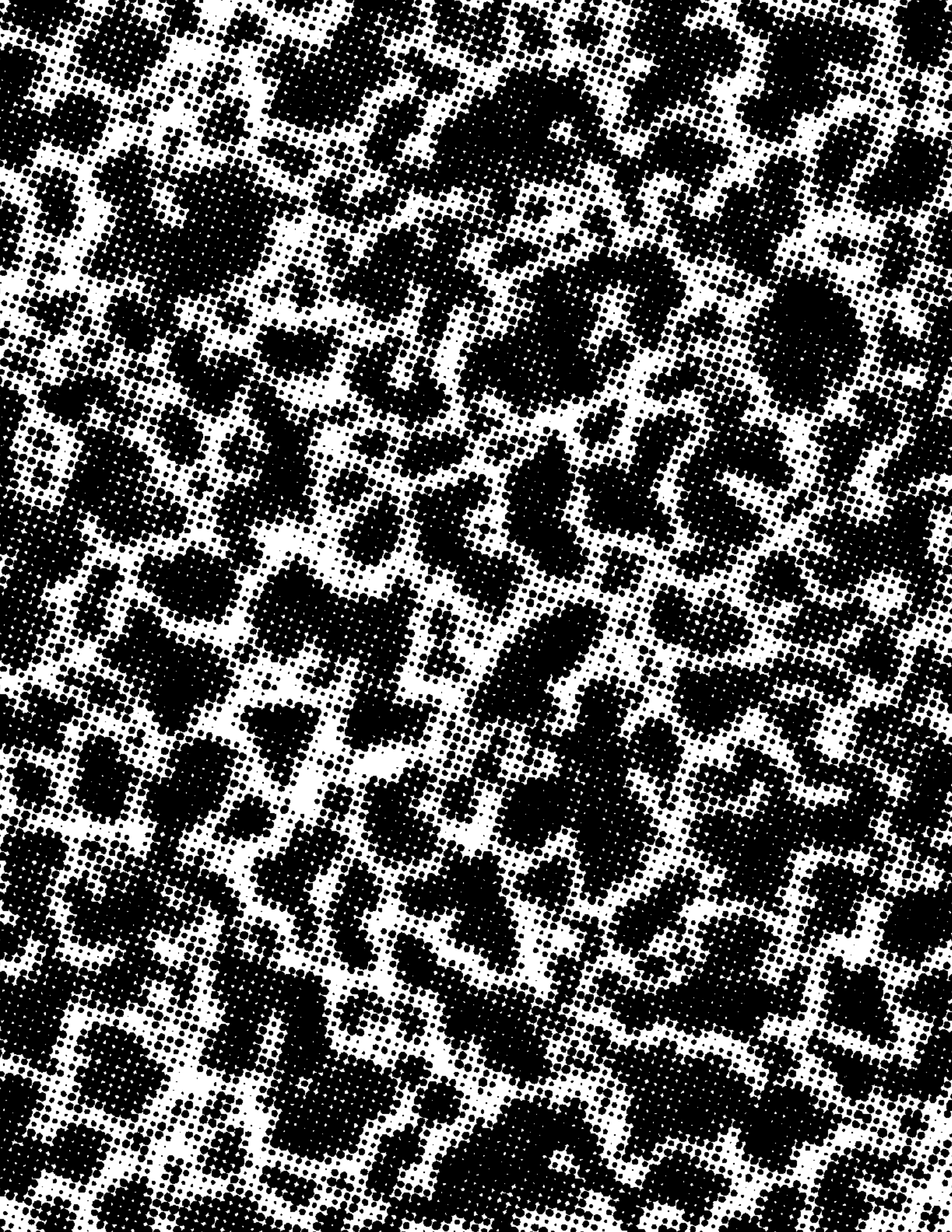


CREATING
IN THE
GREYSCALE:
A GUIDE TO
NAVIGATING
INTELLE©TUAL
PROPERTY AS
AN EMERGING
A©TIST OR
DESIGNER.





CREATING
IN THE
GREYSCALE:
A GUIDE TO
NAVIGATING
INTELLE©TUAL
PROPERTY AS
AN EMERGING
A©RTIST OR
DESIGNER.





INTRODUCTION⁶

→Glossary⁸

SCENARIOS¹⁰

→Appropriation¹²

→Control & Presentation¹⁴

→Ownership in
Collaboration¹⁶

→Communication &
Licensing on Social Media¹⁸

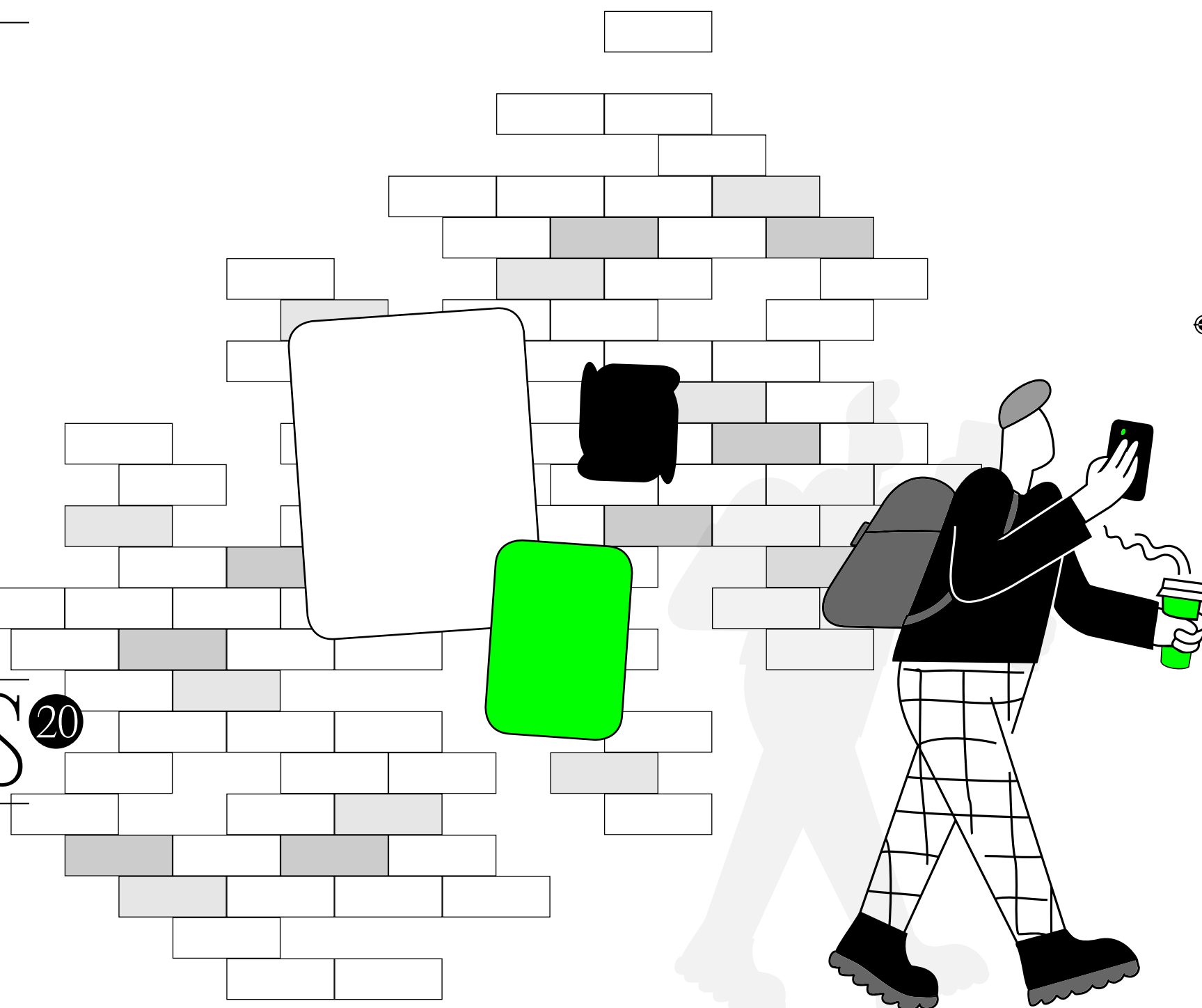
MEETING of the MINDS²⁰

→Artist Contracts²⁰



MINDFUL INQUIRY²⁵

→Canvas²⁶





As an artist or designer building your creative practice, there are many new situations you may encounter around protecting the work you are making, as well as showing and selling your work.

