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Content Space

IP and the E-Space Project

1. The place of IP within the E-Space workflow

There are a number of steps in the E-Space workflow, from inception of the idea for a pilot project, through the hackathon, to incubation for the projects that have demonstrated a potentially successful business model.

1.1. Pilots develop ideas for projects using a mixture of open and proprietary tools and content. The Protected Space

The tools used by the pilots represent a mix of proprietary tools protected by copyright, and open source tools that may be freely used and built upon by third parties.

Examples of Proprietary tools used in E-Space by the pilots include:

- The tool for granular content annotation (Dance Pilot)
- The Eureva Blinkster App (Photography, Museums)
- Unity 3D game engine (Games)

Examples of Open source tools used in E-Space by the pilots include:

- Web-based Toolbox (e.g. Museums Pilot)
- The platform for multiscreen applications, developed by Noterik. (TV)

- Omeka and JPSearch API (Photography)
- Technical Toolkit (Games)
- WordPress (Publishing)

During the course of developing the tools, the pilots will create IP. For example, IP will be created as layers, enhancements and customisations are added to the existing tools listed above during the pilot projects.

Pilots will also use content, some of which will be 'open' and others of which will be proprietary. Some content may be licensed for the purposes of the pilot (and hackathon) only.

Examples of open content to be used by the pilots in E-Space includes:

- Content from Europeana (All pilots)
- Material from the public domain or under an open licensing regime, such as Wikipedia (e.g. Games and Publishing)
- Content with various open source software licences (e.g. TV)

Examples of proprietary content to be used in E-Space pilots includes:

- Content from third parties contributing to pilot content (e.g. Photography, Museums and Dance)
- Content under various commercial licences (e.g. TV)
- Content under creative commons licences not considered open (e.g. Games)

As with the tools, during the course of developing ideas, the pilot will create IP in the content adding layers of copyright to existing works and/or creating new derivative works. Each pilot will need a clear idea of:

- IP in existing tools: ownership, and use rights
- IP generated by pilot participants: ownership and use rights. Note that the DOW states that this IP should licensed under an open licence.

1.2. Hackathons are two or three day events combining talks and co-creative events. The tools and content developed by the pilots are available during these events. Attendees can bring their own tools and content and/or use/mix tools and content provided by pilots.

Tools may be open source, or layers of existing IP may subsist in the tools contributed by the pilots. IP will be created when hackathon attendees mix, adapt, enhance and otherwise re-use the tools supplied by the pilots to the hackathon events. IP will also be generated as tools enter the incubation and business modelling stage and are prepared for commercial use.

Content IP may be 'open' or proprietary. New IP may be created in the content during the course of the hackathon to the extent that the content is re-worked. This may be the content contributed by the pilots and/or the content brought by the participants. Each hackathon will need to have a clear idea of how the 'new' IP generated during the event is to be owned and managed.

1.3. Incubation for the projects deemed to have business potential. Beyond the Protected Space

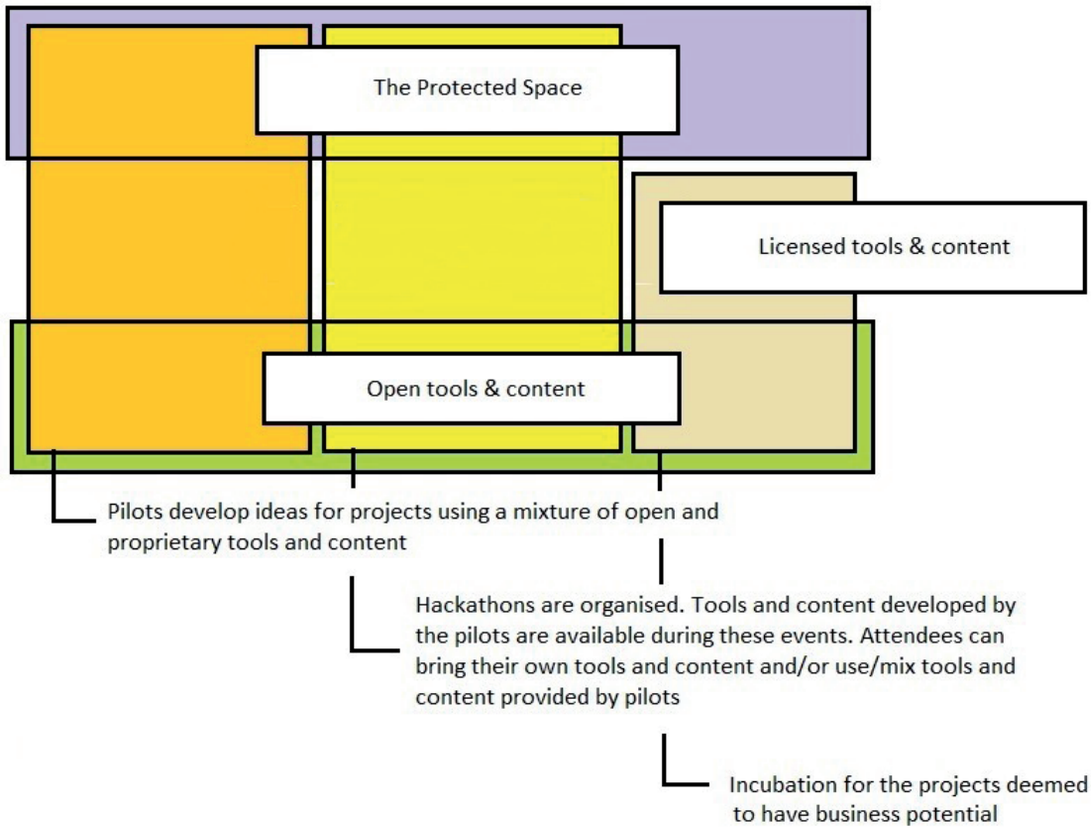
Prior to leaving the protected space and pitching for a place at the business modelling workshops which may lead to incubation, agreement needs to be reached on IP in the tools (and content if to be part of the business model). This agreement needs to take into account the IP identified at stages 1 and 2 discussed above.

