

CODE OF FAIR PRACTICE FOR THE USE OF AUDIOVISUAL WORKS IN FILM EDUCATION

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OVERVIEW

This Code of Fair Practice aims to help UK film educators make informed decisions around the lawful use of copyright protected films and other audiovisual materials for educational purposes. It is based on the views and statements collected through two main research exercises: a series of online workshops held in 2020, where 48 film academics from 32 different Higher Education institutions in England, Scotland, Wales and Northern Ireland participated; and a follow-up questionnaire completed by 64 film educators.

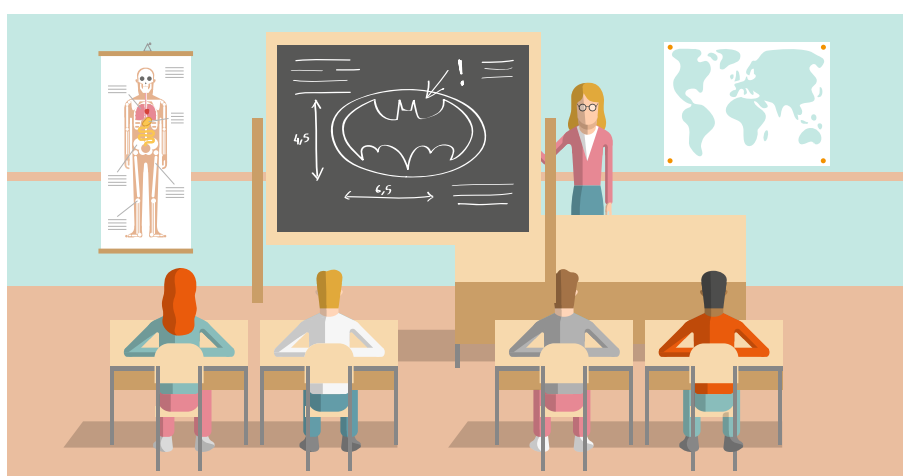
Under UK copyright law, using protected materials such as films generally requires permission from the copyright owner. However, the law also permits several uses that do not require permission as they are considered to be socially, culturally, politically or economically beneficial, including educational uses. These are referred to as copyright exceptions and often depend on the notion of 'fairness', such as the fair use doctrine in the US or fair dealing exceptions in the UK. This Code focuses on the latter: the notion of fair dealing in UK copyright law and how it applies to the use of films and audiovisual materials in education.



Original illustration by Ilaria Urbinati for The Adventure of the Forger's Apprentice, Ep. 5 of The Game is On!

Using copyright protected works under reasonable licensing conditions has the benefit of reducing the risk of copyright infringement potentially to zero. For example, Learning on Screen's BOB¹ allows teachers and students at subscribing institutions to search and use an archive of over 3 million broadcasts under the terms and conditions of the Educational Recording Agency (ERA) licence.² Licensed services such as BOB provide teachers and students with an extensive pool of materials that can be used safely and creatively in education. BOB records programmes from over 75 free-to-air channels, and since 2016 it has been automatically adding everything broadcast on BBC1, BBC2, BBC4, ITV1, Channel 4, Channel 5, More 4, BBC Radio 4 and BBC Radio 4 Extra. All these broadcasts - including films, TV series,

documentaries, news, and much more – can be used lawfully for educational purposes under the ERA licence. However, a film educator may well need to use a film that has not been broadcast on British television and therefore is not covered by the ERA licence nor is available on BOB or other licensed services. While in these cases one may try to get permission directly from the copyright owners, rights clearance is often a long and expensive process which does not accommodate educational uses. Copyright exceptions are therefore an essential part of the copyright system for educators: they complement existing licensing schemes to enable film educators to lawfully use all the materials they need in order to achieve their pedagogical goals. This Code intends to facilitate educational uses of audiovisual works that are permitted by law but are not available on licensed platforms like BOB.



