

Guide "Insignificant Attachments "¹

This practical guide was created in response to an increasing number of requests from beneficiaries to VdFS - Verwertungsgesellschaft der Filmschaffenden regarding the clearing of rights in the course of a film shoot and is intended to provide a general introduction to the topic and raise awareness of various legal issues. It cannot replace advice in individual cases.

A large part of the objects that surround us in everyday life (such as clothing, furniture, pictures or graphics, but possibly also household objects) are protected by copyright in their design. Therefore, the use in a film work is also an exploitation of a copyrighted work. If these are incorporated into a film work, the question arises as to whether the rights to use the work must be contractually acquired by the rights holder. In this regard, it must be clarified in advance that the purchase of a piece of furniture, an original painting or any other copyrighted work alone does not constitute the acquisition of any further rights to use the work, as is generally required for filming. This is provided that nothing to the contrary is agreed with the author (or other person entitled to use the work).

According to Section 42e of the Copyright Act, works may be exploited without obtaining the consent of their authors if they are used in the exploitation only incidentally or incidentally and without reference to the actual subject matter of the act of exploitation. This is what is known as non-essential incidental work.

The purpose of this provision is to prevent the need to obtain the author's consent if his work is used only incidentally or incidentally and without reference to the actual subject matter of the exploitation act and his interests are therefore not affected. This provision is thus of great importance, especially for film, where images, furniture, jewelry, items of clothing or even film clips are regularly visible in passing.

The regulation originates from the German Copyright Act and was only adopted in Austria in the course of the 2015 Copyright Act Amendment. Previously, these uses were often unlicensed, but in the gray area. However, German case law interprets this regulation very strictly, and the Austrian Supreme Court (OGH) also relied on the BGH's interpretation in an initial decision².

In each individual case, a weighing is always necessary; the most important criteria are presented below:

¹ Prepared by Dr. Harald Karl on behalf of VdFS Verwertungsgesellschaft der Filmschaffenden. This guide can only provide an overview of the legal framework and cannot replace obtaining professional legal advice in individual cases. Although this guide has been prepared with the greatest possible care, the author and VdFS assume no liability for the accuracy and completeness of this guide.

² OGH 26.09.2017 - 40b81/17s (image of the poacher) with reference to BGH, judgment of 17.11.2014.

- I ZR 177/13 - Furniture catalog.

Immateriality is to be assumed if the work could be omitted or substituted without this being noticeable to the average viewer or without the overall effect of the main object being influenced in any way.

The decisive factor is therefore not the horizon of the director, producer or designer, but that of the average viewer and how much he perceives the work used at all. The mere fact that props are deliberately selected, as in a feature film, does not mean that they cannot be an accessory. However, the degree to which they are included in the film is an indication of materiality. A work that is included in the action is therefore usually no longer an insignificant accessory. Pieces of furniture or clothing, on the other hand, which have a predominantly functional character and whose design is hardly perceived by the viewer on its own, are.

In order to be "insignificant", the accessory must be an object of even less than minor or subordinate importance. Such a subordinate importance can regularly no longer be assigned to the co-exploited work as soon as it has been

- recognizably style- or mood-creating or
- underlining a certain effect or statement
- is included in the actual object of the exploitation,
- serves a dramaturgical purpose or is otherwise characteristic.

If one of these criteria is present, it must be assumed that it is not an insignificant accessory.

The assessment also depends on the type of work and how concisely it is used. In the case of advertising films, which are arranged down to the last detail, a stricter standard is to be applied than, for example, in the case of documentary films: If, for example, music can be heard by chance in the background of documentary recordings, this may well be permissible as an accessory, provided that there is no reference to the content of the subject matter and the music is not emphasized, for example, by post-production. In the case of feature films or commercials, it cannot be assumed as a rule that the music is an accessory, because film music is generally selected in a concise manner to create style or atmosphere.

Since it is often not possible for the set designer or prop master to foresee in detail whether and to what extent a work selected by him will ultimately be visible in the film, the decision as to whether a work can be freely used as an accessory can only be made in consultation with and ultimately by the production. The decisive factor here is the completed film and the visibility and interchangeability of the respective accessory for the average viewer.