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IP & Collaborative Agreements in the Creative Industries

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IP & Collaborative Agreements in the Creative Industries

A CREATe Report to support the launch of the AHRC's Creative Industries Clusters Programme 2018

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Executive Summary

The AHRC Creative Industries Clusters Programme (CICP) is a radical departure from traditional research funding. Research is understood in the context of R&D collaborations that are conceived to lead to new products and services, and ultimately to increased productivity and economic growth. These are ambitious, perhaps unprecedented goals for arts and humanities funding.

The experimental nature of creative R&D collaborations between Universities and industry, the subject matter of this report, requires new and innovative collaborative models and considerable cultural adaptation. We cannot know what works best at the outset. But consortium leaders and collaborators need to know the state of the art: what is the orthodox approach to managing and exploiting intellectual property (IP) (where IP is seen as a 'thing to be sold'), as well as, more fluid iterative interactions (where IP may be viewed as an enabler and catalyst to achieve wider goals, such as increasing capacity and developing an ecosystem).

This report does not aim to provide a set of IP exploitation templates. It is designed to instigate discussion and draw attention to recent research and resources that make it possible to develop bespoke solutions. The aim is to achieve a better understanding of the environment and to enable collaborators on the Creative Industries Clusters Programme to make informed decisions.

The report is structured in 5 sections. Section 1 provides a brief introduction to different forms of intellectual property (including patents, trade marks, design rights, copyright & confidentiality). As copyright regulates much of the creative industry's output, the report includes a crash course on copyright law, drawing on the resources of CopyrightUser.org, a guidance portal developed by CREATe research. Different types of copyright works are explained, the criteria for protection, the difference between authorship and ownership, how there are economic (linked to owner) and moral (linked to author) imperatives in the copyright system, and, finally, how licensing is used to exploit copyright works.

Section 2 focuses on the resurgence of creative reuse that appears to be a function of the digital environment. It is rare that new products or services do not touch on, be inspired by or adapt existing creative productions. There are opportunities within copyright law, due to the availability of public domain materials and limitations placed by law on the scope of copyright protection, but there are also real risks where exploitation becomes impossible without a careful understanding of joint creation and the need to obtain permissions.

Section 3 explains the current practice of collaborative agreements between the University sector and industry, focussing on the so-called Lambert approach, a toolkit of model agreements that has wide currency in science and technology collaborations. An important difficulty of the Lambert approach is the complexity and formality of the language used that seeks to provide legal clarity for future scenarios before the market potential of the collaboration can be assessed. In the creative industries, it is often necessary to revisit agreements at a later stage, typically once scalability becomes viable. Tying too many knots at the outset may provide legal assurance but also stifle the growth potential of the collaboration.

Without concrete examples, it is difficult to envisage how IP arising from collaborative projects is translated into the real world. Section 4 shares 4 case studies, each from a different creative sector and using a different R&D approach. First, the traditional Hollywood 'Studio' approach is presented as the paradigm for consolidating all IP in one production entity, providing maximum freedom for subsequent exploitation; secondly, a more mixed

approach of using copyright material for audio-visual production with overlapping layers of different licences for different subject matter is explained; thirdly taking cues from a rapidly developing technology sector, product development over open source licensed artificial intelligence (AI) platforms is explored; and finally a case study from the galleries, libraries, archives and museums sector contrast different attitudes to the use of public domain materials.

The report concludes with Section 5 entitled ‘pitfalls and challenges’. This suggests a number of issues that decision makers should reflect on when seeking to manage IP in collaborative agreements:

- the difficulty of distinguishing background and foreground IP in creative projects, especially under conditions of iterative production involving users;

- the importance of trust in creative relationships and the need to devise contractual ownership agreements rather than relying on joint authorship provisions of the law;

- the ‘nobody knows’ characteristic of cultural production, where prediction of future success is elusive but potential windfalls are high (due to the ‘winner-take-all’ tendency of creative markets);

- the need to understand the use of options to collaborate under conditions of uncertainty, and the advantages of building future freedoms to operate into the R&D process;

- clarification of IP issues in augmented and virtual reality (AR/VR) which usually contain a wide range of potential subject matter, including technology and third party cultural materials;

- the temptation of micro-enterprises and SMEs in the creative sector to avoid engaging with IP, due to time, knowledge and financial pressures;

- an understanding of the ‘negative space’ under copyright law, where it may be difficult to draw the line between ideas and expressions, and where alternatives to enforcement may be needed, such as brand identity and first mover advantages;

- open access obligations that cover research outputs in the context of the UK Research Excellence Framework (REF);

- navigating and challenging the established culture of University technology transfer offices, shaped by a culture that often results in risk averse processes of managing and exploiting IP.

The radical nature of new R&D collaborations in the creative industries will require new approaches. There is a need for policy buy-in at the highest level from both research funders and collaborating Universities. Experimental collaborative models will not come risk free. Innovative and adaptive approaches, open and closed, exclusive and non-exclusive need to be encouraged. There can be no hiding in walled gardens.

1. INTRODUCTION TO COPYRIGHT AND OTHER INTELLECTUAL PROPERTY RIGHTS

1.1 Different forms of IP and Quasi-IP: Patents, Trade Marks, Design Rights, Copyright, Confidentiality

Intellectual Property (IP) systems are devised to encourage innovation in culture, business and technology. They try to do so by offering time-limited legal protection to various intellectual creations, turning culture into goods that can be transacted (the so-called creative economy). There are four main types of IP:

1) Patents
2) Trade Marks
3) Design Rights
4) Copyright

In addition, ideas and inventions can be protected through

5) Confidentiality

Patents

Patents are used to protect inventive steps in industrial processes and machinery. Technical inventions can be patented if they are both new and inventive when the patent application is filed, and if they can be made or used. Patent protection lasts for 20 years, giving the applicant the exclusive use of the invention during that period. 'Exclusive' use means that the owner may take legal action to stop any other party from using their patented invention during the period of protection. The owner may also license or transfer the patent to another party, such as a larger company or a licensed distributor. At the end of the 20-year period, the patent enters the public domain, and since the schematics are registered publicly with a centralised office, everyone may access and build upon the invention.

You can find more information about what you can patent and how on the Intellectual Property Office (IPO) website: https://www.gov.uk/patent-your-invention

Trade Marks

A trade mark protects the use of a sign such as text, a logo or a phrase, to denote the source of a product or service. Trade marks are used to indicate to potential consumers the origin of goods for sale. As such, a trade mark cannot be merely descriptive of the products or services but should be distinctive to differentiate it from competitors' marks. When registering a trade mark, the registrant must indicate the class of goods for which the mark is being registered. Trade mark protection lasts for 10 years, giving a business an exclusive right to use that mark to promote specified goods and services. However, unlike other forms of IP, trade mark registration can last indefinitely if renewed every 10 years. Trade marks can be registered:

- In the UK with the Intellectual Property Office: https://www.gov.uk/how-to-register-a-trade-mark
- In the EU with the EU IPO: https://euipo.europa.eu/ohimportal/en/apply-for-a-trade-mark
- Internationally through the WIPO Madrid System: http://www.wipo.int/madrid/en/

Unregistered trade marks are also protected through the common law of Passing Off. However, proving Passing Off can be a difficult and costly process.