OCAD U's Centre for Emerging Artists & Designers has developed this resource to introduce you to Canadian **intellectual property (IP) concepts & terms**; share some possible **scenarios**; and offer a tool for creating an **action plan** when you need it.

How you choose to respond in a situation related to intellectual property depends on many factors like your relationship to the other parties involved, alignment to your values, and how the outcome impacts your personal goals, etc. Though IP is guided

by definitions, policy, law, and precedent cases, it is inherently murky because each situation has unique differences. The intention of this resource is to set up a framework of understanding, and prompt you to ask questions that can help you determine the next steps to your own specific scenario.

ADVOCATING FOR YOUR WORK IN THE ART WORLD

So, what is intellectual property (IP) and how does it affect me as an artist or designer?

For emerging creatives, particularly those who have recently graduated, IP is often described as "a really uncomfortable thing". It can be stressful or overwhelming to think about, and may not always be top priority. But it is important because it underpins the **value that you and others ascribe to your work**.

The system of intellectual property law that governs IP rights is a means to give economic incentive to encourage the creation of intellectual goods (original creations

like art and music, novel designs, inventions, new technology etc.). It rewards creators, authors, and inventors by giving them exclusive control over their work, so that they would be willing to share their ideas and drive progress for social good. In an ideal sense, it **rewards** creators by giving them **exclusive control to protect** their interests in their work so that the public can enjoy **access to and use of** their work.

In reality though, this system can be complex, and laden with ambiguities as well as injustices. However, understanding basic concepts and the right questions to ask can be a

key starting point to navigating survival in capitalism and tackling artist precarity. **IP applies to all disciplines of creative practice**, from jewellery design and creative coding to public and community art. Understanding IP is a means to advocate for your work in the art or business world – and **to be able to advocate for your self and your peers, and the value of your artistic labour is ultimately a form of self and community care**.





Glossary:

INTELLECTUAL

PROPERTY

©Copyright

Original creations
“The right to copy”

Copyright is made up of a bundle of exclusive rights that include the sole right to publish, perform, show, transmit, and produce or reproduce a work—or a substantial part of it—in any form. In Canada, Copyright in a work lasts for the life of the author + 50 years (+70 years in the US).

Copyright protects artistic, literary, dramatic, and musical works including computer software, sound recordings, performances etc. **You can't copyright an idea** – it has to be in a fixed form (put it down on paper!) in order to be copyrightable.

Copyright is **automatic**, there is no need to register. Although registering it with the Canadian Intellectual Property Office (CIPO) will give you a certificate of registration, which is clear evidence of ownership.

Moral rights are distinct from the economic rights under copyright. They protect the author's personality or reputation through the right to paternity/attribution, integrity, and association with a work.

→ **CIPO Copyright Overview** ↗
→ **Canadian Copyright Database** ↗
→ **10 Myths about Copyright Law** ↗
→ **Fair Dealing** ↗ – copyright exceptions in Canada
→ **CARFAC-RAAV Minimum Recommended Fee Schedule** ↗ – guidelines on payments for copyright & other professional services

™Trademarks

Brand (words, logos)
“Use it or lose it”

A trademark is a distinctive mark or symbol used to **distinguish your goods or services from those by another maker in the public's mind**. It can be a combination of letters, words, sounds, or designs used in association with particular goods or services that you are actually making, offering, or producing. The mark needs to be distinctive enough so that it won't be confusing with existing trademarks or deceptive in tricking the consumer to buy something from a competitor that takes advantage of another maker's goodwill.

It is always a good idea to do a trademark search before designing a logo or brand identity for a client, or to protect your own products.

By registering a trademark with CIPO, it gives you the exclusive right to use (sell, or license) it throughout Canada. A trademark registration lasts for 10 years, and is renewable if you continue to use it.

- **CIPO Trademarks Overview** ↗
→ **Canadian Trademarks Database** ↗
- Case Studies:
- **Cadbury's purple wrapper** ↗
→ **Tarzan's yell** ↗
→ **Christian Louboutin's red sole** ↗
→ **Deadmau5 vs. Disney over mouse head logo** ↗

①Industrial Designs

Aesthetic features
“They way it looks”

Industrial designs protect the appearance of a product – the visual features of shape, configuration, pattern or ornament, or any combination of these features applied to a finished article. It's meant to encourage **form and function** to work together.

By registering your industrial design with CIPO, you have the exclusive right to prevent others from making, selling, or importing objects that embody your registered description in Canada. A registered industrial design lasts for 15 years, and is renewable.

- **CIPO Industrial Designs Overview** ↗
→ **Canadian Industrial Designs Database** ↗

®Patents

Inventions
“New, useful, not obvious”

Patents protect original inventions and can be applied to products, processes, machines, chemical compositions, and improvements to any of these. The invention must be **new** (first in the world), **useful** (functional and operative), and **inventive** (showing ingenuity and is not obvious). It's meant to reward ingenuity that fuels progress.

In order to be awarded a patent, you need to be the first applicant to register it. A registered patent excludes others from making, using, or selling your invention in Canada for 20 years.

- **CIPO Patents Overview** ↗
→ **Candian Patents Database** ↗

™Trade Secrets

Confidential Info
“Keep it a secret”

A trade secret is confidential information that is not known to the public, and has commercial value. Trade secrets can include ideas or proposals; recipes or formulas; blueprints and designs; customer lists; data; and processes, methods or "known-hows" you've finessed for your practice etc. It's a means to protect valuable information that you don't want widely known (especially when you are in the research and development phase for a project). It can be used as an alternative to a patent, or to make sure an invention or design is not disclosed to the public before applying for a patent or industrial design.

The only way to protect a trade secret is to **keep it secret**. Use non-disclosure agreements (NDAs), confidentiality clauses, encryption, passwords, or even a lock and key to keep it safe. If you can keep it a secret, it can potentially last forever! Also watch out for confidentiality clauses or NDAs as part of artist contracts or commission agreements, and make sure you understand the terms before signing.

→ **CIPO Trade Secrets Overview** ↗

- ADDITIONAL RESOURCES**
- **OCADSU** ↗ – free legal advice to all OCAD U students through OCADSU
→ **Artists Legal Advice Services Ontario (ALAS)** ↗
→ **Canadian Artists' Representation/Le Front des artistes canadiens (CARFAC)** ↗ – advocacy group for Canada's professional visual artists
→ **The Professional Association for Design (AIGA)** ↗ – standard Form of Agreement for Design Services(pdf)
→ **The Canadian Intellectual Copyright Office (CIPO)** ↗ – the IP administration body of Canada
→ **CIPO's IP Academy** ↗
→ **Copyrightlaws.com** ↗
→ **IPilogue** ↗ – Osgoode Hall Law School's IP blog ↗
→ **UAL's Creative IP** (UK specific) ↗



The following four scenarios dive into common, but murky, situations where intellectual property might come into play. These scenarios take you through considerations, questions, and possible next steps.

