

# Copyright Term and the Public Domain in the United States<sup>1</sup>

### Never Published, Never Registered Works<sup>2</sup>

Type of Work	Copyright Term	In the public domain in
		the U.S. as of 1
		January 2020 <u>3</u>
Unpublished works	Life of the author	Works from authors who
	+ 70 years	died before 1950
Unpublished anonymous and	120 years from	Works created before
pseudonymous works, and works made for	date of creation	1900
hire (corporate authorship)		
Unpublished works when the death date of	120 years from	Works created before
the author is not known <sup>4</sup>	date of creation <sup><math>5</math></sup>	1900 <u><sup>5</sup></u>

### Works Registered or First Published in the U.S.

Date of Publication <sup>6</sup>	Conditions <sup>7</sup>	Copyright Term <sup>3</sup>
Before 1925	None	None. In the public domain due to copyright expiration
1925 through 1977	Published without a copyright notice	None. In the public domain due to failure to comply with required formalities
1978 to 1 March 1989	Published without notice, and without subsequent registration within 5 years	None. In the public domain due to failure to comply with required formalities
1978 to 1 March 1989	Published without notice, but with subsequent registration within 5 years	70 years after the death of author. If a work of corporate authorship, 95 years from publication or 120 years from creation, whichever expires first
1925 through 1963	Published with notice but copyright was not renewed <sup>8</sup>	None. In the public domain due to copyright expiration
1925 through 1963	Published with notice and the copyright was renewed <sup><math>\underline{8}</math></sup>	95 years after publication date
1964 through 1977	Published with notice	95 years after publication date
1978 to 1 March 1989	Created after 1977 and published with notice	70 years after the death of author. If a work of corporate authorship, 95



## Cornell University Library

Date of Publication <sup>6</sup>	Conditions <sup>7</sup>	Copyright Term <sup>3</sup>
		years from publication or 120 years from creation, whichever expires first
1978 to 1 March 1989	Created before 1978 and first published with notice in the specified period	The greater of the term specified in the previous entry or 31 December 2047
From 1 March 1989 through 2002	Created after 1977	70 years after the death of author. If a work of corporate authorship, 95 years from publication or 120 years from creation, whichever expires first
From 1 March 1989 through 2002	Created before 1978 and first published in this period	The greater of the term specified in the previous entry or 31 December 2047
After 2002	None	70 years after the death of author. If a work of corporate authorship, 95 years from publication or 120 years from creation, whichever expires first
Anytime	Works prepared by an officer or employee of the United States Government as part of that person's official duties. <sup>19</sup>	None. In the public domain in the United States (17 U.S.C. § 105)

## Works First Published Outside the U.S. by Foreign Nationals or U.S. Citizens Living $\rm Abroad^2$

Date of	Conditions	Copyright Term in the
Publication		United States
Before 1925	None	In the public domain
		(But see first special
		case below)
	Works Published Abroad Before 1978 <sup>10</sup>	
1925 through	Published without compliance with US	In the public domain
1977	formalities, and in the public domain in its source	
	country as of 1 January 1996 (but see special cases) $\frac{20}{20}$	
1925 through	Published in compliance with all US formalities	95 years after
1977	(i.e., notice, renewal) <sup>11</sup>	publication date
1925 through	Solely published abroad, without compliance with	95 years after
1977	US formalities or republication in the US, and not	publication date
	in the public domain in its home country as of 1	
	January 1996 (but see special cases)	



Date of Publication	Conditions	Copyright Term in the United States
1925 through 1977	Published in the US less than 30 days after publication abroad	Use the US publication chart to determine duration
1925 through 1977	Published in the US more than 30 days after publication abroad, without compliance with US formalities, and not in the public domain in its home country as of 1 January 1996 (but see special cases) <b>Works Published Abroad After 1 January</b>	95 years after publication date
	1978	
1978 to 2002	Created before 1978 and first published in a country that is a signatory to the Berne Convention or other 17 USC § 104A(h)(3) treaties <sup>20</sup>	The greater of 70 years after the death of author (or if work of corporate authorship, 95 years from publication) or 31 December 2047
2003-	Created before 1978 and first published after 2002 in a country that is a signatory to the Berne Convention or other 17 USC § $104A(h)(3)$ treaties $\frac{20}{3}$	<ul><li>70 years after the death</li><li>of the author, or if work</li><li>of corporate authorship,</li><li>95 years from</li><li>publication</li></ul>
1 January 1978 - 1 March 1989	Published without copyright notice, and in the public domain in its source country as of 1 January 1996 (but see special cases) <sup>18</sup>	In the public domain
1 January 1978 - 1 March 1989	Published without copyright notice in a country that is a signatory to the Berne Convention or other 17 USC § 104A(h)(3) treaties and is not in the public domain in its source country as of 1 January 1996 (but see special cases) <sup>18</sup>	70 years after the death of author, or if work of corporate authorship, 95 years from publication
1 January 1978 - 1 March 1989	Published with copyright notice in a country that has copyright relations with the US (but see special cases) $\frac{13}{2}$	70 years after the death of author, or if work of corporate authorship, 95 years from publication
After 1 March 1989	Published in a country that has copyright relations with the $US^{\underline{13}}$	70 years after the death of author, or if work of corporate authorship, 95 years from publication
After 1 March 1989	Published in a country with which the United States does not have copyright relations under a treaty	In the public domain



Date of	Conditions	Copyright Term in the		
Publication		United States		
	Special Cases			
1 July 1909	In Alaska, Arizona, California, Hawaii, Idaho,	Treat as an unpublished		
through 1978	Montana, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands ONLY. Published in a language other than English, and without subsequent republication with a copyright notice <sup>12</sup>	work until such date as first US-compliant publication occurred		
Anytime	Created by a resident of Eritrea, Ethiopia, Iran, Iraq, Marshall Islands, or San Marino and published in one of these countries. Works from Nauru, Palau, Somalia, South Sudan or Timor- Leste may also be included. <sup>13</sup>	Not protected by US copyright law until they become party to bilateral or international copyright agreements		
Anytime	Works whose copyright was once owned or administered by the Alien Property Custodian, and whose copyright, if restored, would as of January 1, 1996, be owned by a government <sup>14</sup>	Not protected by US copyright law		
Anytime	If fixed or solely published in one of the following countries, the 1 January 1996 date given above is replaced by the date of the country's membership in the Berne Convention or the World Trade Organization, whichever is earlier: Afghanistan, Algeria, Andorra, Angola, Armenia, Azerbaijan, Belarus, Bhutan, Cambodia, Cape Verde, Cook Islands, Comoros, Equatorial Guinea, Grenada, Haiti, Jersey, Jordan, Kiribati, Democratic People's Republic of Korea, Kuwait, Kyrgyzstan, Laos, Malaysia, Micronesia, Mongolia, Montenegro, Nepal, Niue, Oman, Panama, Papua New Guinea, Qatar, Samoa, São Tomé and Príncipe, Saudi Arabia, Solomon Islands, Sudan, Syria, Taiwan, Tajikistan, Tonga, Turkmenistan, Tuvalu, United Arab Emirates, Uzbekistan, Vanuatu, Vietnam, Yemen			

### Sound recordings

(Note: The following information applies only to the sound recording itself, and not to any copyrights in underlying compositions or texts.)



Date of	Conditions	In the public domain
Fixation/Publication		in the U.S. as of 1
		January 2020 <sup>3</sup>
	Unpublished Sound Recordings,	
	Domestic and Foreign	
Prior to 15 Feb. 1972	Indeterminate	Subject to state
		common law
		protection. Enters the
		public domain on 15
		Feb. 2067
After 15 Feb. 1972	Life of the author + 70 years. For	Nothing. The soonest
	unpublished anonymous and	anything enters the
	pseudonymous works and works made for	public domain is 15
	hire (corporate authorship), 120 years	Feb. 2067
	from the date of fixation	
	Sound Recordings Published in the United States	
Before 1923	None	1 January 2022
1923 to 1946	None	100 years from
1723 10 1740	None	publication
1947 to 1956	None	110 years from
1747 10 1750	None	publication
1957 - 14 Feb 1972	None	15 Feb 2067
15 Feb 1972 to 1978	Published without notice (i.e, ©, year of	In the public domain
	publication, and name of copyright	
	$[\text{owner})^{15}$	
15 Feb. 1972 to 1978	Published with notice	95 years from
		publication. 2068 at the
		earliest
1978 to 1 March 1989	Published without notice, and without	In the public domain
	subsequent registration	
1978 to 1 March 1989	Published with notice	70 years after death of
		author, or if work of
		corporate authorship,
		the shorter of 95 years
		from publication, or
		120 years from
		creation. 2049 at the
		earliest
After 1 March 1989	None	70 years after death of
		author, or if work of
		corporate authorship,
		the shorter of 95 years
		from publication, or



Date of	Conditions	In the public domain
Fixation/Publication	Conditions	in the U.S. as of 1
1 IXation/1 doncation		January $2020^{3}$
		120 years from
		creation. 2049 at the
		earliest
	Sound Recordings Published Outside	carnest
	the United States	
Before 1923	None	1 January 2022
1923 to 1946	None	100 years from
		publication
1947 to 1956	None	110 years from
		publication
1957 to 14 Feb 1972	None	15 Feb. 2067
15 Feb 1972 to 1	In the public domain in its home country	Subject to state
March 1989	as of 1 Jan. 1996 or there was US	common law
	publication within 30 days of the foreign	protection. Enters the
	publication (but see special cases)	public domain on 15
		Feb. 2067
15 Feb. 1972 to 1978	Not in the public domain in its home	95 years from date of
	country as of 1 Jan. 1996. At least one	publication. 2068 at the
	author of the work was not a US citizen or	earliest
	was living abroad, and there was no US	
	publication within 30 days of the foreign	
	publication (but see special cases)	
1978 to 1 March 1989	Not in the public domain in its home	70 years after death of
	country as of 1 Jan. 1996. At least one	author, or if work of
	author of the work was not a US citizen or	corporate authorship,
	was living abroad, and there was no US publication within 30 days of the foreign	the shorter of 95 years from publication, or
	publication (but see special cases)	120 years from creation
After 1 March 1989	None	70 years after death of
Alter I March 1909	None	author, or if work of
		corporate authorship,
		the shorter of 95 years
		from publication, or
		120 years from creation
	Special Cases	
Fixed at any time	Created by a resident of Eritrea, Ethiopia,	Not protected by US
v	Iran, Iraq, Marshall Islands, San Marino,	federal copyright law
	or Timor-Leste and published in one of	because they are not
	these countries. Works from Nauru,	party to international
	Palau, Somalia, or South Sudan may also	copyright agreements
	be included. <sup>13</sup>	



