

ReCreating Europe



Code of Best Practices on Creative Reuse for Immersive Experiences

Authors

Bartolomeo Meletti & Stef van Gompel

The Code of Best Practices on Creative Reuse for Immersive Experiences was published on the 30th of June 2022. The authors – Bartolomeo Meletti (CREATe, University of Glasgow) and Stef van Gompel (IViR, University of Amsterdam; Vrije Universiteit Amsterdam) – are grateful to research assistants Andreas Giorgallis, Aline Iramina and Luna Schumacher, and to all the creators and curators of immersive experiences who participated in the project.



The information in this document reflects only the author's views and the European Community is not liable for any use that may be made of the information contained therein. The information in this document is provided "as is" without guarantee or warranty of any kind, express or implied, including but not limited to the fitness of the information for a particular purpose. The user thereof uses the information at his/ her sole risk and liability. This deliverable is licensed under a Creative Commons Attribution 4.0 International License.

TABLE OF CONTENTS

Code of Best Practices on Creative Reuse for Immersive Experiences	1
Storytelling	3
Considerations.....	4
Recreating Reality.....	5
Considerations.....	5
Artificial Intelligence.....	6
Considerations.....	6
The Public Domain.....	7
Considerations.....	8
Attribution and Integrity	8

CODE OF BEST PRACTICES ON CREATIVE REUSE FOR IMMERSIVE EXPERIENCES

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

Cultural heritage institutions increasingly offer new immersive experiences of audiovisual and other copyright protected materials, for example, as an innovative means of storytelling. This includes augmented reality (AR), virtual reality (VR) and new experimental types of use by means of Artificial Intelligence (AI). The use of copyright protected materials usually requires permission from the copyright owner.¹ When permission is available under reasonable licensing terms, clearing rights is a practical and secure way to reuse protected content. However, this is often not the case. In certain cases, the legal situation is so complex that clearing rights is not viable or simply unrealistic, especially if the types of creative reuse involved are relatively small and represent no significant economic value that warrants licensing. In these cases, it is important to be aware of the opportunities offered by copyright law to lawfully reuse content without having to secure permission.

Everyone is free to reuse ideas as well as information and facts embedded in a copyright work, as long as their concrete expression in the work is not copied. For example, while you may need permission to use a clip from a fantasy film featuring a centaur (half-human, half-horse), you are free to create your own version of a centaur or use the idea of creating a hybrid between a human and animal in an immersive experience. Permission is also not required to reuse public domain works, that is works whose copyright protection has expired (in most

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

European countries this happens 70 years after the death of the author). Works distributed under open licences such as Creative Commons can be used for free too. Under certain circumstances, it is also possible to use protected works without permission. These are known as copyright exceptions and are intended to allow uses that are considered to be socially, culturally, economically or politically beneficial, such as research, education, critique, parody, or the preservation of our cultural heritage, among others.

The immersive digital heritage curators and creators who participated in this project are generally aware of these opportunities but struggle to benefit from them in practice. They report an environment characterised by legal uncertainty, where they are confronted not only with what the law permits but sometimes also with what the policies of cultural heritage institutions allow. Curators and creators often feel legally uncomfortable when digitally recreating an existing work to produce a true immersive experience or when using large amounts of copyright protected materials to create a new experimental product. Cultural heritage institutions and other commissioning parties tend to be risk averse and require rights clearance almost by default, even when rights do not subsist or a copyright exception would allow the use of the work. The legal complexity and the uncertainty surrounding the interpretation and applicability of copyright exceptions make it hard for creators and curators of immersive experiences to rely on them confidently.²

We hope this Code will help and encourage immersive digital heritage curators and creators to rely on copyright exceptions and other opportunities offered by copyright law in a way that fits their projects practically and legally. The Code is intended to be dynamic: we encourage creators and curators of immersive experiences to share it and discuss it with their colleagues as well as with cultural heritage institutions and other commissioning parties, with a view to making exceptions a viable and practical option for the reuse of existing materials. The uncertainty and ambiguity embedded in copyright exceptions is a challenge for the risk-averse

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

but also an opportunity: it offers flexibility to allow creative uses that cannot be accommodated by licensing.