The criteria for choosing the projects to go forward to the incubation stage are:

- Proper use and/or re-use of digitized cultural heritage content, or tools facilitating the use or re-use of this content
- Innovation, by which is meant the provision of better, more efficient technology, business models and new ideas
- The capability to engage real communities where there is demand that will be met by the winning tool
- A representative candidate with the passion, capability and dedication to sell the project.

- The project must be technically feasible with a realistic budget, time frame and the necessary expertise

The IP strategy will underpin points 1 and 2 in particular. This diagram illustrates the various steps outlined above:



2. The Legal Framework

How do you make money out of the re-use of digital cultural heritage? This has been a key question for E-Space, looking at pilot projects encompassing Europeana TV, photography; dance; games; open and hybrid publishing and museums. E-Space has followed these pilots from point of conception, through development in hackathons, and into incubation for the selected projects which show the most promise to be able to thrive in the cultural marketplace, ultimately contributing to the economy and to jobs.

A number of key foundational blocks needed to be in place for these pilot projects and the ideas coming from the hackathons to be a success: a market analysis was required, and a business case had to be made out. D5.1 partners produced over 100 pages on market analysis which UNIVE repackaged in six thematic user friendly documents available in the E-Space Innovation Space under market analysis. The purpose of this paper is to consider the place of intellectual property (IP) within this framework: how did IP – specifically copyright – support the pilot projects and hackathons as they moved from idea to reality? The pilot projects and hackathons developed tools and used and re-used digital content: in some cases both the tools and the content were protected by copyright. One of the ways in which the successful outputs could be monetised was through the exploitation of the exclusive rights granted by copyright[1]; these included the right of reproduction; adaptation; and communication to the public (over the internet) among others; in other words, business modelling could rely on a 'closed' strategy, licensing or assigning these exclusive rights in return for royalties or an outright payment. It is the adaptation mostly referred to as re-use, which is not collectively managed. However, for certain types of content (e.g. audio-visual), even for the two other types of rights (reproduction and communicated to the public) there is no full collective management and representation.

Another way was to consider an 'open' strategy to exploitation, where the tools were made 'openly' available and the business modelling strategy developed in other ways – such as software given away for free and a return made on updates and servicing. Within the E-Space project, both paths were explored simultaneously.

In tandem with thinking about exploitation strategies around copyright, copyright also needed to be considered at the 'input' stage. Pre-existing tools and content were used by the pilots and are being re-used in the hackathons. It will be essential to know who owns the copyright in these and how they are licensed in order to ensure that the eventual output of such an event does not infringe the rights of others rendering it incapable of being lawfully exploited in the marketplace.