You can find more information about trade marks on the IPO website:
https://www.gov.uk/topic/intellectual-property/trade-marks

Design

Design rights protect the shape, configuration or appearance of a whole or part of an object. Original, non-commonplace designs are automatically protected by unregistered design rights. Designers can also register their design to obtain stronger protection. In the UK, unregistered design rights last for up to 15 years (although in the last 5 years of protection the owner must give a 'licence of right' to anybody who asks) and protect the shape and configuration of products from being copied without permission. Registered design rights last up to 25 years (subject to renewal fees every 5 years) and protect the complete appearance of the product, such as its lines, contours, colours, materials, texture and shape. Designs can be registered with the UK IPO if they are new, not offensive and have an aesthetic aspect. Any element of a design which is shaped in a certain way to perform a particular technical function or to fit together to another product is not covered by registered designs. Design rights registration schemes also exist on an EU level.

You can find guidance on UK and EU design rights at the following links:

- https://www.gov.uk/design-right
- https://www.bl.uk/business-and-ip-centre/articles/whats-the-difference-between-unregistered-design-right-and-design-registration
- https://euipo.europa.eu/ohimportal/en/designs-in-the-european-union

Copyright

Copyright is a set of exclusive rights that give creators the ability to control the use of their work. As it automatically applies to a wide range of creative works, such as novels, songs, video games, plays, photographs, films, and paintings, copyright is probably the most relevant form of IP for the creative industries. For this reason, UK copyright law will be analysed in more detail in the following sections of this briefing paper.

Confidentiality

Another way to protect ideas, inventions and business information is to keep them confidential. In the UK, trade secrets are protected by the law of confidentiality and by contract. To keep trade secrets protected, you must establish that the information is confidential, and ensure that anyone you tell about it signs a non-disclosure agreement (NDA). NDA templates can be found at the following link:
https://www.gov.uk/government/publications/non-disclosure-agreements

Non-disclosure agreements can be used to discuss business ideas with potential partners; or inventions with investors and developers before product development. For example, NDAs are a key element of protection television companies make use of when pitching and commissioning television programmes and formats.

1.2 Copyright: Types of Copyright Works and Protection Criteria

Copyright does not protect ideas themselves, but only the *expression* of ideas. Similarly, it does not protect facts, principles or concepts. For example, the idea of creating a VR experience that reproduces the Normandy landings by reconstructing archive footage cannot be protected. What is protected by copyright is the way in which the authors express that

idea, that is the actual code underlying the VR experience. This fundamental principle – known as the *idea-expression dichotomy* – can be further explored through the Copyright Bites resource: https://www.copyrightuser.org/create/public-domain/copyright-bite-2-idea-expression/

UK copyright law protects only certain types of creative expressions which are listed in the statute (The Copyright, Designs and Patents Act 1988). These are:

- original literary, dramatic, musical and artistic works (s.1(1)(a))
- sound recordings, films and broadcasts (s.1(1)(b))
- the typographical arrangement of published editions (s.1(1)(c))

Literary works include works of literature (novels, poetry, short stories etc.) as well as computer programs and databases. Dramatic works are works of dance or mime that are capable of being performed. In the UK, musical works only refer to melodies and music scores, as sound recordings are protected separately and lyrics are considered literary works. Artistic works include graphic works, photographs, sculptures, collages, works of architecture and works of artistic craftsmanship.

Sound recordings are vinyl records, tapes, CDs, digital audio files and any other media used to embody recordings. Similarly, films are recordings on any medium from which a moving image may be produced by any means (celluloid films, disks, video recordings, etc.). Broadcasts are a particular category: they do not involve the creation of a work per se; what is protected by copyright is the signal which is transmitted. Finally, typographical layout and arrangements of published editions are protected as a separate category.

These types of copyright works need to satisfy certain criteria in order to attract copyright protection:

- **Fixation**: creative works must exist in some permanent form to attract copyright protection. For example, an improvised poem would not be protected if it is not written down or recorded on other medium (e.g. audio tape).
- **Originality**: literary, dramatic, musical and artistic works also need to be 'original', meaning that they have to be the author's own intellectual creations and should not be copied from other protected works. Sound recordings, films and published editions do not need to be 'original': it is sufficient that they are not copied from previous sound recordings, films or published editions. As for broadcast, UK copyright law simply requires that the broadcast should not infringe the copyright in another broadcast.

When a work satisfies these criteria, it is *automatically* protected by copyright. Unlike other forms of IP such as patents and trade marks, there is no need to register the work for protection: copyright arises as soon as an original work is created in some permanent form. In addition, to qualify for protection under UK copyright law, a work needs to be created by a UK citizen or resident, or it has to be first published (or transmitted, for broadcasts) in the UK.

You can find detailed guidance on what copyright protects and protection criteria on the Copyright Cortex website: https://copyrightcortex.org/copyright-101/chapter-3

1.3 Authorship and Ownership

In UK copyright law (CDPA), 'the author of a work' – that is: 'the first person who creates it' (s.9(1)) – 'is the first owner of any copyright in it' (s.11(1)). While for literary, dramatic,

musical and artistic works the author is generally easy to identify, the CDPA explicitly indicates who the 'author' of other types of work is:

Type of work	**Author**
Sound recording	Producer
Film	Producer and Principal Director
Broadcast	Person making the broadcast
Typographical arrangements of published editions	Publisher
Computer-generated literary, dramatic, musical and artistic works	Person who makes the arrangements necessary for the creation of the work

There is an important exception to the rule on 'First ownership of copyright', provided by s.11(2):

Where a literary, dramatic, musical or artistic work, or a film, is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work subject to any agreement to the contrary.

This means that – unless the IP clauses in the employment contract state otherwise – the copyright in any work created by an employee during the course of her employment is owned by the employer. This exception does not apply to freelancers: unless the contract states otherwise, the freelance creator (not the commissioner) will be the first copyright owner of any work she creates.

When more than an author is involved in the creation of a work, ownership of copyright will depend on whether:

- the contributions of different authors can be distinguished from each other; or
- the nature of the collaboration means that each author's respective contribution cannot meaningfully be distinguished from the other.

If their contributions can be distinguished, each author will own the copyright in the individual contribution they make to the work. If each contribution cannot be distinguished from the other, there exists a situation of *joint authorship*.

Joint authorship and ownership have important implications. If you want to use a work that is jointly authored, you need to get permission from all the joint owners. On the death of the first joint owner, usually copyright will pass under her will or, if there is no will, to her next of kin under the laws on intestacy (*tenancy in common*). In exceptional cases, on the death of the first owner, copyright will pass to the remaining owner (*joint tenancy*). Also, duration of copyright in works that are jointly authored is based on the date of the death of the last of the authors to die (see section 2.1).

You can find detailed guidance on authorship and ownership of copyright on the Copyright Cortex website: https://copyrightcortex.org/copyright-101/chapter-4

1.4 Economic and Moral Rights

The copyright owner of a work holds a bundle of economic rights. These include the right to:

- Copy the work: the reproduction right (s.17 of the CDPA)
- Issue copies of the work to the public: the distribution right (s.18)
- Rent or lend the work to the public: the rental right (s.18A)
- Perform, show, or play the work in public: the public performance right (s.19)
- Communicate the work to the public, whether online or otherwise: the communication right (s.20)
- Make an adaptation of the work or do any of the above in relation to an adaptation: the adaptation right (s.21)

These rights are *exclusive* in nature, meaning that the owner can exclude others from making these uses of her work without her permission, unless their use is otherwise permitted by law (see Section 2.2). Doing any of the acts listed above in relation to 'the work as a whole or any substantial part of it' (s.16 CDPA) without the owner's permission will infringe copyright in the work, and the owner will be entitled to some form of relief or compensation.

The ownership or use of economic rights are the subject of IP negotiations and transactions. In other words, these are the rights that can be assigned or licensed (see Section 1.5) to another party in exchange for a payment.

