Copyright

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You are a visual artist and you would like to include pre-existing visual material that you did not create – perhaps slightly modified – in your new artwork.

If you are unsure whether this is allowed, this 101 may be a useful guide for you. It is designed to help you navigate the intricacies of copyright law and answer the questions you may have at this stage:

CAN I USE THIS?

WHAT DO I HAVE TO DO IN ORDER TO USE THIS?



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Arts

A COUPLE
OF COPYRIGHT
BASICS

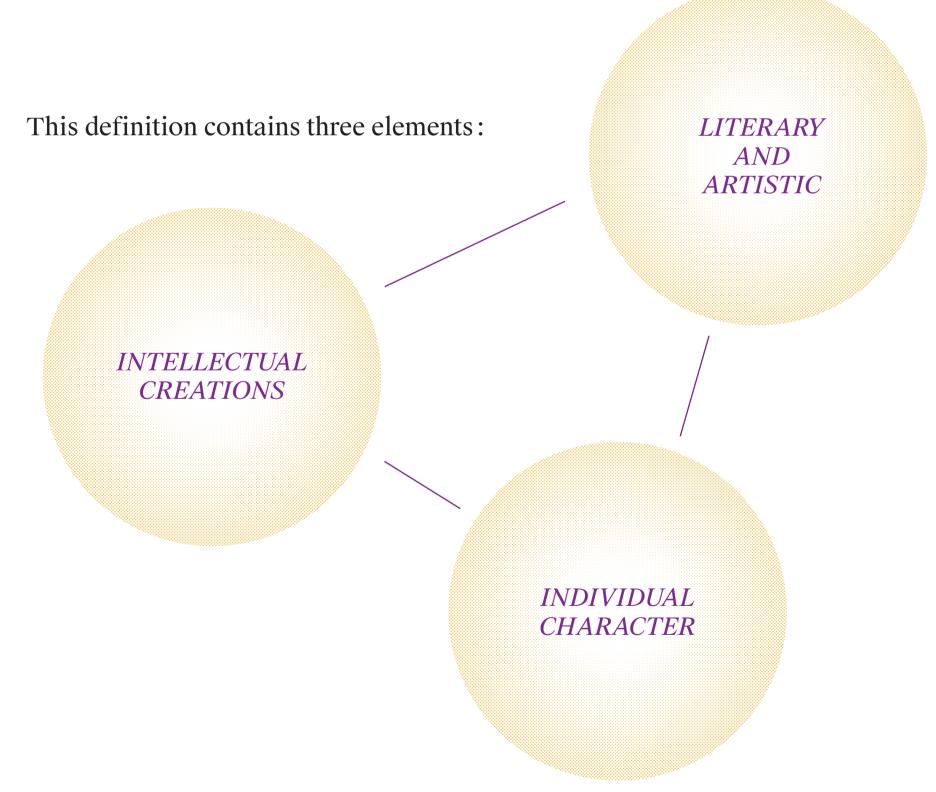
Rights

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Swiss copyright law is regulated in the Copyright Act (CopA). According to Art. 2 para. 1 CopA,

"Works are literary and artistic intellectual creations with individual character, irrespective of their value or purpose".



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In practice, the element of "individual character" (or just "individuality") is the most important requirement for artefacts to become copyrighted works. In most copyright systems, this requirement is called "originality". It requires that the artefact be new, not banal, and that it did not exist before in this form.

When an artefact did not already exist in the form it now exists in, it is likely considered original and thus protected by copyright law.

WHAT DOES ORIGINALITY MEAN?

IT'S RATHER
ABSTRACT, BUT
SOMETHING NEW,
NOT BANAL,
IS CONSIDERED
ORIGINAL

Since April 1st, 2020, all photographs of three-dimensional objects are protected in Switzerland, even if they are not individual. This means for exemple that the pictures taken by your 5-year-old cousin at your grandma's birthday, the pictures that you took by mistake while jogging, and every picture of the Matterhorn – irrespectively of the quality – are protected by copyright.

This reduces the quantity of works that are in the public domain, i.e., the quantity of works that you can freely use. Remember: If it is a photograph, it is protected in almost every case, at least in Switzerland.

