additionally more complex, as Ancestral Remains are also taken into account.

Another way to utilize digital reconstruction may be to supplement other restitution activities by providing access to 3D digital reconstructions or digitally enhanced access in situ. While rebuilding destroyed or dismantled buildings may not be the best possible option, because a full reconstruction will not always be possible or would simply be impractical, the digital option offers new opportunities. Certain methods help the public understand what the destroyed structure looked like originally. Some are low-tech, like placing a transparent plate with a silhouette of the building or preparing online materials to enrich the experience with virtual reality. Another possibility, which, quite recently, would have been considered a Star Trek-style sci-fi is digital restitution providing holographic projections of lost buildings and artefacts. Much to our surprise, technologies for this exist, although are still in the initial development phase. So, what you would get right now is not a fully-fledged Starship Enterprise holodeck, but when the digital restitution debate comes to its end what we will have will be close enough.

Digital restitution, especially when providing the viewer with the possibility of interacting with an object or objects on site, would also provide a much-desired added value to the restitution process. Namely, it would put the objects in a wider social, cultural, and historical context. It is especially important in the case of artifacts that can be fully appreciated only while understanding the context, as well as in the case of buildings and areas destroyed by time, human negligence or war crimes. Imagine the possibility of seeing Mariupol in Ukraine three-fold: as it originally was, its wartime destruction, and the city rebuilt after the war.

Finally, we should mention a third and somewhat supplementary option for digital restitution, which is augmenting the social capital of the affected communities. All technology-based means of restitution require a lot of research to be done, plus good programming and UX design skills. Furthermore, the technical means used for digital restitution will require both maintenance and further development. And this provides the opportunity to atone for colonial looting in yet another way; namely, by providing the affected communities with ways and means to participate in the digital restitution process. The situation where a former colonial power has a total control over the whole process, starting from the research phase through digital product development up to post-restitution maintenance, would lead to strengthening a dependency on former colonial powers, which is the opposite desired effect [18, 27].

On the other hand, involving the affected communities in the R&D process, handing over to them project management, and, where necessary, transferring resources to relevant research and cultural institutions involved in management of the digitally “returned” heritage, would give the affected post-colonial and post-dependence communities actual control over the process and make them independent of policy changes in any of the countries obliged to return the objects. This would transfer restitution from something thought of mostly in property terms (“We want what’s ours,” as Bernardette Atuahene put it in her book [28]) to cooperation, reconciliation and safeguarding of cultural security of post-colonial and post-dependence nations. This is in accordance with earlier proposals *de lege ferenda* stressing the need to engage dispossessed communities in the digitalization process and making it dependent on their consent [27].

4 Ukraine and Cultural Heritage in Emergency - New Responses to Global Threats

Saving Ukrainian Cultural Heritage Online (www.sucho.org) is an international initiative that is a bottom-up response to the threats to Ukrainian cultural heritage resulting from Russian aggression. The primary task is to identify and archive endangered sites, digital content and data in Ukrainian cultural heritage institutions. Various technologies are used, and as of March 2022 30 TB of material has been ‘secured’, which includes scanned documents, artworks and other digital material from more than 3,500 websites of Ukrainian museums, libraries and archives. The activities are funded by the Association for Computers and the Humanities (ACH), the European Association for Digital Humanities (EADH) and supported by Amazon Web Services [29]. Apart from this rescue activity, SUCHO is involved in UNESCO’s “Provide

an institutional framework for safeguarding documentary heritage at risk in Ukraine by supporting: – the creation of the “National Digital Library of Ukraine (NDLU)”;

and – the establishment of a dedicated network that is concentrated on the country’s documentary heritage [30].