It is important to note that the distribution right only relates to the first sale of the physical copy of a work, not to subsequent sales. This means that once a physical (not digital) copy of a work (e.g. a CD, a DVD, a book, etc.) is sold within the European Economic Area (EEA), the copyright owner cannot control the distribution of that copy within the EEA territory any longer (in legal terms this is known as 'exhaustion of rights'). The buyer may resell that copy to others without the copyright owner's consent. Exhaustion of IP rights within the EEA territory is one of the IP issues that are being discussed as part of the Brexit negotiations.

In addition to economic rights, authors (not copyright owners) also enjoy moral rights, which are intended to protect their non-economic and non-proprietary interests in the work. These include:

- the right to be identified as the author of the work (often referred to as the right of attribution)
- the right to object to the derogatory treatment of a work (often referred to as the right of integrity)
- the right to object to false attribution of the work
- the right to the privacy of privately commissioned photographs or films

Unlike economic rights, which can be licensed or assigned to another person, moral rights remain with the creator of the work and cannot be exercised by anyone else. However, unlike in other EU countries such as France or Italy, in the UK moral rights are finite (they last only as long as the work is in copyright) and can be waived by the author. Moral rights waivers are often included in employment contracts and contract for services.

You can find detailed guidance on economic and moral rights on the Copyright Cortex website:

- Economic rights: https://copyrightcortex.org/copyright-101/chapter-5
- Moral rights: https://copyrightcortex.org/copyright-101/chapter-12

1.5 Licensing and Exploiting

Copyright owners can exploit their work in different ways. The two main forms of authorising another party to make use of a copyright work are:

1) Assignment
2) Licensing

An assignment of copyright is the transfer of the ownership of economic rights from one person to another. Assignment of rights can be specific in terms of what rights are being transferred (what you are allowed to do), for how long (a year, or ten years, or perhaps for the entire copyright term), and jurisdiction (where in the world you can make use of the work). For example, an author might assign the right to turn her work into a film to an American production company, while assigning the right to publish the work to a British-based publisher. The publisher, in turn, might assign the right to publish the work in a foreign language to an overseas publisher.

Whatever the nature of the assignment, it is important to know that the assignment must be in writing and signed by or on behalf of the assignor (the person making the assignment).

A licence is essentially a permission to make use of a work in a way that, without permission, would constitute copyright infringement. The main difference between assignment and licensing is that the licensor retains copyright in her work: unlike an assignment, with a licence no property interest passes from the copyright owner to the licensee.

Licences can be *exclusive* or *non-exclusive*. Exclusive licences grant the use of the work only to the person who acquires the licence; whereas non-exclusive licences enable the copyright owner to license the use of her work to more than one person at the same time. Non-exclusive licensing can be a convenient arrangement in collaborative projects: each author involved in the project grants a non-exclusive royalty free licence to the other members of the team. This allows the whole team to use the outputs of the project according to the licence, while each author can still exploit their individual contribution independently. Further on in this paper, we discuss a real-life example of this kind of licensing arrangement.

There are also *open* licences, such as the GNU General Public Licence (for software) and Creative Commons (for all types of copyright work). These allow the licensee (everyone) to use the work for free under certain conditions. For example, all Creative Commons (CC) licences require the re-user to credit the author of the original work (in CC terms, this requirement is indicated as BY Attribution). Other conditions that the licensor can include in a CC licence are: ShareAlike (SA) – the new work must be distributed under the same CC licence; NoDerivs (ND) – the original work can be freely shared but without modification; NonCommercial – the work can be used for non-commercial purposes only. All six types of CC licences are a combination of these four conditions.

You can find more information about Licensing & Exploiting and on Creative Commons licences on the Copyright User website:

- Licensing & Exploiting: https://www.copyrightuser.org/understand/rights-permissions/licensing-exploiting/
- Creative Commons: https://www.copyrightuser.org/understand/creative-commons/

You can also go through FAQs on Creative Commons & Open Access containing responses to common concerns surrounding Open Access, Creative Commons, and the publication of research. It is intended to aid researchers, teachers, librarians, administrators and many others using and encountering the Open Access movement in their work. https://doi.org/10.5281/zenodo.841085

2. COPYRIGHT AND CREATIVE REUSE

As noted earlier, if you want to copy, distribute, rent or lend, perform, communicate to the public or make an adaptation of a copyright work 'as a whole or any substantial part of it', you need to get permission from the copyright owner. In practical terms, this means identifying the copyright owner and obtaining a licence for the intended use. Due to the complexity of the legislation and the duration of the copyright term, clearing rights to use existing content is often a long and costly process. However, not all uses of creative works require permission. You do not need permission from the copyright owner to use:

- Insubstantial parts of a copyright work (although these are hard to define); see https://www.digitisingmorgan.org/uploads/BN7-insubstantial%20use_DigiMorgan.pdf for more)
- Ideas (rather than a particular expression of those ideas) or other elements of a work which are not protected (information, facts, theories, commonplace themes, etc.);
- Works that are in the public domain because their copyright term has expired (see section 2.1);
- Works distributed under a Creative Commons licence or other open licences;
- Substantial parts of copyright works when the use is covered by a copyright exception (see section 2.2).

Understanding the free uses allowed by copyright law can be crucial for projects that include elements of creative reuse of cultural heritage and have limited budget for rights clearance.

2.1 Copyright Duration and the Public Domain

Copyright does not last forever. It generally lasts for the lifetime of the author plus 70 years. When the copyright term expires, a work enters the public domain and can be reused for free and for any purposes by anyone. To calculate the duration of copyright in a work, you need to find out who created the work and when the author died. In most cases, copyright expires 70 years from the end of the calendar year in which the author died. For example, the works of Shakespeare, Joyce, Mozart and Vermeer are all in the public domain; whereas the works of Picasso (1881-1973) will enter the public domain on 1st January 2044.

The following table illustrates how the copyright term is calculated for different types of work under the current UK Copyright Act:

Type of work	**Copyright duration**
Literary, dramatic, musical and artistic works	Life of the author + 70 years. If the work is jointly authored, 70 years from the death of the longest surviving author.
Films	70 years from the death of the last to die of the following persons: - the director - the author of the screenplay - the author of the film dialogue (if different) - the composer of music specially created for and used in the film.

Sound recordings	50 years from the end of the calendar year in which the sound recording was made; or if published, played in public or communicated to the public during that period, 70 years after the end of the year in which the work is first published, played in public or communicated to the public.
Broadcasts	50 years from the end of the year of transmission.
Typographical arrangements of published editions	25 years from the end of the year of first publication.

You can find user-friendly guidance on copyright duration and the public domain on the Copyright User website:

- Public Domain: https://www.copyrightuser.org/create/public-domain/duration/
- Copyright Bite #1 – Copyright Duration: https://www.copyrightuser.org/create/public-domain/copyright-bite-1-duration/
- SMEs, Copyright and the Public Domain: https://www.copyrightuser.org/create/public-domain/sme/

When considering whether a work can be freely reused because its copyright term has expired, it is important to bear in mind the territorial nature of copyright law. That is, a work may be in the public domain in the US or another country but not in the UK (or vice versa). For example, *Also Sprach Zarathustra* by Richard Strauss is the public domain in the US (because published before 1923 – for a guide on the US copyright term see here: https://copyright.cornell.edu/publicdomain); but it is still protected in the UK (Richard Strauss' work will enter the UK public domain only in 2020, 70 years after Strauss' death).

However, works that are originally released into the public domain, such as images and most film and video footage produced by NASA or the White House, can be considered in the public domain globally.

