



ReCreating Europe

Code of Best Practices on Creative Reuse for Documentary Filmmakers

Authors

Bartolomeo Meletti & Stef van Gompel

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CODE OF BEST PRACTICES ON CREATIVE REUSE FOR DOCUMENTARY FILMMAKERS

This Code of Best Practices aims to help documentary filmmakers make informed decisions around the lawful reuse of existing materials in filmmaking. It is based on the views and statements collected through a series of workshops with documentary filmmakers from the UK and the Netherlands. While the legal considerations included in this document refer primarily to UK and Dutch copyright law, this Code is written in such a way that it aims to be relevant to other European jurisdictions too.

Using copyright protected materials such as images, footage or music usually requires permission from the copyright owner.¹ When permission is available under reasonable licensing terms, clearing rights is a practical and secure way to reuse protected content. However, this is often not the case. In certain cases, the legal situation is so complex that clearing rights is not viable or simply unrealistic, especially if the types of creative reuse involved are relatively small and represent no significant economic value that warrants licensing. In these cases, it is important to be aware of the opportunities offered by copyright law to lawfully reuse content without having to secure permission.

Everyone is free to reuse ideas as well as information and facts embedded in a copyright work, as long as their concrete expression in the work is not copied. For example, while you may need permission to use footage or voice-over from a documentary film about climate change (expression), you are free to reuse the information and facts included in that film (ideas) when creating your own documentary about climate change. Permission is also not required to reuse public domain works, that is works whose copyright protection has expired (in most European countries this happens 70 years after the death of the author). Works distributed under open licences such as Creative Commons can be used for free too. Under certain circumstances, it is also possible to use protected works without permission. These are known as copyright exceptions and are intended to allow uses that are considered to be socially,

¹ In this Code we only refer to the copyright owner, but this is meant to include the owners of related rights, such as performers, producers of sound recordings and broadcasters.

culturally, economically or politically beneficial, such as education, critique, parody, or the preservation of our cultural heritage, among others.

The documentary filmmakers who participated in this project are generally aware of these opportunities but struggle to benefit from them in practice. They report an environment characterised by risk aversion, where many archival institutions, funders, broadcasters and distributors require rights clearance by default, even when rights do not subsist or a copyright exception would allow the use of the work. The legal complexity and the uncertainty surrounding the interpretation and applicability of copyright exceptions make it hard for documentary filmmakers to rely on them confidently.²

We hope this Code will help and encourage documentary filmmakers to rely on copyright exceptions and other opportunities offered by copyright law in a way that fits their projects practically and legally. The Code is intended to be dynamic: we encourage filmmakers to share it and discuss it with their colleagues as well as with archival institutions, funders, broadcasters and distributors, with a view to making exceptions a viable and practical option for the reuse of existing materials. The uncertainty and ambiguity embedded in copyright exceptions is a challenge for the risk-averse but also an opportunity: it offers flexibility to allow creative uses that cannot be accommodated by licensing.

This initiative takes inspiration and builds upon the [Codes of Best Practices in Fair Use](#) developed by the American University and partners. Although the [Documentary Filmmakers' Statement of Best Practices in Fair Use](#) was produced in 2005 around the US fair use doctrine, which is unknown in the European tradition, our project shows that a similar Code can help to explain and give meaning to legal norms contained in European copyright exceptions. This Code attempts to bridge legal traditions by focusing on what the law permits in both the UK and the Netherlands. This evades thorny issues of territorial legal differences that may exist between these countries. The Code may apply to other European jurisdictions too, depending

² An overview of the most pressing copyright-related issues and concerns faced by documentary filmmakers can be found in Meletti, B. & van Gompel, S. (2021). D4.10 Issue reports on how copyright exceptions and other permitted uses that are relevant for documentary filmmakers and immersive digital heritage practitioners are understood in the Netherlands and the UK. Zenodo. <https://doi.org/10.5281/zenodo.5070427>.

on the copyright exceptions that are adopted there.³ The more countries to which this Code will legally apply, the more it will further the harmonization of the framework of exceptions and limitations for documentary filmmakers in Europe.

Please note that the content of this Code does not constitute legal advice. This Code aims to describe common uses of protected works that are considered fair by filmmakers and lawful by lawyers. However, it does not intend to be exhaustive in any way. The uses of copyright works permitted by law are more than those described below, and inevitably are going to evolve over time.

DOCUMENTING REALITY

Documentary films are intended to document reality. Real-life scenarios often include copyright protected materials, such as music in the background, a t-shirt with a famous artwork, or a photograph on the wall. Copyright should not act as an obstacle to documentary filmmakers' mission of reporting facts accurately and effectively, whether for education, commentary or maintaining a historical record. Documentary filmmakers should be able to tell their real-life stories as they actually happened, without having to distort reality. Using copyright protected materials to document reality should be, and in most jurisdictions is, permitted by law.

CONSIDERATIONS

- Filmmakers should only use the amount of the protected work that they need in order to document the facts of their story accurately and effectively.
- Any unplanned (incidental) inclusion or capturing of a work on film is permitted, except if it is used as the main subject of the scene.
- Buildings and 3D artworks permanently situated in public places may be integrally included or captured on film.⁴

³ The EU legal framework of copyright exceptions has been harmonized, but many of these exceptions are optional and not implemented in all European jurisdictions. See: <https://copyrightexceptions.eu/>.

⁴ In the Netherlands, the freedom of panorama does not permit the use of more than a few works of the same author in a compilation and only allows reproduction of works of architecture and other artistic works in the way they appear in their surroundings.

- Documentary films reporting current events may include or capture a work on film to the extent that this is justified for giving a proper account of the current event that is the subject of the documentary.⁵
- The use is more likely to be considered lawful if the work was accessed from a legitimate source.
- Whenever possible, the source and the authors of the work used in the film should be acknowledged (see below under Attribution and Integrity).

