

COPYRIGHT PREROGATIVES IN AUDIOVISUAL WORK: THE DOCUMENTARY

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Title: Copyright Prerogatives in Audiovisual Work: The Documentary

Abstract: The issue of copyright remains a topic of constant interest, especially in today’s society, where the field of artificial intelligence (AI) is becoming increasingly present. This study focuses on these issues and is both theoretical and interdisciplinary, combining aspects of private law with those of mass media. The article will present various interpretations of the documentary (as an original creation), as it is a genre at the intersection of different specializations. The focus will then be on illustrating the variety of documentary typologies, with the multitude of forms and subjects they can address. By correlating legislative elements from the EU with those of our country (with an emphasis on the latter), we will examine the documentary from the perspective of copyright, identifying both the influence of moral rights and those of economic rights on the mentioned journalistic genre. Additionally, we will propose a new research direction for a future study, highlighting some of the limitations that arise in the creation and dissemination of documentaries, imposed by copyright law.

Keywords: *copyright; documentary; mass-media; audiovisual; moral rights;*

Introductory aspects

The issue of intellectual property rights and copyright remains of constant interest, especially in today’s society, where artificial intelligence (AI) is increasingly present in everyday life.

The legal regulations in our country are similar to those in the European Union. In recent years, particular attention has been paid to the issue of copyright, especially in the context of digitization, the emergence of digital copies, “piracy”. Worldwide, whether in Europe or in the United States, the approach has been similar, with an attempt being made to overhaul legislation. “Revisions of copyright law both in U.S. (*The Digital Millennium Copyright Act*, 1998) and Europe (*Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society*) in the last decade may be understood as a response to a new digital environment, giving stronger protection to copyright holders” (Larsen, Nærland, 2010: 4-5).

The European Union's legal framework regulates copyright in the audiovisual field, and thus also in documentary film. Thus, European legislation emphasizes that a film script, as an original work, is covered by copyright. "Therefore, the subsequent rights of the author to reproduce, distribute and adapt the screenplay arise with the creation of the work, while its registration with the competent authorities is only intended to facilitate protection" (Chera, Gheldiu, 2024).

The European Union retains legislative elements dating back to the Berne Convention for the Protection of Literary and Artistic Works (1886), which gives an important role to copyright, whereby the creator of an original work has the following attributions: "the right to translate; the right to make adaptations and arrangements of the work; (...) the right to communicate to the public the performance of such works; the right to broadcast (...); the right to make reproductions in any manner or form (...); the right to use the work as a basis for an audiovisual work, and the right to reproduce, distribute, perform in public or communicate to the public that audiovisual work" (Cabrera Blázquez et al., 2020, p.11). These rights give the creators of audiovisual works (and therefore also documentary films) the possibility to control the further use and benefits of their creations.

In addition, it is important to note that the Berne Convention also provides for *moral rights*, "that is, the right to claim authorship of the work and the right to object to any mutilation, deformation or other modification of, or other derogatory action in relation to, the work that would be prejudicial to the author's honour or reputation" (Cabrera Blázquez et al., 2020, p.11).

Documentaries in press and cinema: definition and typology

Documentary is one of the genres on the borderline between several fields, between journalism and cinematography, using elements of artistic creation, but also specific features of the media: objectivity, impartiality, informative purpose. Over time, several meanings of documentary have been identified. The definitions underline the complexity of this media genre and emphasize its social character, starting from a "chronological and exhaustive synthesis of the most relevant information concerning an event or phenomenon that focuses the interest of public opinion at a given moment" (Bucheru, 1997:87) - in the written, printed press, and going as far as: "the TV documentary satisfies man's need for global, complete and integrating information; It is not a simple description of a phenomenon, but presents the history, the present and the perspectives of the phenomenon in question" (Iacob, 2006: 10-11), in the audiovisual sphere. Documentary has been compared to reportage, which exceeds it in terms of duration and methods of investigation, as well as to news and investigation, but it implies a greater focus on documenting and identifying the causes as well as the possible consequences of the socio-economic-cultural phenomenon in question.

This journalistic genre has aroused interest over the years, mainly because of its characteristics, but also because of the role of those involved in its making: "Documentary film today has a multitude of ways of expressing a theme that

concerns the filmmaker or filmmakers”. (Bancoş, 2022:69). The subject becomes the central element of the documentary; the whole journalistic approach revolves around the story. Furthermore, the documentary is a journalistic material characterized by *originality* (Mureşan, 2014:257), a feature that we will discuss later, determined by the imprint that its creator leaves on the final product.