1

APPROPRIATION:

How incorporating the work of others in your own work impacts the various parties involved

2

CONTROL & PRESENTATION:

How IP might have a role in your ability to determine and maintain the way that your work is publicly presented

3

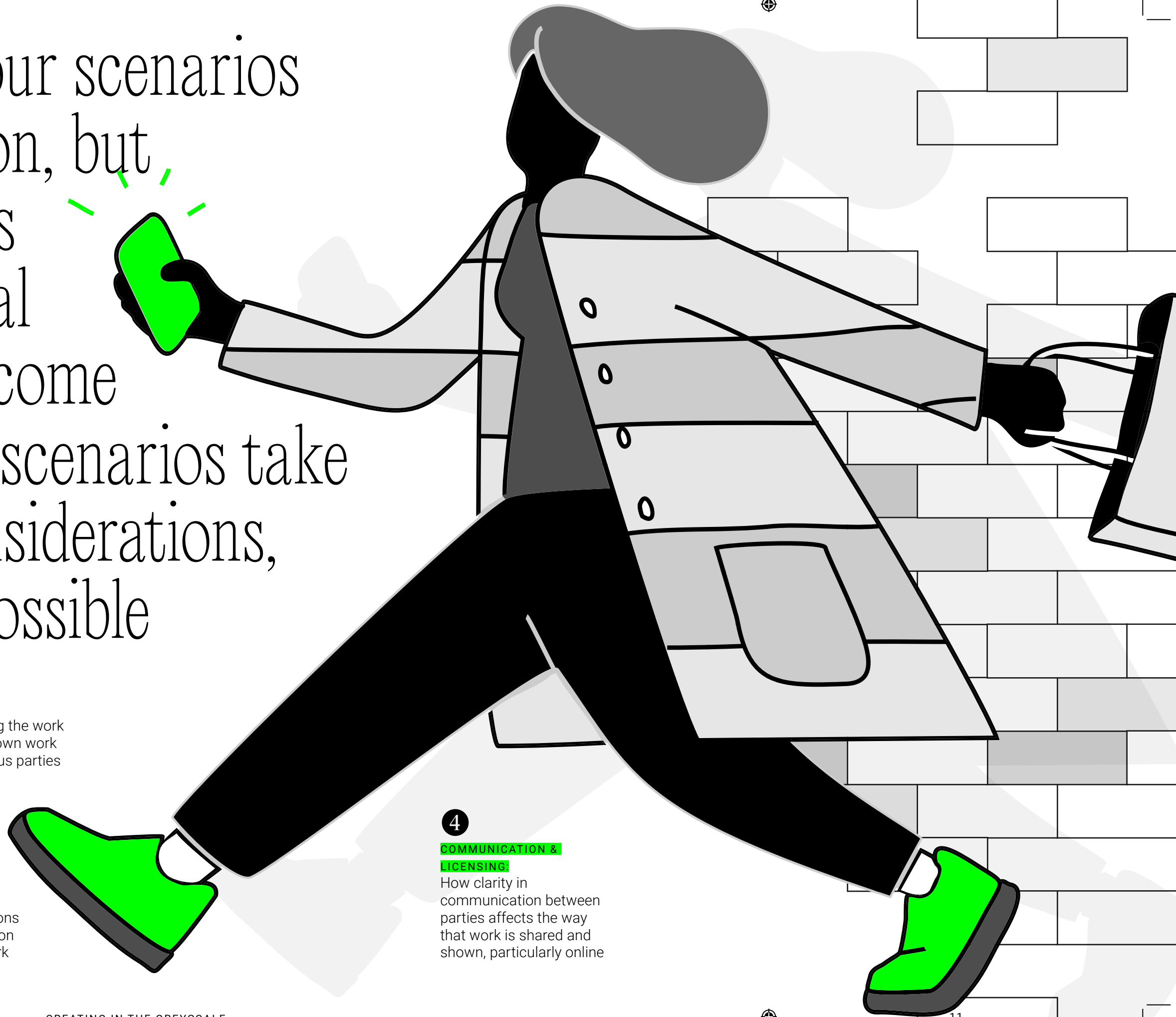
OWNERSHIP IN COLLABORATION:

How creative collaborations might have implications on who owns the IP in a work

4

COMMUNICATION & LICENSING:

How clarity in communication between parties affects the way that work is shared and shown, particularly online



① Appropriation: THE ART OF COPY

This scenario explores considerations and implications in the grey areas behind using other artists' work in your own work.

THE SITUATION

You're submitting a new media work to an open call, and come across this criteria:

Requirement for Entry:

You must be the sole owner and creator of the artwork. If any element of the work (e.g. sound, photography) is created by someone else, permission must be granted and credit given.



® Recognize

What is your understanding of the current situation? What are the facts?

- You need to make sure you own the copyright to all elements of the work that you are submitting to the exhibition
- You need to determine if there are any copyright-protected elements in your work
- If there is, you need to have permission and credit given to the other artists in order to exhibit

Who else is involved in this situation? What is their relationship to and/or interest in the project?

- The exhibition programmer needs to make sure that nothing in the show infringes on anyone's rights
- Other artists whose work you might have incorporated might want to know, be acknowledged, or compensated for use of their work
- You need to ensure you meet the requirement for entry

I Investigate

Investigate any information that you may not know. Are answers to any of these questions important to your interests?

- ☐ Are there any aspects of my work that overtly or inadvertently uses **copyright-protected or trademarked elements**①?
- ☐ What is the purpose or intent behind my work? Will I be showing it publicly, will I be **selling it**②?
- ☐ Am I getting **source material**③ from an artist or **platform**④ that encourages the use of their work?
- ☐ Have I asked / should I ask for **permission**⑤ to use other people's work in my work?
- ☐ Am I **respecting**⑥ the labour that has been put in the work that I am using? How might I do so?
- ☐ What kind of **harm**⑥ might I be causing to the creative whose work I am using?
- ☐ Am I jeopardizing my positionality

or my values? What kinds of moral obligations might I have? **Am I good with using other people's work in this way**⑧?

① It's important to consider what aspects of your work or practice might utilize the work of others. In a video art piece, for example, images, logos, products, sounds, and music might all be protected **copyright** or **trademarks**, and your use could be considered infringement.

② Often deemed as the **YouTube or Mash-Up Exception**, s. 29.21 of the Canadian Copyright Act allows for the use or dissemination new works created from copyright-protected materials given that it is for a non-commercial purpose.

③ Copyright doesn't last forever. When copyright expires in a work (life of author +50 years in Canada), it enters the **public domain**, so that it's available for anyone to use without needing to get permission.

Useful links to works in the public domain ↗.

④ **Creative Commons (CC)** is a licensing framework that allows creatives to easily give permission and define conditions around how they want others to use and share their work. The aim is to encourage more openly licensed creativity in "the commons" – work that is freely available for use, sharing, and re-mixing. **Search on the CC website for content to reuse** ↗.

⑤ **Fair Dealing** is an exception in the Canadian Copyright Act that allows the use of copyright-protected work without permission or payment for the purpose of **research, private study, education, satire, parody, criticism, review or news reporting**.