Date of Fixation/Publication	Conditions	In the public domain in the U.S. as of 1 January $2020^{3}$
Fixed prior to 1996	Works whose copyright was once owned or administered by the Alien Property Custodian, and whose copyright, if restored, would as of 1 January 1996 be owned by a government <sup>14</sup>	Not protected by US federal copyright law
Fixed at any time	If fixed or solely published in one of the following countries, the 1 January 1996 date given above is replaced by the date of the country's membership in the Berne Convention or the World Trade Organization, whichever is earlier: Afghanistan, Algeria, Andorra, Angola, Armenia, Azerbaijan, Belarus, Bhutan, Cambodia, Cape Verde, Cook Islands, Comoros, Equatorial Guinea, Grenada, Haiti, Jersey, Jordan, Kiribati, Democratic People's Republic of Korea, Kuwait, Kyrgyzstan, Laos, Malaysia, Micronesia, Mongolia, Montenegro, Nepal, Niue, Oman, Panama, Papua New Guinea, Qatar, Samoa, São Tomé and Príncipe, Saudi Arabia, Solomon Islands, Sudan, Syria, Taiwan, Tajikistan, Tonga, Turkmenistan, Tuvalu, United Arab Emirates, Uzbekistan, Vanuatu, Vietnam, Yemen	

### Architectural Works<sup>16</sup>

(Note: Architectural plans and drawings may also be protected as textual/graphics works)

Date of Design	Date of Construction	Copyright Status
Prior to 1 Dec. 1990	Not constructed by 31 Dec. 2002	Protected only as plans or drawings
Prior to 1 Dec. 1990	Constructed by 1 Dec. 1990	Protected only as plans or drawings
Prior to 1 Dec. 1990	Constructed between 30 Nov. 1990 and 31 Dec. 2002	Building is protected for 70 years after death of author, or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation <sup>17</sup>



Date of	Date of Construction	Copyright Status
Design		
From 1	Immaterial	Building is protected for 70 years after death of
Dec. 1990		author, or if work of corporate authorship, the shorter of 95 years from publication, or 120 years from creation $\frac{17}{2}$

### **Editorial Note:**

1 January 2019 marked two important changes to the copyright duration chart. First, for the first time in 20 years, published works entered the public domain. 1923 finally arrived, and the cutoff date for the public domain has started to shift. Second, the enactment of the Orrin G. Hatch-Bob Goodlatte Music Modernization Act in 2018 radically changed the calculus for pre-1972 published sound recordings. Both of these changes are reflected in the chart.

#### Notes

1. This chart was first published in Peter B. Hirtle, "Recent Changes To The Copyright Law: Copyright Term Extension," Archival Outlook, January/February 1999. This version is current as of 03 January 2020. The most recent version is found at Cornell Copyright Information Center's "Copyright Term and the Public Domain in the United States" page. For some explanation on how to use the chart and complications hidden in it, see Peter B. Hirtle, "When is 1923 Going to Arrive and Other Complications of the U.S. Public Domain," Searcher (Sept 2012). The chart is based in part on Laura N. Gasaway's chart, "When Works Pass Into the Public Domain," and similar charts found in Marie C. Malaro, A Legal Primer On Managing Museum Collections (Washington, D.C.: Smithsonian Institution Press, 1998): 155-156. A useful copyright duration chart by Mary Minow, organized by year. A "flow chart" for copyright duration, and a "tree-view" chart on copyright. Several U.S. copyright duration calculators are available online, including the Public Domain Sherpa and the Durationator (in beta). Europeana's public domain calculators for 30 different countries outside of the U.S. The Open Knowledge Foundation has been encouraging the development of public domain calculators for many countries. See also Library of Congress Copyright Office. Circular 15a, Duration of Copyright: Provisions of the Law Dealing with the Length of Copyright Protection (Washington, D.C.: Library of Congress, 2004). Further information on copyright duration is found in Chapter 3, "Duration and Ownership of Copyright," in Copyright and Cultural Institutions: Guidelines for Digitization for U.S. Libraries, Archives, and Museums, by Peter B. Hirtle, Emily Hudson, and Andrew T. Kenyon (Ithaca, NY: Cornell University Library, 2009) available as a free download from Cornell eCommons. Additional guidance on the public domain may be found in Melissa Levine, Richard C. Adler, and Justin Bonfiglio. Finding the Public Domain: Copyright Review Management System Toolkit (Ann Arbor, Michigan: Michigan Publishing, 13 June 2016) and Menesha A. Mannapperuma, Brianna L. Schofield, and Andrea K. Yankovsky, et. al. Is it



in the Public Domain? (Berkeley, CA: Samuelson Law, Technology & Public Policy Clinic at the University of California, Berkeley, School of Law, 27 May 2014).

- Treat unpublished works registered for copyright prior to 1978 as if they had been published in the US (though note that the only formality that applied was the requirement to renew copyright after 28 years). Unpublished works registered for copyright since 1978 can be considered as if they were an "Unpublished, Unregistered Work."
- 3. All terms of copyright run through the end of the calendar year in which they would otherwise expire, so a work enters the public domain on the first of the year following the expiration of its copyright term. For example, a book published on 15 March 1925 will enter the public domain on 1 January 2021, not 16 March 2020 (1925+95=2020).
- 4. Unpublished works when the death date of the author is not known may still be copyrighted after 120 years, but certification from the Copyright Office that it has no record to indicate whether the person is living or died less than 70 years before is a complete defense to any action for infringement. See <u>17 U.S.C. § 302(e)</u>.
- 5. Presumption as to the author's death requires a certified report from the Copyright Office that its records disclose nothing to indicate that the author of the work is living or died less than seventy years before.
- 6. "Publication" was not explicitly defined in the Copyright Law before 1976, but the 1909 Act indirectly indicated that publication was when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority.
- 7. Not all published works are copyrighted. Works prepared by an officer or employee of the United States Government as part of that person's official duties receive no copyright protection in the US. For much of the twentieth century, certain formalities had to be followed to secure copyright protection. For example, some books had to be printed in the United States to receive copyright protection, and failure to deposit copies of works with the Register of Copyright could result in the loss of copyright. The requirements that copies include a formal notice of copyright and that the copyright be renewed after twenty eight years were the most common conditions, and are specified in the chart.
- 8. A 1961 Copyright Office study found that fewer than 15% of all registered copyrights were renewed. For books, the figure was even lower: 7%. See Barbara Ringer, "Study No. 31: Renewal of Copyright" (1960), reprinted in Library of Congress Copyright Office. Copyright law revision: Studies prepared for the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary, United States Senate, Eighty-sixth Congress, first [-second] session. (Washington: U. S. Govt. Print. Off, 1961), p. 220. A good guide to investigating the copyright and renewal status of published work is Samuel Demas and Jennie L. Brogdon, "Determining Copyright Status for Preservation and Access: Defining Reasonable Effort," Library Resources and Technical Services 41:4 (October, 1997): 323-334. See also Library of Congress Copyright Office, How to investigate the copyright status of a work. Circular 22. [Washington, D.C.: Library of Congress, Copyright Office, 2004]. The Online Books Page FAQ, especially "How Can I Tell Whether a Book Can Go Online?" and "How Can I Tell Whether a Copyright Was Renewed?", is also very helpful.
- 9. The following section on foreign publications draws extensively on Stephen Fishman, <u>The Public Domain: How to Find Copyright-free Writings, Music, Art & More</u>..



(Berkeley : Nolo.com, 2017). It applies to works first published abroad and not subsequently published in the US within 30 days of the original foreign publication. Works that were simultaneously published abroad and in the US are treated as if they are American publications.

- 10. Foreign works published after 1923 are likely to be still under copyright in the US because of the Uruguay Round Agreements Act (URAA) modifying the General Agreement on Tariffs and Trade (GATT). The URAA restored copyright in foreign works that as of 1 January 1996 had fallen into the public domain in the US because of a failure to comply with US formalities. One of the authors of the work had to be a non-US citizen or resident, the work could not have been published in the US within 30 days after its publication abroad, and the work needed to still be in copyright in the country of publication. Such works have a copyright term equivalent to that of an American work that had followed all of the formalities. For more information, see Library of Congress Copyright Office, <u>Highlights of Copyright Amendments Contained in the Uruguay Round Agreements Act (URAA)</u>. Circular 38b. [Washington, D.C.: Library of Congress, Copyright Office, 2013].
- 11. US formalities include the requirement that a formal notice of copyright be included in the work; registration, renewal, and deposit of copies in the Copyright Office; and the manufacture of the work in the US.
- 12. The differing dates is a product of the question of controversial Twin Books v. Walt Disney Co. decision by the 9th Circuit Court of Appeals in 1996. The question at issue is the copyright status of a work only published in a foreign language outside of the United States and without a copyright notice. It had long been assumed that failure to comply with US formalities placed these works in the public domain in the US and, as such, were subject to copyright restoration under URAA (see note 10). The court in Twin Books, however, concluded "publication without a copyright notice in a foreign country did not put the work in the public domain in the United States." According to the court, these foreign publications were in effect "unpublished" in the US, and hence have the same copyright term as unpublished works. The decision has been harshly criticized in Nimmer on Copyright, the leading treatise on copyright, as being incompatible with previous decisions and the intent of Congress when it restored foreign copyrights. The Copyright Office as well ignores the Twin Books decision in its circular on restored copyrights. Nevertheless, the decision is currently applicable in all of the 9th Judicial Circuit (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and Guam and the Northern Mariana Islands), and it may apply in the rest of the country.
- See Library of Congress Copyright Office, <u>International Copyright Relations of the</u> <u>United States. Circular 38a</u>. [Washington, D.C. : Library of Congress, Copyright Office, 2019].
- 14. See 63 Fed. Reg.19,287 (1998), Library of Congress Copyright Office, <u>Copyright</u> <u>Restoration of Works in Accordance With the Uruguay Round Agreements Act; List</u> <u>Identifying Copyrights Restored Under the Uruguay Round Agreements Act for Which</u> <u>Notices of Intent To Enforce Restored Copyrights Were Filed in the Copyright Office.</u>
- 15. Copyright notice requirements for sound recordings are spelled out in the <u>Copyright</u> <u>Office's Circular 3, "Copyright Notice."</u> Here is the exact text: The copyright notice for phonorecords embodying a sound recording is different from that for other works. Sound



recordings are defined as "works that result from the fixation of a series of musical, spoken or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work." Copyright in a sound recording protects the particular series of sounds fixed in the recording against unauthorized reproduction, revision, and distribution. This copyright is distinct from copyright of the musical, literary, or dramatic work that may be recorded on the phonorecord. Phonorecords may be records (such as LPs and 45s), audio tapes, cassettes, or disks. The notice should contain the following three elements appearing together on the phonorecord:

- 1. The symbol; and
- 2. The year of first publication of the sound recording; and
- 3. The name of the owner of copyright in the sound recording, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner. If the producer of the sound recording is named on the phonorecord label or container and if no other name appears in conjunction with the notice, the producer's name shall be considered a part of the notice.
- 4. Example: 2004 X.Y.Z. Records, Inc.
- 16. Architectural works are defined as "the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features." Architectural works were expressly included in copyright by Title VII of Pub. L. 101-650.
- 17. What constitutes "publication" of a building is a very interesting question. As the Copyright Office has noted, "A work is considered published when underlying copies of the building design are distributed or made available public by sale or other transfer of ownership, or by rental. Construction of a building does not itself constitute publication registration, unless multiple copies are constructed." See its <u>Circular 41</u>, "Copyright <u>Claims in Architectural Works."</u>
- 18. If the source country's first adhered to either the Berne Treaty or the WTO after 1 January 1996, then the relevant date is the earliest date of membership. Date of membership is tracked at <u>on Wikipedia: List of Parties to International Copyright Agreements.</u>
- 19. Contractors and grantees are not considered government employees. Generally they create works with copyright (though the government may own that copyright). See <u>CENDI Frequently asked Questions about Copyright: Issues Affecting the U.S.</u> <u>Government</u>. The public domain status of U.S. government works applies only in the U.S.
- 20. Thanks to Dr. Paul Goldsman and Tony Greenman for noting that the chart lacked information for foreign works created before 1978 and first published between 1978 and 2003.

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## GUIDELINES FOR THE USE OF COPYRIGHTED MATERIALS AND WORKS OF ART BY ART MUSEUMS



This document is intended for informational purposes only and should not be construed as legal advice or a substitution for obtaining legal advice from an attorney licensed in your jurisdiction and familiar with the specific circumstances with which you are dealing. The content of this document may not reflect current legal developments and is designed only to give general information on the issues actually covered. It is not intended to be a comprehensive summary of recent developments in the law, treat exhaustively the subjects covered, provide legal advice, or render a legal opinion. The content may be revised from time to time to reflect new developments or refine the guidance provided.

**OCTOBER 11, 2017** 

## **MESSAGE FROM THE AAMD PRESIDENT**

The mission of the Association of Art Museum Directors is to advance the profession by cultivating leadership capabilities of directors, advocating for the field, and fostering excellence in art museums. AAMD serves a unique function, providing a valued forum for art museum directors to build connections, strengthen their leadership skills, share strategies for museum management, develop creative programs, cultivate audiences, and advocate for their institutions and the field at large. AAMD provides crucial leadership and advocacy, supporting art museum leaders and stakeholders in identifying best practices, fostering diversity and inclusion, and addressing challenges both within their institutions and for the field as a whole and finally, AAMD conducts research and generates knowledge that enriches and expands art museum practice, and shares its findings widely to support transformation in—and advocacy for—the field.

The AAMD gratefully acknowledges the many individuals who gave of their time and expertise to the project of creating these Guidelines, but in particular the AAMD expresses its gratitude to the following individuals and to the institutions who generously allowed these lawyers to devote many hours to the project: Cristina Del Valle, Senior Associate Counsel, The Metropolitan Museum of Art, Lauryn Guttenplan, Associate General Counsel, Smithsonian Institution, Fred Goldstein, Senior Vice President, Administration, General Counsel and Secretary, Los Angeles County Museum of Art, and Nicholas S. Holmes, General Counsel, Whitney Museum of American Art. Thanks are also due to Maureen Whalen, formerly Associate General Counsel of the J. Paul Getty Trust, whose advice during the process was invaluable and to Stephen J. Knerly, Jr., special counsel to the AAMD, for his expertise and forever wise counsel. The AAMD also wishes to thank Bruce Barnes, Ron and Donna Fielding Director, George Eastman Museum and Chair, Task Force on Fair Use, for his leadership.

Finally, AAMD acknowledges the generous support of our own members without which this project would not have been possible.

Lori Fogarty Director and CEO Oakland Museum of California President, Board of Trustees, Association of Art Museum Directors

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## I. INTRODUCTION

he possession, ownership and use of copyrighted materials and works of art<sup>1</sup> in art museums<sup>2</sup> involves virtually all aspects of museum operations, from the display of works of art to the dissemination of archival material<sup>3</sup>, from the creation of exhibition catalogues to the use of online collections. In all of these aspects and others, museums must be mindful of the rights of the creators of, and holders of copyright in, materials and works of art. At the same time, in order to accomplish their mission of acquiring, preserving, studying and interpreting works of art that are held for the benefit of the public, art museums rely on fair use, the ability and the right to use copyrighted materials and works of art in appropriate circumstances and under conditions that are well recognized, both legally and ethically. Museums not only use copyrighted materials and works of art, they also create such materials and even commission such works. They should—and the Association of Art Museum Directors ("AAMD") believes do—understand and expect their copyrighted materials and works of art to be subject to the same fair use by third parties.

For many years, museums operated within a reasonably well-recognized system of legal principles, ethical guidelines and norms that guided them in their use of copyrighted materials and works of art. The explosion of electronic media, the application of digital technology, the dissemination of information through the internet, and a more nuanced understanding of fair use, informed by court decisions, have all changed and expanded the ways in which museums think about their collections and their activities. The art world is no stranger to the dynamic forces of digital information sharing and the new ways organizations communicate with the general public, scholars, researchers and others. These phenomena have evolved rapidly in just the last decade and are likely to continue at the same pace, if not an accelerated pace, in the future.

With an ever-evolving technological world and legal landscape, art museums need and want guidance with respect to how they can fulfill their missions while respecting the rights of authors, artists and copyright holders. Any such guidance should acknowledge the right to use copyrighted materials and works of art without undue restriction or limitation, so long as such uses are legally and ethically sound.

The AAMD believes that there is a need to inform the field about appropriate and normative practices in the use of copyrighted materials and works of art and the application of fair use in the context of various

<sup>1</sup> For purposes of these Guidelines, "copyrighted materials" and "materials" mean printed, manuscript or digital material such as books, articles, artists' notes or archival material that are subject to copyright in the United States. "Works" and "works of art" mean works of the visual arts in any media, including paintings, works on paper, video, digital, sculpture and other three-dimensional media, that are subject to copyright in the United States. These Guidelines do not address materials and works of art that are not subject to copyright in the United States, commonly known as public domain works.

<sup>2</sup> References in these Guidelines to "museums," "art museums" or "member museums" are generally intended to refer to museums whose directors are members of the Association of Art Museum Directors (the "AAMD"). While these Guidelines are written for members of the AAMD, if museums whose directors are not members find these Guidelines to be useful, they are encouraged to adopt them.

<sup>3</sup> While each type of copyrighted materials may have specific issues under copyright law, archives can be particularly complicated and while generally included in the definition, present special issues discussed in <u>Article IV</u>, <u>Section E</u>, <u>Archives</u>.

museum activities.<sup>4</sup> Because the same general principles of fair use apply regardless of the nature of the museum activity, providing the guiding legal principles and precedents that dictate the fair use analysis and applying those principles to a series of examples specific to art museums makes sense. While these Guidelines are designed to inform and assist member museums generally, each museum should develop its own written policy and procedures relating to the use of copyrighted materials and works of art.

These Guidelines are designed to guide and educate the members of the AAMD, the museums of which they are directors and other museums that choose to follow them. They do not cover every aspect of fair use or copyright and, except where specifically discussed, they do not address other legal considerations impacting the use of copyrighted materials or works of art such as trademarks and rights of privacy and publicity. Furthermore, in making a decision about how and when to use copyrighted materials and works of art, member museums must be sensitive not only to the laws governing activities in their home jurisdictions, but also, especially with the proliferation of internet activities, other jurisdictions in which they may be found to operate. These Guidelines assume the application of United States copyright law, which may differ in significant ways from laws in other jurisdictions. The AAMD cannot provide guidance for every situation and every jurisdiction. Museums should seek legal advice as necessary.