This paper will consider the 'copyright space' within E-Space. It will highlight the, often conflicting, demands of the stakeholders - the authors, the owners, the users and the policy-makers – which are made at International, European and domestic levels of policy and law making. It is not intended to be comprehensive in the

1. Not all content used in the wider E-Space project is necessarily copyright protected. The use of Public Domain material or open content will be encouraged wherever possible.

discussion. There are a great many other sources of information, both academic and practical, that examine in detail the historical and contemporary state of copyright and challenges that are faced in the digital era. The purpose of this contribution is to highlight some of the contemporary challenges as they impact on the work in E-Space and to illustrate how challenging the current state of copyright can be for innovation in the cultural heritage sector. It will go on to suggest that, while copyright should always be respected, what may help is for innovation within the pilots and the hackathons to take place in a protected space. In other words a space where innovation takes place using openly licensed tools and content, and tools and content specifically licensed for use in the protected space but not out of it and where innovation is demand led rather than supply fed.

This contribution contains tools that the pilots and hackathons may find helpful in developing their strategies.

2.1. The Contested Space

Copyright is characterised by three interests: those of the author of the work; the owner of the copyright in the work; and the user of the work (sometimes also thought of as the public interest – although the two are not wholly contemporaneous). The interests of these groupings sometimes converge and often diverge. Generally it is the task of the policy maker to balance these interests whilst at the same time pursuing wider political agendas.

Little more than a decade ago copyright was a relatively unknown branch of the law. It was certainly important to those industries that depended on the law to provide exclusive rights in creative works that could be traded: publishing, music and the arts are good examples. It was with the advent of digitisation and the implications that had for the speed and ease with which cultural works could be copied and disseminated around the world with few or no barriers, that copyright became a household name. It was perhaps the music industry more than any other that brought copyright to the attention of the masses as it sought to grapple with the challenges of digital reproduction and internet dissemination of musical works. There were big gains and big losses to be made and vocal lobby groups emerged representing mostly interests of the copyright owners and also piggybacking on authors' interests. Less loud were the lobby groups for the user or public interest. Matters of control over dissemination of works on the internet became paramount although how that was to be effected entirely unclear. Law ascribing liability to

various actors – ISPs, individuals - and notice and take down requirements, suing in the courts and technical measures all were and are used by copyright owners as part of the effort to stem the tide. More recently it has been the re-use of content by creative industries that has climbed the policy agenda. Since the financial crash of 2008 and in the wake of sluggish economies, the time of the creative industries has arrived. The creative industries are considered by policy makers to be one of the ways in which economies can be revived. Policy makers, therefore, encourage the use of innovative technologies and existing cultural heritage content, and pursue increasingly ambitious strategies. However, in this melee conflicting demands are being placed on copyright that can make creative innovation problematic.

It is in this contested space that E-Space works. And it is for this contested space that we have sought to develop tools around copyright and licensing that will support the pilots and the hackathons in their work, from ideas to business modelling. One of the recommendations, specifically to try and address the challenges faced by the pilots and hackathons in this contested space, was, where open licensing was not possible, to develop licensing strategies to enable innovation to take place in a way as unencumbered by copyright restrictions as possible. We were not advocating that copyright should not be respected; we were advocating strategies that would help to support the work of the projects and hackathons whilst looking for innovative ways to build tools and to use and re-use content.

To this end we suggested that pilots and hackathons use a mix of content that is licensed in the least restrictive manner possible: open licences including CC-BY (and other CC licences although not all are considered ‘open’ – see below); and public domain licences/marks. In addition we urged pilots to use content specifically sourced for their use and for use in the hackathons. Here there were content owners who were willing to allow use of their materials for specified purposes. If these are ultimately monetisable, before any tools or content are allowed to leave that protected space and move into incubation, all the parties who have a copyright interest in those tools and that content, both in original third party material and in the content as it has developed, have to agree on exploitation methods. Our suggestion is that if agreement cannot be reached, then the proposal by the innovator wishing to enter incubation is not viable in the market place. If, on the other hand, all can see the advantages, then agreement will be reached and the exploitation strategy developed. This may be by way of open or closed licensing strategies.

Pursuing these strategies may well open up new sources of tools and content for the pilots and hackathons and may let owners of IP in tools and content experiment

with ideas they might not otherwise have been willing to pursue. It may help them to develop innovative, creative, imaginative and inspired uses of our cultural heritage that may not have been possible, but the possibilities of which become apparent in the protected space.

2.2. The author

The author is central to the copyright system. From international, through regional to domestic levels, the copyright system is built around the author. The oldest copyright Convention, the Berne Convention for the Protection of Literary and Artistic Works 1886[2] refers to authors rights and to the protection of the rights of authors in their literary and artistic works. That the author is pivotal to the copyright framework is most obvious from the term of protection that is linked to the life of the author. The Berne Convention provides that copyright lasts for 50 years after the death of the author. Subsequent moves to increase the term of protection have always based themselves on the life of the author for justification however strained; her heirs live for longer, therefore the term should be increased.

