



Research Insights

Designing a cooperative digital future for managing the arts

PART 3

Legal Practices

Legal recommendations for open source SaaS and platform cooperatives: An initial overview

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Preface

Research Insights: Designing a cooperative digital future for managing the arts is a series of reports summarizing insights from collaborative research facilitated by ArtsPond to help foster a prosperous, shared digital future for managing the arts.

The mandate of ArtsPond is to nurture healthy human ecosystems that promote social, spatial, economic, digital, and equity justice by fostering cooperative actions fusing the values and practices of social innovation and the arts.

In Summer 2019, ArtsPond received multi-phase funding from the Transformation of Organizational Models component of Canada Council for the Arts' Digital Strategy Fund to incubate the development of **Hatch Open** (an open source arts management cloud computing solution) and **Artse United** (an arts management platform cooperative, powered by Hatch Open).

The goals of these two interconnected platforms are to boost economic and digital justice and strengthen creative and entrepreneurial excellence of small creators and producers in arts and culture.

Research Insights: Designing a cooperative digital future for managing the arts provides a summary of key findings from early-stage human-centered design research, prototyping, and other activities prioritizing the visual, performing, and disability arts from Summer 2019 to Spring 2021.

Reports in this series include:

Design Thinking (Issue 1, Fall 2020)

Prepared by **Jessa Agilo** (ArtsPond) and **Margaret Lam** (BeMused Network), Issue 1 summarizes the research protocols and insights from preliminary design thinking activities for Hatch Open + Artse United including human-centered design workshops in Toronto, Sudbury, and Ottawa in Ontario, Canada In Summer/Fall 2019.

Impact Practices (Issue 2, Fall 2020)

Prepared by **Kelly Hill**, **Alix MacLean** (Hill Strategies Research) and **Jessa Agilo** (ArtsPond), Issue 2 presents a review of quantitative and qualitative assessment frameworks from within and outside the arts in Canada, Australia, United States, and United Kingdom. These frameworks help inform the design of Hatch Open + Artse United's early-stage impact practice solutions.

Legal Practices (Issue 3, Fall 2020)

Prepared by **Andreas Kalogiannides** (Aura LLP), Issue 3 presents recommendations for legal practices on which Hatch Open + Artse United will need to focus during its early stages, such as user privacy, data management, and intellectual property issues and agreements.

Platform Coops (Issue 4, Winter 2021)

Prepared by **Stephanie Guico** (Coop Coach) and **Jessa Agilo** (ArtsPond), Issue 4 shares input from preliminary structural scoping research on the values, interest, and steps for establishing and sustaining Artse United as a viable platform cooperative for managing the arts.

Prototyping (Issue 5, Spring 2021)

Prepared by **Jessa Agilo** (ArtsPond) and **Amine El** (Technical Lead), Issue 5 provides an overview of technical and strategic insights leading to launch of Hatch Open's early stage financial and project management, business intelligence and impact investing technologies.



ArtsPond.com



HatchOpen.ca



Artse.ca

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Legal Coach
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Scope

Legal recommendations for open source SaaS (Software as a Service) and platform cooperatives: An initial overview for Hatch Open + Artse United

Prepared by Andreas Kalogiannides (Aura LLP)

For this review, I was engaged to answer three questions:

1. What are the legal issues on which Hatch Open + Artse United needs to focus?
2. How much should ArtsPond budget to cover these costs?
3. What is the timeline for addressing these issues?

I have also included certain guiding principles and recommendations concerning issues of user privacy, data management and intellectual property; these particular issues will have a significant impact not only the business and legal architecture of not only Artse United's platform cooperative, but also Hatch Open's user interface and SaaS design.

Considerations

The perspective in this note depends on the requirements of Hatch Open + Artse United's business model, and its monetization strategy. At the time of this writing, and throughout the research process, ArtsPond does not have in place a finalized monetization strategy and business model for these two platforms; at least, the process to develop a revenue strategy has been iterative. However, this is perhaps not without good reason.