## **II. FAIR USE**

he AAMD reaffirms the right of art museums in the United States to make fair use of copyrighted materials and works of art in the fulfillment of their missions. This right is critical to the accomplishment of activities that are performed by art museums for the public benefit. In fact, the right to use copyrighted materials and works of art fairly is one that inures to the benefit of the public that is educated and informed by art museums using such materials and such works.<sup>5</sup>

The right of fair use is deeply embedded in American law and is codified in Section 107 of the Copyright Act of 1976 (the "Copyright Act"). Congress has provided a set of four factors to be considered when evaluating whether a use of copyrighted material or a work of art is "fair." In the introduction to the four factors, Section 107 provides that "fair use of a copyrighted work...for purposes such as criticism, comment...teaching, scholarship, or research, is not an infringement of copyright." Because the analysis is one of weighing factors, bright lines in the area of fair use are rare and judgment and the evaluation of the use of the material are critical to arriving at an appropriate decision. The four factors to be considered are:

 The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

<sup>4</sup> The AAMD commends the College Art Association for its work in creating the Code of Best Practices in Fair Use for the Visual Arts which has substantially advanced the knowledge of and discussion about fair use and informed these Guidelines.

<sup>5</sup> The Copyright Act of 1976 (the "Copyright Act") (§108(f)(4)) refers to "the right of fair use as provided by section 107." Fair use has been characterized in many ways, e.g., a privilege, an affirmative defense, a noninfringing use. The AAMD views fair use by museums in support of their missions as a right.

- The nature of the copyrighted work;
- The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- The effect of the use upon the potential market for or value of the copyrighted work.

These factors are discussed in greater detail in <u>Fair Use and the Four Factors</u>, Annex A to these Guidelines ("Annex A"). Courts have over time enunciated considerations for each factor and the importance of each factor in a fair use analysis.<sup>6</sup> For example, the first and fourth factors are considered extremely important in a fair use analysis, the third factor less so and the second factor interrelated in many ways with the first factor.<sup>7</sup> As a result, a museum must consider the use of copyrighted material or a work of art in the context of the factors before determining that a use is protected.

The fair use analysis does not require that every factor be found in a museum's favor to support a museum's use of copyrighted materials or works of art.<sup>®</sup> In fact, many cases still find fair use even when at least one of the factors weighs in favor of the copyright holder.<sup>®</sup> In those cases, fair use is nevertheless upheld because the strength of the other factors (in particular, the first factor) in favor of the user outweighs those found in favor of the copyright holder.<sup>10</sup>

The more that a museum evaluates, informs and educates a particular public, audience or recipient about copyrighted material or a work of art, the more extensive (in the extent and amount of copyrighted material or in the size and quality of reproduction of a work of art) the fair use can be. As one court<sup>11</sup> noted, "The more transformative the new work, the less important the other factors, including commercialism, become." Or, as another court said, "In some instances, it is readily apparent that [the defendant's] image display enhances the reader's understanding of the biographical text."<sup>12</sup> On the other hand, mere retransmission of a copyrighted image in a different medium is not likely to be considered transformative. As one court explained, ". . . where the use is for the same intrinsic purpose as [the copyright holder's], such use seriously weakens a claimed fair use."<sup>13</sup> Nor is fair use designed simply to excuse users from seeking permission when other non-infringing material is available and equally suited to the user's needs. As another court recently noted, "The fair-use privilege under § 107 is not designed to protect lazy appropriators. Its goal instead is to facilitate a class of uses that would not be possible if users always had to negotiate with copyright proprietors. (Many copyright owners would block

<sup>6 4</sup> Melville B. Nimmer & David Nimmer, Nimmer on Copyright, §13.05[A][1][a] at 13-161 (2015) (quoting *Mathews Conveyer Co. v. Palmer-Bee Co.*, 135 F.2d 73, 85 (6th Cir. 1943)).

<sup>7</sup> Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003) ("Kelly"); Kienitz v. Sconnie Nation LLC, 766 F.3d 756 (7th Cir. 2014).

<sup>8 4</sup> Nimmer, supra at §13.05[A][5][a] at 13-206.5 (2017) (quoting Wright v. Warner Books, Inc., 953 F.2d 731, 740 (2d Cir. 1991)).

<sup>9</sup> *Id.* at 741.

<sup>10</sup> Id. at 736-37.

<sup>11</sup> Kelly, 336 F.3d 811.

<sup>12</sup> See Bill Graham Archives v. Dorling Kindersley Ltd. 448 F.3d 605 (2<sup>nd</sup> Cir. 2006) ("Graham").

<sup>13</sup> Worldwide Church of God v. Philadelphia Church of God, Inc., 227 F.3d 1110 (9th Cir. 2000) ("Worldwide").

all parodies, for example, and the administrative costs of finding and obtaining consent from copyright holders would frustrate many academic uses.)"<sup>14</sup>

While there are cases that have analyzed the fair use doctrine in the context of copyrighted materials or works of art, no cases as of the date of these Guidelines have involved the use by a museum. As a result, there is limited specific guidance on this issue, but there are precedents that inform a museum on how to evaluate the use of copyrighted materials and works of art in the context of fair use. Some of those precedents are discussed in <u>Annex A</u>.

## III. SPECIAL CONSIDERATIONS

et forth below are some special considerations that are not strictly part of the legal test for fair use, but are related. They will not apply in all instances, but should form part of the fair use analysis when museums are using copyrighted materials and works of art.

## **A. Attribution**

While not a component of the fair use analysis, museums should, whenever possible, attribute copyrighted materials or works of art when they are used. Normally this means attributing the material or work to the author(s) or artist. If there is a separate copyright holder or agent of the copyright holder known to the museum (or the holder of copyright, if any, of an image of an underlying work of art), the museum should also consider acknowledging that holder in a fashion consistent with the medium and usage within the field or the custom and practice applicable to the type of use. While attributions directly accompanying the use of copyrighted materials and works of art are encouraged, doing so may not always be feasible given the nature of the use (*e.g.*, Twitter's character limitation), the material being used or the various mediums of use (print versus digital publications, for example). There may also be times when attribution is not appropriate,<sup>15</sup> but the analysis should begin with a presumption that attribution is the norm.

<sup>14</sup> Kienitz, 766 F.3d 756.

<sup>15</sup> In certain circumstances under the Visual Artists Rights Act ("VARA"), artists (and only artists regardless of whether or not they are the copyright holder) have the right not to have a work of art attributed to them (see the <u>Copyright Act (§106(a)</u>). This right is limited and generally only applies if there has been a distortion, mutilation or other modification of the work which would be prejudicial to the artist's honor or reputation.

### **B. Partial Images**

As a courtesy to artists, museums generally should use the entire image of a work of art, without cropping or other diminution. If less than the entire work is reproduced or modifications to the image of the work are made, they should be clearly identified as such (*i.e.*, detail, alteration, etc.) and if possible, a complete, unaltered reproduction of the work of art should appear in the same publication for reference purposes in such size and resolution as would independently meet the fair use factors. In some circumstances, the use of a detail may be more strongly supported as fair use than the entire work, if the transformative purpose of the use is best served by only reproducing a detail of the copyrighted work, under the first<sup>16</sup> and third<sup>17</sup> factors. In such a situation, only the detail would be used.

### **C. Documentation of Considerations**

Any fair use analysis is fact and context-specific, and requires a careful balancing of the four factors in the context of a specific use. When a museum makes a determination to use copyrighted materials or works of art based on fair use, the museum should consider documenting its reasons for relying on fair use when the decision is made. A writing that is substantially contemporaneous with the decision can demonstrate the museum's good faith in making a decision, even if the decision is ultimately found not to be supported by fair use. The documentation need not be extensive, even a simple summary of the use of the material or work and why the museum believes the use is fair use will provide important support for the museum's position if challenged.<sup>18</sup>

### **D. Website Terms of Use**

A museum's website often uses copyrighted materials and works of art in a number of different ways, including online collections, guides to the collection, previews of exhibitions, blog posts, scholarly articles, webcasts and many others. A properly drafted "terms of use" or "terms and conditions" can serve a number of purposes, including placing the users of the website on notice of important restrictions often applicable to all (not just copyrighted) materials and works of art on the website. An additional level of protection, to evidence acceptance of conditions of access and use, would be a click through agreement.

<sup>16</sup> The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.

<sup>17</sup> The amount and substantiality of the portion used in relation to the copyrighted work as a whole.

<sup>18</sup> Additionally, <u>Section 504(c)(2) of the Copyright Act</u> requires a court to remit statutory damages for a copyright violation if the infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use and if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords. Whether a museum can avail itself of this defense in all circumstances is not a decided question, but the contemporaneous writing at least preserves the argument.

Common terms of use provide that:

- certain materials and works of art on the website are protected by copyright and may also be subject to other third party rights, including trademarks and the rights of privacy and publicity;
- downloading for commercial purposes is prohibited;<sup>19</sup>
- in accordance with scholarly practice, users of materials or works of art (whether copyrighted or not) in publications, etc., should cite the author/artist and the source;
- the use of trademarks is limited or prohibited; and
- using copyrighted materials or works of art for fair use purposes is permitted—sometimes this is stated in terms of allowing uses that are non-commercial, scholarly, educational or research-related.
- Terms of use or terms and conditions can also provide protection to the museum, including:
- disclaiming any warranties about the museum's rights in the copyrighted materials and works of art;
- limiting liability for downstream uses by users of the museum's website of copyrighted materials or works of art;
- providing choice of law and venue provisions for disputes between users of the museum's website and the museum;
- requiring indemnities to the museum from users of the museum's website for the user's unauthorized or infringing uses; and
- providing a mechanism for making a copyright complaint (notice and take down procedures), including procedures available under the Digital Millennium Copyright Act of 1998.

Terms of use or terms and conditions should also be carefully reviewed in the context of the museum's policies with respect to the use of museum proprietary or protected information, use of content not subject to copyright, consequences of posting by users, and users' rights of privacy. Properly crafted terms of use or terms and conditions also demonstrate the museum's responsible approach to fair use and protection of copyrighted materials and works of art.

<sup>19</sup> Some museums have not only prohibited downloading or generally prohibited downloading for commercial purposes in their terms of use, but have actually sought to disable downloading. Doing so does not appear to be legally required, but may be an additional proactive step that, as a policy matter, museums may consider.

