



## **Rethinking digital copyright law for a culturally diverse, accessible, creative Europe**

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## Executive Summary

This *reCreating Europe* deliverable D4.10 outlines the most pressing copyright-related issues and concerns faced by documentary filmmakers and by curators and creators of immersive experiences in the United Kingdom and the Netherlands. It is the main output of the first stage of Task 4.3 *Developing best practice codes for creative audiovisual re-use*, led by CREATE (University of Glasgow) and IViR (University of Amsterdam) as part of Work Package 4 *Creative Industries*.

After a short introduction to the project and its methodology (Section 1), the document offers an overview of the issues identified and discussed by the communities being examined in relation to copyright and the lawful reuse of audiovisual materials. The findings of four online workshops – one for each community in the two jurisdictions under consideration – are systematised in four issue reports (Sections 2 and 3). Each issue report describes the creative and cultural practice of the workshops' participants and the core copyright-related concerns they identified. The main points discussed by participants under each area of concern are reported. The copyright issues that documentary filmmakers reported as being the most worrying related to access (identifying and negotiating with right owners and archives), use (exceptions and limitations/fair dealing vs rights clearance) and distribution (territoriality of the law). The main copyright concerns raised by curators and creators of immersive digital heritage revolved around the questions of identifying, contacting and negotiating with rights holders, the uncertainties of knowing whether your use is fair/lawful or not, and responsibilities (for infringement and preservation). This was the same in both jurisdictions.

Section 4 provides a snapshot of the copyright exceptions and limitations in UK and Dutch law which may cover the uses of protected content discussed by participants. Finally, Section 5 encompasses conclusive remarks and the next steps of the project.



## 1 Introduction and methodology

The task *Developing best practice codes for creative audiovisual re-use* is part of Work Package 4 – *Creative Industries of reCreating Europe*. The objective of this project is to enable creative innovation and culture-based business through the development of sector-specific codes of best practices in relation to copyright exceptions and other permitted uses of copyright works in the audiovisual (AV) field. To unlock the creative, cultural, economic, and social innovation potential deriving from the reuse of European digitised cultural heritage, the project ultimately aims to enable creative and cultural AV sectors to make informed business decisions based on shared principles and best practices in (re)using copyrighted materials. The project adopts a bottom-up, participatory research method in order to provide contextualised evidence and guidance on how copyright exceptions are being perceived and used in practice by specific AV sectors of certain countries. An established methodology for developing best practice codes<sup>1</sup> is adapted to the European context in three steps. (1) Mapping of issues that specific communities encounter; (2) formal deliberative exercises; (3) drafting of codes. Each step involves co-production with creative and cultural practitioners in the relevant AV communities.

The project examines two communities: (a) documentary filmmakers; and (b) immersive digital heritage, where cultural heritage institutions offer new immersive online experiences of AV materials, for example as an innovative means of storytelling. The analysis of these two sub-sectors is being conducted in the United Kingdom and the Netherlands.

This deliverable – comprising four issue reports – is the main output of step (1) of the project (mapping of issues) and outlines the issues identified by documentary filmmakers and immersive digital heritage curators in the UK and the Netherlands through four online workshops held in early 2021. Both communities in both jurisdictions were defined through self-identification; more details about the online workshops' participants are provided in the corresponding issue reports. As scholars in the field of deliberative democracy have noted, “the problems that actually arise in social life should drive the selection and articulation of the problems to be investigated in the first place” as well as “the formulation and execution of the research plans that we develop to address those problems”.<sup>2</sup>

## 2 Copyright issues relating to audiovisual reuse in the documentary filmmaking sector

This section summarises the key findings of the two online workshops organised with documentary filmmakers in the UK and the Netherlands. During the workshops, participants were asked to identify and discuss the copyright relevant hurdles they face when (re)using copyrighted materials in documentary films. Section 2.1 gives an account of the copyright issues faced by documentary filmmakers in the UK. Section 2.2 provides an overview of the copyright issues encountered by documentary filmmakers in the Netherlands.

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<sup>1</sup> The task *Developing best practice codes for creative audiovisual re-use* builds upon the work of Professors Patricia Aufderheide, Peter Jaszi and others on the Codes of Best Practices in Fair Use in the United States, which can be accessed at the URL <https://cmsimpact.org/report-list/codes/>

See also Aufderheide, P. & Jaszi, P. (2018). *Reclaiming Fair Use: How to Put Balance Back in Copyright*, Second Edition. The University of Chicago Press.

<sup>2</sup> Bevir, M., & Bowman, Q. (2018). *Qualitative Assessment of Deliberation*. In A. Bächtiger, J. Dryzek, J. Mansbridge, & M. Warren (Eds.), *The Oxford handbook of deliberative democracy* (pp. 1-32). Oxford: Oxford University Press.



## 2.1 Issue report 1: Copyright issues identified by documentary filmmakers in the UK

This first issue report outlines the issues identified by documentary filmmakers in the UK at the online workshop held in early 2021 via video conferencing software. Potential participants were identified through desk research, the researchers' networks of contacts, and existing documentary filmmakers' networks such as the Scottish Documentary Institute and UK Feature Docs. Invitations were sent via email and encouraged participation from individuals who identified themselves as '*documentary filmmakers who make creative choices on which existing materials to include in their films*'. This attracted seven participants based in the UK and two based in Ireland. Eight participants identified themselves as documentary filmmakers, one of which also works as archive producer in big documentary productions. One participant was a producer with extensive experience of producing documentary films based on fair dealing and fair use. Some participants also held academic positions.<sup>3</sup>

All participants produced documentary films using archive materials. These included feature documentary films made for broadcast and short films to be screened in art galleries.

At the beginning of the workshop, participants were split into two smaller breakout groups and asked to introduce themselves, briefly describe their creative practice, and share one copyright issue they found particularly concerning.

During the round of introductions, participants identified a number of copyright-related issues ranging from concerns over access and budgets for rights clearance to uncertainty over the operation of copyright law including the exceptions to infringement. In particular, participants identified the following issues:

- Lack of knowledge and uncertainty surrounding fair dealing, among not only independent filmmakers but also funders, broadcasters and national institutions. American documentary filmmakers seem to have a clear understanding of how the fair use doctrine works in the US, whereas there is too much ambiguity around exceptions in Europe and fair dealing in the UK.
- Access and use of archive films are often prohibitively complex and expensive, due to legal complexity, difficulty to ascertain ownership of content, and arbitrary and inflexible clearance costs (same costs applied to big corporations and independent filmmakers). This limits creativity and the number of people who can afford to work with archives.
- Conservative, risk-averse approach and lack of support from funders and broadcasters, who often have unrealistic expectations compared to the budget they make available to filmmakers.
- Filmmakers often have to choose between paying a lawyer to advise on what can be used for free; or paying a person or organisation who claims ownership on the work the filmmaker wants to use. Neither is affordable. This was referred to as the "paperwork industry", which also includes accountancy. Funders seem keen to facilitate this industry rather than supporting the work of filmmakers.
- Having to pay for the use of out of copyright films, either to get a physical copy of the film or a piece of paper confirming you have a legitimate copy.
- Territorial nature of copyright law: while there are insurance mechanisms that enable filmmakers to safely rely on fair dealing in the UK and on fair use in the US, it is not possible to be covered in other jurisdictions.

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<sup>3</sup> The workshops held in the UK were granted ethical approval by the University of Glasgow: participants received a Participant Information Sheet and signed a Consent Form and Privacy Notice before attending the workshop.



Following the round of introductions, each group of participants discussed the issues above and identified the following three areas of common concern related to copyright:

1. Access: identifying and negotiating with copyright owners and archives
2. Use: fair dealing vs rights clearance
3. Distribution: territoriality of the law

### **2.1.1 Access: identifying and negotiating with copyright owners and archives**

Most participants defined access to archive materials as a “wild west” and a “painful battlefield”, characterised by legal complexity and ambiguity; uncertainty around ownership of rights; arbitrary, excessive and inflexible rights clearance costs; “cowboy” individuals and organisations requiring questionable payments; and lack of support and recognition from funders, broadcasters and national institutions.

The level of difficulty of accessing films depends on the nature of the material that the filmmaker wants to use. For example, using works in a documentary about a famous filmmaker is usually easier, as in these cases the materials are often available in DVD or Blu-ray. However, one of the participants highlighted the legal issues that may arise if one needs to “crack” the DVD or Blu-ray in order to access the content (“I was better off not knowing that”).

Accessing films held by international, national, and regional archives is often challenging, especially if the materials are politically sensitive. Participants identified as a major obstacle the ability of “gatekeepers” to arbitrarily decide whether to give access to the materials and at what price. Archives often request excessive access fees, without differentiating between big production companies and independent filmmakers with small budgets. One participant argued that the rise in archive access fees is due to the increasing practice in the TV sector of producing programmes that “recycle archive materials in non-original ways”. This tendency has created a market for archive materials that big broadcasters can afford to pay, whereas independent filmmakers cannot.

Participants felt that independent documentary filmmakers operate in a “niche between big companies with big budgets, and artists who make films for art installations or to be made available on YouTube”. Independent documentary filmmakers make the same small profits that individual artists make, but without enjoying the same freedoms; and they have to “do everything by the book” and pay the same high licence fees that big production companies pay. “We get the benefits of neither and the downsides of both”. Participants agreed that independent documentary filmmakers should be recognised and protected as a community that creates “culturally valuable work” that “celebrates the use of archive in a very good way” within a “deeply cutthroat commercial sector”.

Participants recognised that archive access fees are justified by the amount of work involved in preserving and maintaining the archives. However, they questioned archives’ discretion in charging often excessive fees arbitrarily. One participant shared the example of an archive charging them £500 to access one film can and another £500 for the sound can of the same film. The initial total price quoted by the archive for accessing all the materials the filmmaker needed amounted to £22,000, which the filmmaker managed to reduce substantially through lengthy negotiations. Other participants agreed that filmmakers need to strategise when approaching archives and distributors. “When you talk to distributors, you want to persuade them that your film is going to be huge. Then when you talk to rights holders and archives, you want to look small and unambitious to get a better rate”. Other tips shared by participants included engaging in negotiations towards the end of the financial year, when sales agents “need to get the deal in and may be keener to sell for a lower price”; and try to “skip the middleman” such as estate agents and get in touch with the copyright owner directly, who sometimes are grateful that you are interested in their footage.



Participants repeatedly made the point that they are willing to pay a fair price to use archive materials if the money is going to reward the artists and creators of the work. They consider unfair having to pay “bad actors” and “cowboys” who claim ownership over materials they do not own (such as out of copyright works), and force you to pay “for a meaningless piece of paper or dodgy DVD rip” by threatening legal action. In this context, participants criticised Getty Images for monetising out of copyright works such as old films or images from the 1600s. Although these materials can be accessed from other free sources (e.g. the Prelinger Archives)<sup>4</sup>, funders often require copies from Getty and other commercial libraries which offer indemnity insurance in case “somebody’s family comes out of the woodwork”.

Participants suggested three possible solutions to these systemic issues:

- i) lobbying archive organisations, broadcasters and national institutes to adopt more nuanced and sympathetic policies towards independent filmmakers using cultural heritage, who should pay lower rates for use of archives than those applied to big commercial entities;
- ii) community-based, collaborative support, such as a database where filmmakers transparently share the rates they have been charged to access and use certain materials, so that other filmmakers can estimate costs; and
- iii) centralised legal support that filmmakers can rely on when threatened by individuals and organisations claiming ownership over materials they do not necessarily own.

One participant mentioned the Zero Fee Licence scheme offered by the National Film and Sound Archive in Australia as a good practice example. The scheme offers independent documentary filmmakers the possibility of using up “to three minutes of footage from the Film Australia Collection for a no-fee All Rights, All Media, World, In Perpetuity licence”.<sup>5</sup> However, another participant found this solution interesting but problematic because in the UK national archives such as the British Film Institute do not own rights in many of the materials they hold.