Original illustration by Davide Bonazzi for CopyrightUser.org

This Code aims to describe common educational uses of protected films that are considered fair by film educators and lawful by lawyers. However, it does not intend to be exhaustive in any way and does not constitute legal advice. The uses of copyright works permitted by law are more than those described below, and inevitably are going to evolve over time. For various reasons, film educators or educational establishments may also choose to adopt a more restrictive approach to the use of protected materials than the one suggested in this Code. The purpose of this Code is to encourage film educators to better understand how they can lawfully use existing films in their teaching, so that they can make their own informed decisions. The Code adopts an accessible language based on the statements collected from film educators through the workshops and questionnaire mentioned above. Legal references to specific provisions of the UK Copyright Act have been included in the footnotes, with a view to helping educators refer to these should they need to justify their decisions. Accessible guidance on UK copyright can be found at copyrightuser.org³ and more detailed legal guidance on the use of copyright material in film education in the UK is also available.⁴

This initiative takes inspiration and builds upon the Codes of Best Practices in Fair Use developed by the American University and partners.⁵ While these Codes have been produced around the US fair use doctrine, which is not part of UK law, our project shows that a similar Code can help to explain and give meaning to legal norms contained in UK copyright exceptions. To maintain consistency, we have adopted the same format of the US codes, consisting of principles, considerations and hard cases.

It is important to note that copyright law is territorial in nature, meaning that different rules – including copyright exceptions – apply in different countries. While this Code is based on UK copyright law, we believe the uses it describes and encourages are likely to be allowed in most jurisdictions. However, in certain countries with more restrictive exceptions, the uses described below may not be allowed. Users should bear this in mind when assessing the potential risks of using protected content cross-border. Relying on copyright exceptions is mostly a matter of risk management. Exceptions are defences that can be relied upon if the use of the work is challenged by the copyright owners, rather than rights to use the content. They are also based on ambiguous concepts such as ‘fair dealing’ itself, which are not defined in the statute but are determined by courts on a case-by-case basis. While this Code intends to help film educators carry out a robust fairness analysis based on existing court cases and legal doctrine, other real-life risks should be considered. Among others, these include the commercial value of the work being used, the litigiousness of the copyright owners of that work, whether the use of the work would compete with its exploitation by the copyright owners, and the potential loss in revenue for copyright owners (e.g. allowing students to download protected films as opposed to enabling them to stream the film for a short period of time during their course). At the same time, fair dealing exceptions are an essential component of the copyright system and often the only viable option for film educators to use protected content lawfully.

We hope this Code will help you appreciate what you can do under UK copyright law.

THE CODE:

Principles, Considerations and Hard Cases

A - Allowing Students Equitable Access to a Diverse Range of Films

Description

In order to develop an understanding of filmmaking and cinema, students need to be able to watch a diverse range of films in their entirety. Educational establishments purchase film content on physical media such as DVDs and Blu-ray disc, as well as subscribing to online film services where these are available to the



Original illustration by Davide Bonazzi for CopyrightUser.org

educational market. On some occasions lecturers use their own personal film collections for screenings, particularly where the content is rare. Cohorts of students are given the opportunity to attend screenings together where facilities are available as there is a benefit in the shared, collective experience of being part of an audience. However, where facilities are not available, or there are practical limitations such as where the student is located, educational establishments provide online access to films. This ensures film students' most fundamental need – the ability to watch films – is met by their educational establishment.

Principle

It is fair to show films to students, or allow students to watch films online where the activity is required for their study. This principle applies without regard to the medium or platform on which the film is available, subject to the following:

Considerations

1. Films should only be available to the students participating in the activity, or those responsible for organising the screening events.
2. The activity should be non-commercial in nature, unless the activity can be justified for the purposes of criticism or review.⁶
3. Commercial purpose' relates to the use itself, not the status of the organisation using the work. Educational uses by for-profit organisations can be allowed if the use itself is not directly aimed at generating income.

4. This principle applies even where a contract such as a licence or the terms and conditions of an online platform appear to prohibit educational use.⁷
5. The activity involves lower risks when online access to content hosted by an educational establishment is made available to stream only within a password protected area.
6. Educators should only provide access to films for as long as it is necessary for students to complete their educational activities.
7. When sourcing content from free to access online video sharing services (e.g. YouTube, Tik Tok), it is preferable to use official content uploaded by or with the authorisation of the copyright holder.