SOCIAL, POLITICAL, OR CULTURAL COMMENTARY OR CRITIQUE

Documentary films are often created to illustrate, critique or comment on social, political or cultural issues. This may well involve the use of a protected work in the film, whether to comment on the work itself or on something else. Quoting any type of work for criticism or review or other purposes is permitted in most jurisdictions. If it can be justified in relation to the purpose of the quotation, photographs, paintings and other works can be quoted in their entirety. Other types of critique such as parody are also permitted. The form of the commentary can vary from explicit comments in the voice-over, text on screen or interviewees' remarks to commenting by juxtaposing image with image.

CONSIDERATIONS

- The more the filmmaker engages with the protected content for the purpose of commentary or critique, the more likely it is the use will be considered lawful.
- Filmmakers should only use the amount of the protected work that they need in order to make their point.
- You can only quote from works that have been lawfully disclosed to the public.
- Commercial uses are generally allowed under exceptions for criticism or review or parody. However, the use of the existing work should not be so extensive that the new work can be considered a market substitute of the original.
- To be considered a parody, a film must evoke an existing work while being noticeably different from it and constitute an expression of humour or mockery.

⁵ In the United Kingdom, the freedom to report current events explicitly excludes photographs.

- Whenever possible, the source and the authors of the work used in the film should be acknowledged (see below under Attribution and Integrity). However, this does not apply to the use of a work as a parody.

ART

Filmmaking is an art form. Rather than documenting facts, certain documentary films question reality and art itself by borrowing, copying or altering existing images and objects. This practice – known as appropriation art – often cannot be accommodated by licensing mechanisms, especially when it involves the use of hundreds or thousands of existing works. Imitation and copying are an essential part of the creative process. As artists, filmmakers should be able to experiment and play with existing materials such as found footage, images and sounds, the same way that renowned artists like Andy Warhol or Marcel Duchamp appropriated everyday objects and images to create new works. These artistic uses of protected materials may be allowed by the copyright exception for pastiche that exists in various jurisdictions, thus requiring no permission from the copyright owners of the works being used.

CONSIDERATIONS

- The pastiche exception likely covers a wide range of artistic expressions, including mash-ups, collage, and music sampling, among others. However, please note that ‘pastiche’ as a legal term may (in the future) attract a particular meaning in law that might not map onto what different artistic communities regard as pastiche.
- Commercial uses of protected works are generally allowed under the exception for pastiche. However, the use of the existing work should not be so extensive that the new work can be considered a market substitute of the original.
- The pastiche exception does not explicitly require the acknowledgement of the authors of the works used in the pastiche.
- When a work of appropriation art cannot be considered a pastiche, it may still be covered by other exceptions such as that for quotation.

THE PUBLIC DOMAIN

Copyright does not last forever. After a certain period of time – usually 70 years after the death of the author, depending on the jurisdiction – the works of that author enter the public domain and everyone is free to reuse them. Documentary filmmakers often need to use and edit public domain materials such as old paintings, photographs or films to tell their stories. While the law allows them to do so without restriction, the institutions holding the original work sometimes claim copyright on and require payment to access and use the scan of those works. Due to risk aversion, funders and broadcasters often require rights clearance of public domain works, although there are no rights attached to these works.

Documentary filmmakers need to be able to access, copy and modify high resolution versions of public domain works. 2D scans of public domain images are not protected by copyright and should be available for everyone to build upon to create new knowledge and culture. Cultural heritage institutions, funders and broadcasters should facilitate the access to and reuse of public domain materials, without adding restrictions through contract and technological protection measures.

CONSIDERATIONS

- Copyright law is territorial, and so is the copyright term. This means that copyright duration may be different depending on the jurisdiction. While classical works such as Mozart's compositions or Leonardo da Vinci's paintings are in the public domain everywhere, works created in the 20th century may still be protected in certain jurisdictions.
- 2D copies of public domain paintings, photographs and films do not meet the originality criterion and therefore are not protected by copyright. However, a sound recording of a public domain composition may well be protected, depending on when it was made or published. In the EU, sound recordings are usually protected for 70 years after their publication.
- It is good practice to acknowledge the authors of a public domain work. In certain jurisdictions, where the moral right to attribution is perpetual, this is also legally required.

ATTRIBUTION AND INTEGRITY

Being creators themselves, documentary filmmakers recognise the importance of treating other people's work with respect and integrity. At the same time, they want their own work to be treated appropriately. While existing material may have to be modified to make it fit for a film production, this should not amount to a distortion or mutilation of the work, or otherwise damage the honour or reputation of the creator. Acknowledging the authors (rather than the copyright owner) of the work being used – whether to document reality, for critique or artistic purposes – is particularly important for filmmakers, and is often also required by law. Attribution can take different forms, depending on the circumstances. Sometimes it may be possible or even aesthetically desirable to provide credits on screen. In other cases, credits on screen are too intrusive and it is more appropriate to acknowledge the authors of the work in the end credits. In some specific cases, for artistic reasons, it may not be possible to include credits at all. Whenever possible, credits should be generous, acknowledging the title of the work, the year of publication, the author and the source.



The ReCreating Europe project aims at bringing a ground-breaking contribution to the understanding and management of copyright in the DSM, and at advancing the discussion on how IPRs can be best regulated to facilitate access to, consumption of and generation of cultural and creative products. The focus of such an exercise is on, inter alia, users' access to culture, barriers to accessibility, lending practices, content filtering performed by intermediaries, old and new business models in creative industries of different sizes, sectors and locations, experiences, perceptions and income developments of creators and performers, who are the beating heart of the EU cultural and copyright industries, and the emerging role of artificial intelligence (AI) in the creative process.



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