Participants also recognised that from a practical point of view, technological advancements in the digital age have made it easier to access content. “We no longer rely on the gatekeepers, we no longer require a 1-million budget to make a documentary”. The issue, according to participants, is that the legal system and the “powers that be” (funders, broadcasters, distributors) have not kept up with these advancements yet. “There are some funders that are still stuck in certain ways of doing things. Some sales agents have delivery requirements that refer to technologies that don’t exist anymore”. One participant argued that while they are always keen to honour the rights of copyright owners, “piracy” and “underground archives” can be helpful in giving access to rare materials.

### 2.1.2 Use: fair dealing vs rights clearance

Most participants had no experience of relying on exceptions, mainly because of uncertainty around their applicability and the risk-averse, conservative approach of funders, broadcasters and national institutes who require rights clearance in any third-party material included in the films they fund or broadcast. Participants felt that creative and cultural work by independent documentary filmmakers is often treated with suspicion by funders and broadcasters. When they raise questions about fair dealing, filmmakers are perceived by funders as “trying to get something for nothing”. Participants argued that this is often due to lack of understanding of fair dealing and a tendency of the “powers that be” to support big commercial players rather than independent filmmakers.

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<sup>4</sup> <https://archive.org/details/prelinger>

<sup>5</sup> <https://www.nfsa.gov.au/collection/using-collection/zero-fee-licence>



Participants expressed a desire for more awareness of and clarity around exceptions, “through some form of centralised or collaborative support to help each other understand exceptions as a community”. According to one participant, “if the language (e.g. ‘critique and analysis’, ‘pastiche’) was more precise and the precedents codified in a way that you can access them, you could have strength in numbers. Knowing that a certain use was considered fair dealing and being able to rely on that precedent” would be helpful.

Some participants argued that funders’ and broadcasters’ reluctance to support work based on exceptions is also due to their own lack of understanding of fair dealing. One participant shared the example of a funder who initially was not willing to “back anything that was fair dealt”, but after the film producer explained to them how fair dealing works, they decided to support the project. Participants highlighted the need to direct education and awareness initiatives around fair dealing also to funders, broadcasters, and distributors.

Two participants had experience of relying on exceptions. One participant employed “fair use” once as a “negotiating tool”, rather than to use content without a licence. The project had managed to raise a substantial amount of funds to cover rights clearance costs and secured all relevant permissions. Following a legal dispute unrelated to copyright, one of the copyright owners withdrew the licence they had originally granted. As a result, the filmmakers decided to rely on fair use and added text on screen, next to the clips whose licence was withdrawn, explaining the points they were trying to make through those clips (“we called those texts health warnings”). After receiving an opinion letter from an American lawyer confirming that the use of the clips was fair, the filmmakers used the letter to persuade the copyright owners to fulfil the original licensing agreement. “It had to get confrontational. [We said to the copyright owners:] we either use it under fair dealing and create a precedent, or you license us as you said you would, and we pay you. And they backed down because they didn’t want to set a precedent for other filmmakers”.

Commenting on this example, another participant noticed how having to “verbally or textually justify and articulate on screen the commenting that you’re doing” impinges filmmakers’ creative practice and goes against modern documentary filmmaking concept of commenting by “juxtaposing image with image”. “But that’s not enough for the lawyers, which obviously is very worrying creatively”. The participant involved in the incident agreed that having to add text on screen to explain why you are using something “totally destroys the momentum within your film, the whole narrative structure, and the finesse in your voice over”.

The other participant with experience of fair dealing was a producer working primarily on documentary films about cinema and filmmakers, and relying almost entirely on exceptions to use protected content. The participant described fair dealing as an “exception built around practice”; especially in the UK, where “practice makes law”, the more creators rely on exceptions, the harder it becomes for rights holders to challenge use under fair dealing. According to this participant, the main issues related to fair dealing are the territoriality of copyright law, lack of knowledge and limited understanding. “Nobody quite knows how it works. I talked to an American lawyer once who said: ‘we assume these are the rules and practice establishes what we think are the parameters, but nobody knows how this really works because it’s never challenged’. In the UK, everyone still refers back to the Clockwork Orange case because there are very few cases in which any of this has been tested. We are all operating in this entirely theoretical area”.

However, the same participant outlined the following fairness factors in the documentary filmmaking sector:

- Proper on-screen credits;
- Under criticism and review, using works that you are reviewing or critiquing;
- The work needs to be published at some point, “you can’t fair deal a private diary for example”;
- “You can’t use too much, you can only use as much as you need; which is why it is almost impossible to fair deal photographs”.

Another participant found the latter parameter of only “using as much as you need” problematic. For example, in a documentary about a trial, “you can’t tell the story without the hearing testimony, and to get into a character you really need to immerse yourself in what they are saying. Where is the line? How far can



you push it?”. The producer responded that “it is a dialogue with the lawyer. You may well have a reason to show the context in order for your point to be fully appreciated. You have to make the case to your lawyer, and that’s the case they will make to a judge if it ever came to it”. The other participant who relied on fair use as a negotiating tool shared their understanding of fair use: “there are some general principles that apply, but then it goes down to the nitty-gritty of your film and the materials you use in it, and the context [...] If you're using a clip from a movie, say from a Hollywood blockbuster, in your documentary, and you're using that clip to analyse it or comment on it and critique it, in voiceover or in interview, or somebody saying something before it or over it, or after it, then that's that's a fair use situation: you're not just using it, willy nilly, to tell your story, you're using it to make a point”. Participants also understood that one cannot start a rights clearance negotiation with the copyright owner to get access to the material, and later decide to rely on fair dealing and not pay for a licence; “you can’t fair deal on the basis that you can’t afford something; [...] “it doesn’t fall under the criteria of fairness”. The decision of relying on fair dealing or clearing rights has to be made up front.

The type of work being used also seems to affect creators’ ability to rely on fair dealing. According to one participant, the safest way to use music under fair dealing is to fair deal a video with the music, rather than using music on its own: “because you can’t fair deal the music, but you can fair deal the video”.

In general, most participants clear rights in the materials they use in their films despite the challenges discussed in the context of “access”, such as the complexity of ascertaining ownership of works and tracing the copyright owners; the difficulty of assessing whether a request for payment is legitimate; and excessive licence fees that independent documentary filmmakers often cannot afford. As discussed in the next section, participants consider that rights clearance is often necessary in order to be able to exploit their films fully and safely.

### 2.1.3 Distribution: territoriality of the law

Most participants considered rights clearance the only viable option to produce archive-based documentary films that can be exploited fully and safely. Participants highlighted how international distributors and sales agents are often unwilling to distribute and represent work based on exceptions; and the standard contractual practice of funders and broadcasters to require to “clear all necessary rights” in any third-party materials included in the films they fund or broadcast. Most participants stressed the need for a broader conversation between independent documentary filmmakers and funders, broadcasters and archival institutions with a view to persuading them to adopt a less conservative approach towards exceptions and “to push the edges of copyright law in favour of art”. This broader conversation should take place at Berlinale, Sheffield, Punto di Vista and other prominent festivals to include local communities and bring the discussion to the fore.

The only participant with extensive experience of relying on exceptions argued that certain funders and broadcasters are not conservative at all. For example, the BBC is “wilder than anyone else when it comes to fair dealing”. According to this participant, there are different policies towards fair dealing in different departments of the BBC: the BBC archive - which now deals with Getty, “the most expensive archive” - charge high fees for use of their materials and tend not to support work based on exceptions. On the other hand, commissioners at the BBC are usually happy to fund work that reuses BBC footage based on exceptions, and BBC own productions often rely heavily on fair dealing.

The same participant clarified that if you benefit from exceptions, you are not subject to contractual clauses that require to clear all necessary rights because “if you have a fair dealing defence, then it’s not *necessary* to clear rights”. Their productions regularly rely on fair dealing in the UK and fair use in the US to use protected content. The common practice in the sector is to get Errors and Omissions insurances (E&O) in the UK and the US which protects against potential claims by the copyright owners in those territories. In each



jurisdiction, E&Os require an opinion letter from a lawyer stating that their use of protected content is covered by fair dealing or fair use. Opinion letters in the US are usually more costly than in the UK (around four times more expensive), and tend to cover more extensive uses (“if you pass fair dealing in the UK there is no way you are not going to pass fair use in the US”). In certain cases, US broadcasters may accept a UK fair dealing opinion letter only, assuming that anything covered by UK fair dealing will also be allowed under US fair use. According to this participant, “the single biggest problem is jurisdiction. It’s not possible to comprehensively and certainly fair deal or fair use a film worldwide. Then it’s a question of individual distributors and sales agents being willing to support that”. Although the E&O insurances only cover claims made in the UK and the US, the films produced by this participant are distributed internationally, but “you can never be sure if someone is going to sue you somewhere” else.

However, in most cases, uses made under exceptions are not challenged by copyright owners. “We may do 50 to 100 bits of fair dealing in each film and maybe get one letter from someone, but with fair dealing you have your answer, and the copyright owner usually backs off”. According to this participant, being “small independent film companies is our best protection in this area”; “if we were Marvel relying on fair dealing, they would probably come after us; but with us it’s not worth it”. For this reason, the participant shared their “concerns about standardising fair dealing too much, because in practice we get away with a lot. Because it is a wild west and a grey area, the practice of relying on fair dealing has expanded hugely in the last 10 or so years, and very little challenged. The danger of suggesting a clearer framework is that you end up circumscribing activities”.

Participants also discussed the distinction between commercial and non-commercial uses, arguing that the work of independent documentary filmmakers falls in between the two categories and should be recognised as such. “We count as commercial although we are not really commercial, [our films] are not going to make anyone a lot of money”. At the same time, “we all want our films to do very well and become commercial. We don’t want to be too constrained by this definition” [commercial vs non-commercial] and “lose commercial viability”.

## 2.2 Issue report 2: Copyright issues identified by documentary filmmakers in the Netherlands

This second issue report outlines the issues identified by documentary filmmakers in the Netherlands at the online workshop held in early 2021 via video conferencing software. Potential participants were identified through desk research and the researchers’ networks of contacts. Invitations were sent via email and encouraged participation from individuals who identified themselves as ‘*documentary filmmakers who make creative choices on which existing materials to include in their films*’. This attracted six participants: five based in the Netherlands and one Dutch film scholar based in the UK. Four participants identified themselves as documentary filmmakers and one as a film scholar. One participant is a lawyer with broad experience in advising documentary filmmakers about copyright-related issues, including the use of exceptions and limitations to make free use of existing materials in documentary films.

To identify the most pressing copyright-related issues and concerns faced by documentary filmmakers when making documentary films, the workshop commenced by asking participants to introduce themselves, briefly describe their creative practice, and share one copyright issue they found particularly concerning.

All documentary filmmakers participating in the workshop indicated that they produce documentary films using archive materials. This includes several feature documentary films made for broadcasting and festival screening as well as a number of shorter artistic movies. One participant also works as a visual artist. Other participants have experience also as caretakers of film and photographic archives. Most participants have a long-standing experience in making documentary films. One participant is just starting as a filmmaker. Some participants also have an academic background or work as mentor at different film and art academies.



During the round of introductions, the participants identified a number of copyright-related and ethical issues that they encounter when making documentary films. This ranges from concerns over access to materials and problems associated with identifying rights holders and the clearance of rights to the legal uncertainty over the operation of copyright law including the exceptions or limitations on which documentary filmmakers can rely. In particular, participants identified the following issues:

- How to make proper use of the increasingly important culture of images within a legal framework that is meant to protect creators, but at the same time hinders them in their creativity.
- The thin lines between the freedom of reusing works of others and permitting reuse of your own work.
- The question of clearing rights versus relying on exceptions or limitations.
- The legal boundaries of proper quotation of visual materials.
- The legal and ethical questions of appropriating the work of others and reusing it in a sometimes altered way in an entirely different context and setting.
- The ethical issues connected with reusing and regenerating new interest in old materials that are politically sensitive and that could potentially harm the persons depicted in the images.