Also, a reproduction or a recording of a public domain work will often qualify for copyright protection. For example, a piece of music (a musical work) and a sound recording of that piece of music are two different types of copyright works. Even if the musical work is in the public domain (e.g. a Mozart composition), the sound recording may still be protected. If you want to include a Mozart composition in a video or other creative production, the easiest way is to find a sound recording of that composition distributed under a Creative Commons licence. A good source of royalty free music – including classical music – distributed under Creative Commons licences is the Incompetech website: https://incompetech.com/music/

The copyright status of photographs of public domain artworks is still being debated. UK galleries and museums often claim copyright in photographs of public domain artworks in their collections and generate income by licensing the use of those photographs. However, many scholars consider this to be controversial, especially when dealing with a photograph of a two-dimensional work of art such as a painting. Again, the safest way to use the digital version of a public domain artwork without permission is to find one that is free to use. A

good source for this is Wikimedia Commons, a database of millions of freely usable media files, like images, sounds and videos: https://commons.wikimedia.org/wiki/Main_Page

The duration of copyright protection has also changed over time, and depending on when a work was made, was registered (for certain types of film), first published, made available or communicated to the public, the term of protection may be different.

You can find detailed guidance on how to calculate the copyright term of different types of copyright works on the Copyright Cortex website: https://copyrightcortex.org/copyright-101/chapter-6

2.2 Copyright Exceptions

Under certain circumstances, it is possible to use substantial parts of copyright protected works without permission from the copyright owner. These cases are known as copyright exceptions and enable the reuse of protected works for a number of purposes. In the UK, some of these exceptions are *fair dealing* exceptions, meaning that you can benefit from them only if your use can be considered *fair*. How much copying from a work is fair or unfair is an issue ultimately decided by courts on a case-by-case basis and according to a number of factors, including the amount taken, the amount added, how the work is used, whether the use is transformative, and whether it's commercial or not.

It is important not to confuse fair dealing exceptions with *fair use*, a doctrine in US copyright law (not applicable in the UK) which allows more extensive uses than EU / UK exceptions. Unlike US fair use – which is a very general and open-ended exception – EU and UK exceptions are traditionally linked to a specific purpose such as education, research, or preservation. However, in 2014 the UK government introduced a new quotation exception, the first ever UK exception that is not limited by purpose but only by the type of use ('quotation'). The quotation exception is potentially very enabling but has not been tested in courts yet. You can find the transcript of an interesting talk on this topic by Lionel Bently (University of Cambridge) on the CREATe website: https://www.create.ac.uk/creative-reuse/legal-respondent-bently/

In general, how much of an existing work you can copy and use under copyright exceptions depends on your risk appetite. You can find guidance on the most relevant UK copyright exceptions on the Copyright User, Copyright Cortex and IPO websites:

- Copyright User - Copyright Exceptions: https://www.copyrightuser.org/understand/exceptions/
- Copyright Cortex - Exceptions to Copyright: https://copyrightcortex.org/copyright-101/chapter-7
- Copyright Cortex – Exceptions for Libraries, Archives and Museums: https://copyrightcortex.org/copyright-101/chapter-8
- IPO - Exceptions to Copyright: https://www.gov.uk/guidance/exceptions-to-copyright

3. UNIVERSITY & INDUSTRY COLLABORATIVE AGREEMENTS: THE LAMBERT APPROACH

3.1 Context: The Lambert Review

In 2003, the UK government's Treasury (HMT) commissioned Sir Richard Lambert to conduct an independent review of Business-University Collaboration. The aim of the Lambert review was to explore the opportunities arising from changes in business R&D and university attitudes to collaboration, and to highlight successful methods of collaboration between universities and industry, including small- and medium-sized enterprises (SMEs). The review made a number of recommendations to help shape policy in this area, including a recommendation to the Funding Councils and the Research Councils to agree a protocol for the ownership of IP in research collaborations (Recommendation 4.1); and to The Association for University Research & Industry Links (AURIL), the Confederation of British Industry (CBI) and the Small Business Service (SBS) to produce a small set of model research collaboration contracts, for voluntary use by industry and universities (Recommendation 3.5). These recommendations led to the publication in 2005 of the Lambert toolkit, a set of decision tools and model agreements designed to improve the process of negotiating collaboration agreements between research establishments and business. The Lambert toolkit – summarised in the next section – aimed to produce a compromise approach that was fair and balanced, without favouring either industry or university interests, to:

- facilitate negotiations between potential collaborators
- reduce the time and effort required to secure agreement
- provide examples of best practice

In 2013, the UK Intellectual Property Office commissioned a new report – titled 'Collaborative research between business and university: the Lambert toolkit 8 years on' – to examine whether the toolkit had achieved these aims. The report indicated that organisations and people who were aware of the Lambert toolkit – 80% of the research community, and over 50% of the companies surveyed – found it useful and most of them (almost 70%) had used at least some part of the toolkit to support different activities. However, while the Lambert agreements seemed to be welcome by research institutions, large companies strongly preferred their own standard agreements and tended to view the Lambert ones as biased towards universities. Also, only 3% of the Lambert toolkit users had adopted the agreements unmodified, suggesting that the Lambert agreements were more suitable to be used as a starting point for negotiations rather than to replace the negotiation process altogether. Some of the university respondents felt that the agreements - mainly designed for collaborations in the field of science and technology - were over complicated for use in the creative sector or social science research, where the knowledge and data gained from the research are more important than formal IP. However, the sample did not have sufficient representation from these sectors to draw any firm conclusions.

3.2 Summary of Lambert Toolkit

The toolkit is available at: https://www.gov.uk/guidance/university-and-business-collaboration-agreements-lambert-toolkit

The toolkit consists of:

- a decision guide
- 7 model research collaboration (one to one) agreements (1-6)
- 4 consortium (multi-party) agreements (A-D)

- heads of terms and variation agreements for both collaboration and consortium agreements
- guidance notes

The toolkit offers two model heads of terms agreements, one for two party collaboration agreements and the other for multi-party consortium agreements. These are meant to be used as the starting point for negotiations to agree the basic principles and wording before drafting the full agreement.

Once the heads of terms have been agreed, you can choose among 7 model research collaboration agreements, which offer different possible solutions on ownership and exploitation of IP in bilateral research collaborations. A useful online decision guide tool can help you choose which agreement would be more suitable for your project: https://www.ipo.gov.uk/lambert-decguide-sect1.htm

The seven model agreements are summarised in the table below.

For the difference between non-exclusive/exclusive licences and assignment, see earlier section. Other useful terms include, the Institution (research centre or university leading the project), the Collaborator (the industry partner), and the Results (any products created as part of the projects that attract IP protection).

Collaboration Type	**IP Terms**	**Ownership of IP rights**
Agreement 1	All third parties involved in the project assign their IP rights in the Results to the Institution. The Institution grants to the Collaborator a **non-exclusive, indefinite licence** to use the Results, possibly in a specified field/territory for any purpose. The Collaborator cannot sub-license the Results to any external people or organisations.	Institution
Agreement 2	Same as Agreement 1, with the additional possibility for the Collaborator to negotiate with the Institution an **exclusive licence** (with right to **sub-license**) for certain IP rights in the Results.	Institution
Agreement 3	Same as Agreement 2, with the possibility for the Collaborator to negotiate with the Institution **an assignment** (instead of an exclusive licence) of certain IP rights in the Results.	Institution
Agreement 4	The Institution as well as any third party involved in the project assign their IP rights in the Results to the Collaborator. The Collaborator grants the institution a royalty free, non-exclusive licence to use the Results for the purposes of carrying out the project, and for academic and research purposes.	Collaborator

Agreement 4A	The Institution and the Collaborator own the IP rights in the Results they create, and grant each other a non-exclusive licence to use the Results for academic and research purposes.	Institution and Collaborator
Agreement 5	The Collaborator owns all IP rights in the Results and grants the Institution a royalty free, non-exclusive licence to use the Results only for the purpose of carrying out the project. The Institution can use the Results for academic and research purposes only with the Collaborator's permission.	Collaborator
Agreement 6	Same as Agreement 5 but the Institution can use the Results also for academic and research purposes.	Collaborator

With regard to Agreement 5, it is worth noting that some copyright exceptions (see section 2.2) – such as the exception for research and private study – cannot be overridden by contract. This means that any term of a contract seeking to prevent or restrict copying under this exception is unenforceable in law.