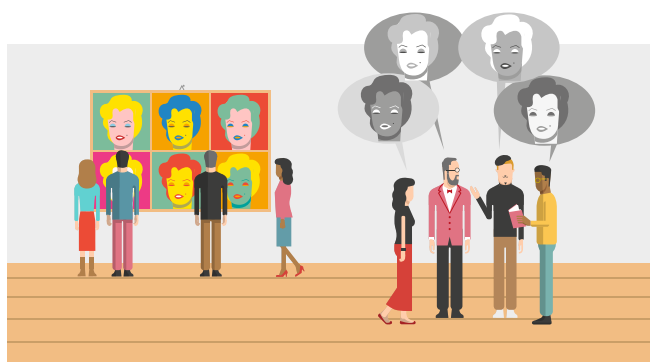
Hard Cases

The vast majority of participants agreed that screening films from unlawful sources or pointing students to those sources is unfair. On the other hand, most participants would screen films from on-demand consumer services such as Amazon Prime, Netflix and Disney+ if it was necessary to achieve their learning outcomes. Using personal subscriptions and content for teaching purposes is legally unclear, but can be seen as the equivalent of using personally owned physical media. Teaching staff may decide to use their own personal accounts to show films in a classroom if the showing can be justified for teaching and learning purposes. However, the systematic use of personal subscriptions by educational institutions, such as sharing login details of such subscriptions with colleagues and students, is unlikely to be considered lawful.

B - Allowing Students to Critically Analyse Films

Description

Students need to study film closely in order to understand the process of film-making and the development of film as a cultural and social phenomenon. This involves watching and re-watching specific parts of films, freeze-framing, playing at different speeds or in reverse, and interacting with source material in any way that produces insight and



Original illustration by Davide Bonazzi for CopyrightUser.org

commentary. Analysing, critiquing and comparing films often requires watching the entire film. Film educators need to screen whole films in order to enable critical analysis of narrative structure and development, authorship, genre, character development, and production disciplines such as sound design, editing, visual effects or colour grading, among others.

Critical analysis of entire films is particularly important in certain specific subjects such as film history, for example to appreciate how a film fits within its historical context or to assess the political implications of narrative development in certain periods; or in film musicology, for example to understand placement and development of a score over the full running time of the film.

Principle

It is fair to screen and watch films, whether in parts or in their entirety when aimed at enabling and encouraging critical analysis, subject to the following:

Considerations

1. When the film is analysed for non-commercial educational purposes, more extensive uses are generally permitted by law. Educators can use film clips or entire films as required by their pedagogical aims.⁸
2. Critical analysis of films may be allowed for commercial purposes and beyond educational settings, if the primary purpose for using the film is criticism or review of the film itself or of another work, rather than education.
3. Educators and students should only use as much of the film as is necessary to achieve their pedagogic and scholarly aims. Using a film for commercial purposes under fair dealing usually requires a larger amount of direct criticism or commentary than using it for non-commercial educational purposes. Educators should be prepared to explain the intended significance of the film used in relation to the purpose of the use.
4. 'Commercial purpose' relates to the use itself, not the status of the organisation using the work. Educational uses by for-profit organisations can be allowed if the use itself is not directly aimed at generating income.
5. Unless this is impossible for practical reasons, the authors of the film should be acknowledged. Under UK copyright law, these are the producer and the principal director.⁹

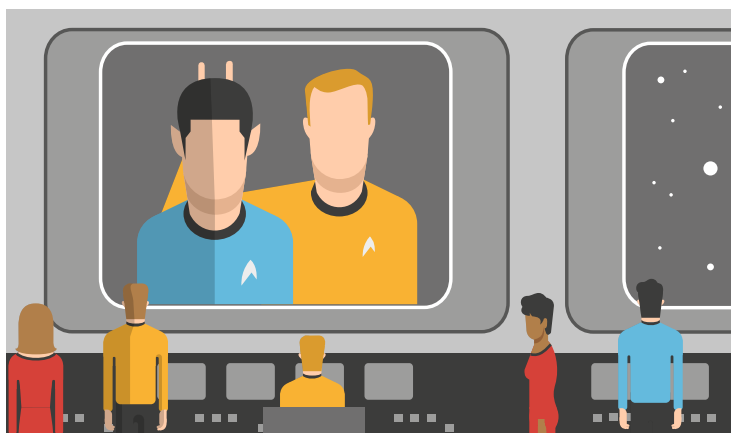
Hard Cases

While in principle both in-classroom and online uses of films can be considered fair, subject to the considerations outlined above, the fairness assessment will change depending on the circumstances of the use. For example, showing an entire film in the classroom or via a password-protected Virtual Learning Environment (VLE) is likely to be fair if the use has clear pedagogical value. However, the same activity in a MOOC (Massive Online Open Course) is unlikely to be fair as making an entire film freely available on the internet may be commercially competing with the copyright owner's work.