Following the round of introductions, the participants further discussed the issues above, which by and large centre around the following three areas of common concern related to copyright, which are identical to the main concerns that were expressed in the workshop for documentary filmmakers in the UK:

1. Access: identifying and negotiating with rights owners and archives
2. Use: exceptions or limitations vs rights clearance
3. Distribution: territoriality of the law

The next three sections give an account of these discussions during the workshop in the Netherlands.

### **2.2.1 Access: identifying and negotiating with rights owners and archives**

All participants agreed that one of the main problems of reusing archival film footage is that it is often unclear who exactly owns the rights in those materials. Film archives are full of materials of which the author and rights holder are unknown. The authorship status may also be difficult to establish when a film is made by a collective. One participant clarified to have privately purchased a collection of films once from an online marketplace, but the producer warned against reusing that collection for a documentary film because of the legal uncertainty around the ownership of rights. If permission cannot be asked because the rights holder is unknown or untraceable, this undoubtedly raises legal uncertainties for filmmakers who want to reuse and include those materials in a documentary film.

As guardians of old films, film archives play an important part in granting filmmakers access to materials that they want to include in their films. The participants were nevertheless divided about the role that archives play in practice. On the one hand, they appreciate that film archives are actively promoting freely accessible material and helping filmmakers to use it. The participants indicated that they see a growing role for archives in facilitating access to such material. On the other hand, the participants maintained that film archives also have their own financial interest: they can charge fees for the use of material in their collections, not only for access and the clearance of rights, but also for digitisation, preservation and restoration of their collections. These indirect costs are partly factored in the access fees, and thus recovered from users of the archives such as filmmakers. The participants understand where this comes from, as film archives have witnessed cutbacks in the financing of their institutions and they cannot rely on subsidies alone, but the consequence is that the costs for digitisation, preservation and restoration are increasingly being passed on to filmmakers.



Another problem that the participants shared is that, even when film archives grant them permission to use archive material, it still does not exempt them from possible claims for copyright infringement. Film archives do not own the rights in many – often unique and sometimes obscure – films in their collections and there is always the risk that an unknown rights holder or a person depicted in a film who may have portrait rights in the image will come forward and file a complaint.

In practice, the archives also differ greatly in their policies for granting access to materials. While the Library of Congress in the US considers the archive as being for the benefit of the public, other archives treat their collections in a more proprietary way.

One participant suggested that a possible resolution could be for archives to apply a different fee structure with different criteria for different types of creators or users of their collections. They could ask a higher fee, for example, from creators who want to use material from the archive for purely commercial purposes, such as to promote something in advertising, and a lower fee from creators who use it in a cultural context, such as for a work of art or in a documentary film.

The participants expressed the opinion that no licensing fees can be charged for works that are in the public domain, although they understand and accept that film archives, if necessary, may ask a modest fee to cover the costs of digitisation and other processing costs. It is not always easy however to establish whether a work is in the public domain. Films created in the Netherlands before 1912 are in the public domain, because the copyright regime before 1912 did not cover audiovisual works. For younger materials and films made in other countries, it is more complicated to determine the copyright status. One participant stated that audiovisual archives, such as the Netherlands Institute for Sound and Vision, can help to check the public domain status of works. The Institute does charge a fee for access to materials, including public domain materials, but the upside is that you do get the best quality. Another participant pointed to a tool to establish the public domain status for US film material, based on a decision tree to calculate the term of copyright protection.

### **2.2.2 Use: exceptions and limitations vs rights clearance**

The workshop revealed that attitudes towards the reuse of copyright protected material vary between the participants. Several participants expressed a paradoxical attitude to copyright. On the one hand, they want to control and have insight into the use of their own work, especially when the user has time and money or a team to ask for permission. On the other hand, they also indicated that they want to be able to use the works of other authors without too many obstacles and difficulties. Other participants, however, voiced a more liberal attitude towards reusing works of others, making the statement that, if done fairly, certain types of uses of works should simply be permitted and not be restrained by copyright. The participants agreed that it makes a difference if a work is reused for purely commercial purposes or for artistic expression.

The degree to which the reuse of existing works causes feelings of legal uncertainty equally varies among the participants. While some participants said they create art first and only afterwards try to solve any legal issues that may arise, other participants explained they are “in constant fear” if they reuse works without knowing whether this is legally permitted. The latter participants indicated that the question of whether to clear rights, which gives legal certainty, or to rely on an exception or limitation, which does not provide the same certainty even if the use is legitimate, feels like a sword of Damocles hanging over them. These participants described how this fear limits their artistic freedom. Although they realise that a certain ‘risk assessment’ can be made to mitigate risks, this does not remove their fear entirely. In fact, some participants said that they sometimes do not carry out projects because of the uncertainties around copyright questions. In such cases, participants indicated that copyright issues can clearly inhibit the artistic freedom of filmmakers.

One participant explained that different types of reuse of copyright protected material may cause different types of concerns. If a pre-existing work is reused as a ‘quotation’, this often involves financial concerns and uncertainty about whether the use legally qualifies as a quotation. The ‘appropriation’ of a pre-existing work



may serve different purposes, varying from a statement against the concept of copyright and authorship to an ode or tribute to the original creator. Other than legal and financial concerns, this also has an important ethical dimension: to what extent can filmmakers take someone else's work, reuse it and make it their own? For which purposes? To what extent is it ethically sound if another person's work be altered (e.g. shortened or zoomed-in) or presented differently outside its original context? One participant stated that appropriating works can cause feelings of "ethical nervousity" and distress, meaning that filmmakers often creatively engage with existing materials, without knowing whether this is legally or ethically permissible.

The participants also discussed that certain types of uses lie in-between a quotation and appropriation. They find it difficult to determine, however, when the reuse of visual material is considered a quotation and when it is not. How to 'signal' that a visual work is being quoted? For literary works, it is standard to use inverted commas as quotation marks, but no such markings are available for visual works. The participants feel freer therefore to quote textually, with inverted commas, than in images. Images are also quickly used to create a certain atmosphere and less to make a certain point, so the participants wondered whether a quotation of a visual work in such circumstances would still meet the criteria to be legally considered a quotation.

Other participants stated that they are less concerned about ethical questions, as long as the original author is duly credited. In this respect, ethical aspects can come into play in terms of how to give the author proper attribution. For aesthetic reasons, it is not always possible to name the author while showing the reused film fragment. Moreover, attribution is impossible when the author is not known.

The discussions at the workshop further showed that documentary filmmakers base their decisions about clearing rights or relying on exceptions or limitations not merely on legal grounds. One participant who makes use of exceptions or limitations explained to receive good legal and financial assistance and support from the producer, which gives more liberty to take certain risks. Other participants expressed that they feel uneasy if they have not arranged permission, but also confirmed that they are sometimes required by outsiders to clear the rights. They said that film producers and funders like the Netherlands Film Fund typically require a 'clean' product: a product of which all the rights have been cleared or of which a lawyer has confirmed that the project can be continued without problems. Participants indicated that film producers are possibly even more afraid of legal consequences than filmmakers.

Some participants explained that their decisions to clear the rights or to rely on exceptions or limitations is preceded by a risk assessment, which typically requires the involvement of a lawyer or other legal expert. A risk assessment often includes different factors. One factor may be the likely response of the author whose work is being reused. This normally depends on the appreciation expressed to the author and the recognition of his or her status, but also on the feeling that the author does not feel excluded, is not hindered in his or her own actions and retains autonomy. A second question could be: what is the motivation of the other party to take action against the use? Is the author content-driven or money-driven? The participants acknowledged that the risk of an infringement claim is higher if use is made of a work owned by a rights holder who is known to be easily intimidated or who has a reputation of quickly and aggressively enforcing rights. A third element to be taken into account are fairness factors, such as whether the use is of a transformative nature, whether it covers the entire work or only a part of it, what the effect of the use is upon the market of the work, and whether it takes away value of the work or affects money flows that are important for the author. Such an assessment does not determine the legality of the intended use, but it does help to understand the risks of reusing existing materials owned by others without asking permission for this use.

Some participants argued that, depending on the circumstances, it may not harm if documentary filmmakers inform rights holders that they intend to reuse their works under an exception or limitation. In other cases, it is better just to make use of a work under an exception or limitation and keep the use under the radar. One participant said that often it is better to arrange things informally between creators than to approach things purely legally. In the end, what is most important is that as a creator you are duly credited.



In general, the clearance of rights can be very expensive, especially for international distribution. For US films, in particular, the price per minute is very high. But filmmakers must also pay for reusing materials produced by public broadcasters. Rights clearance, however, does not always require paying high fees. One participant indicated that rights clearance sometimes only involves giving recognition and that a symbolic fee or personal note to the author may be sufficient. Other participants voiced different experiences and explained that they have interacted more actively with rights holders to clear rights. This is certainly the case if famous authors or large companies are involved, who usually ask high fees for the reuse of their works. The participants were particularly cautious about reusing big blockbuster movies. One participant said that using materials from a blockbuster is “out of the question” because it would be far too costly. Another participant would only dare to use materials from a blockbuster if there were full legal certainty: it should be recognisable as a quotation and a lawyer and the film producer would have to support it. The participants also indicated, however, that engaging with material from larger studios may be easier, because these studios often find it too much work to ask everyone for permission that they sometimes turn a blind eye to the reuse of their material, especially in non-commercial film productions that do not harm their own exploitation models. Some US studios even prefer a filmmaker to not clear the rights, but rather stay under the radar, since they otherwise must arrange the distribution of licensing fees amongst all actors that appear in the film material that is reused.

In terms of legal uncertainty, the participants indicated that it makes no difference whether they are making a large commercial documentary film or a small online image essay: the fear of impinging on someone else’s rights and getting into legal trouble applies regardless of the film they are making. In this respect, there was agreement between the participants that it would help them if they received legal support from an interest group representing documentary filmmakers. At present, there is no such organisation in the Netherlands. The Dutch Directors Guild (DDG) represents the interests of film directors and the Netherlands Audiovisual Producers Alliance (NAPA) of film producers, but there is no equivalent organisation for filmmakers.

### 2.2.3 Distribution: territoriality of the law

The participants explained that the intended scope of distribution of their documentary films also determines to a large extent how they have to clear the rights in the materials that they intend to reuse. This implies that they must make important decisions upfront about the market for which they create their documentary films.

One participant said that because of the use of existing music, his films are ‘doomed’ to be distributed beyond the Netherlands. In general, the use of music in documentary films is well regulated within the Netherlands. When a documentary film is shown in a TV broadcast or a webcast of the Dutch public broadcaster NPO, the use of music is covered by the collective agreement with Buma/Stemra, which permits a lot of musical works to be used. However, this agreement only applies to the Netherlands. If a documentary film is first meant to be released only as a public broadcasting production and the music is not separately cleared because the use falls under the collective agreement with Buma/Stemra, it will be unsaleable internationally. A platform like Netflix would probably require a full clearance of rights before accepting a film for distribution.

The participants argued that it is strange that a collective arrangement as the one that applies to the NPO does not apply EU-wide. They feel they should at least be able to exploit a Dutch film ‘safely’ within the EU. This also goes for the situation in which a film fragment is used under an exception or limitation. They regard any legal arrangement that applies only to the national territory as being very outdated.

One area in which the participants alleged to have never experienced any legal issues with rights clearance is the distribution of documentary films on film festivals. Screening on a film festival is considered to be a non-public affair and typically does not lead to claims from rights holders. This seems to be based on custom, not on law, but this custom is never challenged: no rights holder would ever think of stopping a documentary film from being screened on a film festival based on a claim for copyright infringement.