What is considered "fair" takes into consideration 6 factors:

- Purpose of the dealing
 - Character of the dealing
 - Amount of the dealing
 - Alternatives to the dealing
 - Nature of the work
 - Effect of the dealing on the work
- Keep in mind that these fair deal-

ing exceptions don't apply to **moral rights**, which could allow creators to require attribution and restrict changes to or uses of their work.

⑥ **Transparency** throughout – from getting permission to clarity on how you plan to use the work. This allows both sides to articulate wants and boundaries. Acknowledging the labour put into the work you are using whether in terms of attribution, or creatively paying homage to the original work contributes to the respect of artistic labour.

⑦ Whether in the use of the work, the way the work might have been altered, or the presentation of the altered work – would your use tarnish the other creative's reputation, alter the intent behind their work in a detrimental way, be an appropriation of their culture or traditional knowledge, expose them to unforeseen harm? How might they feel with the way that you have used their work?

⑧ Legalities aside, **what does your gut tell you?**

AND THEN...

While checking out a group show at a major art institution, you come across a work by another artist that seems to have used elements of your own original work. No credit was given to you, and you have never heard from this artist about using your work.

How are you feeling about this situation? How are the others involved feeling about this situation?

Ⓢ What's Next?

Reach out to the artist directly.

Reach out and initiate conversation with the artist to understand their perspective. Think about what you want from the situation, and articulate your interests and wants. See if a win-win situation can be achieved.

Reach out to the gallery, institutions, or other parties involved in the presentation of the work.

Perhaps you have a better relationship with others involved in the situation, reach out and get a better understanding of the facts.

Go public or create your own work as a response.

If conversations have been unsuccessful, telling your story publicly could help garner public support and help raise awareness of the issue. Tapping into your own creativity to create work that generates conversation about this could sometimes be an even more effective means to address your interests.

Make it easy for others to know you are the copyright owner, you are willing to have your work remixed, and to contact you if needed.

You might be happy that others are taking inspiration from your work. Perhaps you believe in the **copyleft philosophy**, which encourages access to to use, copy, or modify works as long as all derivative works also offer the same freedoms (e.g. through CC-Share-alike licensing).

MORE READS

- The Ethics Centre, "The Art of Appropriation" ↗
- Artsy, "When Does An Artist's Appropriation Become Copyright Infringement?" ↗
- Copyright and Fair Use Cases (US context) ↗
- McLeod & Kuenzli (ed), *Cutting Across Media* ↗



② Control & Presentation: CALL FOR PUBLIC ART

This scenario explores how IP concepts might impact your artistic vision and how your work is publicly presented.

THE SITUATION

The Centre for Emerging Artists & Designers shares a call for submissions for artwork to be on the hoarding of a developer's development project. Here is the call:

CALL FOR SUBMISSIONS

2 Year Public Art Project
A Leading Canadian Developer
+ OCAD U's Centre for
Emerging Artists & Designers

Overview

OCAD U's Centre for Emerging Artists & Designers (CEAD) is excited to partner with one of Canada's leading developers, to feature the work of students and alumni in a high-profile public display of art on the construction hoarding surrounding a development project for two years.

Participating artists and designers are asked to submit original existing work in any medium while responding to the project description and specifications.

Artist / Designer Fees

The project is committed to paying the artists and designers and copyright fees according to the guidelines established

by CARFAC and will be credited on-site for their work.

The Process

Submissions by interested students and alumni will be reviewed by a selection committee comprised of representatives from the CEAD, and Faculty.

Considerations

- Works in any medium will be eligible. The organizations will work with selected artists to professionally scan or photograph the work for reproduction.
- To minimize the likelihood of vandalism, works should have minimal blank or white space.

ⓇRecognize

What is your understanding of the current situation? What are the facts?

→ The call is looking for works that fit with the theme of the building, to be displayed for 2 years on the construction hoarding

→ Opportunity created by the developer, in partnership with OCAD U's CEAD

→ Support for artists include help with digitization, considerations around potential vandalism, credit, and payment based on Canadian Artists' Representation (CARFAC) rates

Who else is involved in this situation? What is their relationship to and/or interest in the project?

Researching their website and social media accounts you discover the following:

→ The Leading Canadian Developer has many projects around the city. They often feature artists on their construction hoarding, selecting works that thematically align with each construction project.

→ The CEAD supports students and alumni through facilitated hirings, commissioned work, career development support, and finding meaningful, valuable, paid opportunities.

→ Yourself: Consider how your work might fit with this call and the theme. What are your interests in terms of getting your work out in the city?

ⓈInvestigate

Investigate any information that you may not know. Are answers to any of these questions important to your interest in the project?

☐ Through conversations, written instructions, or a contract, have I conveyed how I want my work to be presented to those involved in the presentation of my work?

☐ Are there items in the agreement that I can ask for clarification on, or terms that I want to add?

☐ What control do I have over how the other parties can **use the reproductions or images of my work** ❶ (i.e. can images of my work be used as part of different projects, reproduced, or exhibited separately from this project?)

☐ How will I be credited both on the project site and in photographs marketing/promoting the project?

☐ Is there a waiving of **moral rights** ❷ in the contract or license agreement? Am I okay with giving the other party that control? Could I negotiate more in exchange?

☐ Who is responsible for **maintaining the artistic integrity of my work** ❸ (i.e. if my work gets damaged or vandalized, will this be fixed and how?)

☐ In what ways can I ensure my questions are answered and who can I go to if I have concerns?

❶ Even before you apply for a project, ensure that your work and your personal values align with the opportunity and you understand what it means to give **licensing rights** to your work (permission to use your work) for this project.

Ensure you understand how the artwork you provide will be used and how you will be credited, this includes documentation or reproductions of your work created in the process. Ask for clarifications around length of time the other parties can use the image(s), the context of the image use (i.e. on the hoarding ver-

sus on merchandise like t-shirts), and how you're being credited – these specificities should be included in your contract.

❷ **Moral rights** exist as a distinct type of protection under Canadian copyright law that goes beyond economic interests to ensure the integrity and intent behind the artist's work are preserved.

As the creator of an artistic work, you have the right of paternity (attributing your name (or not) to your work), integrity (preserving the intended meaning of your work against alterations, modifications etc.), and right of association with your work (choosing the contexts and entities with which your work can be shown or used).

Moral rights cannot be given away. Even if ownership of copyright is transferred, the moral rights remain with the original author of an artwork. But moral rights can be waived – you can choose not to exercise your moral rights under a license agreement for example.

❸ Have a discussion about any **plans for maintenance and remediation** to manage how the work is presented over the course of the agreement. The question of "what happens afterwards" may also be important if, for example, there is a delay and the developer wants to leave the hoarding up for another year.

AND THEN...

You apply, and you selected. Digitization and installation go smoothly. Three months in, you noticed that someone has vandalized the hoarding in a way that does not match the integrity of your artwork. A month later, this still has not been fixed. You are extremely unhappy about this and want the work to be repaired as soon as possible.

ACKNOWLEDGE

How are you feeling about this situation? How are the others involved feeling about this situation?

ⓌWhat's Next?

Open up a conversation with the other parties involved

If you feel like your work has been manipulated or misrepresented, can you reach out and have a conversation about how it is important to you and see what some of the limitations might be? Are there different ways to make sure the intent and integrity of your work are preserved? For example, knowing CEAD's mandate is to support students and alumni, they are in a place to help advocate for your needs. In setting up this partnership, the CEAD has an agreement outlining the remediation of the artwork and have ensured that the agreement has your – the creator's – best interest in mind. They can help advise on possible next steps and can reach out to Tridel.