## **E. Contract Limitations**

Museums often obtain copyrighted materials and works of art, including images, from third-party sources through license agreements that impose restrictions on use. Museums also acquire works of art or images of works of art from the artist or a gallery representing the artist or copyrighted materials from an author under contracts (*e.g.*, licenses) that contain use restrictions. These restrictions can limit a museum's use of copyrighted materials or works of art regardless of whether or not a proposed use qualifies as fair use. *Normally, fair use is not a defense to, and does not excuse a museum from abiding by, an enforceable contractual limitation.* For this reason, museums should consider inserting in contracts with third-party sources, artists and galleries provisions that expressly preserve fair use rights permitted by the Copyright Act without having to seek permission from the copyright holder.

## **F. Courtesy Clearance**

Notwithstanding the right to fair use, museums may voluntarily elect to seek copyright permission even when they would not legally be required to do so under a reasonable reading of fair use. Seeking such permission should not, as a matter of law,<sup>20</sup> custom or practice, be construed as limiting a museum's right to make fair use of copyrighted materials or works of art, including the copyrighted materials or works of art for which permission has been sought. Maintaining time-honored relationships with authors, artists, and other creators and copyright holders is a vital aspect of art museum life. Museums should not be expected to choose between exercising their fair use rights and maintaining such relationships.

## **G. Practical Considerations**

An additional practical consideration is the copyright holder's approach to protecting and enforcing its copyrights. Copyright holders that routinely challenge even fair uses and aggressively pursue licenses and fees can present a cost and risk for the museum that should be taken into account when deciding whether or not (or how) to publish copyrighted material or a work of art.

<sup>20</sup> See Graham.

## **IV. SPECIFIC EXAMPLES**

et forth below are examples that address various museum activities and provide guidance in the fair use analysis. The AAMD cautions that each specific use needs to be evaluated on its own merits and the examples below are simply to provide a framework for that analysis. The AAMD may supplement and add to the examples set forth below, as appropriate, and may revise existing examples as more guidance becomes available through actual experience, the courts and/or Congress.

Because there are very few bright lines, a fair use analysis by definition involves a potential for some risk, and each museum should evaluate for itself where on the risk continuum a specific activity falls and whether such use is, therefore, one that the museum finds appropriate under the circumstances. As indicated above, the results of this analysis should be documented and maintained in the museum's records. Furthermore, any risk should be understood in the context of the remedies available to a copyright holder. Some users believe that the only risk is having to discontinue the use or pay a license fee. This is not always the case, as there are considerable costs incurred in terms of staff time, resources, legal fees and adverse publicity if litigation results or even if it is merely threatened. If successful litigation is brought by the copyright holder, monetary damages, injunctive relief and even attorneys' fees are possible consequences.

### **A. Online Collections**

This Section<sup>21</sup> provides guidance in the museum's use of online collections. Online collections can serve a variety of purposes, among them providing the public with a basic index of works of art in a museum's collection and serving as a valuable research tool for scholars. The amount of information contained in such online collections can range from simple tombstone information (*i.e.*, name of the artist, title of the work, date of the work) included for the basic purpose of identifying the work of art to rich contextual information about the work of art including, for example, its provenance, publication history, medium/ materials, technique and historical significance. The use of collection images in a searchable online collection of images constitutes a transformative use and squarely falls within fair use according to such decisions as *Kelly*, which held that "thumbnail" images were fair use within the context of a commercial search engine for online images.<sup>22</sup> As one court explained in finding a search engine in and of itself transformative, a search engine "transforms the image into a pointer directing a user to a source of information.<sup>23</sup> In a searchable museum online collection that only contains minimal tombstone information and that serves almost exclusively as an index, relatively small images are more likely to be considered to qualify as transformative use. The rulings in *Kelly* and *Perfect 10* support at least "thumbnail"-sized images as fair use in the context of a museum's online collection, but larger images may also constitute

<sup>21</sup> This Section was issued June 1, 2016.

<sup>22</sup> See Kelly.

<sup>23</sup> Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007) ("Perfect 10").

fair use because of the context of the online collection within and connected to other educational aspects of a museum's website, as well as the non-commercial nature of a museum's online collection.

As the nature of the information included in an online collection becomes more robust and contextual, the use also becomes more transformative, involving other, core fair uses directly relating to the image such as commentary and criticism, thereby justifying a larger size and higher quality resolution necessary to illustrate the content in the accompanying text. As explained in *Graham*, when a work created for one purpose (*e.g.*, a concert poster) is used for a different purpose (*e.g.*, the illustrated history of the Grateful Dead in *Graham*), the doctrine of fair use permits reproduction of the poster image in a size much smaller than the original image (in *Graham*, approximately the size of a baseball card or 1/8 of a page in the book), but sufficient for the transformative use. Similarly, in the context of an online collection, when a work of art is used with contextual information such that the online collection can be used by the general public as a guide to the museum's collections as well as by scholars and researchers to facilitate research, analysis, and close-up examination, the additional transformative uses of the image provide an even stronger basis for fair use, and justify, under fair use principles, the use of larger and higher resolution images necessary to illustrate the contextual, critical and educational commentary accompanying the image.

As the amount of information in the online collection as to a work of art expands along a continuum from basic index information to detailed and substantive information equivalent to scholarly essays, the transformative purpose serves to justify reproducing the image at a larger size and higher resolution. Thus an online collection can be, and often is, a combination of formats and image sizes depending on the amount of information about each image. Some images may be accompanied by only tombstone information requiring a smaller and lower resolution image while others may be accompanied by more extensive information and, therefore, can be larger and higher resolution. Specifying one specific size and resolution is problematic because such prescriptions do not take into consideration the variety of factors that comprise the fair use analysis. Nevertheless, museums must appreciate that there is a delicate balance between a fair use of an image in an online collection and reproductions that are so large and high quality as to interfere with the copyright holder's exclusive rights.

Under the fair use standard's third factor,<sup>24</sup> the size/resolution of the image, or how much of the image to reproduce, should be related to the museum's intended transformative use. For example, if the museum's transformative purpose is to use the image as part of a searchable online collection, with minimal tombstone information, the AAMD recommends that the image size be sufficiently large to accommodate that purpose, but not larger than is required to accommodate such purpose.

Without suggesting that such a size would in any way constitute an upper limit for such a use, an image that on a standard, integrated, personal computer screen is not larger than one-quarter of the screen and not more than 560 x 843 pixels could be argued to be well within the test of a reasonable use in light of current technology, the digital platform being used and the purpose being served. Of course, larger and higher resolution images, as well as details and features such as zooming, can be fully justified

<sup>24</sup> The amount and substantiality of the portion used in relation to the copyrighted work as a whole.

in the context of uses that are more transformative. For example, scholarly publications, articles about conservation that encourage magnification of areas being conserved, and educational tools on the website to encourage comparative analysis of brush strokes or techniques, all could and should allow a museum to enhance the size and resolution of the image as well as to publish details or permit zooming.

While the one-quarter screen and 560 x 843 pixels dimensions should be well within accepted norms of fair use for online collections, the application of the law of fair use to digital images as well as technology itself is constantly evolving.<sup>25</sup> The AAMD encourages museums to review periodically, and reconsider as appropriate, their policies on the use of images of copyrighted works of art in online collections in light of what may be evolving normative sizes and resolutions.

### **B.** Publications

Publications are found in many different museum activities, but for this Section,<sup>26</sup> the discussion is confined to exhibition catalogues, scholarly articles, blogs, educational materials, collection handbooks and museum brochures, whether in print or digital format. This grouping is intended to separate the analysis with respect to these publications that are primarily, if not exclusively, scholarly in nature and fall within fair use from those publications that have a significant promotional or marketing aspect (those being dealt with in <u>Article IV, Section C of these Guidelines</u>) and may fall outside fair use. The latter category may also include publications, such as highly illustrated, limited content, "coffee table" books produced for the commercial market that use artworks for the same intrinsic purpose as the original without transformation or sales and marketing materials produced in connection with auctions or other sales of works. The mere fact that a publication is sold does not necessarily make the use commercial or negate the fair use analysis, as discussed in <u>Annex A</u> under the First Factor. Rather, the publication's sale is just one consideration that should be taken into consideration as part of the larger fair use analysis.

The courts have not provided significant direct guidance in connection with fair use of copyrighted materials or works of art in the context of museum publications. There are certainly cases that allow one to make an informed analysis of what should constitute fair use within this museum publication field, but cases dealing specifically with use by museums of copyrighted materials and works of art in museum publications, as of the date of this Section, have yet to be decided. *Graham*, which addresses the use of images in a publication that was found to be transformative, does provide some guidance for museum publications and certainly bolsters the argument that the use of a copyrighted image in a publication that provides explanation of and historical context for the copied work can constitute fair use even though, as was the case in *Graham*, the publication might not be classified as exclusively "scholarly" and was created for a commercial market. Conversely, courts have not yet issued opinions determining that a museum's use of copyrighted materials or works of art in publications is **not** fair use. As a result, museums must consider the use of copyrighted materials and works of art within a broader analysis of

<sup>25</sup> An example of this evolution is the AAMD's *Policy on the Use of "Thumbnail" Digital Images in Museum Online Initiatives*, which many viewed as a "standard" but which, with evolutions in technology and a more precise understanding of fair use, is now obsolete and has been revoked by the AAMD.

<sup>26</sup> This Section was issued June 1, 2016.

fair use, evaluating the four factors as applied to each proposed publication on a continuum that once again starts with simply copying the material or the work for no intrinsic purpose other than reproducing the material or work of art without any, or at least any significant, transformation and ends with the kind of extensive, in-depth and contextual, scholarly analysis for which museums are well known; in particular, in exhibition catalogues and scholarly articles.<sup>27</sup>

The AAMD is mindful that publications that have traditionally been in print are rapidly moving to digitization and distribution through the internet, either as a complement to or as a replacement for print publication. By eliminating distribution barriers, the internet creates unprecedented opportunities for museums to disseminate content, but it has also raised new challenges, many of which were discussed above in <u>Article IV, Section A, Online Collections</u>, with respect to online collections, *e.g.*, terms of use. Also, the distribution of any publication, whether in print or digital format, depending upon how extensive and targeted the distribution, can raise issues with respect to the protection of intellectual property in countries that do not recognize fair use or recognize fair use with different standards or requirements. These Guidelines do not address those issues. They assume that U.S. copyright law governs. Finally, in all the uses discussed in this Section, attribution and care in the use of partial or modified images should be the norm.