The participants stated that they would also want a more liberal regime for making their documentary films available online, for example, on a platform such as Vimeo. This is certainly the case for older films that have been financed with public money. The participants argued that such films should be freely available for the public to watch, but copyright issues prevent them from putting these materials online.

### 3 Copyright issues relating to audiovisual reuse in the immersive digital heritage sector

This section summarises the key findings of the two online workshops organised with creators and curators of immersive experiences in the UK and the Netherlands. During the workshops, participants were asked to identify and discuss the most pressing copyright-related issues and concerns they face when reusing audiovisual content in immersive experiences. Section 3.1 outlines the issues identified by immersive digital heritage practitioners in the UK. Section 3.2 provides an overview of the issues identified by the immersive digital heritage community in the Netherlands.

#### 3.1 Issue report 3: Copyright issues identified by immersive digital heritage practitioners in the UK

This third issue report outlines the issues identified by immersive digital heritage curators and creators in the UK at the online workshop held in early 2021 via video conferencing software. Potential participants were identified through desk research and the researchers' networks of contacts. Invitations were sent via email and encouraged participation from individuals who identified themselves as '*cultural heritage curators and creators who use audiovisual heritage to create immersive experiences or other experimental products*'. This attracted five participants based in the UK and working at major cultural heritage institutions, small companies, and academia. Participants' roles included screen heritage producer, digital curators, executive director at a publicly funded creative company, and university professor.

At the beginning of the workshop, participants were asked to introduce themselves, briefly describe their curatorial and creative practice, and share one copyright issue they found particularly concerning.

Participants shared a variety of creative and curatorial practices they engaged with either as creators, curators, or commissioners, including:

- Immersive work using regional film archive materials in experimental ways with a view to connecting young audiences to archive footage and history. This included exhibitions using 3D headless immersive content, where visitors would go into a dome structure with archive footage being projected around.
- Touring theatre work; site specific work such as large-scale video mapping projects outdoors; immersive gallery style work. All these projects combined digital technology and digital projections with live performances, and could be grouped into two main categories:
  1. Stage work. One example was a show taking place on a stage, with two screens in the background: one showing a film in its entirety, the other showing actors recreating the film.
  2. Immersive productions. These included immersive screenings inside disused theatres or gallery spaces, based on footage from regional film archives. The footage used to create the immersive experience was modified ("*chopped and changed, and recreated, and putting music to it*").



All digital outputs of these projects were made freely available online.

- 3D productions led by students, involving both archive material and materials originally created by the students. Materials created by students were treated as ‘digital commons’, meaning that other students can use and build upon them in a collaborative workflow.
- Digital art and new media art based on reuse of archive material and digital collections, for exhibition in museums and galleries, festivals, outdoor locations, and online.
- Games and interactive digital books based on innovative use of digitised library and archive collections. Digital art based on maps and other types of works such as audio.

During the round of introductions, participants identified the following copyright-related issues as particularly concerning:

- Increase confidence of exhibitors in using archive footage.
- Timeframes: archive sector and exhibition sectors move at different speeds; usually it takes longer to curate immersive archive-based projects.
- Exhibitors are often keen to use different types of archive materials which are not always available to them.
- Common misconception that old films are in the public domain and free to use, whereas the film or some of its elements such as the script are still protected.
- Negotiating with big American companies is challenging. Dealing with regional archives is easier but still difficult.
- Term of copyright protection is too long and is constantly extended due to lobbying from big creative firms. Life of the author is no longer the right criterion to determine copyright duration as the main beneficiaries of extended protection are companies whose commercial interests do not expire.
- Artists having to pay more to get high resolution versions of the works they want to use.
- What are the responsibilities of small organisations if the artists they commission infringe someone else’s copyright?
- Title rights: how to bring commissioned online work into an institution’s collection when institutions and small organisations commission online work without formally agreeing their accession into the collection.
- When online work is commissioned, what is the legacy responsibility “*when things are on your server*”.
- How to encourage innovative use of contemporary digital collections when only very old materials are out of copyright and free to use, and the difficulty of getting rights holders on board to enable use of more contemporary materials.

Following the round of introductions, participants were asked to discuss the issues above with a view to agreeing on the three most pressing concerns faced by the sector. At the end of the first hour, participants identified the following three areas of common concern related to copyright, specifying that the group was speaking on behalf of both artists and commissioners:

1. Identifying, contacting and negotiating with rights holders
2. Knowing whether your use is fair/lawful or not
3. Responsibilities (for infringement and preservation)

After a short break, the discussion focussed on each of the three areas of concern identified by participants. The main issues discussed under each area are reported below.



### 3.1.1 Identifying, contacting and negotiating with rights holders

Immersive experiences and other experimental products often involve the use of many different films and other types of protected materials. For example, a company developing an immersive experience may need access to a large number of materials to experiment with, and only a small portion of these materials will be used in the final product. A cultural heritage organisation may want to make a collection available for a competition around the experimental reuse of items within the collection. Rights clearance mechanisms do not seem to accommodate these experimental uses of audiovisual materials.

Participants agreed that time and expense played an important role in making decisions around getting permission to use audiovisual materials in immersive experiences and other experimental products. In most cases, rights clearance is often a prohibitively long and expensive process, and has a negative impact on creative projects. Sometimes, artists may finalise an experimental product using protected materials and later find out that the work cannot be released because the rights clearance costs are too high. Participants discussed the example of an animator, with extensive experience in the commercial digital film sector, who created an animation for a soundtrack but then found out that clearing rights in that piece costed more than the commissioning budget would allow. In other cases, ready-made projects are cancelled because it would be too time consuming to evaluate if rights clearance is even required. A project involving materials from the 1890s was cancelled because the organisation found it too difficult to identify all the estates of the illustrators and artists whose work may (or may not) still be protected by copyright. Projects that would require access to a vast collection of works for experimental purposes often do not even start because of the time and expense required by clearing rights in the materials. Finally, the difficulties of rights clearance may affect the quality of the final product. Participants discussed the example of an interactive digital portrait which used AI to allow users to interview and interact with a famous musician. Although it was a well-funded, large scale commercial project with direct support from the rights holders, clearing the rights to include the musician's work as background music in the interactive experience was too costly, and they opted for linking to a Spotify playlist of songs by the musician. One of the participants involved in the project commented: "That kind of took the wind out of the sails a little bit for me in terms of just how it felt, how it could have been and how it actually ended up being". Participants noted how artists would often make a compromise decision on the quality of material they are going to use based on the time and budget they have. In the first place, artists will always go for the best quality version of the material they want to use; if they realise that getting that material is going to take more time than they have or cost more than what they can afford, then they might go next level down.

Participants agreed it is often too difficult to ascertain ownership of rights in the materials (or elements of materials, such as the script of a film) they want to use. Participants shared examples in which they wanted to use certain materials but the company which held the rights was sold or merged several times, and the current rights holder may not even know that they hold those rights. Even when ownership of rights is ascertained, the cost of getting permission is often too high. Negotiating with big American film companies is particularly challenging. Dealing with regional film archives is easier but still "extraordinarily long and labour intensive and drawn-out". Participants identified litigiousness of certain rights holders as another issue: some rights holders are known to be litigious, and this often discourages artists and curators from even approaching them. In most cases, artists and curators will opt for using out of copyright materials rather than engaging in difficult negotiations with rights holders.

It was pointed out that organisations such as Wellcome, Smithsonian and Rijksmuseum have open policies that allow the free reuse of their collections, although this may be due to their better financial position. It was suggested that the UK government should be lobbied to show them the direction of travel of these organisations adopting open access policies.



### 3.1.2 Knowing whether your use is fair/lawful or not

None of the participants felt comfortable in relying on copyright exceptions to use protected materials, due to the complexity of the legislation, limited knowledge of the law and lack of resources. Before exceptions were raised as a point of discussion, most participants seemed to consider rights clearance and the public domain as the only viable options to lawfully reuse existing materials, with a preference for the latter.

Participants discussed the need for more education and awareness on copyright law, including on the duration of copyright. Participants highlighted common misconceptions around copyright, e.g. that materials from public archives are free to use because they are publicly funded. Education and awareness should not be limited to copyright law but cover other aspects of reuse such as donors' restrictions, indicative costs to use archive films, and how to deal with sensitive materials (e.g. oral history collections). One participant argued that education and awareness initiatives should be aimed at the rights holders and focus on the small financial risks and big cultural gains of sharing protected materials with artists.

As with rights clearance, time and resources play an important role. In most cases, artists and curators need to seek expert advice on legal issues surrounding exceptions. Sometimes it is possible to rely on exceptions for tiny snippets of works to be used in a big project, but significant uses always require advice from a specialist because "it seems so intricate and complicated". Participants suggested that it would be useful to have flowcharts indicating when a use of a protected work is indisputably lawful, and at what point you need to get help from a specialist. However, they also highlighted the challenge of how creative practices, especially experimental ones, evolve very rapidly and each project requires ad hoc legal guidance. Some participants were aware of existing guides and information about copyright but stressed that artists and organisations only have a certain amount of time "to absorb and learn all of that [information about copyright], and then it changes and moves on". This results in artists having "a very dangerous tiny amount of knowledge that's best ignored, so you go straight to somebody that does know".

Litigiousness of certain rights holders and the difficulty of predicting rights holders' reactions produce a chilling effect on the ability of artists and curators to rely on exceptions. One participant reported how in one of their projects they were advised not to rely on exceptions because of the renowned litigiousness of the copyright owner of the work they wanted to use. Relying on exceptions is "scary" because it is hard to know if and when rights holders will "lawyer up". In this context, participants also discussed transmedia storytelling and storyworlds involving fans communities, highlighting how fans creations in certain cases attract explicit support from the creators whereas in other instances receive cease and desist letters from corporations who own rights in the storyworld. Trade mark protection of fictional characters was also mentioned as an additional layer of complexity. The average person is expected to have the same kind of specialist knowledge of an expert; "There is no watered-down version [of copyright law] for the average person, you could be liable for hundreds of thousands of pounds, and you don't even know it".

Experimental use of short extracts from various materials, which is often required before making decisions on what materials are going to be included in the immersive experience, does not seem to be accommodated by either rights clearance mechanisms or exceptions. Having to pay copyright owners in advance or be very specific in funding applications on which materials are going to be included in the final product do not suit experimental creative practices. On the other hand, legal complexity, lack of legal knowledge and perceived inflexibility around permitted uses were identified as obstacles to relying on exceptions. As one participant noted, "It would be great if we could feel that we could more readily rely on fair usage, but ... I don't know enough, I know far too little – but it feels a bit like that's such murky waters"; "for us to be able to do anything with any material, we would have to feel that those exceptions were a fair bit looser before we would start going to our specialist and actually exploring that avenue".

Whether these difficulties prevent artists from creating what they want to create seems to depend on the type of work and its dissemination. It was argued that "Artists will always find ways around ensuring that



their artistic output doesn't have to abide by particular other vested interest if needs be". In certain cases, artists decide to remake the materials they want to use in order to avoid rights clearance procedures and own the final work in its entirety. In other cases, artists remake their own work to get around contractual restrictions. Examples shared by participants included Taylor Swift rerecording her whole library and Marina Abramovic rerecording a number of her performances at MoMA. While discussing exceptions, it was pointed out that artists "who are very aware of the origin and sources and are informed about copyright are absolutely willing to [rely on exceptions]. Whether that affects the nervousness on the part of exhibitors or possible collectors to the work is another thing." Examples included Christian Marclay's *The Clock* (2010), a looped 24-hour film comprising thousands of uncleared clips from film and television; and *The Time Machine in Alphabetical Order* by Thomson & Craighead, a rework of the film *The Time Machine* (dir. George Pal, 1960) based on H.G. Well's classic 1895 novella.