Talk to a friend or mentor

Speaking to a peer or mentor can give you perspective on the situation. Moreover, they may have gone through a similar experience, or worked with the same parties, and can give you insights.

MORE READS

→ Artists' Legal Outreach, "Making Art Public: Artists, the Law, and the Making of Art in Public Spaces" (PDF) ↗

→ copyrightlaws.com, "Moral Rights in Canada & US" ↗

→ Heer Law, "Understanding Moral Rights under Copyright Law" ↗

→ Case Study: Michael Snow vs. The Eaton Centre ↗





③ Ownership in Collaboration: A COLLABORATIVE CLASS PROJECT

This scenario explores the implications of creative collaboration on IP ownership and strategy.

THE SITUATION

Assignment-turned Business Idea

You are given an assignment to develop a project together with two other students. The first part of the assignment requires putting together a proposal with the concept, timeline, and research. The second part of the assignment requires creating a working prototype of the concept and presenting it to the class.

You are the one who came up with the idea that your group decides to go ahead with. Feedback on the prototype from your prof was really promising and you are excited to turn this into a real business idea. You want to approach your group members to see if they are interested in turning the prototype into a full-fledged business plan.

AND THEN...

After a discussion with your group, only one of your group members is as passionate about and willing to commit to pursuing the prototype further. Your prof mentions there is a high chance that you can patent the prototype. The third group member is not interested in continuing to work on the project, but said,

if the idea takes off,
I want a cut!

ⓇRecognize

What is your understanding of the current situation? What are the facts?

→ The business idea came out of a group project in the class
→ Though you came up with the initial concept, all your group members contributed to the final prototype

Who else is involved in this situation? What is their relationship to and/or interest in the project?

→ Your two other group members – they helped to actualize the prototype, which means it could be considered a work of **joint authorship**. Although they might or might not be interested in continuing with the project, it is important to understand each other's expectations, roles, and capacity for further contributions. This can be supported by either a formal or informal agreement between all collaborators.
→ Faculty member who assigned the project and gave constructive feedback
→ The university – sometimes if a work is created under funding from an institution or within an employment setting, ownership of copyright or IP rights might also belong to the university or employer.

ACKNOWLEDGE

How are you feeling about this situation? How are the others involved feeling about this situation?

ⓈInvestigate

Investigate any information that you may not know. Are answers to any of these questions important to your interest in the project?

☐ How much ownership do I have over the **idea**① and the **resulting prototype**②?
☐ Do I want to continue pursuing the project with the group members? What are my personal interests or goals with the project? What type of **arrangements**③ might other members desire?
☐ What are different members' expectations of the **collaboration**④ – i.e. how much time and effort, how does each member get credited?
☐ What if the idea really **takes off**⑤ and becomes very successful, how far am I willing to take it? How far are other members willing to take it?

① Ideas are not copyrightable. Copyright protects the expression of an idea but does not extend to the idea itself. Until an idea is expressed in a fixed form (i.e. paper, electronic, or digital media), there is no copyright protection.

② The prototype could be seen as a **work of joint authorship** – a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other authors. In a work of joint authorship, the authors are all co-owners of copyright in the work.

③ As co-owners of copyright, each person could have a stake in decision-making, it might be helpful

to consider: what percentage of copyright ownership does each person have? How will decisions about licensing opportunities be made (sometimes it might be easier to make one person in charge)? If one co-owner licenses the work, are royalties owed to the others, or do the co-authors intend to go their separate ways with the work? May co-owners sell their "portion" of the copyright and, if so, what rights do the others have? Are co-owners entitled to develop derivative works such as sequels, adaptations, or later versions? What kind of accreditation is expected?

④ You might consider creating an **Artists' Collaboration Agreement** with the others involved to outline expectations of some considerations regarding co-ownership of copyright and other concerns. This does not need to be onerous or overly formal, it can even be documentation of a conversation. The goal is just to get everyone on the same page.

⑤ Think about **what other types of IP might exist in the prototype**, and what strategies could be useful to protect it. Is there confidential information that can be protected with a confidentiality agreement or non-disclosure agreement (NDA)? If it's a new invention, could it be eligible for patent protection?

MORE READS

→ [copyrightlaws.com](https://copyrightlaws.com/who-owns-copyright-in-canada/), "Who owns copyright in Canada?" ↗
Sample Artist Collaboration Agreements:
→ CARFAC Ontario ↗
→ CARFAC Saskatchewan (PDF) ↗
→ VLAA (PDF) ↗

ⓌWhat's Next?

Open up conversation with your collaborators

Have a conversation with all collaborators about interests and wants, and talk through an option that works for everyone. For the collaborators that you're continuing to work with – you can come up with a collaboration agreement that outlines expectations such as time commitment, roles, amount invested, ownership etc. For the individual that wants future recognition, you can outline what is fair based on their contribution to the prototype.

Find a neutral third party to mediate the conversation

If this is a particularly difficult conversation to have, it can be helpful to find a neutral third party to mediate the conversation.

Think about your business goals, and start forming a strategy that includes IP considerations, including potential patent application

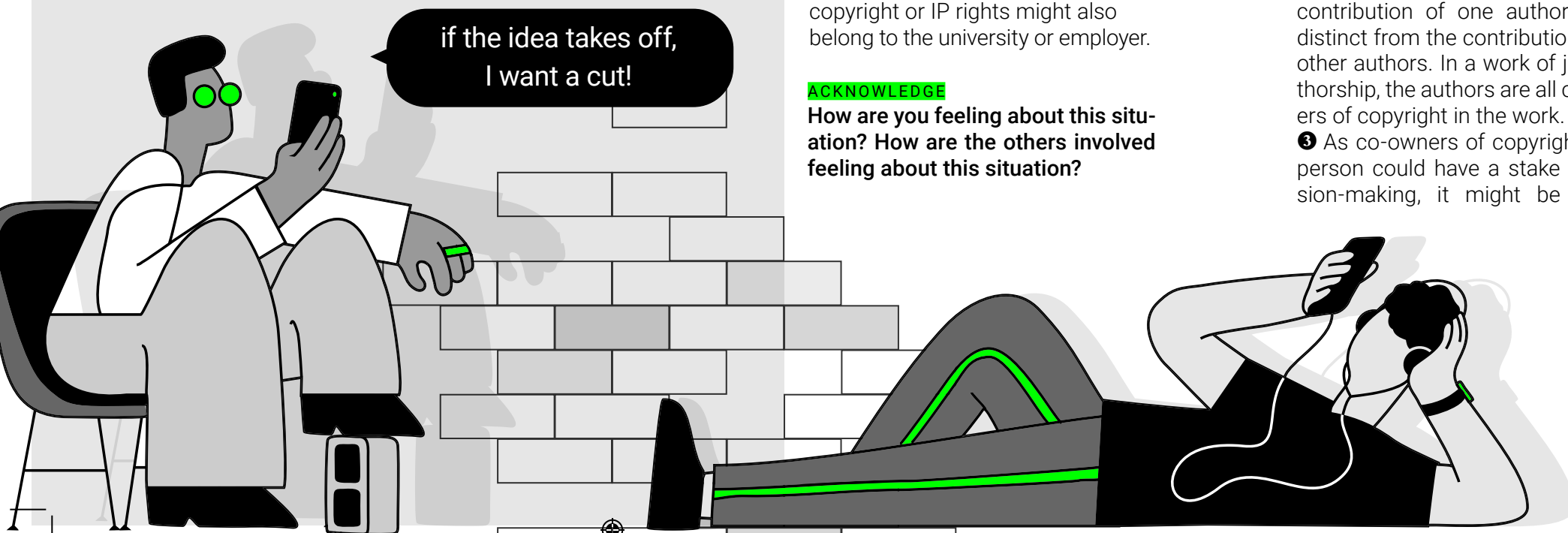
Speak with industry peers and do some initial patent **searches**⑥ to see if patenting is something that fits within your business goals. It's also important to consider keeping certain information confidential if there is a patent opportunity, some people refrain from patenting due to costs, but instead are able to leverage the value of their invention through trade secrets. Patenting is a complicated process, so speaking to a patent agent or lawyer for clarification and recommendations is the best way to proceed towards **patent application**⑦.