For collaborations between more than two parties, the Lambert toolkit provides 4 model consortium agreements, summarised in the table below.

Consortium Agreement	**IP Terms**
Agreement A	Each member of the consortium owns the IP in the results that it creates. They grant each other party a non-exclusive licence to use those results for the purposes of the project and any other purpose.
Agreement B	The other parties assign their IP in the results to the lead exploitation party (or the lead exploitation party is granted an exclusive licence).
Agreement C	Each party takes an assignment of IP in the results that are germane to its core business and exploits those results.
Agreement D	Each member of the consortium owns the IP in the results that it creates. They grant each other party a non-exclusive licence to use those results for the purposes of the project only. If any member of the consortium wishes to exploit another's IP they must negotiate a licence or assignment with the owner of that IP.

Further guidance on these model research collaboration and consortium agreements can be found on the UK Intellectual Property website:

https://www.gov.uk/government/publications/university-and-business-collaboration-agreements-model-agreement-guidance

3.2 Evaluation of Lambert & related approaches

Following the 2013 review, the Lambert toolkit was revised and an updated version ('Lambert 2') was launched in October 2016. Although the standard collaboration agreements offered by the Lambert toolkit cannot fit every specific situation, they can facilitate the achievement of reasonable compromises in business-university IP negotiations.

One main criticism of the Lambert toolkit is the complexity of the language used in the model agreements. If the ambition is to avoid going through the institution's legal or research support department to speed up experimental product development, there may be questions on whether the toolkit is suitable for deployment in these scenarios.

A second important difficulty is that the Lambert approach seeks to provide legal clarity for future scenarios before the market potential of the collaboration can be assessed. In the creative industries, it is often necessary to revisit agreements at a later stage, typically once scalability becomes viable. Tying too many knots at the outset may provide legal assurance but also stifle the growth potential of the collaboration.

In the 15 years since the Lambert review was published, much development of thinking within technology transfer offices of Universities has taken place. However, there is still considerable resistance, with personnel within legal or research support departments trusting their own individual training (often biased towards a technology perspective, i.e. a patents focus). There appears to be a perennial hunt for the big ticket win, and an underlying fear of 'underpricing' or 'undervaluing' a potential IP. This inhibits innovative thinking.

When projects are funded through direct industry grants or partnerships, this is considered straightforward. Typically it is dictated by the bargaining power behind the funding partner's terms. Google, for example, has a policy of seeking non-exclusive licences (or exclusive licences with a time limited option) when engaging with IP of academics. However, tech transfer offices seem to struggle when dealing with IP in research council funded projects.

Lambert is not the only initiative aimed at facilitating IP negotiations and licensing between universities and industry. Easy Access IP - a collaboration since 2011 between University of Bristol, University of Glasgow and King's College London, and lately being championed by UNSW Australia - aims to promote new ways of sharing intellectual property between academia and industry. Among 30 known academic and research institutional users around the world, the Defence Science & Technology Laboratory in the UK is one of the more active users. See https://www.gov.uk/guidance/easy-access-intellectual-property

A 2015 report by the Report by National Centre for Universities and Business introduces Easy Access IP as *"an approach to knowledge exchange (KE) between Universities and business under which research institutions offer a free licence to a specific technology, using a simple, non-negotiable, one-page agreement. In return for the licence, the recipient must commit to using the technology to create value for society and the economy, and to acknowledge the role of the Institution as the originator of the intellectual property (IP)."*
For a fuller review of Easy Access IP, see https://ncub.atavist.com/easyaccessip

The main reason for academic and other institutions to enter into Easy Access IP is a recognition that universities may generate more opportunities than they can support directly to exploit. And therefore it offers a route for those types of IP institutions choose not to invest

in, to be able to reach the market or benefit society in some way. It plays mostly a symbolic role, signalling a progressive knowledge exchange strategy.

An overview of the current practices in commercialisation of university IP can be found in a report commissioned by the Department for Business, Energy, and Industrial Strategy (BEIS), prepared by RSM PACEC LTD: Research into issues around the commercialisation of university IP (February 2018): https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/699441/university-ip-commercialisation-research.pdf
Again, the focus is almost entirely on technology, with copyright receiving one mention.

New ways of sharing ownership of IP rights easily and effectively in collaborative projects are also being explored through smart contracts and blockchain technologies. The Digital Catapult's Smart Contracts for IP Assembly aims to create Ethereum based smart contracts which formalise the process of dividing IP ownership and revenue sharing to help drive democratised and creative teamwork. The technology is designed to help arrange the IP ownership aspects of any collaborative work that requires a multifaceted blend of inputs and unpredictable outcomes, in areas such as virtual and augmented reality through to the creation of music. Although currently the prototype is being trialled for games development, the Digital Catapult are keen to test it across other sectors, including university-business collaborations. https://www.digicatapult.org.uk/projects/smart-contracts-for-ip-assembly/

4. IP IN COLLABORATIVE PROJECTS: CASE STUDIES

4.1 The Studio approach: Consolidating IP in production entity

The conventional approach for managing intellectual property in complex copyright works has been developed by the film industry. Films were an early example of a discrete product that incorporated creative input from many contributors. Multiple layers of rights had to be consolidated before exploitation became possible.

The entity in which this assembly of rights happens, typically, is a production company, sometimes set up for a specific film. We term this model the Studio approach, as it is the function of a studio to organise and finance a pipeline of such discrete productions. However, the model is not limited to films and TV. In fact, it is the standard for games, and is being promoted for VR/AR companies as well. See *Growing VR/AR companies in the UK: A business and legal handbook* (2018), Digital Catapult in collaboration with PwC: https://www.digicatapult.org.uk/news-and-views/publication/growing-vr-ar-companies-in-the-uk-a-business-and-legal-handbook/. Wherever there a multiple creative inputs into a new product or service, hold-ups in exploitation are likely if not all rights are consolidated at the production stage.

It is important to note that there are important differences how multiple inputs are treated where collecting societies are involved, most pertinent in the music sector (see section 4.2). So the studio approach does not translate everywhere.

Although the law defines the authors of works as the first owners of any copyright (if not created under employment, see section 1.3), it is common practice under the studio approach to require the creators to assign all of their rights to the commissioning company. Under the tried and tested formula, the production company is the one to engage capital or resources to hire creators to contribute their respective creations into a new entity. Copyrights are cleared (i.e. licensed in, or assigned to the production company) at every stage in return for payment: a writer's story, a screen adaptor's screenplay, a musician's background score, an actor's performance, and so on. These are different types of copyright, based on the kind of work, duration, etc. but the consolidation of rights into one entity allows maximum freedom for the exploitation of IP. Thus, the production company, set up for this purpose, is ready to pursue different routes to market: territorial licences, technology based franchises (theatrical, DVD or streaming releases), options (for sequels, book deals, TV adaptations), and so on. The key aspect to negotiate under this type of collaboration is the share of ownership and royalties.