However, other participants noticed how these montages often are gallery-based installations or live events which are shared with a few galleries and museums under very strict conditions and are not released in any other form. Legal complexity and uncertainties can prevent other types of immersive work such as touring shows from being created. One participant stressed that they would not create a touring show unless they are confident that they can show it to an audience. "It is about the level of risk that you are willing to take. If we are making a touring show, every time we take that to a venue, we are signing a contract with that venue that says that we have all the rights for everything that we're putting on their stage; so there is a whole set of risks there. And if we receive a cease-and-desist letter, we don't just take it down off the Internet, we have to cancel an eight-week tour".

Participants noted some common misconceptions due to limited knowledge or understanding of copyright law, including uncertainty and fear around using Creative Commons or public domain materials for commercial purposes, even when commercial use is explicitly allowed and encouraged; and "superstitious practices" such as adding fair use disclaimers to fanfiction works. More education and awareness in these areas would be beneficial to the sector.

One participant referred to a gap between what people should be allowed to do and the reality of interacting with video-sharing platforms like YouTube, where legitimate works may be taken down automatically.

Participants also highlighted the challenges posed by the territorial nature of copyright law, and how artists who work internationally bump into different restrictions depending on which country they create or exhibit their work in.

### 3.1.3 Responsibilities (for infringement and preservation)

"Responsibilities" was initially identified as an area of concern in relation to copyright infringement, i.e. responsibilities of small organisations if the artists they commission infringe someone else's copyright and legacy responsibilities when potentially infringing commissioned work is hosted on an organisation's server.

Participants highlighted that in most cases artists, small museums and small arts organisations do not have the capacity to defend themselves against any legal action for copyright infringement in the work they create or commission. Small organisations tend to make decisions based on their (often low) risk tolerance and the behaviour of other similar organisations ("they got away with that, so we can get away with this").

Referring to commissioners and exhibitors which adopt standard contractual clauses requiring artists to clear the rights in all third-party materials they have used in their work, one participant suggested limited liability or shared liability as a possible solution. Establishing long-term partnerships and memoranda of understanding between archives and creative organisations may also help facilitate the lawful use of archive material in immersive experiences. However, it was noted that these solutions might be suitable only for organisations working with a few archives and venues. Negotiating these solutions with different archives and venues (e.g. for touring shows) would be too demanding and time consuming.



During the second hour of the workshop, the discussion focussed on responsibilities for preservation of and access to culture. It was argued that commercial companies with vested interests should be more aware that by enclosing cultural assets, they are endangering shared culture. Participants criticised the “rent seeking, profit first” attitude of certain big media companies such as Disney trying to create monopolies over public domain works and fairy tales, and lobbying to extend the copyright protection of their adaptations, which has a detrimental effect on culture. Blockchain and NFTs may also “reinforce negative behaviours of the enclosure of the commons”, when people take screenshots of artists’ digital works and mint them, and the artists lose control over their rights not even to the person who took the screenshot but to the platform where the NFT is sold.

The discussion on responsibilities for preservation of culture focussed on the game sector, where commercial companies are often “not archiving their own archives”. Game studios focus on immediate financial gain and often do not consider long-term archiving for the benefit of researchers and other creators. The Digital Preservation Coalition and the collaboration in Japan between Nintendo and the National Diet Library were mentioned as good practice examples. Archiving in the game sector is particularly challenging because of rights issues and the use of complex codes that only a few people would be able to understand and build upon (the latter being described as “creating orphans for the future”). “Enhanced curation” – the practice of archiving complimentary materials such as press packs and blog reviews – was also mentioned.

It was noted how big media companies like Marvel rely on fans to create and maintain wikis, that they then use for their own productions. Although these companies understand the value of fan culture, they are still unwilling to share their assets and in certain cases they even sue their fans, such as White Wolf suing The Camarilla fan club.

The discussion ended with one participant suggesting as a parallel line of thought the way in which science is supported and the responsibilities that scientists have to maintain data sets over a period of time, with full instructions of how it worked to enable other people to recreate. “We still adopt a kind of 19th century model of an original author, and the game community has shown us that actually the best way to preserve is to remake, and to remake idiosyncratically. It's the old analogy that if you want to save ice cream you don't buy a freezer, you write the recipe down”.

### **3.2 Issue report 4: Copyright issues identified by immersive digital heritage practitioners in the Netherlands**

This fourth issue report outlines the issues identified by immersive digital heritage curators and creators in the Netherlands at the online workshop held in early 2021 via video conferencing software. Potential participants were identified through desk research and the researchers’ networks of contacts. Invitations were sent via email and encouraged participation from individuals who identified themselves as *‘cultural heritage curators and creators who use audiovisual heritage to create immersive experiences or other experimental products’*. This attracted four participants based in the Netherlands and working at or creating content for major audiovisual cultural heritage institutions in the Netherlands. Participants’ roles include digital content creator and filmmaker, digital heritage researcher and project developer, curator and project leader for public media and digital heritage, curator of animation and sales manager of the film collection.

To identify the most pressing copyright-related issues and concerns faced by the immersive digital heritage sector, at the beginning of the workshop, participants were asked to introduce themselves, briefly describe their curatorial and creative practice, and share one copyright issue they found particularly concerning.

Participants shared a variety of creative and curatorial practices they engaged with either as digital content creators or as curators of digital heritage, including:



- A filmmaking bot applying artificial intelligence (AI) to generate experimental films using archival film footage from the collections of a large audiovisual cultural heritage institution in the Netherlands.
- A recreation of an object from the collections of a large audiovisual cultural heritage institution in the Netherlands through virtual reality (VR) technologies, creating a true immersive experience for users in a VR environment. The recreated object is an audiovisual recording of a famous live television (TV) performance by a singer wearing a unique costume. The aim of the project is to recreate the experience by allowing users to virtually step into the clothes of the singer and perform as such in the VR environment.
- A variety of other immersive creations that involve the use of archival film materials.

Other than these examples, the participants shared their experiences with other projects concerning creative reuse, including documentary films and educational projects, such as a series of master classes on creative reuse, including a master class on IP related issues. One participant shared specific experience with granting access to archival film footage from the collections of a large audiovisual cultural heritage institution in the Netherlands, which creators or curators want to use in their creative and curatorial practices.

During the round of introductions, participants identified the following copyright-related issues as particularly concerning:

- The many layers of IP protection that the recreation of an object in a VR environment involves.
- The difficulty that recreating an existing work into a new immersive experience does not involve a one-on-one copy of the original, but sometimes requires a full (re)adaptation of the work.
- The responsibilities of using a work containing archival film footage in social media distribution.
- The uncertainty surrounding the appropriation of material when it comes to coining and minting cryptoart through non-fungible tokens (NFTs). What an artist is selling through NFTs is merely a registration, not the right to the image. So it is merely a transaction of value, not of copyright. The question is whether the blockchain can also provide for a cleaner and more transparent way of transacting copyright.
- The different conditions under which creators/curators can legally engage with different types of materials in the collections of audiovisual archives in the Netherlands (e.g. orphan films, public domain works, amateur or home movies, etc.) and how the archives can provide access to those materials with permission of the rights holders involved.
- The aggravation of copyright issues when it comes to audiovisual works from foreign countries, where the legal framework can be different. Also, when it concerns films created under former regimes, such as in the former USSR, many production companies do not exist anymore, which makes it nearly impossible to identify who owns the rights in those films.
- In general: the lack of knowledge about all legal ins and outs of copyright, which for creators and curators is a complex legal area that is not always easy to comprehend.

Following the round of introductions, an inventory was made of the issues that the participants consider to be the most pressing concerns faced by the sector. Based on the introductory comments, the main issues were summarized as follows:

- Access problems
- Does creating an immersive experience actually amounts to a reproduction?
- Deciding between rights clearance and relying on exceptions and limitations
- Using immersive experience and ethical and moral rights considerations
- Social media distribution/distribution in general
- Archiving of immersive experiences

In order to bring these issues down to the three most pressing concerns faced by the sector, which is in line with the approach taken in the other workshop, in this report, the six issues identified above have been



regrouped according to the same categorization that was agreed upon in the UK workshop on immersive digital heritage. In general, the problem of access very well fits the category of identifying, contacting and negotiating with rights holders; the second and third issues can well be treated under the heading 'knowing whether your use is fair/lawful or not'; and the last three issues clearly fall within the scope of responsibilities (for infringement and preservation). Accordingly, the report commences with an elaboration of the issues along the following themes:

1. Identifying, contacting and negotiating with rights holders
2. Knowing whether your use is fair/lawful or not
3. Responsibilities (for infringement and preservation)

After a short break, the discussion focussed on each of the three areas of concern identified by participants. The main issues discussed under each area are reported below.

### 3.2.1 Identifying, contacting and negotiating with rights holders

The participants indicated that they all encountered or are familiar with several issues that have to do with access to audiovisual material for reusing it in immersive experiences. They either personally faced these issues in their capacity as a creator/curator of immersive experiences or have experience in access issues as a gatekeeper of the collections of a large audiovisual archive in the Netherlands.

A common problem that creators and curators experienced is the difficulty of identifying and/or contacting rights holders of the films and other types of protected materials that they want to reuse in their creations. For archival films, information to establish the copyright status is often lacking. It is not always known who owns the rights to those materials. If no rights holder can be identified or no contact with the rights holder can be established, it is clearly impossible to seek permission to reuse the material. A related problem of legal uncertainty occurs when rights are claimed by different parties and there is no clear chain of title. A further access issue may arise when a foreign producer owns the rights in a film. As one participant explained, if an artist needs stills from an international film of which the film archive only has distribution copies, the artist or the film archive may need to contact the producer to search for the best prints. Experience shows, however, that it may be difficult to get in touch with the producer. Major American studios do not always answer and it is hard to find the right contact person to ask for the prints and clear the rights.

A different issue identified by the participants is when a creator/curator needs access to a broad range of audiovisual works to produce an immersive experience. This is the case, for example, when large amounts of works are needed as input for an immersive experience powered by AI. In such a case, clearing the rights to all these works or asking permission to access each individual work from the film archive can be too time consuming. The only viable option for the creator/curator is then to seek collaboration with the film archive to carry out the project. However, such collaborations are not very common and depend on the nature of the project. Often, film archives are reluctant to give access to large amounts of works in their collections, because these works often represent a lot of value (e.g. for their digitisation and preservation).

Film archives, moreover, can only provide limited relief to creators/curators who want to reuse materials in their collections. Film archives act mostly as guardians of audiovisual collections; they are not necessarily the rights holders of the works contained therein. Film archives thus take an 'in between' position, having to leverage between rights holders and users of their collections. This sometimes puts them in a difficult position. This manifests itself, for example, in the provision of access to materials. When it comes to making their film collections available and searchable to improve accessibility, some rights holders object to the inclusion of their works in online databases; others object to making (previews of) their works accessible online. This may prevent collections of film archives being made available online, which raises the question: if a collection is not searchable online, how accessible is it? According to one participant, it would have true positive effects for rights holders if they would give permission to make their works accessible online. Free



access to works can have a 'shop window'-function. If material can be freely accessed and viewed online, this may attract creators or commercial parties who want to use it for commercial purposes, in which case they will have to ask for a high resolution version of the work without watermark. A freely accessible online version of a work may thus spark a broader interest and lead to a wider spread of the work.

Film archives can also be an important first reference point to establish contact between a creator/curator and rights holders, who will set the conditions under which the work can be reused. When it concerns a protected work for which rights need to be cleared, the film archive can sometimes help creators/curators with contact details of the rights holders. For amateur films, film archives cannot provide contact details, but they can help by directly contacting these rights holders. Other than providing users of their collections with contact details of rights holders, film archives may require users to make an effort in contacting the rights holders, to record this effort and to indemnify the archive for claims that may arise from the creative reuse of orphan works in the collections of the archive. When users do not contact the rights holder or when they distribute or reproduce a work in a way that does not align with the agreed conditions of the use of the materials, there is a breach of contract. However, film archives usually do not have the resources to follow up on a breach of contract. Ultimately, film archives aim to ensure that their collections can be used widely, while keeping good relationships with rights holders of the works that are available in their archives.