C - Adapting Films for Teaching and Learning Purposes

Description

Film students often adapt existing films and incorporate these into new works such as video essays, collages or mash-up works and documentary films. This hands-on practical experience is necessary for the students to learn how to communicate, comment and construct arguments through the cinematic language. Students' productions often combine existing



Original illustration by Davide Bonazzi for CopyrightUser.org

materials such as found footage and music with originally created voiceover, footage, and sound. In other cases, these works can consist entirely of already existing materials, for example in mash-up works. This allows students to create a dialogue between existing work and their own practice, as well as enabling comparison between different films or types of film. Commenting in this context does not necessarily have to be verbal or textual, it can involve juxtaposing image with image. Even when students create these films as part of their assignments or other educational activities, they often wish to make their work publicly available via online platforms, academic video journals, or at film festivals. Educators also create mash-ups and other derivative works to illustrate and demonstrate cinematic techniques and other forms of audiovisual language to their students.

Principle

It is fair for educators and students to incorporate film clips, images and other existing materials when creating new work, subject to the following considerations:

Considerations

1. When film clips and other materials are used for non-commercial educational purposes – for example, to create a video essay as part of an assignment – more extensive uses are generally permitted by law. Educators and students can experiment with innovative adaptations of existing films as required by their pedagogical aims.
2. Films that adapt and incorporate existing films or other materials in order to criticise or review them can be exploited outside of educational settings, for example in film festivals or as part of a commercial portfolio. Educators and students should be prepared to explain the comments or arguments they intended to make by reusing films, images or other materials.

3. Educators and students are allowed to make parodies and pastiches of protected works. They can also quote from existing works for any purpose, even when the use is commercial. There is no need to engage with the materials through explicit criticism or commentary in this context.¹⁰
4. Film makers should only use as much of the content as is needed to achieve their aims. Educators and students should be prepared to explain the intended significance of the film or other work used in relation to the purpose of the use.
5. Unless this is impossible for practical reasons the authors of the film or other work should be acknowledged. However, acknowledgement is not legally required if the content is being used for the purposes of parody, caricature or pastiche.

Hard Cases

The permitted uses mentioned above apply to all the acts restricted by copyright, including the right of 'communication to the public'. This means that in principle teachers and students can share their mash ups and other derivative works online. However, in addition to considering the differences between the laws of different countries (see Introduction), teachers and students should bear in mind that their work cannot act as a market substitute of the original. For example, including various short clips from a TV series in a video essay to illustrate a point about a certain cinematic technique can be considered fair and lawful. On the other hand, including an entire episode of the same series in the video essay and make the video essay freely available online is likely to be considered unlawful, as in this case the video essay would act as a market substitute of the original.

Creators of mash ups and other derivative works should also be aware that take down mechanisms on online video sharing platforms may automatically remove content that is identified as infringing even if fair dealing exceptions apply. In this case, they have the option to submit a counter-notice and be prepared to explain how and why their use of third party protected content is covered by copyright exceptions. We hope this code will assist with this process.

D - Format Shifting of Film Content

Description

Educational establishments need to provide access to audiovisual content for teaching through digital platforms in order to make learning accessible to students. Some content is available to educational establishments via educational streaming services, but some content is only available on physical media or via consumer



Original illustration by Davide Bonazzi for CopyrightUser.org

streaming and download services. Educational establishments may have to choose between format shifting content from physical media to digital files so that students can access films and other audiovisual works that are required for their studies, or not making the works available at all. Format shifting may involve digitisation of analogue content such as VHS tapes or 'ripping' of DVDs to create a file that can be made available on a streaming platform. This will also involve navigating practical considerations such as the resource and technology available to undertake the format shifting.

Principle

It is fair for teachers and institutions to format shift audiovisual content if this is necessary to provide access to the content for their teaching.