The project coordinators emphasize that the project also addresses recent heritage that is only available in the digital space (i.e. digital born). In addition, digital versions of tangible assets from libraries, archives and museums are documented. The sites are saved on the Internet Archive [31]. One of the coordinators, referring to the scope of the project, stated that the activity is not aimed at creating a new digital collection, nor is it considered a scientific project, but a rescue project. He stated that the files will return to where they came from to Ukrainian libraries, archives and museums. This will be a special type of return of assets which, being replicable, can be copied and secured on other servers. It seems that this is already a step up from considering topics beyond the problems of inventory and registration of digital cultural property to a debate around models for securing this heritage, digital safe havens and new challenges for preservation plans in the event of armed conflict. The concept of returning the files to where they belong constitutes safeguarding in the face of emergency and the threat of destruction. Unlike in other digital restitution cases, where the returning party plays a key role, cooperation on the opposing (Russian) side is neither sought nor desired here.

5 From Digital Restitution to Property Rights

The idea that cultural property is somewhat special and that standard rules on ownership will not always apply is slowly gaining approval in the legal community [28, 32]. A new approach to old institutions (e.g. trusts) has also been proposed recently by Piotr Lasik [33]. Digital restitution of post-colonial and post-dependency cultural objects is one of the cases where this problem becomes visible.

Thinking about cultural property in a non-civilian way may help one understand overlapping interests in heritage items and create a restitution model balancing interests of all stakeholders.

The classical European way of thinking about property requires a physical object and person(s) exercising the Holy Triad of property law: *ius utendi-fruendi*, *ius possidendi et ius abutendi* (the right to use and profit, the right to possess and the right to dispose of an object). This way of understanding property leads to rather single-minded optics: the property is there to serve its master’s purposes [34]. However, even in ancient Roman times, fiduciary relationships were recognized, and later in the Middle Ages, English chancellors created trusts as a creature of equity. It should also be noted that the Roman Catholic Church originally saw itself less as the owner of its property, and more as its trustee or depositary holding it for Christ [35]. In modern constitutional law this attitude is visible, with article 153 of the Weimar Constitution (“ownership is an obligation. It should be used for the common good”) acting as a leitmotif [36]. This is visible especially with respect to public property, natural resources and cultural heritage. The owners in all these cases have the duty of care not only towards their heirs, but also towards all the generations to come. So in this respect

even the classical, Roman understanding of ownership has started to include other people(s)'s interests vested in property. There are of course other, non-Western ways of thinking about ownership, and sometimes both types of interest co-exist, although usually not without conflict [37]. This can lead to a somewhat optimistic assumption that it would be possible to create a legal title in heritage objects that would, although on different planes, be vested both in the current legal owner and the beneficiary of a digital restitution. In terms of managing the cultural heritage components the matter of use and access also plays an important role as well as the system of public ownership. The latter is in certain countries used in terms of protection of public collections where the object becomes inalienable or *res extra commercium*. Both private and public cultural property pose an opportunity for e-restitution models, though the differences should be taken into account while applying the model [38].

6 How Would This Shared Ownership Work?

While referring to “mobility” in the e-environment, Irini Starmatoudi points out: “New business models are also extremely relevant in a digital cross-border environment, where intermediaries can also play the role of either a facilitator or an aggregator” [39]. Therefore, the focus should be also on the digital content being shared, moved and displayed in order to abide by the existing regulations.

The proposed model of digital restitution with shared responsibilities will (of course) only work if the parties involved are willing to cooperate [40, 41]. And in most cases, it will require a physical object to be maintained by one of the parties. It would only apply exceptionally to 100% virtual (digital) objects that have ceased to exist and whose vestiges are protected by the parties¹. It is a limitation of this proposal, but also an opportunity to use digital restitution in the spirit of “cooperation and reconciliation” to quote the cultural goods clause of the Polish-German Good Neighborliness Treaty [42].

What, then, would this split - or rather, shared “new ownership” model - mean for heritage-owning and heritage-dispossessed countries? A system based on the assumption that digital restitution in kind should be connected to the granting of actual control – factual and legal - over a returned object. Merely providing online access is not enough. Neither is handing over a digital replica. We understand that it is not possible to turn back time, nor to disperse museum collections: *fiat iustitia pereat mundus* in this case would imply the literal destruction of many heritage collecting and curating institutions. What we propose is to create a dual ownership model composed of a classical ownership triad and the rights to digital use of heritage items. Both rights will be vested in the returning country and the country of origin, although each will use these rights differently.