This initiative takes inspiration and builds upon the [Codes of Best Practices in Fair Use](#) developed by the American University and partners. While these Codes have been produced around the US fair use doctrine, which is unknown in the European tradition, our project shows that a similar Code can help to explain and give meaning to legal norms contained in European copyright exceptions. This Code attempts to bridge legal traditions by focusing on what the law permits in both the UK and the Netherlands. This evades thorny issues of territorial legal differences that may exist between these countries. The Code may apply to other European jurisdictions too, depending on the copyright exceptions that are adopted there.³ The more countries to which this Code will legally apply, the more it will further the harmonization of the framework of exceptions and limitations for immersive digital heritage curators and creators in Europe.

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

STORYTELLING

Immersive experiences based on digital cultural heritage are a creative and compelling way of telling stories that give the audience the feeling of “being there”. Curators and creators of such experiences need to use a wide range of audiovisual and other materials to enable the full immersion of the audience in the story. Using digital cultural heritage such as films, TV and radio broadcasts, photographs or paintings in immersive experiences is often necessary to educate the public about the works themselves or their authors, the social, cultural or political issues they depict or speak to, or our history more broadly. Such immersive experiences help cultural heritage institutions fulfil their public mission to disseminate

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

knowledge. Other immersive experiences are purely artistic products of experimental nature. Unlike more traditional forms of creative production, artistic immersive experiences often require access to and use of a large variety of materials to experiment with before selecting the works to be included in the final product. In most cases, clearing rights in hundreds or thousands of protected works is prohibitively expensive and time consuming. Creators and curators of immersive experiences need to be able to rely on copyright exceptions to reuse digital cultural heritage lawfully and creatively.

CONSIDERATIONS

- When digital cultural heritage is used in immersive experiences for non-commercial education or research, more extensive uses are permitted by law. Creators can use protected works in part or in their entirety as required by their pedagogical or research aims.
- Creators and curators can use digital cultural heritage in immersive experiences to critique or comment on the works themselves, other works, or on social, political or cultural issues.
- Creators and curators can use protected works to create a parody or a pastiche of those works. It is also lawful to quote from protected materials for artistic and other purposes, as long as the work has been lawfully disclosed to the public and the creator engages with the material and not merely uses it for decoration purposes.
- Whether for criticism or review, to create parody or a pastiche, or to quote a protected work, creators and curators should only use the amount of the work that they need in order to achieve their purpose.
- To be considered a parody, an immersive experience must evoke an existing work while being noticeably different from it and constitute an expression of humour or mockery.
- The pastiche exception likely covers a wide range of artistic expressions, including mash-ups, collage, and music sampling, among others. However, please note that 'pastiche' as a legal term may (in the future) attract a particular meaning in law that might not map onto what different artistic communities regard as pastiche.

- Commercial uses are generally allowed under exceptions for criticism or review, parody or pastiche, or quotation. However, the use of the existing work should not be so extensive that the new work can be considered a market substitute of the original.
- Whenever possible, the source and the authors of the work used in the immersive experience should be acknowledged (see below under Attribution and Integrity). However, this does not apply to the use of a work as a parody or pastiche.

RECREATING REALITY

Allowing visitors to immerse themselves in the experience often requires translating works from one medium to another, or recreating them from scratch. For example, an artist may need to reuse various screenshots from a video game to create a composite image or 3D video of a fictional city that users can visit in a VR or AR experience. A curator may want to recreate from scratch a 3D version of a protected object that visitors can ‘wear’ in VR. Depending on the circumstances, these uses may be allowed by copyright law.

CONSIDERATIONS

- The process of recreating a protected work from scratch is permitted by copyright law, unless the final product is too similar to the original work being recreated or borrows (too many) protected elements from it.
- Reusing fragments of a protected work that can be considered ‘insubstantial’ does not require permission from the copyright owner, regardless of the purpose of the use.
- More extensive parts of protected works can be used if these can be considered a quotation, a parody or a pastiche of those works, or if they are used for education, research or to critique or comment on those works or other social, cultural and political issues (see the considerations under the Storytelling section).

- Buildings and 3D artworks permanently situated in public places may be integrally depicted as images in immersive experiences.⁴
- Works that are in the public domain because their term of protection has expired can be used in their entirety without restriction, although it is good practice (and in some countries legally required) to acknowledge the authors of a public domain work (see below under The Public Domain).