Very interesting to note are the categories for categorizing documentaries, which are very varied and involve approaches from different angles: “From the topic addressed to the content of the documentary and the manner of exposure, to the techniques used to be given further, a number of categorizations have been attempted for (...) this type of media product or cinematic genre or cultural artifact or art form” (Bancoş, 2022a:70). Documentaries know a diverse typology, especially according to their purpose, structure and medium of dissemination, as mentioned above. Thus, we will find documentaries with a journalistic purpose (denoting objectivity, neutral approach, truthful sources of information, etc.), as well as documentaries with a poetic purpose, illustrating creativity, an artistic approach and stylistic elements. The visual in the documentary will thus encompass “visual metaphors” transmitted to the audience, depending on the creator’s concept for the documentary material: “We live in a world of images. An image is composed of: a story, the basic visual components, and it may also include sound, sound effects, music, or dialogue constructions, through which the meaning communicated to the viewer is formed” (Bancoş, 2022b: 53).

In addition, Oana Iacob observes three types of documentaries, according to their predominant characteristics: “the cinematographic, the thematic and the *news documentary*” (2006:14). Therefore, in this situation, the typology goes the way from the strong influence of films, cinematography, with specific elements of film editing and film directing, then it reaches the second category, focused on the subject and identifiable especially in specialized, niche television. The last type incorporates investigative reporting techniques, with a strong investigative function. In our country, independent journalism creates many “series” with so-called *news documentaries* or thematic series (see *Recorder*, *Rise Project* etc.), which bring to the public current investigations on topics of social, political, civic, but also confessional, educational, medical or cultural interest.

Other categories are divided according to the length of the documentary or the subject area. But it is interesting to look at this genre according to the medium in which it is delivered (especially nowadays, when online is the public’s number one choice for information). Thus, we identify documentaries on “traditional media” - video, in “digital format” - digital media and, last but not least, “interactive *web-documentaries/live* documentaries” (Bohanţov, 2013: 104). The latter, which is increasingly present in the audience’s information/entertainment options, is found at the intersection of the traditional genre with all the forms observable on the internet, with *social* and *new media* and bases its approach on cross-media and trans media, but also on direct interaction with the audience, whose feedback is essential.

Also, more information about the types of documentary films in contemporary society can be found in Raluca Bancoş (2022), who emphasizes the changes

that are occurring with the increasing use of the Internet as a primary means of information. New media gives the interactive documentary or web documentary a prominent place by providing the opportunity for the audience to actively participate in the “narrative of the new format” (Bancoş, 2022:76). Through digital technology, we witness a universe created by journalists together with the users of internet networks (about which we find more information in Solomon, 2016). In addition, in today’s media, documentary combines diverse and varied forms, such as: “*cinéma vérité*, investigative journalism, the compilation film, and various kinds of *reality television*” (Larsen & Nærland, 2010:3).

All these typologies, following the characteristics of media or cinema documentaries, are ultimately centered on the role and significance of audiovisual documentaries, both for information and education in today’s society. The subjects chosen, the approach and the structure of delivery to the audience are an adaptation, a (re)creation of the image of a society and culture, as Larsen and Nærland researchers have also stated: “Documentary film may be understood as an audiovisual record of our culture” (2010: 3).

A look at copyright in documentaries

After a presentation of the definitions, typologies and characteristics of documentaries, we will now identify some issues related to the moral/non-material rights and patrimonial rights of the persons involved in documentary production.

Although we can identify several typologies of *documentaries* – as products of journalistic creation – they all come together under the umbrella of *originality*. This characteristic entitles *documentaries* to protection, as regulated by Law 8/1996 on copyright and related rights.¹

Seen through the prism of intellectual property law, documentaries can be categorized as *audiovisual works*, which have been defined in Article 65 of Law no. 8/1996 as “a cinematographic work, a work expressed by a process similar to cinematography or any other work consisting of a succession of moving images, whether or not accompanied by sound”.

A first observation to be drawn from the legal definition of audiovisual works is that the description of the creation is made in general terms, without any reference to particular types of audiovisual works. In terms of its characteristics, however, *the documentary* can be categorized in the final sentence of the legal text, since, in this case, we are talking about a work created from “a succession of moving images, whether or not accompanied by sound”.

¹ Law No 8/1996 on Copyright and Related Rights entered into force on June 24, 1996, the current form of the law being based on the republication (r1) of the Official Gazette, Part I, No 489 of June 14, 2018 and including amendments made by the following acts: Law No 203/2018, Law No 15/2019, Law No 8/2020, Law No 39/2022, Law No 69/2022; According to art. 7 of Law No 8/1996, “Original works of intellectual creation in the literary, artistic or scientific field, whatever the mode of creation, mode or form of expression and irrespective of their value and intended purpose, such as:(...) cinematographic works, as well as any other audiovisual works”.