One participant noted that archivists and rights holders sometimes respond differently to requests to reuse archival film footage, cautioning that subjective standpoints should not inform access decisions. Whereas the one person might really like a certain reproduction or adaptation to be made, the other person might not. It is difficult to predict, therefore, what the outcome is of a request to reuse archival material.

For film archives, however, reputational issues may also play a role when responding to requests to reuse archival film footage. When a film archive with permission of rights holders gives a creator/curator access to materials in its collection for creative reuse in an immersive experience, it is important that the rights holders and the general public understand that it was the creator/curator and not the film archive who has been tempering with the film footage. Otherwise, this could damage the film archive's credibility.

The participants also flagged a number of circumstances that may exacerbate access problems. First, there clearly is a knowledge gap, especially for beginning creators/curators, who are not always aware of which materials are available for reuse and, if they have identified the material they want to reuse, they do not always know how to access it. The Dutch Network for Digital Heritage (*Netwerk Digitaal Erfgoed*) has also recognized this as a problem. Second, during the covid-19 pandemic, it was often impossible to get physical access to the collections of film archives, but this will probably be resolved once the restrictions are lifted. Third, access to material that is archived outside of the Netherlands can create specific problems. While in the Netherlands, a lot of material is digitised and available (under certain conditions), this is not the case in every (European) country. Often, creators/curators must physically travel there to get hold of the material. However, even in the Netherlands, a good quality print/copy is not always readily available.

### 3.2.2 Knowing whether your use is fair/lawful or not

As indicated above, the participants essentially voiced two concerns that fall within the broader theme of the fairness/lawfulness of reusing audiovisual works in new immersive experiences. First, creators/curators feel legally uncomfortable when they need to digitally recreate an existing work in order to produce a true immersive experience. Rather than making a one-on-one (digital) reproduction, they must reverse engineer the work in all its elements to be able to recreate it in a virtual environment. Second, legal uncertainty can arise when creators/curators are confronted with the question of whether to clear the rights or to rely on an exception or limitation. These two issues are discussed separately below.

#### *Digital recreation of an audiovisual experience*



The participants explain that, to create an immersive experience, it is sometimes necessary to make “virtual” reproductions of existing physical objects that are available in the collections of film archives. Although the original work may be part of the collections and creators/curators have access to it, it is not always suitable for direct one-on-one reuse in a new immersive format. This is particularly so for objects that are recreated in a virtual environment. In contrast to incorporating archival film footage into a documentary film, which at most involves a step of digitisation, an experience cast in an audiovisual work cannot simply be transformed into VR by a simple act of reproduction (except for the sound recording, which in digital form can typically be reused in a direct manner). To realistically recreate an experience in a virtual environment, the experience needs to be fully reverse engineered from the different elements of which the existing work is comprised. This means that for a creator/curator of a VR experience, the design engineering challenge comes first and the copyright question only comes second. However, the creator/curator is nevertheless required to touch upon the existing work in so many different ways other than the mere copying of it. This can bring creators/curators outside of their comfort zone of what is legally permissible and what is not.

The participants explained that, legally speaking, this feels like uncharted territory for them. They are not sure whether what they are doing qualifies as a breach of copyright, since they do not make a one-on-one reproduction but try to approach the reality as close as possible to create a sense of realism. In this respect, one participant draws a comparison with the practice of using drawings from stills of audiovisual material instead of making direct one-on-one copies. This is seen as a ‘safer’ choice, but also entails risks of infringing upon the audiovisual materials, as the genesis of the works is still captured in the drawings.

What further complicates this matter are the many layers of IP protection that the recreation of an object in a VR environment involves. One of the participants referred to the above-mentioned example of the virtual recreation of the performance by the singer-in-costume, of which a videotape is part of the collection. What is recreated there is not only the design of the costume and the performance of the musical work, but also the set design, etcetera. These items, which can be protected under various regimes of IP protection, all need to reappear in the virtual representation of the event. Indeed, to produce a true immersive experience for the user, it is the full experience that must be replicated in the 3D responsive digital environment.

#### *Clearance or relying on exceptions and limitations*

Clearing rights is not necessary when a user can rely on an exception or limitation. However, it is not always entirely clear when a copyright exception or limitation applies. The participants indicated that they use both the strategies of relying on copyright exceptions or limitations and of clearing the rights.

One participant suggested that the question of whether to clear rights or to rely on exceptions or limitations depends on whether a work is created for commercial purposes (i.e. for a client) or made freely for artistic purposes. In general, creators/curators will want to ensure to have cleared all the rights in their commercial work, but they may feel more freedom to rely on exceptions and limitations in their own artistic work.

Other participants indicated that they sometimes rely on copyright exceptions or limitations, depending on a cost/benefit analysis. They emphasized that exceptions and limitations also come with costs. Sometimes it is actually more time-consuming (and potentially more costly) to rely on exceptions and limitations than to clear the rights. For projects that are co-produced by the audiovisual cultural heritage institution for which they work, standardized IP procedures must be followed to operationalize safeguards. Flow charts must help them to make decisions about clearing rights or relying on exceptions or limitations. Among the factors that are relevant in this regard is the possible negative impact that the use of exceptions or limitations may have on the relationship with rights holders. To assess this impact, the efforts of making a fair quotation of works (e.g. is the use proportional and enforcing the point you are trying to make?) must be weighed against the efforts of contacting the rights holders with which the institution has an established relationship and who will likely give permission to use the work. To keep the relationships good, rights holders are often asked for permission even if an exception or limitation applies. When it is uncertain if rights holders will give permission for a certain use, which is deemed of high relevance to the institution, e.g. use in an exhibition or online video



production, exceptions or limitations may be relied upon in order not to be dependent on the permission of the rights holder.

The participants acknowledged that when a creator/curator requests access to material in the collections of film archives to be used under an exception or limitation, it is the legal responsibility of the creator/curator to check compliance with the legal conditions of use. However, this can be a grey area and film archives may be cautious to grant such access if they are unsure about the legality of the intended use. When it is clear that a project falls under the quotation right, film archives should not ask for rights clearance.

### **3.2.3 Responsibilities (for infringement and preservation)**

The issue of responsibilities (for infringement and preservation) came up several times during the discussions, in a number of ways. The participants mentioned and discussed responsibilities associated with the use of immersive experience, the online or social media distribution of (outputs generated by) immersive creations and the archiving of immersive experiences. These three issues are discussed separately below.

#### *Using immersive experience and ethical and moral rights considerations*

The participants pointed out that creating an immersive experience in which users are invited to an (illusory) environment where they can interact with existing materials or navigate and fully engage with a recreated “real life” experience may also confront them with ethical dilemmas, in particular when users in the virtual environment behave in an inappropriate manner. Other than ethical considerations, the participants fear that the use may also conflict with the moral rights of authors whose works are used to create the immersive experience, especially if a user behaves in such a manner that this would result in an impairment of the work that could be prejudicial to the honour or reputation of the author or to his dignity as an author.

An example that was mentioned in this respect is the above-mentioned case in which a musical performance of a famous artist in a TV show is reproduced and translated into a digital responsive environment. Users of this immersive experience are invited to enter the virtual environment as the performing artist, literally being on the set in the costume of the artist, allowing them to virtually redo the show in their own unique fashion. In this case, given that the immersive experience is reactive, users can adapt the situation by their behaviour. This can be normal behaviour, but also ethically ambiguous or offensive behaviour. If the user experience is then recorded and reproduced, for example in the form of a video or photo, this can circulate and be further distributed. Rights holders of works appearing prominently in the immersive experience, such as the TV show, the costume, the music and the musical performance, might object to their works being used in this context. Creators/curators of immersive experiences are uncertain about the legal responsibilities that they may face when their creations are used in an impertinent manner by users of the experience. The participants agreed that it is difficult to regulate this type of behaviour and avoid these risks.

#### *Distribution*

The participants also expressed some concerns in respect of the online distribution of their creations and of the recordings of users enjoying an immersive experience. In general, they have the feeling of losing control over their creations once they make them available online. The participants indicated that once a creation is “out there”, they feel like it is very vulnerable to use and reuse and it becomes hard to keep track of what is done with it. One participant suggested that NFTs or blockchain technologies could perhaps be used to solve the problem of tracking a creation online and arranging permissions. Another participant recommended that things could be done to improve education for creators/curators and to teach them best practices.

The participants further acknowledged that online distribution can be problematic when they have to clear the rights for the entire world. In general, the larger the territory in which a work is made available, the higher the licensing fee a creator/curator has to pay for the (re)use of material in their creations. In cases of online



use, the licensing fee could potentially be so high that a production becomes prohibitively expensive, even though the content might only be directed at a small territory. One participant suggested that this problem could be mitigated if the actual use is taken as the basis for calculating the licensing fee (e.g. that a reduced fee is applied when an online license is granted for a small web page with only limited views).

One participant pointed out that publishing an immersive creation containing archival film footage on social media also brings responsibilities for creators/curators. There appear to be certain accepted practices, such as giving attribution by ‘tagging’ the original author, but this is not always done consistently and there surely is not an official standard of how to do things right. Also, tagging a person is sometimes impossible, e.g. when the author is no longer alive or when the work does not belong to a natural person but to an agency.

#### *Archiving of experience*

Further responsibilities may arise when creators/curators want to archive or store their immersive creations or the outcomes of the immersive experiences in a publicly accessible database. One participant explained that the experimental films that were generated with the use of AI by the above-mentioned filmmaking have all been archived and made available online. These films incorporate a large body of pre-existing films from the collections of a large audiovisual cultural heritage institution in the Netherlands. For other types of output produced by immersive creations, such as the recordings of users enjoying an immersive experience, it is not only the pre-existing works that are stored and made available, but also the personal images of users, which may have legal consequences of its own. Another participant expressed the idea that education could be of use and considered developing a masterclass on archiving for creators/curators.

The participants emphasized that, in the future, more and more works will be transferred to the digital space. It is expected, therefore, that creators/curators will more often encounter legal issues as described above.

## **4 Positioning the issues identified within the national legal frameworks**

### **4.1 The legal framework in the UK**

The UK Copyright, Designs and Patents Act 1988 (CDPA) offers a range of fair dealing exceptions that documentary filmmakers and curators of immersive experiences can rely on to use protected content. These include criticism or review<sup>6</sup>; quotation<sup>7</sup>; caricature, parody or pastiche<sup>8</sup>; and, to a certain extent, illustration for instruction<sup>9</sup> and research and private study<sup>10</sup>.

The two documentary filmmakers who reported use of protected content under exceptions relied primarily on fair dealing for the purpose of criticism or review for distribution in the UK, and on the fair use doctrine in the USA. Both participants demonstrated a good level of practical knowledge around the application criteria of Section 30(1) CDPA. They recognised the requirements of providing sufficient acknowledgement of the work (“proper on-screen credits”); engaging with the content being used through review or critique (“if you’re using a clip from a movie [...] to analyse it or comment on it and critique it, in voiceover or in interview, or somebody saying something before it or over it, or after it, then that’s a fair use situation”); using published works<sup>11</sup>; and using only “as much as you need”.<sup>12</sup> The participant with extensive experience

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<sup>6</sup> Section 30(1) CDPA.

<sup>7</sup> Section 30(1ZA) CDPA.

<sup>8</sup> Section 30A CDPA.

<sup>9</sup> Section 32 CDPA.

<sup>10</sup> Section 29 CDPA.

<sup>11</sup> One of the application criteria of Section 30(1) CDPA is that “the work has been made available to the public”.