Excluded are only pictures of bidimensional things, for example a photograph of another photograph, or of a flat painting hanging on the wall.

The

101

The public domain comprises all those artefacts that for some reason are not protected by copyright. If artefacts are not protected by copyright, they can be used freely, meaning that you can include them in your new artwork without restriction. In the following we illustrate some cases of public domain and explain the reason why they are in the public domain.

REMEMBER: SHARING IS CARING

EXCEPT WHEN IT'S COPYRIGHTED!

a. UNORIGINAL ARTEFACTS

These are artefacts that do not qualify for copyright protection because they do not have the required "individual character", i.e., they are not "individual" enough, not original, banal.

Examples thereof are the star or heart shape, a smiley, simple doodles, etc. Before April 1st, 2020, even banal photographs did not qualify for copyright protection. This changed with the new CopA, that protects all photographic depictions of three-dimensional objects.







EXPIRED COPYRIGHT PROTECTION (OLD ARTEFACTS)

Copyright protection ends 70 years after the death of the author, or 50 years after the date of production, depending on the type of work. This means that many images circulating on the internet (even b/w ones) are still protected by copyright, since the author is still living or has been dead for less than 70 years.

A simple example shows: In 2025, artefacts of an author deceased in 1955 fall into the public domain. Works by authors deceased in 1956 will fall into the public domain in 2026, and so on.

ARTEFACTS NOT CREATED BY A HUMAN

Works created by machines, by artificial intelligence (AI), or by animals, are not protected by copyright. However, caution is advised. For example, artworks created by a human being with the support of AI are protected by copyright, as long as the human author's creative choices are reflected in the final artwork.

d. IDEAS, STYLES AND MOTIVES

Copyright protection does not extend to ideas, styles, and motives. Concretely, this means that you can use an existing idea and develop on it to create your artwork. An example? It is permissible to pack buildings just like Christo and Jeanne-Claude used to, because the idea to pack buildings cannot be monopolized by copyright. Ibrahim Mahama did it, for example, with his artwork "A Friend" (2019).

Similarly, you can evoke an existing style in your artwork, meaning that you can paint (or take photographs) "à la manière de". An example? Woflgang Beltracchi, the famous art forger, realized many paintings in the style of Max Ernst. He was then prosecuted for fraud, but not for copyright infringement. Since the fake "Ernsts" he created did not exist before, he had not copied anything! Another example? In their artwork "Portrait of V.I. Lenin with Cap, in the Style of Jackson Pollock III" (1980), Art & Language clearly emulated Pollocks' painting style. From a copyright perspective, this is unproblematic.²

Finally, you can retake a motive, just as you can take a picture of the same scene. For example, there are uncountable variations of the painting by Édouard Manet "Le déjeuner sur l'herbe" (1863), since it is allowed to retake the scene of three people sitting on the grass and having lunch, even in that particular position (moreover, since Manet died in 1883, the artwork is also in the public domain).³

1 https://vimeo.com/591700589.

² https://artuk.org/discover/artworks/portrait-of-v-i-lenin-with-cap-in-the-style-of-jackson-pollock-iii-203053

3 http://histoiredesartssaintlaurent.over-blog.com/pages/Le_Dejeuner_sur_Herbe_Variations_citations-4145317.html.

Such a long copyright protection can be explained, at least in part, by Disney's lobbying in the USA. Disney has fought to keep its copyright of its Mickey Mouse as long as possible, lobbying the government to extend copyright protection before it was originally set to expire in 1984.

In 1976 the law was changed to allow owners to retain copyright protections for the duration of the life of the author plus an additional 50 years. This duration has been adopted internationally in the Berne Convention for the Protection of Literary and Artistic Works.

In 1998, Disney once again successfully lobbied along with other entertainment companies to extend copyright protections to life of the author plus 70 years for a maximum of 95 years. Many countries have since then adopted this longer protection.