### **1. Exhibition Catalogues**

Exhibition catalogues are usually publications that, while using copyrighted materials and images of works of art in the exhibition, place those copyrighted materials and images within or accompanied by text of an educational, scholarly, or even critical nature. In addition, the catalogue may contain images of works not in the exhibition, but included in the catalog for comparative purposes. The use of copyrighted materials and images of works of art often, and importantly, "…enhances the reader's understanding of the … text. …"<sup>28</sup> The use should be confined, in the extent of copyrighted materials and in the size and quality of images of works of art, to that necessary to illustrate the educational, scholarly or critical text and no more. Exhibition catalogues may also contain small scale images of works, sometimes used in exhibition checklists in the back of catalogues, which are more like online collections in that they serve the purpose of documenting basic information about every work included in the exhibition catalogue.

Care should be taken before relying on fair use to reproduce images exclusively or primarily used as cover pieces, frontispieces or on other pages with little or no text; in other words, as potentially approaching a substitute for the original image without a transformative context. Further, the fair use

<sup>27</sup> For additional guidance, the reader is referred to <u>Article II, Fair Use</u> and Annex A, <u>Fair Use and the Four Factors</u> as the factors, analysis and specific guidance discussed in that Article and Annex are all applicable to uses discussed in this Section. Furthermore, as appropriate, the special considerations set forth in <u>Article III, Special Considerations</u>, may also apply when works of art and copyrighted materials are involved in the uses discussed in this Section.

<sup>28</sup> See Graham.

analysis should be evaluated in the context of the use of each image and not simply on the basis of the publication as a whole.<sup>29</sup>

### 2. Scholarly Articles

The analysis with respect to scholarly articles is much the same as for exhibition catalogues, except one could argue that scholarly articles are even one step further along the continuum of transformative use. Scholarly articles are usually connected to research, and often used for the purposes of teaching. By definition, these uses would qualify as "scholarship" as contemplated by <u>Section 107 of the Copyright</u> <u>Act</u>. As a result, when the amount of the copyrighted material and the size and quality of the image are only so much or so large and of such resolution as to accomplish the purpose of the scholarly article, such use of copyrighted material should be regarded as fair use.

### 3. Blogs

Blogs are a unique creature of the internet that are created in a digital format and distributed electronically rather than in print form. Blogs can serve a multiplicity of purposes even within a single blog, and can contain scholarly analysis, criticism and news, as well as promotional materials. They can announce new acquisitions, upcoming exhibitions or other museum programs. As a general rule, they are written in a less formal style although they can provide important context for a museum's exhibitions, activities and programs. As with other types of museum publications discussed in this Section, the extent to which copyrighted materials or works of art can be included in a museum blog depends on the purpose of the blog and the context.

When the blog is more akin to a scholarly article, the analysis is the same as that for such articles, except the issue becomes the size and quality of the image used in a web context. As a result, these scholarly types of blogs represent an intersection in the analyses between scholarly articles (see Article IV, Section B(2)) and online collections (see Article IV, Section A). The more content, description, and analysis in the blog, the easier to justify a larger, higher resolution image under fair use. Because blogs sometimes describe a work in specific detail with an analysis of the artist's technique or approach, magnification tools may also be appropriate.

For those blogs that are more promotional in nature, with less content, analysis or news, for example, announcing future exhibitions or events, and that are using the image of a work of art for its intrinsic purpose as a work of art rather than for a transformative purpose, there is rarely a need for large or high resolution images. These types of blogs should be analyzed in the context of promotional activities by the museum, discussed in <u>Article IV, Section C</u> of these Guidelines.

<sup>29</sup> Yale University Press has issued an interesting set of guidelines in its *Fair Use of Art Images in Scholarly Art and Architecture Monographs.* Those guidelines suggest that, **generally**, images should be no more than one-quarter of the printed page in size. The guidelines go on to say that larger images may be appropriate under various circumstances.

### 4. Educational Materials

Given that many publications by museums are educational in nature, this subsection addresses those publications the primary focus of which is pedagogical. Examples might include use of digital images in connection with a lecture or symposium or a course taught on-site at the museum or online (*e.g.*, Massively Open Online Course, "MOOC"). Another example would be materials designed to educate children about art in an after-school program or as part of a gallery visit or special exhibitions venue. Educational materials are produced in connection with virtually every museum activity. These uses are not "for the same intrinsic purpose as" the copyright holder's as discussed in *Worldwide* and fall within "teaching," as contemplated by <u>Section 107 of the Copyright Act</u>. So long as the extent of the copyrig of copyrighted materials and the size and quality of the image are sufficient to accomplish the purpose and not more, then the use should be fair use.

### 5. Collection Handbooks

Collection handbooks can run the gamut of publications. Some are highly illustrated "coffee table" books consisting of images of the collection covering almost an entire page and with only limited information that would be found in a basic online collection. Other handbooks are intended to guide the reader through the museum's collection, often providing significant scholarly text (perhaps including copyrighted material) informing the reader about the work and, for example, the artist, the artist's methods, and comparable works. *Museums should take care in relying on fair use to reproduce high quality resolution images for a handbook that resembles an illustrated coffee table book with minimal text.* In contrast, for handbooks with commentary, scholarship and images directly related to the text, the more transformative is that use and the stronger the fair use argument, again consistent with size and quality to effectuate the purpose.

#### 6. Museum Brochures

This category relates to the museum's publications in the context of exhibitions, permanent collection installations, mini-handbooks of highlights of specific departments and similar functions. As a brochure, and perhaps more accurately described as a guide, to a specific exhibition or specific activity of the museum, the primary purpose usually is to guide the visitor through a particular exhibition, activity or area and to highlight specific works and see those works within the context of the exhibition, activity or area. As a result, the amount of text and explanation may be modest or can be very extensive. In making a fair use assessment, the degree matters in relation to the size and quality of the images used. The more the brochure is simply a means of navigating the exhibition or area, or showcasing the activity, the less the need for large and high-quality images; the more the museum brochure approaches an exhibition catalogue or study guide, the greater the justification for larger and higher quality images that complement and inform the text.

### 7. Other

Capturing the full breadth of museum uses involving print and digital publications is simply not possible in guidelines. As evident from this Section, for each new or different type of publication, a museum should first conduct the fair use analysis for the publication as a whole as well as in connection with each use of the copyrighted materials or works of art by using the four factors and other tools provided by these Guidelines. Once the analysis is completed, the museum is advised to prepare and maintain a contemporaneous record of the fair use analysis.

## **C.** Promotional, Marketing and Advertising Materials

This Section<sup>30</sup> addresses the use of works of art and copyrighted material in the context of promoting, marketing and advertising the museum's collection, special exhibitions, events and activities in furtherance of the museum's mission (collectively sometimes referred to as "promotional uses"). <sup>31</sup> Promotional uses serve the purpose of generating public interest in and informing the public about museum activities such as special exhibitions, public programs, lectures, performances, and other core activities, and encouraging the public to visit and participate. Promotional uses often include works of art and copyrighted materials and do so in a variety of ways and mediums. For example, works of art and copyrighted materials can be found on invitations, flyers, brochures, mailers, inserts, banners and signs (inside the museum, on street lights and other poles, busses, shelters and trains), in advertisements in newspapers and magazines, and in announcements and postings on museum websites and social media. Typically, these promotional uses convey information about an event, its location, date, time and other pertinent details.

If an express license has not been granted by a copyright holder and a museum seeks to include a work of art (or other copyrighted material) in promotional materials, it must determine whether its use in this context qualifies as a fair use. As with all museum uses previously discussed in these Guidelines, making this determination requires an analysis of the four fair use factors.<sup>32</sup> In addition to the special considerations, promotional uses can also raise issues of other third party rights, including trademarks and the rights of privacy and/or publicity such as when the works of art or copyrighted materials depict a celebrity whose name, voice, image and likeness are protected by a state's right of publicity law.<sup>33</sup>

<sup>30</sup> This Section was issued February 1, 2017.

<sup>31</sup> As used in this Section, promotional uses are not fundraising uses. The use of works of art and copyrighted material in connection with activities, the principal purpose of which is fundraising, is addressed in <u>Article IV, Section D, Fundraising</u>.

<sup>32</sup> For additional guidance, the reader is referred to <u>Article II, Fair Use</u> and <u>Annex A, Fair Use and the Four Factors</u> as the factors, analysis and specific guidance discussed in that Article and Annex are all applicable to uses discussed in this Section. Furthermore, as appropriate, the special considerations set forth in <u>Article III, Special Considerations</u>, may also apply when works of art and copyrighted materials are involved in the uses discussed in this Section.

<sup>33</sup> In Hoepker v. Kruger, 200 F. Supp. 2d 340 (SDNY 2002), a case involving both copyright and privacy issues in the context of a museum exhibition, the court, applying New York law on privacy rights, not copyright law, recognized that promotional activities and advertisements undertaken by a museum to promote an exhibit for the purpose of increasing patronage satisfied the "ancillary" or "incidental" use exception and, like the exhibit itself, fell outside the reach of New York state privacy law.