ARTIFICIAL INTELLIGENCE

Immersive digital heritage curators and creators increasingly apply AI to create new experimental products. This typically involves the use of large amounts of data, including copyright protected materials, as a necessary source of input for machines to learn from in order to create new, transformative output. Different jurisdictions have different approaches about the legality of the use of copyright protected materials for AI purposes. Some jurisdictions, including the EU, consider that AI necessitates reproduction (one of the exclusive rights held by copyright owners) and therefore permit the use only under specific exceptions for text and data mining. Other jurisdictions may authorise the use of copyright protected materials for AI projects on the ground of the idea/expression dichotomy, considering that as long as the works are merely used as training data and the final output contains no protected expression, the use involves no exploitation of works in a copyright relevant way. The US and a number of other jurisdictions allow the use of copyright protected materials for AI projects under the doctrine of fair use.

CONSIDERATIONS

- Many jurisdictions permit the use of copyright protected materials for AI purposes in one way or another, but there is no uniform legal approach and the specificities of the use permitted may vary significantly between jurisdictions.
- In most jurisdictions, there is more room to use copyright protected materials for AI projects if the use is for (non-commercial) purposes of scientific research.

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

- The use of protected material for AI projects is more likely to be considered lawful if the material was accessed from a legitimate source.⁵
- It is often practically impossible and therefore not necessary to acknowledge the source and the authors of the work used as input for AI projects (see below under Attribution and Integrity).⁶
- When the law does not permit large-scale use of protected material for AI projects, creators and curators may use existing collections of public domain materials or materials made available under open content licences as input for their AI projects (see below under The Public Domain).

THE PUBLIC DOMAIN

Copyright does not last forever. After a certain period of time – usually 70 years after the death of the author, depending on the jurisdiction – the works of that author enter the public domain and everyone is free to reuse them. Creators and curators of immersive experiences may want to use and edit public domain materials such as old paintings, photographs or films to tell their stories, to create a VR or AR experience or to include such materials in AI projects. While the law allows them to do so without restriction and some institutions accommodate this by opening up their public domain collections, other institutions holding the original work sometimes claim copyright on and require payment to access and use the scan of out-of-copyright works.

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

⁵ In the EU and the UK, only protected material that is lawfully accessible can be used for text and data mining purposes.

⁶ In the UK, the exception for text and data mining requires acknowledgement of the authors ‘unless this would be impossible for reasons of practicality or otherwise’.

CONSIDERATIONS

- Copyright law is territorial, and so is the copyright term. This means that copyright duration may be different depending on the jurisdiction. While classical works such as Mozart's compositions or Leonardo da Vinci's paintings are in the public domain everywhere, works created in the 20th century may still be protected in certain jurisdictions.
- 2D copies of public domain paintings, photographs and films do not meet the originality criterion and therefore are not protected by copyright. A 3D scan of a public domain work, on the other hand, may be protected by copyright if it involves a sufficient level of creativity.
- Although a composition may be in the public domain (such as Mozart's works), a sound recording of a public domain composition may well be protected, depending on when it was made or published. In the EU, sound recordings are usually protected for 70 years after their publication.
- It is good practice to acknowledge the authors of a public domain work. In certain jurisdictions, where the moral right to attribution is perpetual, this is also legally required.

ATTRIBUTION AND INTEGRITY

Creators and curators of immersive experiences based on digital cultural heritage recognise the importance of treating other people's work with respect and integrity. In most cases, existing materials need to be modified and adapted to fit into an immersive experience. While this is permitted under all the copyright exceptions mentioned above, such modification should not amount to a distortion or mutilation of the work, or otherwise damage the honour or reputation of the creator. Acknowledging the authors (rather than the copyright owner) of the work being used in an immersive experience is good practice, and is often also required by law. Attribution can take different forms, depending on the circumstances. Sometimes it may be possible to provide credits next to the work being used. In other cases, especially when the immersive experience involves the use of many different works, it is more appropriate to provide credits at the end of the experience, similar to the end credits of a

film. When thousands of works are used, for example in AI projects, it may be practically impossible to provide credits. Whenever possible, credits should be generous, acknowledging the title of the work, the year of publication, the author and the source.



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



This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 870626