Creative

(CC)

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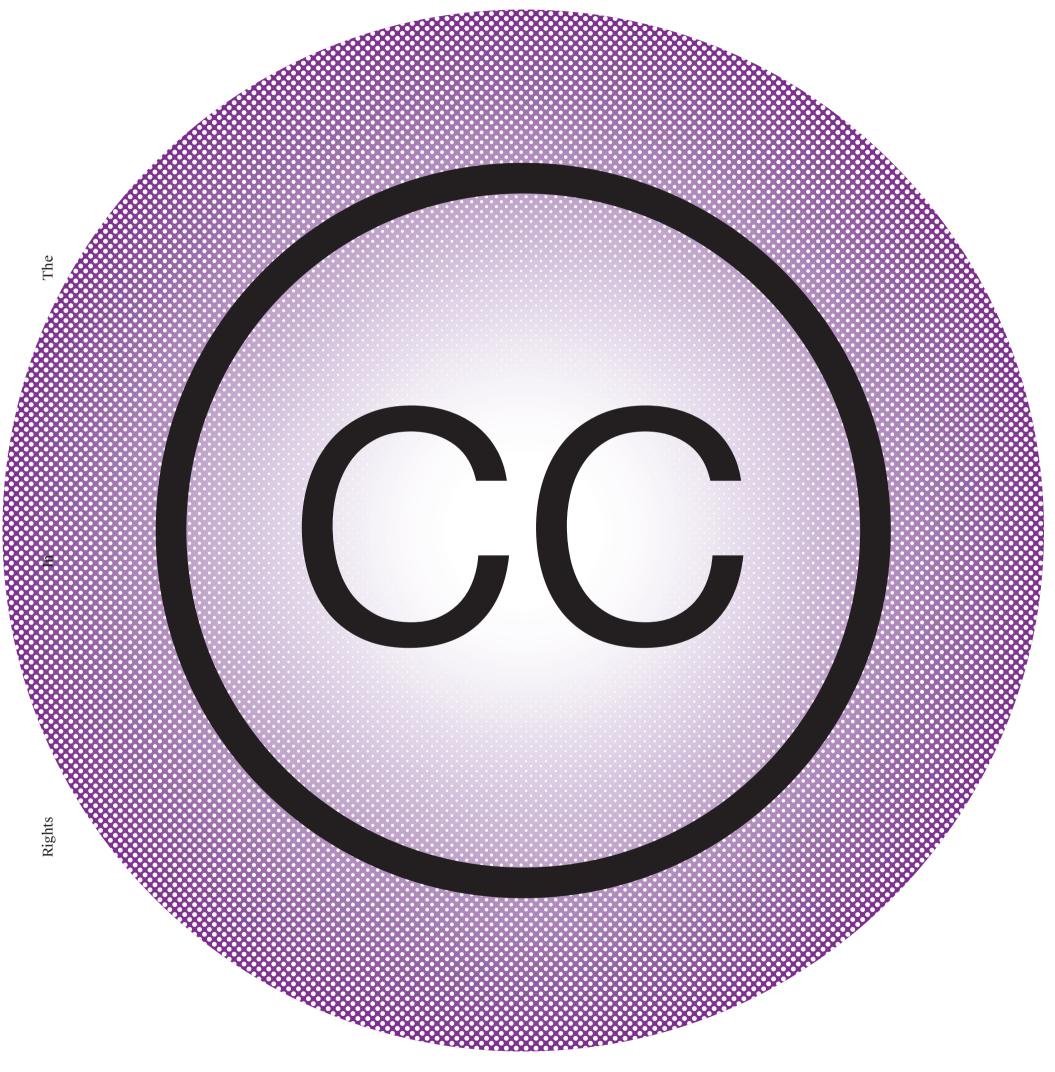
Creative Commons is a system of free-of-charge licenses that allows authors of creative works to communicate which rights they reserve and which rights they waive for the benefit of recipients or other creators. If you see the letters CC, or the following symbol, you know that there is a CC-license attached to the work at stake:

As opposed to public domain artefacts, artefacts that are under a CC-license are protected by copyright, meaning that their authors maintain their rights on them. However, authors choosing to adopt CC-licenses give standard releases that replace the individual negotiations for specific rights between them as copyright owners (licensors) and their licensees. Put simply, they allow certain uses not to single persons as it would happen in contractual relationships, but to the public in general (while also specifying the terms of the use). It is up to the public, then, to make use of their works or not.