The Studio approach works best where there are discrete inputs (rights that can be cleared) and discrete outputs (products that can be licensed). In collaborative projects of immersive and other forms of innovative digital media, distinguishing the various individual contributions to the final product is often difficult. As we have seen in section 1.3, if each author's contribution cannot be meaningfully distinguished from the other, copyright law considers the final work to be of joint authorship (and ownership). When many different authors are involved in the development of a product (e.g. VR/AR productions), joint ownership of works may be an impractical arrangement for exploitation, as any use of the work by third parties would require permission from all the joint authors. Identifying the individual contributions on a case-by-case basis and negotiating shares accordingly can often prove time-consuming and detrimental to the commercial exploitation of the product.

Finally, as introduced earlier in section 1.3, authorship and ownership of creative works varies depending on the type of work in question. Although the main component of a VR/AR product is likely to be the software shaping the immersive experience (in copyright terms, a

'literary work'; see section 1.2), certain specific products could potentially fall under a different category of protected work (e.g. film). In this uncertain landscape, the Studio approach may be an effective solution: regardless of the subject matter and individual contributions, all IP rights in the final product are secured and consolidated in a new production entity that can operate with maximum freedom.

4.2 Creative arts: Copyright in Film and Music (Going for a Song)

While the studio model (see section 4.1 above) works for discrete productions with a clear path to exploitation, alternative solutions might be more suitable for university-business collaborations whose aims are not limited to maximising profit. For example, the Copyright User initiative – an independent online platform aimed at making UK copyright law accessible to everyone – adopts an open IP policy with a view to incentivising the dissemination of its resources. The CopyrightUser.org website offers various creative resources – including illustrations, text, music, video interviews, and animations – that are the result of collaborations between academics and individual creators or creative SMEs. The default copyright arrangement for Copyright User productions is simple: each author retains copyright in the work they produce, and agree to distribute the final product under a Creative Commons Attribution CC BY licence (see section 1.5). This allows each contributor to the project, as well as the commissioning university and anyone else in the world, to reuse and exploit the product as they wish.

At the same time though, this open licensing policy can be combined with more traditional commercial exploitation forms. For example, a combination of different licences was used to distribute Going for a Song - https://www.copyrightuser.org/going-for-a-song/ - an educational resource on music copyright. The resource consists of a short animated video - telling the story of a composer and a lyricist who create a song and discuss how to market it - and a series of research-based explanatory texts (the 'Tracks' below the video). The project was a collaboration between a research centre - CREATe, University of Glasgow - and two digital SMEs - Worth Knowing Productions (who produced the video) and AudioNetwork (who provided the music). The production company Audio Network offered the makers of the video a synch licence to use their song *Twists and Turns* (2007); and one of its original composers – Richard Kimmings – was commissioned to produce a new 'evolving' version of the same song for the video. The new track – performed by Lucy Kimmings and Kes Loy – was used to tell the story of a song from its creation to its distribution, with a view to explaining the various copyright aspects of this journey.

From a copyright perspective, the project involved the production of various works created by different people and protected by copyright, including script, illustrations (also based on existing copyright works), voice-over, the original track, the new version of the song, and the film itself. For most elements of the film, the usual Copyright User open licensing approach was adopted: all creators involved in the project retained copyright in the work they created, but agreed to distribute their work under the CC BY licence. However, this approach was not suitable for the original song Twists and Turns, which is registered with PRS for Music and distributed by AudioNetwork through paid licences. Therefore, the project partners agreed the following licensing approach for distributing the resource: the visual elements and accompanying texts were distributed under CC BY, according to the Copyright User open licensing policy; whereas the music retained its original licensing arrangement and is still being commercially exploited by AudioNetwork. In practical terms, this means that everyone is allowed to watch the video (including the music, covered by the synch licence) and to freely reuse the visual elements and accompanying texts (under the only CC BY condition of crediting the authors). But if someone intends to reuse the song Twists and Turns (or the new version produced for the video Going for a Song) in their own project or creative production, they need to buy a licence from AudioNetwork.

Although the small scale of the project facilitated the negotiation process, the Going for a Song example demonstrates that it is possible for university-business collaborations to agree mixed licensing arrangements that serve the educational, research and commercial purposes of all parties involved.

4.3 Rapid R&D in Artificial Intelligence and Open Source Licensing

Artificial Intelligence (AI), around in nascent forms since the 1970s, has now become a core enabling technology in several industry sectors. Its uses in autonomous driving cars (for example, to "see" and react to dynamic traffic situations), in the health care sector (to "analyse" medical tests or "predict" potential development of diseases), in the legal field (to "read" and "interpret" contracts and agreements) are developing at a very fast pace since 2015. The use of AI in revolutionizing these industry sectors is often discussed in academia, policy and popular media, but less attention has been paid to how AI is starting to make rapid inroads in the creative industries. There is some discussion on how AI is potentially changing the online retail and marketing sectors with the use of long tail recommendation algorithms, but its use in more human centric 'creativity' domains, such as music and painting, is also developing. In part, this pace of development is supported by AI technologies moving from a proprietary IP model to a more open source licensing ecology.

AI, at its heart, is a set of computer programmes that learn as they execute or compute things, sometimes using parallel processing, such that these programmes progressively become better at the computations, 'learning as they do'. Sometimes these become capable of creating a further set of programmes to test their own creations. In computing language, this is known as deep learning over neural networks, mimicking the neural networks of the human brain. They become 'creators' as humans would consider 'creating'.

Developments in AI capabilities are predominantly funded by big technology firms such as Google, Facebook, Amazon, Tencent, Microsoft, IBM, & lately, Tesla. These companies usually drive developments by establishing in-house AI labs (in other words, hiring computer scientists to work on their company rolls). Sometimes, they also develop partnerships with third party institutions, such as academia and government agencies, particularly where substantial amounts of real life data is required for allowing the neural networks to start learning. Thus, without the use of NHS patient data, disease prediction will not be possible. Similarly, without thousands of hours of real life drone video footage from official US Department of Defence sources, development of counterinsurgency warfare systems, will not be possible.

There are well known privacy and ethical concerns surrounding acquisition of such large, and sometimes sensitive, amounts of data and the resultant learning-based patterns, however, licensing agreements which address arising IP are less known due to commercial sensitivity. In recent times, there is development of an ecology in the AI space where underlying software infrastructure (codes, libraries, etc.) are made open source, thereby allowing rapid uptake by the whole AI community. Initially AI developers would research and develop their IP over proprietary platforms, and control access and exploitation. Over time, it became apparent that the very large amounts of data being computed, with the inability of those who have created such neural networks, to understand how the technology will develop and in what ways will it start evolving, meant that much of the AI industry embraced open source based sharing as well as some degree of collaboration to learn from each other. To illustrate, of the nearly 30 AI platforms (and underlying libraries and instructions) available for developers to work on real world practical solutions, more than 20 platforms from leading technology companies, not including IBM, are open source.

Consider, for instance, the Google developed TensorFlow platform and its increasing use in developing AI based creative industry applications. Google has a 'Brain Team' department which started the so-called Magenta project. This project approach enables computer software to understand and make creative products (or underlying models to enable further products) such as music and imagery (similar to digital paintings). In both cases, the aim is to be able to "create" music or 'pictures' which appear aesthetic to humans. Tensorflow was released by Google under an Apache 2.0 open source license. The Apache License is a permissive free software license written by the Apache Software Foundation (ASF). The license requires preservation of the copyright notice and disclaimer but allows the user of the software the freedom to use the software for any purpose, to distribute it, to modify it, and to distribute modified versions of the software, under the terms of the license, without concern for royalties. In other words, you can do what you like with the software, as long as you include the required notices. This permissive license also contains a patent license from the contributors of the code.