⑥ Search for existing patents:

→ Canada-wide ↗
→ International (World IP Office) ↗
→ International (Google Patents) ↗

⑦ CIP0's guide on protecting your innovation:

→ Infographic (PDF) ↗
→ More details ↗





④ Communication & Licensing: ON SOCIAL MEDIA

This scenario explores intentions and impact behind making your work public on social media and the use of your work online.

THE SITUATION

Hi! We love this photo, it really sets the mood. Would you mind if we repost it in an upcoming post about the launch of our new service? Full photo credit of course :)

Thanks so so much! Sure you can <3

AND THEN...

The company went on to post your work without properly crediting you.

Hi again! Following up with photo credit on this. I support reposting as a gesture of support to the community and to customers. I'm happy that you chose my photo to repost, but without proper visible credit, it's not serving that purpose at all.

Apologies for not giving you a proper response until now. Unfortunately, we only give photo credit by tagging and not in the caption for consistency on our channel. It's a great photo, and we're so happy to have you share and support us :)

ACKNOWLEDGE

How are you feeling about this situation? How are the others involved feeling about this situation?

ⓂRecognize

What is your understanding of the current situation? What are the facts?

- You have been using social media as a platform to showcase work that you created and own the rights to
- You've received a request from a brand asking for permission to repost an image of a specific work on their account
- You will be credited, but no compensation is mentioned

Who else is involved in this situation? What is their relationship to and/or interest in the project?

- Communications contact from the business or organization – how have they shared others' work in the past? What's their mission and values?
- Instagram as the social media platform – are you aware of what's in their **Terms of Use and Copyright policies** ↗ around copyright ownership and licensing?
- Yourself and other creatives in the same shoes – your actions and decisions could set a standard for how brands and institutions work with individual creatives



ⓂInvestigate

Investigate any information that you may not know. Are answers to any of these questions important to your interests and decisions in the situation?

- ☐ What are my original intentions behind **putting my work** ❶ up on a public social media platform? Does this request fulfill my intentions?
- ☐ How might this benefit me, and what might this **cost** ❷ me?
- ☐ How did the brand/entity find my work? Why do they want to use my work?
- ☐ Do I have a clear idea of what I am **agreeing to** ❸? Are there details that I want to clarify?
- ☐ What will my work be associated with (brand, product, service, cause etc.), and am I okay with that?
- ☐ How will my work be used? Will they edit, crop, or modify it?
- ☐ Is my own image being used as part of the work? Am I comfortable with that?
- ☐ How will my work be credited?
- ☐ How long will they have my work up for?
- ☐ Is there potential for future opportunities with this relationship?

❶ Creators retain ownership of the work that they post online. Though this area is becoming increasingly grey as some platforms **Terms and Conditions** can be contentious about users granting licenses to their work automatically. Always pay attention to what you are agreeing to. It's also a good idea to add a copyright notice, and an accessible way to contact you for permission to repost or use your work in any way.

❷ Increasingly, artists struggle with the **tensions between wanting visibility or virality and the potential need to relinquish licensing fees**. Do a mental cost-benefit analysis in your mind, and see if there is a fair exchange of value (which can be non-monetary) in this case given your own priorities. Note that for so-

cial media, **CARFAC recommends a royalty of \$25 as a flat fee per artist whose work(s) are used, per platform** ↗.

❸ Think of an agreement or a license to use your work as a partnership. Revisit the interests of the parties involved. Don't be afraid to ask questions and ask for things that you might want. There is often a way to get to a win-win situation.

ⓂWhat's Next?

Reach out to the business directly.

- Are there other, more targeted contacts at the company that you can reach?
- Have you been able to have a conversation with them about your concerns?
- Does their response satisfy your interests?

Report to the platform.

- Document the post as best as you can so you can have a record of it.
- **Report the infringement** ↗ to the platform. Note that on Instagram, you will have to be the owner of the copyright to the work. Instagram may remove the post, but as the copyright owner, your information will be sent to the entity that posted it. They may contact you, and or appeal the removal.

MORE READS

- Legal Implications of Reposting ↗
- Slate, "The Legal Netherworld of Meme Accounts" ↗
- ArsTechnica, recent court rulings on Instagram and Sublicensing ↗
- Hootsuite, "Understanding Image Copyright" ↗

Assess intent, and potentially go public.

In certain cases, conversations and reporting might not satisfy your interests. This goes back to your intention behind promoting your work on social media. Sometimes, achieving virality is the intent, and with that, licensing rights might need to be relinquished. In other cases, it is important to raise awareness of the fact that certain companies do not respect the value of an artist's work. Think about in what ways you might be able to assert influence under these circumstances. It might seem difficult as a single voice against an organization or large entity, but if it is important to you, social media can also be on your side to raise awareness and garner support from your peers. See the example of **Sharona Franklin / @paid.technologies** ↗ who used social media to raise large scale public support and **Maya Ben David** ↗ who creatively incorporated the conflict into her art practice.





Meeting of the Minds: ARTIST CONTRACTS

WHAT'S A CONTRACT?

A contract is a written or spoken agreement. At its core, it's all about **"meeting of the minds"**, meaning that all parties should have a shared understanding of their commitments and expectations. If you don't feel like this mutuality exists, then the contract has not been properly formed. Contracts are meant to clarify, not confuse – **never sign a contract that you are not in full agreement with. There is always room to negotiate.**

WHY CONTRACT?

A contract doesn't have to be complicated or full of jargon. A written contract is merely a tool to help avoid misunderstandings, and have something to hold each other accountable. It's an opportunity to ensure that your interests are met – you can get creative. Think about what you can offer each other, and how you can make that as clear as possible. The process of creating a contract helps parties clarify and document the nature of their relationship, as well as define roles and responsibilities.

LEGAL COMPONENTS OF A CONTRACT:

- ① **Offer:** One party clearly communicates promise to do or refrain from doing some specified action in the future.
- ② **Acceptance:** Another party accepts the offer. There could be counteroffers made before an actual offer is accepted.
- ③ **Consideration:** There needs to be some exchange of value or a benefit that each party gets or expects to get from a contract. Another words, each party should be able to answer why they entered into the agreement.
- ④ **Mutuality / Meeting of the Minds**

Sample clause in Xpace Cultural Centre's artist contract regarding a commissioned essay to accompany an exhibition. The terms find a balance between the parties regarding editorial control, copyright ownership, licensing permissions, and even values that the organization upholds.