There are six types of CC-licenses, from the most permissive one, the so-called "CC-BY", which allows every use but reserves the right to be named as author, to the least permissive one, called "CC BY-NC-ND". This license allows non-commercial reuses in unaltered form and establishes that credit must be given to the author. On the Creative Commons website, you find comprehensive information about the types of licenses and their conditions.4

⁴ https://creativecommons.org/share-your-work/cclicenses/.

Commons



Creative Commons is a Non-profit Organization founded by Lawrence Lessig, a professor at Harvard and political activist related to the copyleft movement. With Creative Commons, he wanted to create a simple system to elude, while not completely deactivating, copyright's regime of exclusivity.

www.rightsinthearts.or

EXCEPTIONS TO COPYRIGHT

Pre-existing visual material that is neither in the public domain (cf. above III.) nor covered by a CClicense (cf. above IV.) is protected by copyright. As a rule, you should assume copyright protection to be comprehensive, i.e., covering all aspects of the work. This means that, in principle, its use is subject to the permission of the rightsholder. There are a few exceptions to this rule. If a so-called exception to copyright applies, you may use copyrighted material without having to ask for permission. Exceptions only apply if the type of use you intend to make fulfils the conditions required by law. E.g., with the freedom of panorama (cf. below V.d.), the exception applies if the visual material is in the public space.



То

For years, exceptions to copyright were interpreted narrowly by judges and scholars. This meant that the conditions to their fulfilment were verified strictly and that interpretations per analogiam (i.e., where conditions are not perfectly fulfilled, but only by way of similarity) were avoided.

Today, exceptions are often interpreted in conformity with fundamental rights, among which we find the freedom of artistic expression. This means that, at least in the copyright literature, alternative and generous interpretations are gaining momentum. However, whether a judge will indeed follow the interpretation proposed by literature remains a highly speculative matter. For this reason, caution is advised.

Copyright

PARODIES AND COMPARABLE VARIATIONS OF THE WORK

Art. 11 para. 3 CopA states that it is permissible to use existing works for the creation of parodies or other comparable variations on the work.

A parodic use is a use that shifts the meaning of a work into a humorous, critical one (détournement). The original work is evoked and modified in the parody, meaning that it remains recognizable. The condition of humor does not mean that the parody must be funny and appealing to anyone. Rather, the question should be whether the public can see in it a manifestation of humor and critique.

OFTEN, TO UNDERSTAND IF SOMETHING IS PARODIC OR NOT, THE CONTEXT IS ALSO IMPORTANT

То

What "comparable variations of the work" (as stated at Art. 11 para. 3 CopA) are, is still debated. No court has yet clarified the meaning of this provision in a judgement. While there are scholars who plead for the existence of a general clause, capable of encompassing the most disparate artistic utilizations, others only see a mere repetition of the core message of the parody exception, i.e., a use that is humorous and critical in essence.

Since many scholars recognize the need for a more comprehensive exception for artistic uses of antecedent visual materials, it is possible – but not certain – that this exception may become a sort of general clause. For this reason, caution is advised.

Rights

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In

b. QUOTATION

Art. 25 para. 1 CopA states that published works may be quoted if the quotation serves as an explanation, a reference or an illustration, and the extent of the quotation is justified for such purpose.

To quote a work means to use a work (or portions of it) in another work, in a way that the citing work makes reference to the cited work, engaging with its meaning in a way that either criticizes or comments it, or uses it as an illustration of an own statement, and similar. Every use that builds up on a previous image, shows the image in another light, recontextualizes the image by explaining the different context and why that particular image was chosen, should suffice to fulfil the conditions of quotations. On the contrary, mere aesthetic quotations (where the source work was chosen only because "it worked") likely do not fulfil the conditions of the exception. Moreover, only what is necessary for the purpose of the quotation should be quoted, and not more.