The author has a diverse range of interests in the copyright framework. She would like to secure long and broad rights for her works that she can exploit in the marketplace. These rights give her the incentive that she needs to keep creating more works: as she can control her works, so she can licence or assign them securing payment in return. She is not too interested in the exceptions and limitations to copyright which allow third parties to re-use content without payment or permissions except perhaps to be quoted – within limits. The author does of course become a re-user herself when creating afresh – at which point she may become more interested in the limits to copyright. She is in many sectors represented by collecting societies that also act as vocal lobby groups. The Authors Licensing and Collecting Society[3] for instance is a strong lobby group on behalf of authors in the UK, and there is CFC Centre Français d'exploitation du droit de Copie[4] in France and SIAE[5] in Italy.

2. See http://www.wipo.int/treaties/en/text.jsp?file_id=283698

3. See http://www.wipo.int/treaties/en/text.jsp?file_id=283698

4. See http://www.cfcopies.com/

5. See http://www.siae.it/Index.asp

2.3. The owner

The rights of the author often end up in the hands of a third party who then goes on to exploit those rights. In some jurisdictions copyright automatically vests in the hands of a third party. The best-known examples arise from the common law countries that root their justifications for the copyright regime in economic rationale. The UK for instance provides that where an employee creates a work in the course of employment, then the copyright vests in the employer. Such automatic vesting is not possible in other countries – such as France. Here the copyright always vests in the author even where an employee acting in the course of employment, but the author may then licence or assign this to the employer – or other third party. An exception exists for software and journalist's copyright where the copyright automatically vests.

If the economic view of copyright is to be believed, then the rights associated with copyright will generally end up in the hands of those most able to exploit them. These rights owners, in common with the authors, tend to want broader, stronger, longer rights but, unlike authors, tend to be more concerned with the exceptions and limitations. Witness for instance the response to the WIPO treaty to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled 2013 (the Marrakesh Treaty[6]) the most recent treaty to be agreed at international level. This treaty was concerned with mandating the introduction of specific exceptions and limitations in domestic law for those States adhering to the Treaty for the benefit of users with print disabilities. Those vehemently opposed were the publishers; those wholly in favour were the users. Authors were on both sides of the divide.

Rights owners engage in active and vocal lobbying in pursuit of their interests even more so than authors. The Marrakesh Treaty mentioned above witnessed fierce lobbying on behalf of publishers much of which has been captured by Knowledge Ecology International[7].

6. See http://www.wipo.int/treaties/en/ip/marrakesh/

7. See http://keionline.org/node/1767

2.4. The user-creator[8]

In this contested space – and certainly for E-Space – the users are generally thought of as the individual and the small collective. With the advent of digitisation, the user has moved increasingly to re-using content and in so doing developing what is colloquially known as user generated content. The user is also the creative industry, upon whose back, and as noted above, governments see a hope of economic revival. In this space, users want more freedom to innovate – translating into more limitations and exceptions to copyright, reduced terms of protection, and more open strategies in exploitation of protected content, certainly for content that they re-use in creating afresh, but often also in relation to their strategies in respect of the tools and content that they produce.

What this group lacks are effective lobby groups – or at least lobby groups whose voice is heard as clearly and articulately as those representing the owner and the author. To the extent that the interests of this group coincide with open exploitation strategies, so their interests are championed by organisations such as Open Knowledge and Communia[9] but these are far less cohesive, far less powerful, and far less well funded than those groups representing authors and in particular owners.

The types of initiatives designed to help this stakeholder would include Licences for Europe (although primarily an owner driven initiative) and the orphan works directive[10].

2.5. The policy makers

It is in this contested space that the policy maker has its job of balancing competing demands whilst at the same time pursing its own policy and strategic goals. This is challenging because policy at present tends to pull in competing directions. As noted above, at European and domestic levels the creative industries are seen as a means for economic generation. All manner of initiatives have been developed to try and encourage creativity, and much public money is spent pursuing this strategy. E-Space is a good example: how can the cultural heritage accessible through

8. There is arguable no such a thing as a passive user in the context of digital cultural content anymore, and specifically within E-Space the users are also creators (reusers).

9. See http://www.communia-project.eu/

10. See http://www.wipo.int/wipolex/en/details.jsp?id=13043

Europeana and from other sources be put to good use in order to create jobs and stimulate economic growth? In this there are tensions – as noted above: broader stronger and longer rights are wanted in the content for the creative industries in order to encourage participation (the interests of the rights owners); but at the same time, more exceptions and limitations are wanted to ensure that existing sources of content can be re-used (the interests of the users).