<sup>12</sup> In the context of criticism or review and film in the UK, one decision of note is *Time Warner Entertainments Company LP v Channel Four Television Corporation* [1994] EMLR 1. The case involved a TV programme that included a thirty-minute segment about the withdrawal of Stanley Kubrick’s *A Clockwork Orange* from exhibition to the public in the UK. Commenting on the total



of using works under exceptions understood that fair dealing operates differently depending on the type of work being used: they argued that “you can’t fair deal the music” and “it’s almost impossible to fair deal photographs”.<sup>13</sup> However, concerns around the use of music and photographs were mainly due to the litigiousness of some rights holders in those sectors.

Criticism or review seems the most suitable exception to accommodate the uses of archive films discussed by the documentary filmmakers who participated in the workshops. They often engage with protected content through commentary or review, either with voice-over, text on screen, interviewees’ comments, or by “juxtaposing image with image”. However, as discussed above, most participants do not rely on exceptions due to the uncertainty around their applicability and the standard contractual practice of funders and broadcasters who require rights clearance in any third-party material included in the films they fund or broadcast. Under UK copyright law, most fair dealing exceptions – including “quotation” and “caricature, parody or pastiche” – cannot be overridden by contract.<sup>14</sup> Therefore, from a legal perspective, documentary filmmakers would not be bound by contractual terms that prevent them from relying on these exceptions. Nevertheless, in practice, filmmakers can rely on fair dealing insofar as funders, broadcasters, distributors and sales agents are willing to support it.

None of the participants of the UK immersive digital heritage workshop reported use of copyright works under exceptions. Curators and creators of immersive experiences tend to use protected content for creative, artistic and experimental purposes rather than to review or comment on it. Under UK copyright law, these uses of copyright works can be accommodated by the exceptions for quotation and for caricature, parody or pastiche. Unlike criticism or review, these exceptions have been introduced in UK law in 2014 only and have not been tested in UK courts yet. Recent scholarship suggests that the scope of application of these exceptions is very broad. Section 30(1ZA) CDPA allows the use of a quotation from any type of work “whether for criticism or review *or otherwise*”. The open-ended quotation exception can therefore permit creative, artistic and experimental uses of audiovisual material (e.g. experimenting with various films before deciding which ones are going to be used in the immersive experience), irrespective of the purpose of the use. As it has been noted, the scope of the quotation exception also depend on how the term “quotation” is understood across different creative and cultural sectors<sup>15</sup>, including documentary filmmaking and immersive digital heritage.

Section 30A CDPA is not open-ended but the prescribed purposes themselves – caricature, parody and pastiche – are creative, artistic and experimental. By permitting fair dealing for the purpose of “pastiche” without requiring attribution,<sup>16</sup> the exception seems particularly apt to cover some of the uses of audiovisual

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length of the clips used in the programme, Lord Justice Neill found that there was “great force in the comment [...] that serious criticism of a film requires that you spend sufficient time showing the film itself. It is also to be remembered that though the clips were shown during a substantial part of the programme, they were accompanied by voices over which contained comments and criticisms by those taking part in the programme”. He said he had “come to the firm conclusion that this programme does not go beyond the bounds of fair dealing by reason of the length of the excerpts from the film.”

<sup>13</sup> Since 2014, most fair dealing exceptions in the UK copyright act apply to all types of copyright works. The only UK fair dealing exception that does not apply to all types of works is Section 30(2) CDPA (“reporting current events”), which does not apply to photographs.

<sup>14</sup> Section 30(4) and Section 30A(2) CDPA – in relation to the exception for quotation and that for caricature, parody or pastiche respectively – state that “To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable.”

<sup>15</sup> Aplin, T., & Bently, L. (2020). *Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyright Works* (Cambridge Intellectual Property and Information Law). Cambridge: Cambridge University Press. See also Bently, L. (2020). *Quotation in Film and TV*. CREATE Working Paper 2020/8. Aplin and Bently shed further light on the meaning of quotation empirically by examining how the term is *used* (rather than defined or analysed) in a variety of cultural contexts, including art, film, music and architecture. They also review and criticise recent judgements of the Court of Justice of the European Union (CJEU) concerning the quotation exception – Case C-476/17 Pelham GmbH v. Hütter EU:C:2019:624; and Case C-516/17 Spiegel Online GmbH v. Volker Beck, EU:C:2019:625 – for adopting the textual paradigm to interpret the quotation exception.

<sup>16</sup> Section 30A is the only fair dealing exception in the CDPA that does not require to provide “a sufficient acknowledgement”.



materials discussed by curators and creators of immersive experiences. Hudson (2017) has argued that Section 30A has given the UK “a defence covering mash-ups, fan fiction, music sampling, collage, appropriation art and other forms of homage and compilation”.<sup>17</sup> The Tate Gallery seems to agree with the argument. Between September 2018 and January 2019, Tate Modern screened Christian Marclay’s *The Clock* (2010), a looped 24-long montage of thousands of uncleared clips. According to the Tate, “it is undoubtedly a pastiche (in the sense of appropriating extracts of existing material to create a new work) and, like other pieces in our collection, we now can therefore share it confidently with our public. There is a huge body of ‘appropriation art’ which could now benefit from this exception”.<sup>18</sup>

While criticism or review seems to cover the uses of protected content made by documentary filmmakers, and quotation and caricature, parody or pastiche those made in the immersive digital heritage community, all three exceptions are available to both communities depending on the context of the use. Some of the uses discussed by creators of immersive experiences may also be allowed by the exception for illustration for instruction and that for research and private study (e.g. “3D productions led by students”). However, these exceptions do not seem suitable for documentary filmmakers who do not want their films to “lose commercial viability”, as both exceptions allow fair dealing for non-commercial purposes only.

## 4.2 The legal framework in the Netherlands

In the Netherlands, the *Auteurswet* (Dutch Copyright Act; DCA)<sup>19</sup> and the *Wet op de naburige rechten* (Dutch Neighbouring Rights Act; DNRA) set the parameters within which documentary filmmakers and curators of immersive experiences can reuse existing content of others in their creations. In general, the reuse of existing content involves different acts restricted by copyright or neighbouring rights. The incorporation of works into a documentary film or an immersive experience implies the making of a copy, which normally requires the consent of the rights holders concerned, except when the subject matter is in the public domain or the act of reproduction is covered by an exception or limitation. Likewise, permission of the rights holders of pre-existing content is required for the communication or making available to the public of a documentary film or an immersive experience in which protected content of others has been incorporated.<sup>20</sup>

The reproduction right is broadly phrased and includes both direct copying of materials and “any partial or total adaptation or imitation in a modified form which cannot be considered as a new, original work”.<sup>21</sup> The test to determine whether a borrowing of existing material amounts to a reproduction in a legal sense is if the part reproduced expresses the author’s own intellectual creation and thus reflects the originality of the work concerned.<sup>22</sup> In other words, if the copyright protected features of a pre-existing work are recognisably reproduced into another work,<sup>23</sup> this legally falls under the exclusive reproduction right and requires the prior consent of the rights holder. To respond to the question about the legal uncertainty expressed by one of the participants in the workshop for immersive cultural heritage curators in the Netherlands, a representation of an existing work in a VR environment will amount to a reproduction in a legal sense if the copyright protected features of the work are recognisably reproduced in the VR experience. In such a case, it does not matter if the representation requires a completely new engineering effort and not a direct copying.

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<sup>17</sup> Hudson, E. J. (2017). The Pastiche Exception in Copyright Law: A Case of Mashed-Up Drafting? *Intellectual Property Quarterly*.

<sup>18</sup> Tate Gallery, Response to UK Intellectual Property Office Consultation on Impact of Hargreaves Reforms (2019).

<sup>19</sup> For an English language version of the relevant provision in the DCA, see Van Eechoud, M.M.M, Hendriks & James Legal Translations (2015). *The Dutch Copyright Act : Including the Copyright Contract Act* (2015). Amsterdam: deLex.

<sup>20</sup> The right of disclosure to the public is contained in art. 12 to 12b DCA and in art. 2, 6, 7a and 8 DNRA; the right of reproduction is contained in art. 13 to 14 DCA and in art. 2, 6, 7a and 8 DNRA.

<sup>21</sup> Article 13 DCA.

<sup>22</sup> Case C-5/08 *Infopaq International A/S v. Danske Dagblades Forening*, ECLI:EU:C:2009:465, paragraph 48.

<sup>23</sup> HR 5 januari 1979, ECLI:NL:HR:1979:AB7291, NJ 1979/339, m.nt. L. Wichers Hoeth (*Heertje v. Hollebrand*).



The legal framework is not fully exclusionary, though. The law provides documentary filmmakers and curators of immersive experiences with a number of exceptions and limitations that they can rely on to reuse existing content, including quotation for criticism or review<sup>24</sup>; and parody, caricature or pastiche.<sup>25</sup>

In general, documentary filmmakers and curators of immersive experiences who reported use of protected content under exceptions and limitations relied primarily on the quotation exception. This exception permits “quoting from a literary, scientific or artistic work in an announcement, review, polemic or scientific treatise or a piece with a comparable purpose” under specific conditions set by law: (1) the work quoted from must have been lawfully disclosed to the public; (2) the quotation must be “in accordance with what is generally regarded as reasonably acceptable” and the number and size of the quoted parts must be justified by the purpose to be achieved; (3) the moral rights of the author must be respected; and (4), the source, including the author’s name, must be clearly indicated, insofar as this is reasonably possible.<sup>26</sup>

The quotation exception covers quotations of text, images, audiovisual works, and implicitly also quotations of sound.<sup>27</sup> Importantly, to be legally permissible under the exception, a quote must be related to the context of its use. According to Spoor, Verkade & Visser, the quote must be “integrated into the context” in which it is placed.<sup>28</sup> This implies that there be a substantive connection between the work quoted and the context in which it is quoted. Therefore, the mere decorative use of a work is not a quotation within the meaning of the quotation exception.<sup>29</sup> At the same time, this substantive connection is not an overly strict criterion. Spoor, Verkade & Visser explain that quoting an image or a text that is somewhat “representative” for e.g. a larger exhibition or as a motto above a book chapter may be permitted under the quotation exception. This applies even if the quote in question is not reviewed or commented on later in the book.<sup>30</sup> This may give some room for documentary filmmakers and curators of immersive experiences who engage with protected content through commentary or review in a somewhat looser way, as long as this broadly occurs within the realm of “an announcement, review, polemic or scientific treatise or a piece with a comparable purpose”.<sup>31</sup>

The quotation exception contains a kind of proportionality test: the quote must be in accordance with what is permitted by the rules of social intercourse and the number and size of the quoted parts must be justified by the purpose to be achieved. These are relatively vague standards, which require documentary filmmakers and curators of immersive experiences who want to reuse works under this exception to assess on a case-by-case basis whether the scope of the quote is proportionate to its intended purpose.<sup>32</sup> They also need to observe the requirement of prior lawful disclosure to the public of the work. This may be an issue especially where documentary filmmakers or curators of immersive experiences want to reuse archived film footage or amateur videos, of which it can be uncertain whether they have ever been publicly disclosed before.<sup>33</sup>

Other than the quotation exception, documentary filmmakers and curators of immersive experiences might potentially also rely on the exception for parody, caricature or pastiche, depending on the purpose for which they intend to use an existing work.<sup>34</sup> A parody must essentially evoke an existing work while being noticeably different from it and constitute an expression of humour or mockery.<sup>35</sup> This does not fit most documentary

<sup>24</sup> Article 15a DCA and art. 10 sub b DNRA.

<sup>25</sup> Article 18b DCA and art. 10 sub j DNRA.

<sup>26</sup> Article 15a DCA. These conditions apply mutatis mutandis under art. 10 sub b DNRA.