#### 1. The First Factor—Purpose/Character

No court has analyzed fair use under the Copyright Act in the context of a museum's promotional use, so reliance on fair use, even after a careful analysis of the four factors, necessarily presents risks for the museum. In considering the first factor, *i.e.*, the purpose and character of the use, the most important consideration is whether the use satisfies the transformative test. When museums incorporate works of art and copyrighted materials into promotional materials, they are using the works of art and copyrighted materials as a vehicle for communicating with the public about the museum's activities, providing information about the location, date and time of events, and generating enthusiasm for the museum. In the promotional context, works of art and copyrighted materials are transformed into vehicles to disseminate information, provide wayfinding, and encourage the public to visit and participate in museum activities. All these purposes further the museum's mission to reach the broadest possible public audience. In addition to providing important information, promotional materials may also combine images with other images, reduce or enlarge the size of the image, change the guality of the image, include a detail of a work of art, and otherwise alter the original work of art to further the promotional purpose. These variations, particularly when works of art and copyrighted materials are used along with contextual information, imbue the copy with a different purpose than the original artistic purpose, thereby "altering the first with new expression, meaning, or message."34

If, however, a court were to find that there was no transformative use,<sup>35</sup> or if the transformative nature of the promotional use is deemed insufficient or weak, the second consideration under the first fair use factor, namely, whether the use is of a commercial nature or for nonprofit educational purposes, becomes more important, as the court in *North Jersey Media* found. No court has defined "commercial" in the context of museum activities, but *Graham* provides helpful guidance by clarifying the meaning of the term commercial. While acknowledging in *Graham* that the publication containing the copyrighted images was a "commercial venture," the Second Circuit rejected the notion that the "crux of the profit/nonprofit distinction is … whether the sole motive for the use is monetary gain."<sup>36</sup> Noting that nearly all of the illustrative uses listed in the preamble paragraph of the <u>fair use section of the Copyright Act</u> are generally conducted for profit, the Second Circuit, citing a Supreme Court case,<sup>37</sup> articulated the test as "whether

<sup>34</sup> See Campbell.

<sup>35</sup> Although museum promotional uses have not been addressed by the courts, promotional use of a copyrighted image in social media by a for-profit media source (Fox News) has been addressed by the district court in *North Jersey Media Group Inc. v. Pirro and Fox News Network*, 74 F. Supp. 3d 605 (SDNY 2015) ("*North Jersey Media*"). In that case, Fox News tweeted an iconic photograph of firefighters on the anniversary of 9/11 to promote an upcoming program along with the hashtag "never forget." Fox contended that the use qualified as fair use because it was newsworthy and the inclusion of the hashtag constituted a transformative use. The district court rejected Fox's argument that use of the image was newsworthy (and hence transformative) noting that the use did not convey any new information, insights or understandings and the photographer actively licensed the iconic photograph for editorial uses. Absent a transformative use, the court gave more weight to the second part of the first factor analysis to conclude that Fox used the image for the commercial purpose of advertising and promoting its for-profit program. While this decision may strike a cautionary note regarding museum promotional uses, particularly in connection with social media uses such as Twitter--where the ability to include contextual information is limited--this case may be distinguishable from museum promotional uses, both in the context of whether the use is transformative (if the use includes information about an exhibition or program and is ancillary to an educational program) and in the context of whether the use is commercial.

<sup>36</sup> See Graham.

<sup>37</sup> Harper and Row, Publishers, Inc., v. Nation Enters., 471 U.S. 539, 562 (1985).

the user will profit from the exploitation of the copyrighted material without paying for that use." Although the Court did not clarify how a user might "profit" from exploitation of a copyrighted work other than by monetary gain, increasing museum attendance at core, mission-related programs (whether general admission, special exhibitions, lectures, programs, etc.) as the result of using a work of art or copyrighted materials seems unlikely to be deemed to be "commercial" or to entail "profit from the exploitation of the copyrighted material" even if general or special admission fees are charged, and, in this context, monetary gain is clearly not the "sole motive" (or a motive at all) for the use.

Applying this reasoning to museum promotional activities allows one to distinguish promotional activities using a work of art or copyrighted material that may result in, for example, revenue from general admission or ticket sales for an exhibition or event from an activity in which the museum profits from a commercial exploitation without paying for the use. While a visitor paying an entrance fee to the museum or a special fee or charge to see an exhibition or participate in a special event, such as a lecture or symposium or class, may generate revenue for the museum, that does not mean it is intended to, nor does it necessarily, generate a profit by the museum in the same sense as, for example, sales of commercial merchandise that depict works of art or copyrighted material. Nor should the fact that certain promotional activities involve an outgoing expenditure by the museum to promote those activities (*e.g.*, purchasing an ad in a newspaper or magazine, offering a gift card as part of a promotional campaign), be deemed to involve exploitation of the copyrighted material for profit so long as the ultimate purpose of the activity is to further the museum's nonprofit educational purposes.

### 2. The Second Factor—Nature of Use

Under the second fair use factor, *i.e.*, the nature of the copyrighted work, courts have identified various elements of a work of art or copyrighted material that argue against fair use under this factor, in particular whether the work of art or copyrighted material used is highly artistic and expressive and whether the work or material has already been published. Works of art in general, as well as many copyrighted materials, are highly artistic and expressive so that their promotional use may argue against fair use under the second factor. In addition, the museum should determine whether its use will be the first publication, another element arguing against fair use.

### 3. The Third Factor—Amount Used

Under the third factor, *i.e.*, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, both a quantitative and qualitative analysis are required. With respect to the quantity reproduced, most promotional uses reproduce the entire work of art rather than only a portion or detail. At one time, reproduction of the entire work might have weighed against fair use. With decisions in such cases as *Kelly* (thumbnails in a searchable digital database), and *Graham* (reproduction of poster in historical context), courts have found that the third factor supports fair use so long as the use of the entire image is also deemed transformative under the first factor and the size/resolution of the image

is appropriate for its transformative purpose. In the context of promotional uses, most uses of works of art or copyrighted materials will entail some adjustment in the size, resolution and other qualities of the image, tailored to the promotional use and dependent on the medium. These variations render the image much less likely to be seen as a mere substitute for the original or a commercial quality reproduction of the original. Thus, images on street banners (though large in size) will only be seen from a distance; images on buses would be seen in passing, without an opportunity for detail or contemplation,<sup>38</sup> images in newspapers and magazines, and on social media, can be tailored to meet the fair use guidelines for publication of lower resolution images addressed in *Kelly* and *Perfect 10* and discussed elsewhere in these Guidelines.<sup>39</sup> These common variations from the original work of art or copyrighted materials can be argued to be qualitatively different than the original work and tailored to the transformative purpose of informing the public about an exhibition or other program. They are also arguably much more effective than promotional materials that omit use of the image. These reasons all support a conclusion that satisfies the requirements of the third factor.

#### 4. The Fourth Factor—Market Effect

Lastly, under the fourth factor, *i.e.*, the effect of the use upon the potential market for or value of the copyrighted work, even if the museum's promotional use is not commercial, this factor is unlikely to favor the museum particularly if the copyright owner routinely licenses images for these types of uses. As in the *North Jersey Media* example, a court could find that a museum's use would interfere with the copyright holder's market and find against fair use with respect to the fourth factor. In some cases (but not in the promotional context), the copyright holder's practice of not licensing her work for purposes similar to those of the alleged infringer has been found to weigh in favor of fair use under this factor.<sup>40</sup>

While there may well be specific circumstances or approaches to the use of images for promotional purposes that should be consistent with fair use (*e.g.*, a promotional ad, in print or social media, regarding an exhibition, that both provides meaningful content about the exhibition and the work in question and that uses a low resolution image of the work), with several factors either weighing against fair use or inconclusive, particularly the question of whether the use is transformative, and given the absence of judicial precedent applying fair use to these specific types of promotional uses, reliance on fair use in the areas addressed in this Section may pose more risk than the other uses addressed in previous Sections of the Guidelines.

<sup>38</sup> Although most discussions of the size of reproductions in fair use decisions involve reduced size reproductions as in *Graham*, the critical issue under the third factor is whether the size is necessary and appropriate to accomplish the transformative purpose. In the context of museum promotional uses, a large size, *e.g.*, on the side of a barn, is often necessary and appropriate.

<sup>39</sup> See Article IV, Section A, Online Collections.

<sup>40</sup> Blanch v. Koons, 467 F. 3d 244, (2d Cir. 2006).

## **D. Fundraising**

This Section<sup>41</sup> addresses the use of works of art and copyrighted material in the context of museum fundraising. The vast majority of museums in the United States are non-profit institutions that need public support in order to accomplish their missions. Museums receive public support through a variety of means, including solicitations of donations of works of art, cash and other items of value.<sup>42</sup> As a result, fundraising is an integral and essential component of a museum's existence.

For purposes of this Section, the AAMD defines fundraising as activities in which the museum is requesting or soliciting financial support or an item of value that the museum can use to raise cash (*e.g.*, donations of cars, boats, items for auctions like vacation home rentals, furniture, rugs, etc.). Fundraising for purposes of this Section does not include solicitations of works of art or other tangible objects for the collections nor does it include an admission fee to the museum or an exhibition or other fees or consideration for or incidental to attendance at an event or participation in an activity.<sup>43</sup> Fundraising activities may consist of direct solicitations or they may include invitations to dinners, concerts, auctions, or other special events arranged by the museum, with or without a fee or other charge to attend, the principal purpose of which is fundraising.

There are many uses of works of art and other copyrighted material in the context of fundraising. For example, customized solicitations directed toward current or prospective donors may feature a specific work of art in the context of seeking a donation. Capital campaigns are often conducted using a wide variety of techniques, tools and platforms that may include works of art, all of which are designed for the purpose of seeking financial support. Membership drives or renewal solicitations that often include the opportunity to attend exhibitions and events free of charge may use works of art and other copyrighted material as part of the request.

### 1. The First (Purpose/Character) and Fourth (Market Effect) Factors

In analyzing whether the use of works of art or other copyrighted material in connection with fundraising may be considered a fair use, assessing whether fundraising is *per se* a commercial use under the first factor<sup>44</sup> of the fair use analysis is important. On one hand, any activity that directly involves or leads to a transaction resulting in the receipt of money, or other items of value that may be converted to cash, such as a fundraising solicitation, can be seen as commercial.<sup>45</sup> On the other hand, activities that benefit

<sup>41</sup> This Section was issued February 1, 2017.

<sup>42</sup> Obtaining public support is of course both an element of and enhanced by most museums' status as organizations exempt from Federal income tax under Section 501(c)(3) of the Internal Revenue Code.