Whilst attempting to balance these interests policy makers also pursue other conflicting goals. While on the one hand innovation and re-use of materials by creative industries is encouraged, the policy makers require the suppliers of the content, the memory institutions, to be at least partially self-funding. One of the ways in which they do this is by licensing digitised content. Not only does this raise the question of whether copyright arises in the act of digitisation, a matter far from free from controversy, but it also causes a tension in the licensing strategy pursued: should this be open to encourage downstream innovation and the goal of content re-use by the creative industries? Or should it be closed to enable the memory institutions to license the content and in so doing add to their coffers? These tensions are particularly acute when the memory institution and the digitisation process are supported by public funds. Policy makers are constantly lobbied by the vocal and well-resourced lobby groups as noted above.

2.6. Other challenges

Not all of the challenges in this contested space arise from copyright. In a Progress Report on the implementation of Commission Recommendation on the Digitisation and Online Accessibility of Cultural Material[11], other pressing matters were highlighted as causing blocks to the accessibility and re-use of our cultural heritage. These included:

- Funding – or rather the lack of it – for digitisation projects[12];
- The lack of open platforms with quality, interoperability and resolution features;
- The watermarking of public domain materials and conditions placed on re-use[13].

11. See file:///C:/Users/aes231/Downloads/Recommendation-2011-2013-progress-report.pdf

12. High interest digitisation projects (e.g. English speaking-audio-visual) have a rights clearance issue whereas most of other projects (with low commercial value) have funding problems.

13. The conditions have mostly to do with legal interoperability, whereas Public Domain watermarking

It was suggested that the Orphan Works Directive may help although anecdotal evidence points to the fact that many working with our cultural heritage doubt its practical utility due to the lack of databases and registries of works and authors (see section 4.2.3 and section 7.2).

As said, it is within this contested IP space that the work of E-Space is carried out: a space in which there are many conflicting demands and competing interests. The purpose of this deliverable is to give participants at least some knowledge around IP to help them to support their innovative projects.

Stakeholder Groupings	Stakeholders in E-Space	Support for Open Data	Support for Closed Data	Lobby Groups	Overall Interest
Authors	Pilots Hackathon attendees Third party artists and performers (COVUNI, CIANT, NISV, KU LEUVEN, GOLDSMITHS, FST, OCC)	Not too concerned about third party exceptions e.g. free re-use of brail editions for the blind Need re-usable content for further creativity	Seek long and broad IPR to market creations, fund further creativity, and benefit heirs	e.g. Authors Licensing and Collecting Society (UK), CFC Centre Français d'exploitation du droit de Copie (France) and SIAE (Italy)	Variable, especially when broader moral arguments are factored into author attitudes to openness, though in general authors look for protections in the short-term and openness in the longer-term.
Owners (content providers)	Museums Libraries Galleries Archives (COVUNI, CIANT, LGMA, FCSH-UNL, NISV, LUCE, LAM, KU LEUVEN)	Seek broad exposure of content to attract interest and visitors to exhibition spaces Seek innovative ways of displaying content that often requires collaboration with tech firms Seek to open up content in line with agendas set by policy-makers in the hope of receiving more public funding	Seek long and broad IPR to market content especially given public funding cuts		Generally gain far more from opening up content with the exception of those that depend on considerable revenue from marketing rights restricted content

has to do with the re-introduction of rights.

Users	Hackathon attendees; Higher education researchers and students; he general public; Creative industries and entrepreneurs (COVUNI, CIANT, NISV, NOTERIK, RBB, PROTON LABS, IN2, KU LEUVEN, EUREVA, GOLDSMITHS, FST)	Desire freedom to create, re-create and co-create new content Desire freedom to exploit content in the marketplace using new tools	Users who are also authors may have interests in IPR as stated above	Open data organisations such as Open Knowledge	By far the majority of users have the greater interest in opening up data as much as possible. Users are currently less well represented at the level of policy-making.
	The European Commission National Ministries of Culture (PACKED, iMINDS, EVK, MMEDIEN, POSTSCRIPTUM, PROMOTER, UNIVE, NTUA, WAAG SOCIETY, UNEXE, SPK, FST, REMIX)	European and domestic agendas aim to open content up for exploitation by the creative industries to boost economies and create employment opportunities.	Broader, longer IPR is needed in content to encourage participation of content owners in collaborations with the creative industries Policy makers require content providers, to be partly self-funding and one way they do this is by licensing digitised content		Agendas at national and international level are largely to open up cultural content as much as possible but this agenda often conflicts with the effects produced when policy makers cut public funding to the culture sector

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