<sup>27</sup> Spoor, J.H., Verkade, D.W.F., Visser, D.J.G. (2019). *Auteursrecht, portretrecht, naburige rechten en databankenrecht*, 4th ed (Recht en Praktijk, IE2). Deventer: Wolters Kluwer, at 278.

<sup>28</sup> *Id.* 278.

<sup>29</sup> HR 26 juni 1992, ECLI:NL:HR:1992:ZC0647, *NJ* 1993/205, m.nt. D.W.F. Verkade (*Damave v. Trouw*).

<sup>30</sup> Spoor, J.H., Verkade, D.W.F., Visser, D.J.G. (2019). *Auteursrecht, portretrecht, naburige rechten en databankenrecht*, 4th ed (Recht en Praktijk, IE2). Deventer: Wolters Kluwer, at 279.

<sup>31</sup> Article 15a DCA and art. 10 sub b DNRA.

<sup>32</sup> Spoor, J.H., Verkade, D.W.F., Visser, D.J.G. (2019). *Auteursrecht, portretrecht, naburige rechten en databankenrecht*, 4th ed (Recht en Praktijk, IE2). Deventer: Wolters Kluwer, at 285.

<sup>33</sup> *Cf. id.*, par. 5.21.

<sup>34</sup> Article 18b DCA ; art. 10 sub j DNRA.

<sup>35</sup> Case C-201/13 *Deckmyn v. Vandersteen*, ECLI:EU:C:2014:2132, paragraph 20.



films and immersive experiences, which reuse existing works not to express humour or mockery. The terms “caricature” and “pastiche”, on the other hand, have not yet been authoritatively defined in court decisions. Looking at the usual meaning of these terms, a caricature can be defined as a “mockery, cartoon, particularly effective through comic exaggeration”, and pastiche as a “piece of work in imitation style”.<sup>36</sup> In contrast to a parody, a pastiche does not mock but rather pays homage to the work it imitates.<sup>37</sup> Pastiche seems to be an art style that many documentary filmmakers and curators of immersive experience understand and possibly also apply every now and then. It is uncertain whether this understanding of “pastiche” also corresponds to the legal definition of the term, but if it does it would give documentary filmmakers and curators of immersive experience quite some leeway to reuse existing works as pastiche in their own works. The only condition that must be met when this exception is relied upon is that the use must be “in accordance with what is generally regarded as reasonably acceptable” for a work to be used as a pastiche.<sup>38</sup> In analogy to the existing case law on parody and taking into account the ordinary meaning of pastiche, this seems to imply that the pastiche must essentially evoke an existing work while being noticeably different from it, while having the effect of celebrating or paying respect homage to the work, its author or an entire genre by imitating the style, manner or characteristics of the work.<sup>39</sup> This suggests that this exception is only applicable where a creator uses the pre-existing work in a somewhat transformative way and does not merely copy it one-on-one. On the other hand, as is apparent from the leading case law on parody, it seems not to be required that the pastiche should display an original character of its own, other than that of displaying noticeable differences with respect to the original work used to create the pastiche.<sup>40</sup> It also does not seem to be required that the pastiche could reasonably be attributed to a person other than the author of the original work itself, that it should relate to the original work itself or that it should mention the source of the work used to create the pastiche.<sup>41</sup>

As far as portrait rights are concerned, the law distinguishes between portraits commissioned by or on behalf of the person portrayed, or for his or her benefit (Articles 19-20 DCA) and portraits made without the author having been commissioned by or on behalf of the person portrayed, or for his or her benefit (Articles 21 DCA). The term “commissioned” implies that the author has been ordered to and is paid for making the portrait.<sup>42</sup> Other than requiring the permission from the author of the image for copyright relevant use, documentary filmmakers and curators of immersive experiences who engage in reproducing and making available to the public portraits may also need the consent of the persons portrayed or, (for ten years) after their death, their next of kin, depending on type of portrait and the circumstances of use. For commissioned portraits, such as old family portraits cast on (moving) images, such consent is required until ten years after the death of the person(s) portrayed.<sup>43</sup> For portraits that have not been commissioned, such consent is only required if there is a “reasonable interest opposing disclosure” on the part of the persons portrayed or, after their death, one of their relatives.<sup>44</sup> Thus, when using non-commissioned portraits, documentary filmmakers and curators of immersive experiences must always consider whether the person portrayed may oppose publication on the grounds of his or her portrait rights. This is especially, but not exclusively, the case when a portrait is used in a controversial context, e.g. when the use endangers the person portrayed, puts him or her under ridicule or contempt, (excessively) exposes a person in an erotic or sexual context or unwelcomely identifies him or her

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<sup>36</sup> Retrieved through the online dictionary, <https://www.vandale.nl/opzoeken>.

<sup>37</sup> Hoesterey, I. (2001). *Pastiche: Cultural Memory in Art, Film, Literature*. Bloomington: Indiana University Press, at 1.

<sup>38</sup> Article 18b DCA ; art. 10 sub j DNRA.

<sup>39</sup> Case C-201/13 *Deckmyn v. Vandersteen*, ECLI:EU:C:2014:2132, paragraph 20.

<sup>40</sup> Id. paragraph 21.

<sup>41</sup> Id. paragraph 21.

<sup>42</sup> Spoor, J.H., Verkade, D.W.F., Visser, D.J.G. (2019). *Auteursrecht, portretrecht, naburige rechten en databankenrecht*, 4th ed (Recht en Praktijk, IE2). Deventer: Wolters Kluwer, at 369.

<sup>43</sup> Article 20 DCA.

<sup>44</sup> Article 21 DCA.



with a particular disqualifying or politically charged context.<sup>45</sup> Furthermore, portrait rights may prevent the use of a portrait in a purely commercial context, such as for trade or advertising.<sup>46</sup>

## 5 Conclusions

The four workshops conducted for *Developing Best Practice Codes for Creative Audiovisual Reuse* have generated an interesting picture of the copyright-related issues and concerns faced by documentary filmmakers and by curators and creators of immersive experiences in the UK and the Netherlands. The lawful reuse of protected audiovisual content is problematic for both sectors in both jurisdictions. Rights clearance is often prohibitively time-consuming and expensive for these communities, preventing films and immersive experiences from being created or released, or affecting their quality. The difficulty of ascertaining ownership of works and of identifying and contacting rights holders, high and inflexible licensing fees, litigiousness of rights holders and unpredictability of rights holders' reaction to requests for reuse were identified as core concerns by both communities in the UK and the Netherlands. Getting permission from copyright owners is particularly challenging for curators and creators of immersive experience who need to access and use a large amount of protected works for technical (e.g. AI) projects or creative reasons (to experiment with a variety of materials before selecting what to use). Documentary filmmakers find it unfair having to pay high commercial licensing fees to use clips in culturally valuable films that generate little profit, especially when it is unclear whether the person or organisation requesting the payment is entitled to do so.

Use of protected content under UK or Dutch exceptions is not so common in both communities. Participants ascribed their reluctance to rely on exceptions to legal complexity, limited awareness and understanding of permitted uses, uncertainty around their interpretation and applicability, and lack of resources and support. Funders, broadcasters, distributors and archival institutions often require rights clearance of all the materials used in the works they support. For documentary filmmakers, this often entails having to "clear" out of copyright works too (e.g. buying a licence from Getty Images). As a result, most participants consider rights clearance and the public domain (when this is easy to determine, e.g. with very old materials) as the only viable options to create archive-based works that can be exploited fully and safely.

Exceptions seem to be available only to those who can afford them. The few participants who use copyright works under exceptions do so with legal support, either internal (e.g. legal expert within a cultural heritage organisation) or external (e.g. by a lawyer in the form of an opinion letter underpinning an Errors and Omissions insurance).

Documentary filmmakers and creators and curators of immersive experiences have different ambitions in terms of exploitation of their work. Documentary filmmakers, even though they often create work that has cultural rather than commercial value, do not want their films to lose commercial viability in the long term. Creators of immersive experiences often exploit their work for a limited period of time only (e.g. in gallery exhibitions or touring shows), but still want their work to be preserved and made available online. In this respect, all participants expressed concerns around cross-border uses and the territoriality of copyright law. Clearing rights in perpetuity for international distribution is in most cases prohibitively expensive for both communities. Even when use of works under exceptions is backed by Errors and Omissions insurances, these tend to cover only certain territories such as the UK and the US, leaving the creators exposed to legal action in other jurisdictions. However, in practice, use of materials under exceptions is rarely challenged.

Largely, documentary filmmakers and creators and curators of immersive experiences in the UK and the Netherlands share similar issues and concerns in relation to copyright and the lawful reuse of protected

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<sup>45</sup> Spoor, J.H., Verkade, D.W.F., Visser, D.J.G. (2019). *Auteursrecht, portretrecht, naburige rechten en databankenrecht*, 4th ed (Recht en Praktijk, IE2). Deventer: Wolters Kluwer, at 393.

<sup>46</sup> Id. at 408.



materials. Community-specific and jurisdiction-specific issues are outlined in the corresponding sections of this report.

### *Next steps*

This report concludes the first stage of the project *Developing Best Practice Codes for Creative Audiovisual Reuse*, which was aimed at mapping the copyright related issues faced by documentary filmmakers and by creators and curators of immersive experiences in the UK and the Netherlands. The next steps of the project will be to engage in formal deliberation exercises using social science standards to identify shared principles and acceptable norms within these communities; and to draft sector-specific codes of best practices that reflect such principles and norms.

The project is already having impact on the UK documentary film community. On 16 July 2020, the researchers presented the *ReCreating Europe* project at the focus group “Archives and Fair Use”, organised by the University of West England (Bristol) as part of the UK Feature Docs (UKFD) initiative. The focus group was part of an extensive consultation process with UK featured documentary filmmakers which resulted in the publication of the policy report *Making It Real: A Policy Programme for UK Independent Documentary Film*<sup>47</sup>. The report outlines a new policy programme for the UK documentary film sector and, following our recommendation, it includes “Develop a code of practice for fair use” among its proposals for the UK documentary film industry. A new UKFD Screen Heritage Working Group has been set up to enact this proposal in collaboration with *ReCreating Europe*.

Participants of the first four workshops identified and discussed two of the main challenges that the project will face in its next steps. One challenge is the danger that by standardising and encouraging certain practices, the codes may signal that other practices are questionable. Another is that both creative practice and copyright law change over time, which makes it difficult to draft future-proof codes of best practices. The deliberation exercises will be designed to respond to these as well as other theoretical challenges identified by scholars, with a view to drafting codes of best practices that are sufficiently “certain, representative and aspirational”.<sup>48</sup>

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<sup>47</sup> Presence, S., Quigley, A., Spicer, A. (2021). *Making It Real: A Policy Programme for UK Independent Documentary Film*. Available to download at the URL (18 June 2021): <https://ukfd.org.uk/policy-reports/>

<sup>48</sup> Aplin and Bently (2020), in the context of the quotation exception, recognise that “while customs surrounding quotation could in theory inform the notion of ‘fair’ practice, there are major challenges associated with this approach. Courts would need to scrutinise any quotation guidelines or practices carefully to ensure that they were sufficiently certain, representative and aspirational and to evaluate their impact”. The authors refer to the work of Jessica Rothman, who argues that customs and norms must be measured against a framework of factors, including “the certainty of the custom, the motivation for the custom, the representativeness of the custom, how the custom is applied (both against whom and for what proposition), and the implications of the custom’s adoption.” According to Rothman, more weight should be given to customs that are “uniformly recognized and supported”; formulated as “an aspirational set of practices” rather than to avoid litigation or to preserve relationships; developed with “a diverse representation of interests”; applied “against parties who participated in its development or, at least, who were adequately represented in the development of that custom”. See Rothman, J. E., (2007). ‘The Questionable Use of Custom in Intellectual Property’. *Virginia Law Review* 93:1899.



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