Xpace will commission a 750-1000 word essay by an emerging writer to accompany the exhibition. The choice of writer is at the discretion of Xpace and Xpace maintains editorial control and approval. The final draft of the essay will be provided to the Artist(s). Should the Artist(s) feel their work has been mis-represented, they should provide specific feedback to Xpace, who will communicate with the Writer and ensure appropriate editorial changes are made.

The Writer owns copyright of their work and publication by the Artist(s) of the essay in any other form or location is permissible only with written permission from Xpace and the Writer. The Writer may only re-publish their essay with written permission from Xpace and the Artist(s).

Xpace operates within an anti-oppression framework and reserves the right of refusal to publish any material deemed inappropriate by Xpace staff.

WHAT NEEDS TO BE IN A CONTRACT?

① **Who (Parties):** Who are you accountable to and vice versa? The two or more people or corporations that are part of a contract are each called a **party**. Make sure you have the proper party's legal name, address, and contact information in the contract so it is clear who is bound to the agreement. Remember both parties need to sign copies of a contract, and each party should keep a copy.

② **What (Goods or Services):** Expressly state what is required of each party, whether it be actions or specific things the other party might want from you – like creating a work by commission, selling a work, or giving a licence to someone for the use of your work.

③ **How long (Term):** How long an agreement lasts for is the **term**. Make sure the term is not automatically renewed, and include specifics of any requirements to meet the end of term, as well as options to terminate or renew the term. For example, can the agreement be terminated early under specific situations, or maybe there is a defined review process before an agreement can be renewed.

④ **Where:** Is the contract defined or restricted to a specific geographical territory? E.g. are you granting a license to reproduce your work only in a specific province? Each contract also specifies its **governing law**. Since laws vary between countries and even provinces, it's always best to use the law of the province that you reside in or is most accessible to you in the off chance that you have to go to court to enforce your rights.

⑤ **"Consideration":** What is the consideration that will be paid? What types of fees or other negotiated benefits, as well as how and when they will be paid to you should be made clear in the contract. Think about the value of the labour you will or have put into your work – you can think beyond sole monetary terms to include things like accommodation, meals, transportation expenses, acknowledgement etc. and include those in your contract. If certain fees are contingent on specific things or there is continuing **royalty** to be paid or **resale rights** to consider, put the specifics of when and how those contingencies or calculations will be made in the contract (e.g. specify that an accounting audit will take place at specific times to calculate royalties).

⑥ **Termination, Conflicts, & Breach:** It's always good to have a way out of a contract if possible – include a **termination clause** to specify under what circumstances parties can end the contract and how much notice must be given (e.g. when services are not performed, payment not paid within a specific time, unforeseen extraneous situations etc.). Don't forget to make room for emergence and fluidity in the contract, i.e. what happens if terms need to be adjusted (e.g. changing timelines), include considerations like how the parties should communicate with each other, whether changes should be in writing, and what other rights or obligations each party have. For example, some licensing agreements give the licensee a **right of first refusal** when a licence expires, which can be a restrictive clause that allows the licensee to be the first to consider whether they



want to re-license the work before the owner approaches anyone else.

LICENSES

A **licence** gives the licensee the legal right to do something, which in the absence of the license, they will otherwise not be able to do. Copyright law, for example, prevents people from reproducing a work without permission. As a copyright owner, you can grant permission through a licence. A licence is a temporary transfer of rights, and can be **exclusive** only to one licensee or **non-exclusive** so that the owner can license out to more than one entity.

You can also transfer ownership of copyright completely through an **assignment**, which can be viewed as a permanent sale of your rights, so you will be giving up your control over who gets to use your work. Note that moral rights (the right to the integrity and paternity in a work)

cannot be assigned. Both exclusive licenses and assignments need to be in writing to be legally binding.

Some key things to include in your license agreement:

- ☐ Whether the license is exclusive or non-exclusive
- ☐ Specifics about where and how your work can or will be used (e.g. limiting use to only print, or only on social media channels, within one province, only for a specific duration of time etc.)
- ☐ How and when you will be paid, whether it's an advance licensing fee, or royalties that might be generated from the use of your work
- ☐ Instructions on what happens if you want to end the agreement, if you disagree with the way your work is being used or whether other approvals need to be obtained, or if any conflicts arise
- ☐ Consider if you want to include a right of first refusal to your licensee

Beyond licensing your work, consider also thinking about adding language to protect your name or brand (which can also more formally become a trademark license). Sample clause from Xpace's artist contract about the need to obtain approval before using their name or logo.

Sample clause in Xpace Cultural Centre's facilitator contract around documentation and reproduction of works after an event. Xpace makes it clear to the facilitator that they can refuse permission if they want. "In perpetuity" is a term used to specify that the permission will last forever:

The facilitator gives permission for Xpace to photograph and document the workshop for non-commercial archival, publicity, publication and educational purposes, in perpetuity, across all media. Xpace will not permit reproductions of the workshop documentation in the exhibition for purposes of sales, rental or loan without the written permission of the Artists.

Does the Facilitator give permission to Xpace to record and share the documentation of the workshop indefinitely after the date of the workshop?

☐ YES ☐ NO

Does the Facilitator give permission to Xpace distribute the workshop slides (if any) after the date of the event?

☐ YES ☐ NO ☐ N/A

If "YES" is selected, the facilitator retains the right to request the removal of the documentation or workshop slides from circulation at any point.

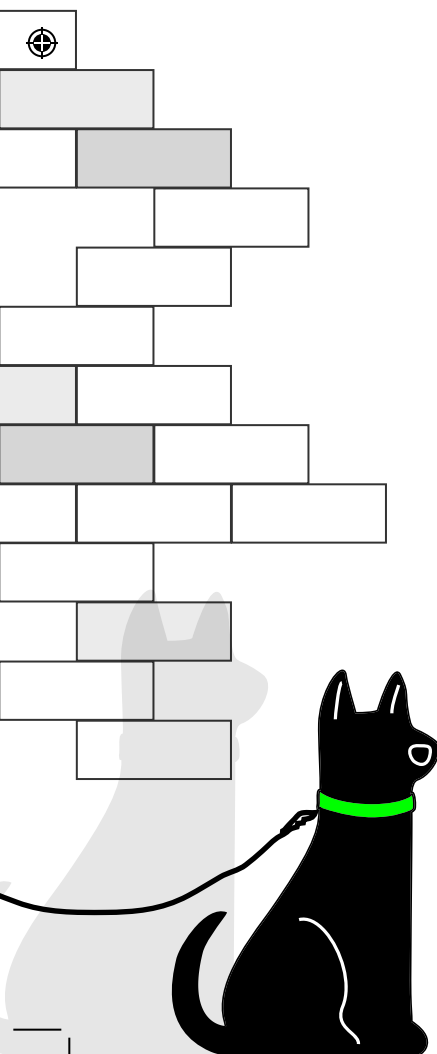
The Artist must obtain the prior approval of Xpace before using Xpace's name or logo in any additional materials to promote this event. The Artist(s) must assume full financial responsibility for any costs incurred in connection with those materials. All such materials must also bear the Xpace logo, which can be provided to the participant upon request.