In analyzing the prerogatives of copyright with regard to *documentaries*, it is essential to identify as a priority who is considered to be the *author of* such a journalistic creation in order to know who will benefit from certain rights in this area. The answer is to be found in the legal text of Art. 66-67 of Law no. 8/1996 - which attributes *the* status of principal author *to the maker of* the audiovisual work (“the maker of the audiovisual work is the natural person who, in the contract with the producer, assumes the direction of the creation and realization of the audiovisual work”, Art. 66) and implicitly of the documentary. In the majority of cases, however, the documentary is the fruit of a joint effort, in which sense, according to Article 67, *the author of the adaptation, the author of the script, the author of the dialog, the author of the music specially created* for the journalistic work, and *the author of the graphics* (for documentaries containing significant animated sequences) are also considered as authors. The contribution of several people to the creation of the audiovisual work led to its qualification as a hybrid work, “between a joint work and a collective work, with a derogatory regime from the two categories of creations” (Roş, 2016: 464).

In the case of documentaries, most of the prerogatives conferred by copyright will be the prerogative of the principal author, i.e. the maker. However, as will be analyzed below, certain moral and patrimonial attributes also belong to the other authors (in the hypothesis that there are several persons who participated in the creation of the journalistic act) or to other natural or legal persons - who, as copyright holders, acquire rights of a patrimonial nature.

a. Moral copyright:

Although the specialized literature in the field has not focused its attention on the analysis of the non-patrimonial rights of copyright, we consider that they are also relevant in the case of audiovisual works and implicitly in the case of documentaries.

A first moral right that can be emphasized is the right of *disclosure* - the author’s right to decide *if, how and when the work will be made public*. In the case of documentaries, this right belongs exclusively to the principal author who is the maker. The creation of the documentary does not directly entail making it available to the public. The decision as to whether to keep the audiovisual journalistic work for oneself (without being exhibited) or to present it to the public is a matter for the maker. At the same time, it is the principal author of the documentary who also decides when the material will be shown to the public. As a result, a peculiarity of audiovisual creation, seen as a “genre” (Gheorghiu, 2004: 36, Bodoaşcă, 2018: 32) and in particular of *documentary* (seen as a “species”) is that only the maker - as the main author - decides on “the public disclosure and specific use of the final version of the work, in whole or in part” (according to Art. 68 of Law no. 8/1996), the other co-authors not having the right to object to the public disclosure.

Once the documentary is shown to the public, another non-pecuniary right arises: the right of *withdrawal*. This right implies the faculty/possibility of withdrawing the communicated work, but with the correlative obligation to compensate the holders of the right of use who have been prejudiced by the withdrawal. The

author is not required to justify the objective or subjective reason which prompted the desire to restrict or limit access to the documentary. Although the legal rules do not expressly state so, we consider that *the right of withdrawal* of the documentary should also be an exclusive attribute of the maker. The other authors will not be able to decide on the full retraction of the journalistic work under consideration, nor does the assignee have such a right (see Circa, 2013:183, for the hypothesis that a person may be the assignee of copyright, but does not have the power to retract the work).

By virtue of their moral prerogatives, all persons who have contributed to the making of a documentary have the right to be recognized as the author (*moral right of authorship*) and to decide whether the documentary is to be made available to the public with their full name, initialled name, pseudonym or without any name (*right to name*).

Of particular importance is the right to the *inviolability* of the journalistic work, and implicitly of documentaries. Any of the authors who have contributed to their creation will be able to oppose any modification of the journalistic act, any interference with the creation, by claiming respect for the integrity of the documentary as it was conceived and created. There is a major difference between documentaries and other audiovisual works and cinematographic works. While in the case of cinematographic works the right to inviolability of the work is blurred by the possibility of cinematographic adaptation, in the case of documentaries the preservation and respect for the integrity of the work is very strict, and no changes can be made without the consent of the director and co-authors.

b. Romanian law lays down special rules regarding the *economic rights* resulting from the creation of a documentary.

Thus, the right to use the documentary belongs to the *producer* (defined by Art. 66 para. 2 of Law no. 8/1996 as “the natural or legal person who assumes responsibility for the production of the work and, in this capacity, organizes the production of the work and provides the necessary technical and financial means”), despite the fact that he is not considered as the author of this journalistic creation. The producer has the right to determine (together with the author) the definitive version of the documentary, without, however, detracting from/harming the authorship of the maker.