In this model, the returning country's position would be similar to that of a *prior user* in patent and trademark law. This term denotes a person who used the patented invention when the patent claim was filed with the Patent Office by the inventor. The

¹ An analysis of the proper way of dealing with the aftermath of the planned destruction of tangible and intangible heritage exceeds the scope of this paper and will be an object of a further study.

prior user is still entitled to use an invention, but cannot extend it beyond the scope existing at the time of applying for patent protection [43]. This balances the rights of an inventor (patent holder) and *bona fide* user of an unpatented invention. In the same way, a returning country would be entitled to use an object in the way it has been used by a museum so far. This mainly refers to the right to own and possess, research and exhibit an object. In this model, the returning country would also be responsible for the safekeeping and maintenance of an object.

The legal title and the right to exploit an object online and to use it in all the manners not covered by prior use would be vested in the country of origin. With the growing importance of the online presence of digitalised heritage and the newly emerging rights to virtual property, these countries will have the opportunity to make their cultural heritage visible and accessible. At the same time, such a division of rights will force both countries to cooperate because in modern heritage practice, one bundle of rights cannot be effectively used without the other one.

This specific form of exercising ownership rights over restituted objects could be created even now by way of contract, resembling the *quoad usum* clauses; i.e. an agreement on how co-owners will use the property. It should, however, be noted that a purely contractual solution is not the best possible option in such cases. A much better solution would be to settle digital restitution with “new ownership” clauses in a bilateral international agreement between interested countries. An even better solution is to create an international convention on digital restitution, including a special property right for digitally restituted cultural objects.

7 Conclusion

Digital restitution, understood as handing over digital copies or replicas by the returning country, is at its best an imperfect surrogate for righting cultural wrongs. Regardless of the Western or non-Western approach to heritage, having a replica without access to the original is not enough. Cultural items and memorabilia share one common trait - it is the fact that they were witnesses of history or in contact with particular persons that makes them valuable. Many of these objects also have religious and spiritual meanings. In these cases, having a digital copy would simply not suffice. Another problem connected with the digital restitution process is that actual control, both factual and legal, will still be vested in the looter. Post-colonial and post-dependency communities have no control over it, nor do they have the right to co-decide their fate.

That is why a new approach to digital restitution is required. We propose a new model of digital restitution, composed of three distinctive elements:

- a) making digital representations of returned cultural heritage items unique by attaching non-fungible tokens (NFTs) to them. Unlike standard digitalisation with an open-license distribution of digitised content, this will make the returned digital copy unique and a new digital heritage object under the control of the requesting country. Having taken into account that both physical and online access to and use of heritage items are equally important, both parties will have

- separate property or quasi-property rights and the possibility to cooperate for the common good;
- b) use of technical means of digital restitution to make the object accessible to the community. This process, as well as research on physical artefacts, should be done with, by and under the control of the requesting state. We assume that digitally returned artefacts should be maintained, examined and used for cultural purposes by the requesting community, preferably cooperating with the returning state. Just having a digital copy does not suffice;
 - c) creation of a new property right for the returned object, with the returning country having prior users' rights to exploit an object in the traditional way that museums use an object, and with the requesting country having the right to virtual exploitation. This will account for an equal share of rights and duties and encourage intergovernmental cooperation: these rights will be used best if both parties cooperate.

We believe that the proposed model of digital restitution will not only help balance the rights of both parties but will also induce cooperation and reconciliation between them [44]. Effective use and protection of heritage items in post-colonial and post-dependency states require joint research as well as organisational and educational efforts by both parties.

It should also be remembered that digital restitution is not only about digitalising cultural objects. Ownership of cultural goods is, in most cases, strongly connected to public law and subject to various restrictions (e.g. prohibition of deaccession, limitation on access etc.). Intellectual property rights, the right to information, and to reuse public information, including digital representations of heritage objects, must also be taken into account. Furthermore, empirical data on how post-colonial and post-dependency communities perceive digital restitution is needed. Otherwise, we risk creating rules that beneficiaries will not accept. In that case, the rules will be, as usual, imposed on vulnerable communities in an unequitable manner.

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