There are also formalities to be respected: the quotation must be designated as such, and the source given. Where the source indicates the name of the author, the name must also be cited.

c. PRIVATE USE

A use of a work that is confined to personal use of or use within a circle of persons closely connected to each other, such as relatives or friends, is permitted (Art. 19 para. 1 let. a CopA).

This means that you may use pre-existing visual material as long as you keep it to yourself, share it only within a restricted group of friends or with your close relatives. While you cannot expose or sell an artwork that you realized in this way, this exception is still useful for building up your own mood board, personal archives, to make tests, exercise techniques or similar.

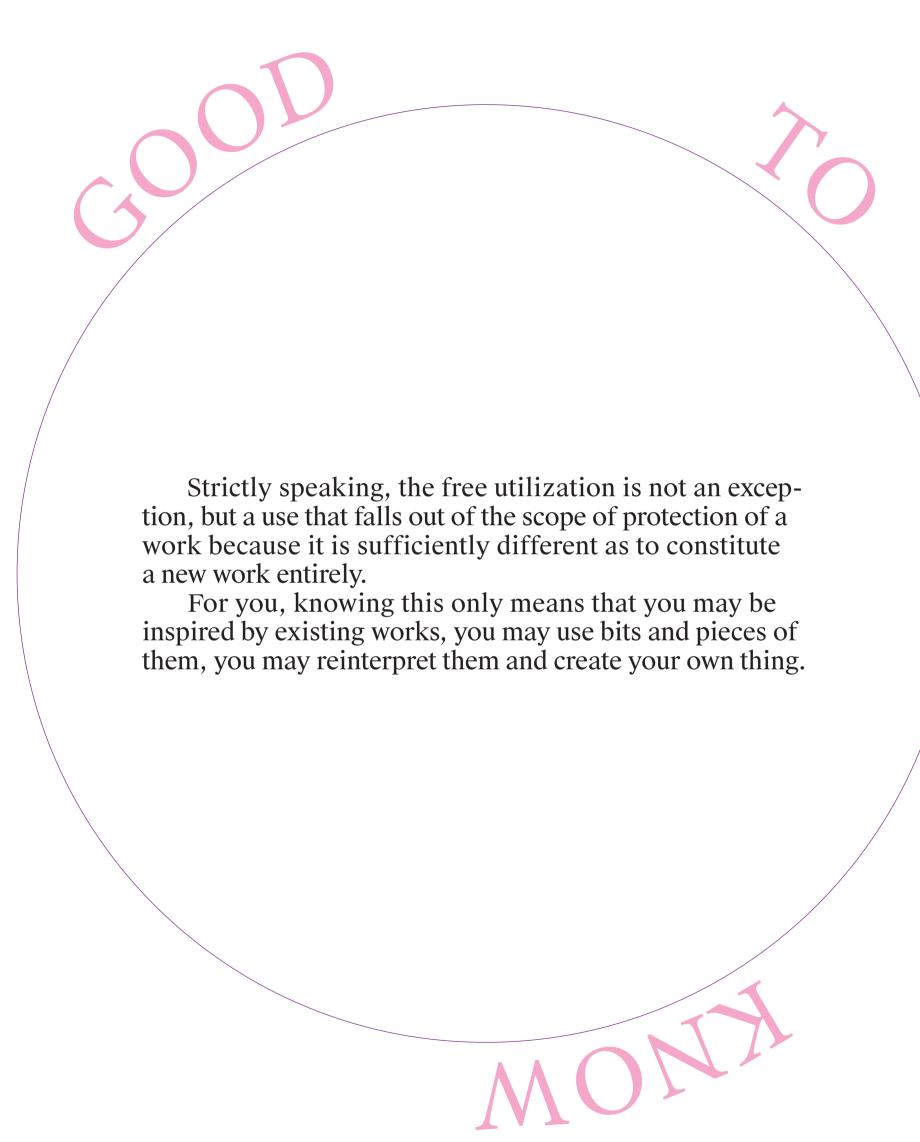
d. PANORAMA

The freedom of panorama states that a work permanently situated in a place accessible to the public may be depicted. The depiction may be offered, transferred, broadcast or otherwise distributed, even for commercial purposes (Art. 27 para. 1 CopA). The depiction may not be three-dimensional, and it may not serve the same purpose as the original (Art. 27 para. 1 CopA).