As the assignee of the right of use, it is the producer who authorizes the dubbing and subtitling (in exchange for remuneration).

The assignment of the right of use from the authors to the producer is made by a contract concluded, under penalty of nullity, in written form, and in the absence of a clause to the contrary, there is a presumption of assignment by the authors of the rights of use over the work in its entirety, except for the authors of specially created music (according to art. 71 of Law no. 8/1996). The authors of the documentary may, however, separately use their own contributions, unless such a prohibition has been provided for in the assignment contract, and may authorize or prohibit the use of the work in whole or in part if it is not for the purpose for which it was created or for its promotion.

By virtue of their economic rights, the authors of the documentary are entitled to receive an appropriate remuneration, either through the producer, directly from the users or through collective management bodies.

Barriers to creating documentaries - copyright limits

In addition to those mentioned above, one can also identify various aspects related to the way in which copyright influences the realization and creative choices in documentary production. We will not dwell on this issue (which will be the subject of a future study), but will only try to point out/mention some of these limitations due to copyright. Very often, journalists who want to make a documentary find themselves in the typical situation of any documentary filmmaker, namely in that area of the “culture of clearance” (Aufderheide & Jaszi, 2004), where intellectual property rights are put on a pedestal, fully respected. Copyright becomes an *absolute right*, which is more likely to hinder the creation of (journalistic) material than to be a link between “the copyright holder and public interests” (Larsen & Naerland, 2008:8), between sources and artistic or journalistic creation.

For example, the rights to the songs and lyrics used in a documentary are often owned by production companies or by the musician who created them. There are situations where the song was created directly for the documentary or was recorded live by the journalist and then integrated into the documentary. An interesting situation is when songs from the public sphere are used (we could mention verses from the National Anthem, popular creations or Romanian or children’s folklore). In this situation, creative freedom is unrestricted, as such works are no longer protected by copyright.

Another element in the area of copyright issues is related to the so-called “broadcaster communication” (Crețu, 2009:109-110) in the area of marketing/advertising, as represented by logos, trademarks (national or international) etc. that appear in a documentary. Usually, these are the ones with strong marketing and require more attention. Examples include fast food such as McDonald’s or KFC, carbonated soft drinks - Coca Cola, Pepsi, luxury goods, IT products etc. However, it is noted that there are situations where, if the appearance is only minimal temporarily, in the background, without any direct reference or disparagement, there is no infringement of intellectual property rights. “Once a trademark is protected, it is usually necessary to obtain the owner’s consent before representing it for any purpose, including in films. Exceptionally, it is usually recognized that the accidental/background appearance of a trademark or logo should not be construed as an infringement of the intellectual property rights of the owner, as long as the trademark is not prominently displayed, is not disparaged and is used as intended, unaltered” (Chera, Gheldiu, 2024).

A survey of documentary filmmakers in the European Union points out that growing problems stem from high copyright costs, which account for 30-40% of total production costs. This research concludes that: “copyright laws in Europe are a serious and growing problem for documentary filmmakers because of increasing

expenses and limitations on the use of archival visual material and music” (Rawie, 2008 apud Larsen and Nærland, 2008:9).

These examples mentioned are only a part of the influence that copyright has in the creation and distribution of a visual, media or cinematic product, emphasizing how: “In documentary storytelling reuse of copyrighted material such as footage and music is of great importance. This requires filmmakers to get permission from right holders, obtain a license or invoke fair use under copyright law. As most documentarians must handle copyright issues in production, copyright law is influencing the practice of documentary filmmaking in various ways” (Larsen & Nærland, 2008:2).

Conclusions

The present study represents a theoretical incursion into the realm/ the sphere of audiovisual works, specifically documentaries – particularly media documentaries. It is viewed from the perspective of copyright. The topic addressed in the article highlights a relevant issue in today’s society, where digitalization and the rise of artificial intelligence (re)bring copyright concerns to the forefront. To discuss the impact of copyright on audiovisual works, we provided an overview of the documentary (with definitions and typology), emphasizing its originality. Attention was then focused on legal aspects. In the case of documentaries, as we have shown, most of the rights granted by copyright belong to the main author, i.e., the creator. In our analysis, we also noted the moral and economic rights that belong to other contributors, as there are often multiple people involved in the creation of a documentary film. Finally, our study, which is not exhaustive, opens the field of research to other dimensions, especially to the identification of limitations imposed by copyright on the creative freedom in the production of new media documentaries.

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