Nevertheless, without a defined and settled monetization strategy, it is unclear which products and services must be built out; without this understanding, it is difficult to have nuanced and specific legal discussions about how to develop privacy, intellectual property and capital raising infrastructure required for the SaaS platform and corporate structure. This is because, in the context of developing a SaaS platform based on a co-operative ownership model, navigating the standards and "best-practices" required by various laws and regulations is directly impacted by the platform's revenue goals, vision, user interface design and technological requirements. Put another way, the legal advice required to design, build, and launch a co-operatively owned data-sharing platform requires a clear and specific product business and revenue mode: from customer journeying to structuring ownership of intellectual property to data management & protection.

For example, with respect to the sharing, ownership and use of data collected through the platform: it is permissible, at copyright law, to create fractional ownership of copyrights in databases and data sets. These copyrights could be:

- Entirely owned by Artse United;
- Entirely owned by Artse United, and licensed either gratis or fee-per-use to the Membership and/or other licensees; or,
- Co-owned by Artse United and the co-op membership.

However, each model brings with it with significant legal implications, and requires an entirely different approach to intellectual property ownership and intellectual asset management; privacy laws; anti-spam laws; and the storage, maintenance and use of data through a cloud-based platform. For example, to unpack this further, if user data is to be collectively owned by the membership, then who decides whether and how this data should be licensed or otherwise exploited? Is there a voting structure? Or, will each user signify at the point of data-collection whether they wish for their data to be licensed? And, what would happen if a sufficient number of users decide to not make their data available for Artse United to share to its customers/users/licensees – to what extent does this this undermine the value of having an arts-data platform in the first place?

This is but one of the unanswered questions which directly affects the direction, quantity, and quality of legal advisory in the design, build and roll-out of the platform.

Legal issues

What are the legal issues on which Hatch Open + Artse United needs to focus?

Based on the information I have been provided, the following are the legal issues on which Hatch Open + Artse United must focus:

1. Privacy Legislation and Consent-based Regimes (Data Protection)

- a. General Data Protection Regulation (GDPR)
- b. Personal Information Protection and Electronic Documents Act (PIPEDA)
- c. Canada's Anti-Spam Legislation (CASL)
- d. Personal Information Protection Acts of Alberta and BC (collectively, PIPA)

2. Intellectual Property Rights

- a. Copyright re: software licensing
- b. Possible fractional ownership of copyright in user/platform data
- c. End-user license agreements for the platform users and licensees

3. Digital Products & Services

- a. Terms of Service for websites and any digital applications
- b. Comprehensive privacy policies for the websites and any digital applications

4. Commercial Law

- a. Commercial agreements and Memorandums of Understanding between ArtsPond (non-profit), Artse United (co-op, for-profit) and ArtsPond Foundation (proposed)
- b. Commercial agreements between the for-fee software developers and the one or more corporation(s)
- c. Payment terms between the platform and end-user

5. Securities issuance to Co-op Members

- a. Unless an exemption applies, the offering of securities will require the preparation and filing of an offering statement with Financial Services Commission of Ontario

Guiding principles

The following principles and recommendations should be followed to ensure adherence to best-practices regarding data collection and protection; privacy; intellectual property; and, ownership of the co-op.

Please note that these recommendations are a summary only, and they are based on the information shared with me to date regarding the business model and the SaaS platform.

Privacy

1. The development of a privacy regime should reflect the expectations of the co-op members.
 - **Recommendation:** That a survey be completed to understand members' expectations with respect to the acquisition, storage, use and retention of their information
2. Canada's Anti-Spam Legislation ("CASL") is among the most stringent anti-spam legislation in the world. Obtaining consent to receive commercial electronic messages (CEMs) is the foundation of CASL. Consent must be obtained through either express or implied mechanisms. Express consent mechanisms are easier to track and offer a rebuttable presumption that consent was properly obtained. ArtsPond cannot create a platform on the condition that an individual will have to consent to the collection, use and disclosure of personal information beyond that which is necessary to provide the service.
 - **Recommendation:** CASL-compliant express "opt-in" consent be obtained for any collection, use and disclosure of personal information, regardless of whether the organization can rely on implied consent
 - **Recommendation:** Designate an individual as the privacy officer who is able to answer user's questions about consent
 - **Recommendation:** Consent be obtained explicitly for all users who interact with the platform. This is best accomplished through one or more requests via "just-in-time" pop-up notifications built into the user interface.
3. Consent should be "meaningful": the user must have a clear understanding of what the organization is doing with their information
 - **Recommendation:** Artse United develop a "plain language policy" so that users clearly understand what Artse United does with their personal information.
4. There exists a clear nexus between the design and structure of the platform user interface (UI), and requirements of obtaining implied/express consent under PIPEDA, PIPA and GDPR; and, the legally binding contracts (read: Payment Terms, Terms of Service, privacy policies, etc.) between the platform and users.
 - **Recommendation:** Legal advisory will have to continually interface with software developers on the UI and platform design in order to ensure conformity with best practices vis-à-vis obtaining consent.
5. The European General Data Protection Regulation ("GDPR") has extraterritorial effect: it applies to any natural or legal person, public authority, agency or other body outside of the EU who: targets