This exception allows you to photograph or depict in any other way (e.g. video, painting, rendering) the public space, including the artworks (installations, sculptures, kunst am bau and others) that may be present in it. Commercial uses (e.g. selling postcards of a picture you took) are also allowed.

e. FREE UTILIZATION

If you intend to use a previously existing work as inspiration to create another artwork or if you use it in such a way that it is barely recognizable, the use is free, meaning that you do not have to ask for permission. The modified use could e.g. be in a different style, add new elements, or change the subject in such a way that the two final works are only similar by way of a certain visual affinity, the fact that they deal with the same theme, or are comparable in composition, use of color, shapes.



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PAY ATTENTION!

a. FAIR USE

While fair use is the copyright exception par excellence in the USA, it does not exist in Switzerland, nor in any other European country. Pay attention where you read information regarding the fair use test. While it does present some similarities with our copyright exceptions, its conditions and practical application are different and may not cover the same uses.

b. ARTISTIC FREEDOM

In Switzerland, we do not have a constitutional court. This means that the laws are applied as such, and that the Federal Supreme Court cannot refuse to apply a law by arguing e.g. that the application would infringe a fundamental right. For this reason, you cannot justify your use of copyrighted material by saying that your fundamental right to artistic expression protects you in your endeavor. While the constitutional right of artistic freedom does protect you in principle, it does not allow to circumvent copyright legislation and the exhaustive list of exceptions it contains.

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THE AMERICAN
FAIR USE DOCTRINE
HAS NO DIRECT
EQUIVALENT
IN SWISS LAW

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101 Copyright Arts HOW TO OBTAIN A LICENSE The In

If the pre-existing visual material you found is protected by copyright and the use you intend to make does not fall under an exception (cf. above V.), you may have to ask for permission before going ahead with your idea or obtain a license. If you don't, you face the risk of a legal proceeding for copyright infringement.

If you know the author of the artwork or have the possibility to contact them (e.g. via their gallery, agent, a museum, or similar), this may be the easiest (and in some cases the only) way to proceed. Often, artists understand that other artists want to use previously existing material for their new art and are therefore willing to grant permission. If you do not find their contact details, it may be a good idea to search for publications of books and/or catalogues of their work and look for the credits page. It is always a good idea to ask for permission in writing (e.g. by e-mail) or sign a simple contract at the end of the talks. In this way, you will have the evidence that an agreement was reached.

In certain cases, the artists or galleries may redirect you to a copyright management organization, such as Prolitteris in Switzerland. However, Prolitteris is only competent for unmodified, or barely modified "mass uses" of works. If you plan to modify the visual material you have found, you should ask the author (or rightsholder) for individual permission.

COPYRIGHT PERMISSION IS KEY TO USING EXISTING WORKS

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Prolitteris handles the collective management of copyrights and is competent to grant licenses for standardized and "mass" uses of artworks (e.g. for book publications, in movies, for postcards, posters, and similar). If you think that the use you intend to make falls under the scope of this type of rights management, you can

the scope of this type of rights management, you can verify Prolitteris' "artists' list" and check for the author's name on it (Prolitteris does not have an own list but uses Germany's and France's lists since it has agreements with the comptent organizations of both countries).

For every question you may have, you can write an e-mail to *art@prolitteris.ch* and they will be happy to help. Alternatively, you can use the chat function on their website.



Prolitteris is also competent for granting licenses for so-called "orphan works" (Art. 22b CopA). These are works whose rightsholder is either unknown or cannot be found following an appropriate research effort.

While the risk that these unknown authors will later show up and protest against a use that they did not allow is relatively low, it cannot be excluded. This type of license constitutes a sort of "insurance" against any future problems. At the same time, when obtaining this type of license, you are also incurring the eventuality that you are licensing a work that is already in the public domain, or e.g. covered by a permissive CC-license. For this reason, it is always best not only to look for the author, but also for the year of creation of the work, and for possible CC-releases of the work.



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