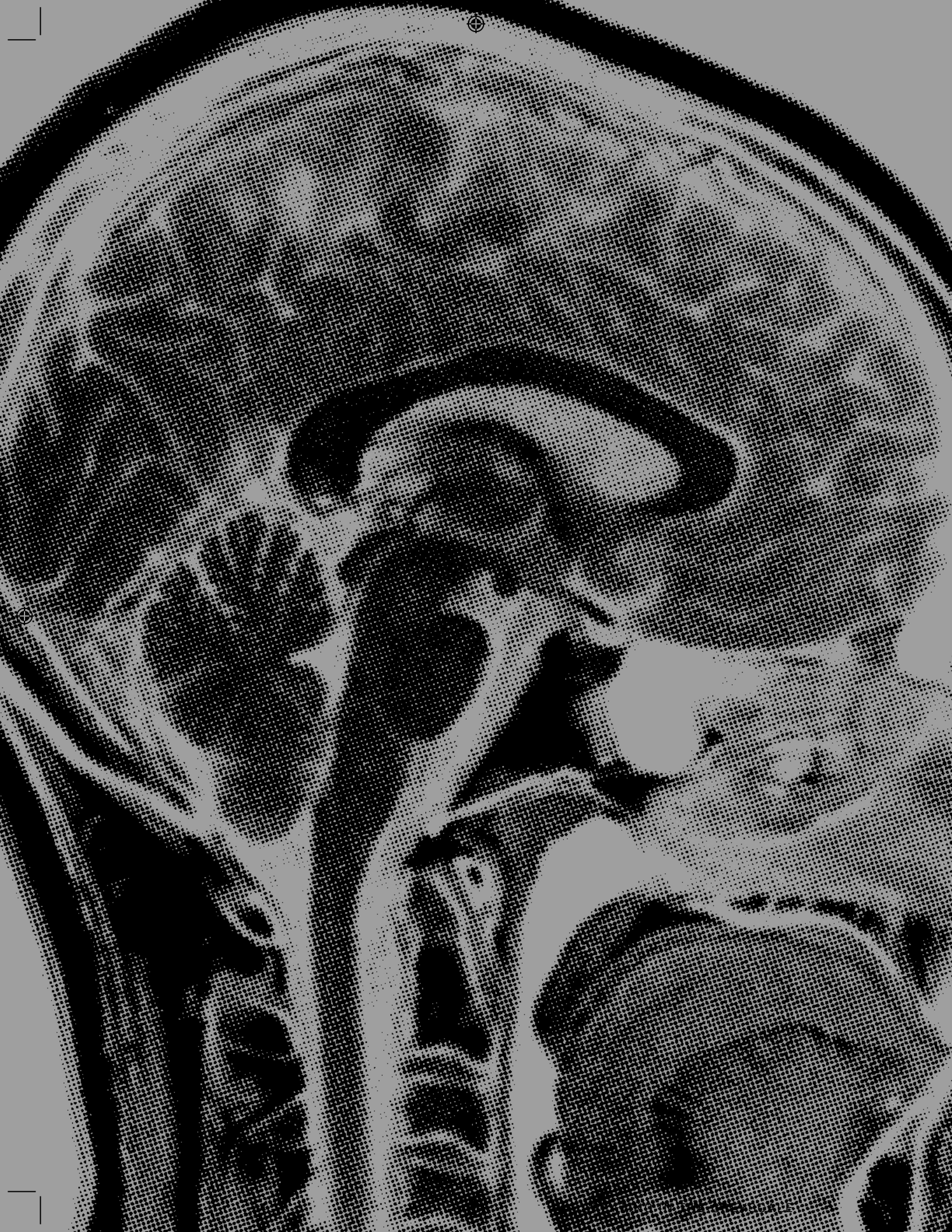


Xpace Cultural Centre is a not-for-profit artist-run centre dedicated to providing emerging and student artists, designers, curators and writers with opportunities to showcase their work in a professional setting. Xpace is supported by the OCAD Student Union.

MORE READS:

- CARFAC Ontario's "Artists' Contracts: Agreements of Visual and Media Artists" by Paul Sanderson & Ronald N. Hier ↗
- Fredericton Arts Alliance, "An Artist's Guide to Canadian Contract Basics" (PDF) ↗
- Using contracts to advocate for artists' rights:
 - Christie's special contract with extensive conditions for buyers ↗
 - A new kind of artist contract with charitable resale benefit ↗



**Mindful Inquiry:**

A TOOL FOR NAVIGATING DIFFICULT INTELLECTUAL PROPERTY CONVERSATIONS

We've developed this canvas to help you navigate murky situations you might find yourself in when it comes to creating, presenting, selling, or working with others in your creative practice. This tool can help you determine what's important to you, and come up with a plan of action that reflects your values and priorities.



● Recognize

Notice what is going on in this moment. Step back and observe what is happening in this situation.

- What is my understanding of the current situation? What are the facts?
- Who else is involved in this situation? Who are they and what is their relationship and/or interest in the project?

● Acknowledge

Acknowledge the complexity of your current situation, even if it is stressful, infuriating, frustrating, or unpleasant. Let the thoughts, feelings and body sensations that you have be present. Take a moment to see the situation from all sides. Be compassionate to yourself and the other parties involved.

- How am I feeling about this situation?
- How are the others involved feeling about this situation?

● Investigate

Investigate or inquire on what is present using curiosity and openness.

Interests

- What do I care about?
- What might the others involved care about?
- What are my goals for this conversation?

Understanding

- What do I want to find out, clarify, or verify?
- How would that information impact my interests and decisions in this situation?
- What do I want the other parties to know?

Impact vs. Intent

- Are there instances where my actions may have had an impact I didn't intend; and vice versa?
- How does this situation impact my larger goals as an artist / designer or for my creative practice?

Relationship

- What is my relationship to the different parties involved and what do I hope it could be like?
- How could this conversation affect our relationship?

Communication

- What can I do to make this conversation go as smoothly as possible?
- What should I watch out for? What can be avoided?

Options

- What are some resolutions that would satisfy everyone's interests?
- Best case scenario?
- Worst case scenario?

● Accept

Accept that this is a tough situation. Your sense of who you are is not fused with or defined by this situation. Allow yourself to have the experience, but not be dictated by it. You can start disentangling from it, develop insight, and always return to your values.

- What is frustrating or uncomfortable about this situation?
- Why do I feel the way I do?
- What do I need right now? How can I get what I need?

● Action

- What are different directions I can take?
 - What are the implications of my decision or action?
 - From a legal standpoint, who do I need to consult with?
- What are 3 steps that I can take right now:
1.

2.

3.





Created by Macy Siu, Hannah Carriere,
and Alexandra Hong
Graphic Design by Strike Design Studio

**Many thanks to the wisdom of the
artists and designers that informed
this project:**

- Rachel Butler
- Liz Ikiriko
- Natalie King
- Kohila Kurunathan
- Serena Lee
- Derek Liddington
- Katika Marczell
- Petrina Ng
- Kofi Oduro / Illest Preacha
- Dhani Oks
- Naz Rahbar
- Luxshanaa Sebarajah
- Josh Vettivelu
- Emily Woudenberg
- Florence Yee
- Staff of OCADU's CEAD
- Staff of Xpace Cultural Centre



The content in this document is
provided for general information
purposes only and does not constitute
legal or other professional advice or an
opinion of any kind.

www.ocadu.ca/cead
Email: cead@ocadu.ca
Instagram: [@ocaducead](https://www.instagram.com/ocaducead)
Facebook: [OCAD U Centre for Emerging Artists and Designers](https://www.facebook.com/OCADUCentreforEmergingArtistsandDesigners)
Twitter: [@ocadu_cead](https://twitter.com/ocadu_cead)



Women Entrepreneurship
Knowledge Hub
Portail de connaissances
pour les femmes
en entrepreneuriat



Funded by the Government of Canada
Financé par le gouvernement du Canada