individuals in the EU by offering goods or services (regardless of whether a payment is required); or monitor the behavior of individuals in the EU (where that behavior takes place in the EU). GDPR is similar to, but more stringent than, the standards of the PIPEDA and PIPA regime; it is also likely the case that PIPEDA/PIPA may be amended to implement tighter privacy regulation in the future.

- **Recommendation:** If any part of Artse United’s business model involves users or customers in an EU-member country, whether now or in the future, then it should design its UI, privacy policies and data management systems to be GDPR-compliant from the inception of the platform.
- **Recommendation:** Artse United develop “best-in-class” privacy policies and “consent-regime” in order to “future-proof” the platform and minimize duplication of legal and UI-design work in the future. Such “best-in-class” policies should:
 - Conforms to GDPR standards
 - Go above and beyond such standards to minimize future legal and
 - Regulatory costs during the consumer-acquisition and growth phases
 - Embody strong data protection standards into processing activities and business practices, from the user-interface design stage right through the product life-cycle.

Data Storage, Protection and Processing

1. Data Mapping & ‘Privacy-by-Design’

PIPEDA and, more importantly, GDPR, require that Artse United maintain a detailed record of how personal information is processed.

- **Recommendation:** Artse United should implement a process for documenting the nature and purpose of personal data processing activities and ensure that only the minimum amount of data is collected, used, and stored.

2. Data Protection

Artse United should embody strong data protection standards into processing activities and business practices, from the design stage right through the product life-cycle.

- **Recommendation:** During the entire design stage (and in future, during any software / platform updates or upgrades), ArtsPond, Hatch Open + Artse United should create formal and informal information pathways / feedback loops and open, constant communication between software development team, UI/design team, legal and the designated “privacy officer”. This will be particularly useful during the alpha and beta testing phases.
- **Recommendation:** Artse United implement a process for documenting the nature and purpose of personal data processing activities and ensure that only the minimum amount of data is collected, used, and stored.
- **Recommendation:** Personal data must be secured against unauthorized or unlawful processing, against accidental loss, destruction, or damage; and, using measures designed to implement data-protection principles in an effective manner, with integration of necessary safeguards.

3. Data Erasure/Portability

Ensure that users are able to erase their data (under certain conditions) or receive their personal data in a structured, commonly-used and machine-readable format and have such data transmitted to another controller/organization.

- **Recommendation:** Select a user-interface design, SaaS platform and back-end cloud storage system which permit efficient data portability to platform users and co-op members.

4. Data Breach

As there has been discussion regarding the physical location of cloud and data servers, Artse United must ensure that its commercial data arrangements in place are not only transparent to users and members in terms of their policies, but also comply with “best-in-place” Canadian approaches to securing user data and privacy (as opposed to jurisdictions with less robust data breach laws and regulations).

- **Recommendation:** Develop a policy framework to address data breaches, and notify users of real or potential risk of harm that is based in Canadian data-protection laws & regulations.

5. Cross-Border processing

It is possible that Artse United may transfer personal data to a third-party service provider outside of Canada (or outside of EU, if GDPR applies) subject to Artse United meeting due diligence requirements for such third-party provider.