Considerations

1. Educators should only format shift audiovisual works that have been lawfully acquired.
2. When format-shifting a film, it is essential to include an acknowledgement of the authors of a film as part of the new content, unless this is practically impossible.
3. Where films are available under reasonable licence conditions, educators should make use of these in the first instance.
4. Lawful acquisition of content relates to ownership of specific titles rather than to streaming services operating an 'all you can eat' business model.
5. 'Educators' should be considered expansively to include all of those people supporting teaching and learning – e.g. technicians, learning technologists or librarians.
6. Where the legality of an online source is unclear, the educator should format shift the content themselves from a lawfully acquired source.

7. Educators should be aware that circumventing copy protection measures on audiovisual media can be a breach of the law, separate to the copyright regime.¹¹
8. Educators should make reasonable efforts to ensure that copies of format shifted, protected works are only made available to the relevant students and cannot be downloaded. Allowing further distribution of the work involves higher risks of infringement.

Hard Cases

Participants felt that if format shifting was possible without technical support, it would be fair to do this if it was necessary to achieve their pedagogic aims. They also reported their institutions supporting a risk-managed approach to the circumvention of copy protection measures during the COVID-19 pandemic. In light of consideration 7, educators should consider the extent to which the potential breach of laws restricting circumvention of copy protection measures presents a significant legal risk balanced against the pedagogic need to provide content.

Many educators first made use of copyright exceptions to format shift audiovisual content for teaching purposes during the COVID-19 pandemic. Some educational institutions have taken the view that the end of the initial crisis period requires a return to pre-pandemic practices. However, other institutions have chosen to maintain the principles of providing on-demand access to audiovisual content when defining the 'new-normal' of post-pandemic teaching. Whilst educators will need to check their institutional policies, copyright exceptions remain a powerful tool for enabling access to audiovisual content where licences are unavailable.

NOTES

- 1 BOB – Learning on Screen’s on demand TV and radio service – is available at <https://learningonscreen.ac.uk/ondemand>
- 2 The terms and conditions of the ERA licence are available at <https://era.org.uk/the-licence/the-era-licence/>
- 3 <https://www.copyrightuser.org/>
- 4 See Hudson, E. (2022). Updated Copyright Guidance for Using Films, Audiovisual Works and Images in Online Teaching: Beyond the Covid Pandemic https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4042770
- 5 Aufderheide, P., and Jaszi, P. (2018). Reclaiming Fair Use: How to Put Balance Back in Copyright. Second Edition. University of Chicago Press. The Codes of Best Practices in Fair Use are available at <https://cmsimpact.org/report-list/codes/>
- 6 The exception for illustration for instruction – Section 32 of the Copyright, Designs and Patents Act 1988 (CDPA) – allows the educational use of protected works for non-commercial purposes only. However, other exceptions such as that for criticism or review (Section 30 CDPA) – also allow commercial uses. The CDPA is available online at the URL <https://www.legislation.gov.uk/ukpga/1988/48/contents>
- 7 Several exceptions in the CDPA, including research and private study (Section 29), text and data mining (Section 29A), quotation (Section 30(1ZA)), caricature, parody or pastiche (Section 30A), and illustration for instruction (Section 32) cannot be overridden by contract.
- 8 Exceptions that allow more extensive non-commercial uses of protected works include research and private study (Section 29) and illustration for instruction (Section 32).
- 9 All fair dealing exceptions, except for the one for caricature, parody or pastiche (Section 30A), require acknowledgement of the authors of the work being used. The provisions on authorship and ownership can be found in Sections 9-11 CDPA.
- 10 In addition to the exception for criticism or review (Section 30), other exceptions that allow the use of protected works for commercial purposes include caricature, parody or pastiche (Section 30A) and quotation (Section 30(1ZA)). Unlike the exception for criticism or review, which can be relied upon only if the purpose of the use is either criticism or review of the work being used or of ‘another work or of a performance of a work’ (Section 30(1)), quotation is not linked to any specific purpose. That is, as long as the use can be considered fair, educators can quote for any educational, creative or artistic purpose. On the other hand, under Section 30A one can use works only for the purposes of caricature, parody or pastiche. However, the purposes themselves, especially pastiche, are broad and can potentially allow, among other things, the use of ‘small fragments from a range of films to compose a larger pastiche artwork’ (UK Intellectual Property Office guidance cited by the Intellectual Property Court in *Shazam v Only Fools The Dining Experience and Others* [2022]).
- 11 The provisions that prohibit the circumvention of technological protection measures can be found in Sections 296-296ZF CDPA.