On the same open source Tensorflow platform, sit two more of Google AI driven creative endeavours. These include the underlying software which Google deployed to create the 'Quick Draw' digital Pictionary type game in 2016. Learning from a large dataset of more than 50 million hand drawn sketches allowed the tech giant to develop the image recognition capabilities deployed in Google Photos. Thus, whereas the underlying technological capability was made open source for others to develop applications upon and learn from iterative learning, Google utilized the machine learning to create new products for itself.

In 2018, Google utilized the above machine learning algorithm to create a creative product to re-enter the huge Chinese mobile internet market. This was after a self-imposed exile of 7 years by being forced to remove its search engine product from China as it did not want to bow to Chinese government censorship requests. The result was that Google's other products (such as the Play Store which drives access to nearly all of Android apps) were also banned in mainland China territory. To overcome this and to enter the market once again, and responding to a huge AI market as well as developer talent pool, Google first established an AI development lab in China. It then entered into a comprehensive collaboration with a Chinese competitor, Tencent, by cross-licensing technology patents and developing a mobile game version of this drawing capability algorithm to launch on Tencent's Wechat messenger cum interaction platform, used by nearly 1 billion individuals.

'Caihua Xiaoge' is a mini-app which sits inside the Wechat player, such that Wechat users do not have to download or install a new program, but simply add this mini-app to their Wechat profiles. Players have 20 seconds to draw a picture of everyday items (such as dogs, watches, or shoes). The underlying Google AI then uses machine learning to guess what the drawings represent. Every time the machine gets the answer right, the player unlocks a badge; when users click into each badge, they can compare their mini-paintings with their friends' sketches.

It is not entirely clear how Google proposes to appropriate value from the other mini-app game. This was part of an IP cross-licensing deal with Tencent Holdings in which both companies cross-licensed several AI patents and other forms of arising IP. Importantly, like most other companies in the AI ecosystem, Google for the time being seems less interested in appropriating current value, but laying the foundations of basic technologies which will then be used to drive future product development. For example, the free to use Google Translate application, for which the underlying machine learning technology is also available

on TensorFlow, has a character limit for free translations. Larger volumes of translation can be done using something known as the 'Cloud Translation API', that is made available on a paid basis, while the access to Google Cloud services, on which these services run, is also monetised. Third party translation services utilize this API to develop their own translation business models.

If you have Wechat already installed, scan the QR code on the side to start playing 'Caihua Xiaoge', which can translate to 'Guess My Sketch' although Google's own translation algorithm, based on machine learning and available open source on TensorFlow, translates it as 'Guessing Little Songs'! Guessing humans are not completely out of business.

4.4 GLAM: Rijksmuseum Amsterdam v National Gallery, London

One of the main copyright questions faced by the GLAM (Galleries, Libraries, Archives, Museums) sector concerns the copyright status of digital reproductions of works in their collections, particularly when the works being digitised are out of copyright. While most UK cultural heritage organisations claim copyright on these 'digital surrogates', many scholars and experts argue that a verbatim reproduction of 2D images (e.g. paintings) does not meet the 'originality' requirement (see section 1.2), and therefore does not attract copyright protection. The advent of 3D scanning has taken this open debate to a new level, focussing on weather the work required to digitise three-dimensional objects is sufficiently creative to meet the originality requirement.

In the absence of a clearly defined position on these issues, the use of digital collections is mostly regulated by the terms and conditions of the individual institution holding the collection. Traditionally, most UK cultural heritage organisations – such as the National Gallery, London – tend to adopt rather restrictive policies on the use of their digital images, allowing their free use only for personal, non-commercial and educational purposes. Most UK galleries share the view that – as they do not charge for visiting the physical collections – they need the income deriving from licensing digital collections to fund their digitisation efforts.

However, in recent years more cultural heritage organisations are experimenting open innovation business models for the exploitation of their digital collections. One of the most famous examples is the Rijksmuseum in Amsterdam, which has adopted an open access policy for the use of their digital images since reopening the museum and launching the new website in 2013. While they charge visitors for entering the museum, the Rijksmuseum website offers hundreds of thousands of high resolution images from their public domain collections for anyone to view, download, copy, remix, print and use for any purpose. In addition to offering free access to these digital collections, they actively encourage follow-on creativity and reuse of those images through competitions such as the Rijksstudio Awards https://www.rijksmuseum.nl/en/rijksstudio-award . The shift to an open access policy has given the museum wider media exposure, getting more people familiar with their collection and attracting them to visit the museum.

Access to large databases of freely usable images can play an important role in the projects funded under the AHRC Creative Industries Clusters Programme, especially those including AI and computer vision components. Even where the commercial use of digital images is not explicitly allowed by the terms and conditions of the institution, in certain cases collections may be used under copyright exceptions (see section 2.2) or more generally by adopting a risk-managed approach.

A good example of an academic project that adopted a risk-managed approach to use digital collections is Display At Your Own Risk (Andrea Wallace and Ronan Deazley, 2016): https://displayatyourownrisk.org/about-dayor/

One of the outputs of the project is a catalogue of digital works organised to potential risk in reuse: https://displayatyourownrisk.org/wp-content/uploads/2016/04/Display-At-Your-Own-Risk-Publication.pdf

In general, the widest collection of freely usable media files is probably Wikimedia Commons: https://commons.wikimedia.org/wiki/Main_Page

5. CONCLUSIONS: PITFALLS AND CHALLENGES – WHAT TO LOOK OUT FOR?

5.1 Background & foreground IP in creative industries

Conventionally, collaborative agreements include standard clauses which distinguish 'background IP' (what parties bring to the table) and 'foreground or arising IP' (developed during the partnership). In creative industries, other distinctions are common, such as the distinction between 'contributor rights' (typically assembled into a production company, see section 4.1, Studio approach) and 'programme' or 'distributor rights' (covering exploitation routes, often by channel and territory). In the production of creative artefacts and services, innovation is often iterative, especially for newer forms of immersive, user generated and collaborative creative outputs. It is important, not to be boxed into any template that does not fit the proposed collaboration. Collaborators may need to explore different models for different types of activity, such as challenge funds, hackathons or sandpits.

5.2 Joint production/ authorship: the importance of trust

Co-creative processes require trust. In creative R&D, it is often difficult to separate individual contributions, and relationships may suffer if this is done insensitively. Instead of relying on the joint authorship status provided by law (see section 1.3), co-creators may opt for using contracts to formalise percentages of ownership or income early on, regardless of the individual contributions. One of the most famous and successful examples of this kind of arrangement is the Lennon-McCartney songwriting partnership: before the Beatles became a global phenomenon, the two English composers agreed that they would be credited equally on songs that either one of them wrote while their partnership lasted. While this type of agreement may not reflect (and reward) the efforts of each individual contributor, imaginative thinking creating trust may increase productivity, and facilitate exploitation of the final product.

Collaborations in co-creative R&D processes often will extend beyond the parties of a traditional consortium agreement. Experimental formats of knowledge production (such as sandpits) need particular attention to establish and sustain trust.

5.3 Unknown value and the use of options

Although it is true in most forms of IP creation (patents, designs, trade marks) that parties do not know how valuable the result will be when R&D collaboration starts, it is especially poignant in the creative industries. In cultural economics, this has been termed the 'nobody knows' principle. See Richard E. Caves (2002), Creative Industries: Contracts between Art and Commerce http://www.hup.harvard.edu/catalog.php?isbn=9780674008083
While copyright protected products tend to organise into winner-take-all markets, no formula has been devised yet that can deliver a hit!