- **Recommendation:** Where possible, Artse United limit the use of third-party services outside of Canada (or EU).
- **Recommendation:** Where Artse United uses the services of a third-party outside of Canada (or EU), data processing policies be thoroughly reviewed by legal prior to implementation in the platform. This means that Artse United must “vet” such third-party providers well in advance of committing to a purchase of such service or forming such partnership with a third-party provider outside of Canada (or outside of EU, if GDPR).

Intellectual Property Rights

1. Sharing ownership of copyright in the data: Artse United has expressed an interest in creating a system of fractional ownership of copyrights in databases and data sets. Copyright law permits the co-ownership of copyright in data, software, and/or other platform databases. While permissible under law, the fractioning of copyright interests across a wide range of stakeholders and/or co-op members will involve significant administrative burdens and costs. Further, copyright should be viewed as an asset which can lead to new revenue streams.

- **Recommendation:** Artse United should centralize the ownership of copyright in the data and/or platform software, and instead create a licensing regime to sell licenses (whether for a fee or gratis) to users and/or members.

Issuing Securities in the Co-op Organization

1. If there will be more than 35 holders of shares in the co-op platform, then an offering statement is required (Regulations 11.1-12.1, per section 34(1) of the Ontario Co-Operative Corporation Act). There are, however, exemptions from the requirement to include an offering statement, including, but not limited to: if the value of shares issued to members is less than \$1,000 per member in one year, and does not exceed the aggregate value of \$10,000 per member; or the securities offered to its co-op members does result in the co-operative having more than \$200,000 of issued and outstanding shares.

- **Recommendation:** Artse United carefully evaluate the need for co-op owners with the additional cost and administrative burden of preparing an offering statement in order to access equity financing. It is reasonable to assume that a co-op data-sharing platform may require more than 35 members for it to be both viable as a business model, and, attractive to potential investors; however, in this case, the co-op must prepare and file an offering statement with the Financial Services Commission of Ontario.

Financial costs

How much should ArtsPond budget to cover legal costs?

Based on the information I have been provided, the following are the estimated amounts ArtsPond should budget to cover anticipated legal costs:

1. Data Protection/Privacy/Digital Agreements (~\$18,500)

\$3,000	Cybersecurity/Technology Vendor Procurement Contracts
\$2,000	Cybersecurity Vendor Agreements (may include negotiation only)
\$3,000	SaaS Agreement for Users
\$2,000	Product/Website Terms of Use
\$2,500	Privacy Policy (compliant with PIPEDA and GDPR):
\$2,000	CyberBreach Data Management and Breach Policy
\$2,000	User-Generated Content Policy:
\$2,000	Terms of Use/Agreement of Purchase and Sale for Users

2. Corporate Work (~\$13,750)

\$1,750	Preparation of Co-Op Constatng Documents
\$4,000	Advising and Structuring of Co-Op Membership Class and Equity Structure
\$5,000	Preparation of Offering Statement to Financial Services Commission of Ontario (if required)
\$1,500	Operating/Founder's Agreement
\$1,500	Employment, Contractor Agreements

3. Intellectual Property (~\$6,500)

\$5,000	Open-source software licenses, policies and agreements
\$750 - \$1,500	Copyright and Trademark assignments and licenses

In addition to the above, there are certain agreements which will likely to require review and/or negotiation. These are cybersecurity & technology vendor agreements and, procurement and tender contracts.

Timeline

What is the timeline for addressing these issues?

A fully-formed, final business model, monetization strategy and intellectual asset management strategy must be developed before a specific timeline can be recommended.

However, given the large scope of anticipated legal work to meet all project requirements, and given that it is strongly recommended to have the legal team involved in the design and structure of the user interface(s), and data collection, management and storage systems, it would behoove Artse United to allocate a timeframe of between 4-6 months in order to address the legal & compliance issues involved in this project.

Profile



Cultivating progressive ideas and untapped potential in the arts into exceptional, everyday shared realities for collective impact on-the-ground and in-the-cloud.

ArtsPond is a changemaker of a different sort.

Devoted to radical inclusivity, our mandate is to strengthen the potential of artistic expression to nurture healthy human ecosystems that cultivate equity and social cohesion by boosting **social, spatial, economic, and digital justice** and other urgent systemic issues in under-served communities across Canada and beyond.

Purposefully, we foster cooperative actions fusing values and practices from community-engaged arts, human-centered design, evidence-based action and applied research, social innovation, social finance and collective impact as a means to uproot intractable systemic issues from gentrification and economic inequality to the digital divide.

Across diverse urban, rural, and virtual communities, our vision is to **strengthen collective human engagement and belonging** through the cultivation of deep, **lifelong connections to the capacity of community-engaged artistic expression to sustain positive social change for all**. Day to day, we live by our guiding vision for incubating a more democratic society: ***Shared prosperity in. Solitary precarity out.***

Cultivating a more creative and open society, we intentionally adopt collaborative practices **crossing cultural, economic, geographic, political, social, and technological boundaries**. We actively enable and celebrate the perspectives of diverse **interdisciplinary, intergenerational, intercultural, and interability** voices. We do so with the assumption that the full spectrum of humanity is better together than we are apart, and community-engaged creativity is a crucial element to bolster and intertwine the best in us all.

Founded as a grassroots entity in 2014, and federally incorporated as a non-profit in 2016, ArtsPond's major actions currently include **Groundstory** (spatial justice), **I Lost My Gig Canada** (economic justice / COVID19 pandemic response), **DigitalASO, Artse United + Hatch Open** (digital justice).



Hatch Open is an open source **Arts Resource Planning SaaS** (Software as a Service) responding to the full spectrum of business management needs of small creators and producers in arts and culture.

Over time, Hatch Open will apply an iterative process to gradually prototype an integrated suite of quality digital tools including **project management, financial management, constituency relationship management, team collaboration management, asset management, qualitative + quantitative business intelligence analytics, impact investing** and more.

Users may manage and visualize their data in a completely secure and private environment, or opt-in to share and/or benchmark their activities with others via anonymous or linked open data infrastructure.

Phase 1+2 prototyping focuses on the visualization and benchmarking of **private + public business intelligence insights** including core financial and activity statistics for individuals and small producers in the **visual, performing and disability arts**. Other disciplines and features will be addressed in subsequent phases.

Additional activities include **design thinking workshops + public consultations**, and **innovation research and development** to address knowledge gaps in the digital transformation of arts services prioritizing the needs of under-served and equity-seeking groups in arts and culture.

Hatch Open Impact Value Chain

**EFFICIENCY
OF ADMIN**

PROJECT MANAGEMENT

Less time spent on administration by artists

Increased time in the studio for artists to develop their creative practices

Improved internal awareness of core artistic vision and potential

Enhanced external marketing communications of artistic vitality to audiences

CONSTITUENCY RELATIONSHIP MANAGEMENT

Increased connectivity between artists and audiences

Increased public attendance and support of the arts

Increased earned and private sector revenues for the arts

Enhanced financial sustainability of the arts

ASSET AND COLLABORATION MANAGEMENT

Improved security in physical and digital spaces for artists and administrators

Increased collaboration, risk-taking, and innovation by artists and administrators

Improved insights and decision-making for the arts

More quality time devoted to administration of the arts

BUSINESS INTELLIGENCE ANALYTICS

Improved impact data for advocates of the arts

Improved public policies for the arts

More resilient arts industry

More inspired and engaged society

**EXCELLENCE
IN IMPACT
PRACTICES**



Artse United is a platform cooperative promoting economic and digital justice for small creators and producers in arts and culture. Powered by Hatch Open, the mandate of Artse United is to:

- + **Increase accessibility of digital tools** by hosting public Hatch Open servers and providing technical support to improve literacy of priority Hatch Open users including low-income, rural and remote regions
- + **Strengthen digital and data justice** by establishing a cooperative structure that empowers Hatch Open users to govern and take ownership of their shared digital lives and the data that lies behind them
- + **Reduce systemic economic precarity** by utilizing the power of data to improve individual and shared decision-making and illustrate collective value to help **incite greater social impact investing** in the arts
- + **Other opportunities** to strengthen the capacity and impact of the arts and culture industry through collective sharing and community-building.

Phase 1+2 activities focus on research and design of corporate and legal structures that secure the sustainability of Artse United long-term, including **incorporation of platform cooperative, definition of membership requirements and benefits, open data intellectual property agreements**, and more.