This makes it difficult to apply the Lambert approach (see section 3) that seeks to provide legal clarity for future scenarios before the market potential of the collaboration can be assessed. In the creative industries, it is often necessary to revisit agreements at a later stage, typically once scalability becomes viable. Tying too many knots at the outset may provide legal assurance but also stifle the growth potential of the collaboration. The use of options is a common tool in the creative industries, for example for turning books into movies. Options do not avoid later negotiations (in particular about the licensing terms and royalties) but they allow projects to get started under conditions of uncertainty.

5.4 Should unforeseen uses be enabled?

The motivation behind the structured approach of the Lambert review (that is still shaping the UK tech transfer discourse, see section 3) was to give universities a more formal stake in the exploitation of technology based on publicly funded research. While the tool kit invites parties to be very specific about potential exploitation routes at the outset of collaborations, the draft agreements also include the possibility of mutual non-exclusive licences. The effect of such an arrangement is that each party can find routes to market that were not foreseen. There is no veto or hold-up. However, potentially, this can create future competition between collaborators, or bring multiple sub-licensees into the picture (which investors do not like who prefer exclusivity).

Where there is an underpinning technology enabling creative development, such as the case of AI platforms (see sections 4.3), there are advantages to build future freedom to operate into the R&D process. By adopting open source licences, it is possible to prevent competitors from enclosing strategic, rapidly developing fields. It also enables rapid deployment and scaling. Open strategies can provide competitive advantages (see sections 4.3 and 4.4). Open strategies also may have important innovative benefits for the economy as a whole, forcing parties to exploit quickly, preventing hold-ups, and ensuring wide diffusion of advances in knowledge or service provision.

5.5 Specific VR/AR issues

As with all emerging technologies, the intellectual property aspects of VR/AR productions are going to be defined through case law and (possibly) legislative reform. From an IP perspective, VR/AR products are complex types of works which usually contain a wide range of potential subjects for different forms of intellectual property protection. For an overview of the main legal aspects of VR/AR, see *Growing VR/AR companies in the UK: A business and legal handbook* (2018), produced by the Digital Catapult in collaboration with PwC: https://www.digicatapult.org.uk/news-and-views/publication/growing-vr-ar-companies-in-the-uk-a-business-and-legal-handbook/ It is important to note that the report is guided by what we call the Studio approach (see section 4.1), assembling all rights in one entity. There may be alternative exploitation strategies.

Retaining IP ownership on the code underlying the VR/AR product can be crucial for developers wishing to create different immersive experiences based on the same code. A good example of a VR product developed through university-business partnerships and adapted to different contexts is William Latham's Mutator VR: http://mutatorvr.co.uk/

5.6 Sidestepping formal IP protection

Empirical research shows that many creative producers, especially micro-enterprises and SMEs, are tempted to avoid engaging with intellectual property issues altogether. Often, they have a false, 'symbolic' understanding of what IP is (Munro 2016). They also cite time pressure and a lack of knowledge or finance to seek formal IP protection. See Grewar, M., Townley, B., and Young, E. (2015). Tales from the drawing board: IP wisdom and woes from Scotland's creative industries. University of St Andrews: Institute for Capitalising on Creativity. This collection of cases is intended to help creative businesses to navigate of IP legal issues and management dilemmas. Each case deals with daily IP challenges as experienced by creative practitioners in Computer Games, Dance & Theatre, Fashion & Product Design, Film & Television, and Music & Publishing: https://www.st-andrews.ac.uk/icc/research/publications/

In other cases, creative output may fall into the 'negative space' between the idea-expression dichotomy (discussed earlier in section 1.2). For certain creative productions, copyright law fails to provide stable and enforceable protection. Entrepreneurs must then depend on alternative methods, such as asserting their originator identity through trade fairs or social media; building industry networks that watch for possible rights infringement and support potential property claims; collaborating with would-be infringers, sharpening relationships with institutional buyers; delivering goods to market before competitors. An example of an exploitation model implementing a range of (partly non-IP) strategies is the market for TV formats (Singh & Kretschmer, 2009: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1465733). For a recent review of no-legal IP-like enforcement strategies, such as social media shaming and reverse appropriation, see Adler, Amy and Fromer, Jeanne C., Taking Intellectual Property into Their Own Hands. California Law Review, Vol. 107, 2019 Forthcoming. Available at SSRN: https://ssrn.com/abstract=3183294 While these strategies can work, they pose a considerable risk for accessing finance. Investors typically want assurance over the exclusivity of the product, signalled by clear rights.

5.7 Open Access obligations

The creation of new products and services within the CICP programme will involve academic research that needs to be mindful of open access obligations, established by the funders in the context of the Research Excellence Framework (REF). According to the Open Access Policy (governing REF 2021) adopted by the four UK HE funding bodies, all research arising from HE funding "should be as widely and freely accessible as the available channels for dissemination will allow". The policy is designed to

- "enable the prompt and widespread dissemination of research findings";
- "benefit both the efficiency of the research process and economic growth driven by publicly funded research";
- "increase public understanding of research".

The Funders' Open Access Policy of March 2014 (with subsequent updates) is still available on the HEFCE website (http://www.hefce.ac.uk/rsrch/oa/) but is likely to be moved in the current restructuring of higher education funding.

UK Research and Innovation (UKRI), the new umbrella body that brings together the seven Research Councils, Innovate UK and Research England, summarises the REF guidance as follows: "The policy states that, to be eligible for submission to the next REF, authors' final peer-reviewed manuscripts must have been deposited in an institutional or subject repository. Deposited material should be discoverable, and free to read and download, for anyone with an internet connection."
https://www.ukri.org/funding/information-for-award-holders/open-access/ref-2021-open-access-policy/

Open access policy may not be at the forefront of the work of R&D Clusters but should be seen as an opportunity. In particular, collaborators may want to discuss the advantages and disadvantages that may arise from making datasets and research findings available at the earliest opportunity. For collaborating academics, the UK Scholarly Communications Licence (UK-SCL) may offer a framework to increase the reach and impact of their research. See: http://ukscl.ac.uk/

5.8 Role of University tech transfer, research support and legal offices

University technology transfer, research support and legal offices of universities are staffed by lawyers and administrative staff with their own cultures. They are shaped by legal training and practice, often resulting in risk averse processes. It is important to realise that defensive advice protects the advisor. For individuals employed by universities, it is sometimes better that nothing happens (often caused by delays in negotiations, trying to control future scenarios at the outset) than that something goes wrong (for example, a technology becoming world leading where ownership was not asserted). This is not because of a lack of good will.

An interesting challenge is to explore conditions in which universities may be best placed to exploit creative industries IP, and those under which only business are the only appropriate exploiters (and Lambert consortium model B with the University as the lead exploitation party can be ruled out, see section 3.2). Are the funders' industrial policy objectives and those of universities aligned?

An important advice to the Creative Industries Clusters programme is to ensure buy-in at the highest level of both the funders and the collaborating universities. There needs to be **policy endorsement** at CIC programme level that can be shown to tech transfer and research support offices, **encouraging the taking of risks**. New approaches, open and closed, exclusive and non-exclusive, need to be explored. It is also important to recognise that industry will not be told what to do. Still, public funding of R&D offers considerable bargaining opportunities. The public funding of creative R&D projects, resulting in the potential creation of new intellectual property, demands that funders ensure that the IP is used for the widest economic and social benefit. It should be one of the outcomes of the CIC programme to evidence best practice. Never before has so much investment gone into R&D partnerships in the creative industries, much of it in the context of emerging technologies. We can't know what works best at the outset.

The experimental and sometimes radical nature of future collaborations will require new and innovative collaborative models and adaptable templates.

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