<sup>43</sup> Some of these activities are addressed in the preceding Section, <u>Promotional, Marketing and Advertising Materials (Article</u> <u>IV, Section C)</u>.

<sup>44</sup> For an analysis of the four factors involved in any fair use analysis, see <u>Annex A, Fair Use and the Four Factors</u>, to the Guidelines.

<sup>45</sup> At least one court has applied a more measured test to define commercial than just a financial transaction. In *Graham*, the court articulated the test as "whether the user will profit from the exploitation of the copyrighted material without paying for that use." See the discussion of *Graham* under Article IV, Section C, Promotional, Marketing and Advertising Materials.

the museum's nonprofit programs, including promotion and marketing and solicitations of charitable donations to help a museum carry out its non-profit purposes, are arguably distinguishable from more traditional commercial transactions such as sales of merchandise (*e.g.*, posters, mugs, t-shirts, or other items depicting copyrighted works of art). Such sales are universally recognized by museums as a commercial activity requiring a license from the copyright holder. Determining whether these distinctions are legally significant in the context of the first fair use factor as applied to fundraising is difficult, however, because there is no current judicial precedent that examines whether museum fundraising constitutes a commercial activity.

Whether or not fundraising is considered a commercial activity for purposes of the fair use analysis, the use may still satisfy the first factor of the fair use analysis provided that it is strongly transformative (an aspect of the first factor that should be present regardless of whether the use is commercial or noncommercial). In the context of museum fundraising activities, when a copyrighted image of a work of art is used on an invitation or in a program for a paid special event the purpose of which is fundraising,<sup>46</sup> the work is typically used as a design element, *e.g.*, for aesthetic or expressive purposes. Sometimes, but not always, the image may be accompanied by contextual information; however, the primary purpose of using the image, *i.e.*, fundraising, in and of itself, is difficult to justify as transformative in nature. Absent a strong transformative use argument, whether or not a court views a museum's use of a copyrighted image in the context of fundraising as a commercial use, that use may fail the first prong of the fair use analysis and potentially the fourth prong (effect on the potential market) by interfering with the copyright owner's market.

### 2. The Second (Nature of Use) and Third (Amount Used) Factors

As discussed earlier in these Guidelines, fair use does not require that the use meet all four of the factors, but if the first and fourth factors are difficult to satisfy in the fundraising context, and the work is highly creative (factor two) and reproduced in its entirety by the museum in connection with fundraising activities (factor three), a copyright holder might successfully argue that none of the four fair use factors is satisfied in connection with the museum's fundraising use.

While there may be arguments against fair use of works of art and other copyrighted material in connection with activities whose primary goal is fundraising, this does not mean that a fundraising component precludes an otherwise well supported fair use. For example, a museum brochure that includes images of copyrighted works along with scholarly essays or general museum information as well as a membership solicitation or invitation to a fundraising event may be sufficiently transformative and non-commercial to justify reliance on fair use.

<sup>46</sup> These types of special events should be distinguished from those in direct fulfillment of the museum's exempt purpose, such as lectures or exhibitions. Invitations or other promotional materials for such educational events are discussed in <u>Article IV</u>, Section C, Promotional, Marketing and Advertising Materials.

The absence of legal precedent or guidance, combined with the argument that fundraising activities are commercial in nature without a strong transformative element, does suggest that significant caution in this area is appropriate.

## **E. Archives and Other Special Collections**

This Section<sup>47</sup> addresses the copyright implications of using copyrighted material and works of art that are part of an archive or other special collection held by a museum.<sup>48</sup> For purposes of this Section, "special collections" or "archives" mean an archival record of a third party or parties such as artists, dealers, curators, galleries and others acquired by the museum by purchase, donation or bequest (as distinguished from the museum's own archives of records and documents pertinent to the activities and history of the museum<sup>49</sup>). Archives and other special collections typically consist of large quantities of many different types of property and ephemera, both tangible and intangible, including works on paper (*e.g.*, letters, postcards, photographs, sketches), interviews and oral histories, three-dimensional works such as models, analog electronic audio and video tape, digital media such as disks, hard drives, digital information stored in the cloud, and text messages (individually, "archival item(s)"). Archival items can be published or unpublished, and can have differing copyright periods. Particular archives also can comprise multiple authors within a single group, for example, letters from and to third parties.

The focus of this Section is the fair use issues to be considered by a museum when it decides to: (1) digitize an **entire** archive or special collection and (2) make available online **all or a substantial portion** of an archive or other special collection.<sup>50</sup> Reviewing the circumstances under which archives or special collections are often transferred to museums provides an important first step in the fair use analysis. Artists, dealers, galleries and others who elect to transfer archival materials and special collections to public museums generally do so with the express understanding and intention that the materials will be made available to scholars, researchers and the general public for educational purposes. Donors to museums of these materials usually (and should) expect that scholars will scour the materials and use them in whole or in part for publications, dissertations, exhibitions, and other means of dissemination in furtherance of a scholarly purpose. If donors are concerned about copyright or other legal considerations, the transfer documents typically will contain limitations or restrictions. Purely as a practical matter, therefore, a museum that receives an archive or special collection is not unreasonable in assuming that the donor will not object to the wholesale digitization and release of the archival items in

<sup>47</sup> This Section was issued March 24, 2017.

<sup>48</sup> In addition to copyright considerations, archives and special collections can raise challenging legal issues pertaining to donor restrictions, rights of privacy, publicity, defamation, and the First Amendment. Before making such collections available to the public online, the museum would be advised to conduct a good faith review of individual items, if possible, to remove or restrict materials that might violate personal rights of individuals and expose the museum to potential liability independent of copyright claims.

<sup>49</sup> Although this Section does not address the museum's own archives, many of the analyses discussed in this Section are equally applicable to those archives.

<sup>50</sup> Reliance on fair use to reproduce and publish individual or selected archival items in their entirety or brief excerpts for scholarly and educational purposes should be considered under the relevant chapters in <u>Article IV, Section B, Publications</u>.

furtherance of the educational mission of the museum.<sup>51</sup> The following fair use analysis should, therefore, be viewed in this context, while keeping in mind that the donor of the archive may not be the owner of some or even any of the intellectual property rights in some or all of the material comprising the archive. Thus, the donor's expectations may not have any bearing on the purely legal issue of whether the digitization and publication of archival material is "fair use" or otherwise complies with the copyright law.<sup>52</sup>

Traditionally, archives and special collections have been made available for on-site and painstaking pageby-page review conducted in reading rooms and often by appointment only. To vastly expand access to these valuable scholarly resources, museums are eager to digitize full archives and special collections and make them available digitally to the public. As with other issues addressed in these Guidelines, the courts have not yet rendered an opinion on the wholesale digitization of an archive or special collection for purposes of making the contents available to the public in their entirety in furtherance of a museum's mission. Nevertheless, other precedent is useful in considering the fair use implications of making these important tools of research publicly accessible.

Archives and other special collections present a unique challenge when considering fair use because traditional copyright fair use analysis is conducted item by item rather than for a collection as a whole. In the context of archives and other special collections, undertaking such an analysis can present insurmountable problems for museums that may lack the staff and resources needed to evaluate each archival item. Even where staff and resources are available, the nature of archival items is often different than typical artistic material where authors tend to include their signatures, dates of creation or other information that would facilitate a copyright determination. Many archival items lack such identifying information and cannot be identified with a specific author or artist. They often include documentary or transactional materials, consisting primarily of personal or professional records that document routine activities or the creative process rather than finished works of aesthetic or artistic expression. As a result, archives often contain materials commonly known as "orphan works," *i.e.*, the copyright owner cannot be identified or cannot be located. The challenges to conducting an archival item-by-item copyright assessment becomes particularly problematic if a museum is expected to determine the copyright status of each archival item before digitizing and making these collections available. For this reason, a museum's ability to rely on fair use to digitize these collections and make them broadly accessible, although not without risk, would represent a significant public benefit in furtherance of the museum's educational mission.

<sup>51</sup> Although the assumption is not unreasonable, depending on the specific facts of each donation, transfer or sale of archival materials or special collections to the museum, it still may be prudent for a museum to seek a license or other consent at the time of the transfer to the museum to future digitization and publication of the collection.

<sup>52</sup> Just as donor expectations may not have any bearing on the legal issue of fair use, the expectations of grant-making entities that require unrestricted access to digitized materials as a condition of providing funding for digitization do not affect the fair use analysis. Some prominent funders of archival digitization projects increasingly are requiring, as a condition of the grant, that the resulting digital content be made available to the public without restriction and some prescribe use of a Creative Commons license, such as CC0 or CC-NC. Arguably, more museums would be able to accept these grant funds if they could comfortably rely on fair use in digitizing their archives and special collections and making them publicly accessible for non-commercial use. Museums still must be cautious, as accepting these conditions can put museums at legal risk not only for possible breach of the terms of the grant but also for potential copyright claims if fair use arguments are rejected. Additional financial risk may arise if grantors require museums to indemnify the grantors for third party claims of infringement. *Grantor expectations or requirements have no bearing on fair use, so museums should exercise caution in accepting grant funds with such requirements absent confidence that they will be able to obtain permissions necessary to comply with the grant or rely on fair use.* 

In conducting the fair use analysis for archival and special collections, two separate but related questions must be addressed: First, is the mere creation of a digital copy of an entire archive or special collection a violation of the copyright holders' rights and second, is the publication (*i.e.*, making the entire digital archive or special collection publicly available online) a fair use?<sup>53</sup> With regard to the first question, there are two independent grounds for the conclusion that such digitization is not a copyright violation. First, the Google decision supports the position that wholesale copying can be a fair use under certain circumstances. In the Google books case, the plaintiff authors contended that the mere act of scanning the books, creating digital copies and storing them on Google's servers constituted copyright infringement. In rejecting that argument, the court, looking at digitization of the entire book, not in the abstract, but rather analyzing the activity in the context of the broader fair use analysis, said "not only is the copying of the totality of the original reasonably appropriate to Google's transformative purpose (*i.e.*, to create a searchable electronic database), it is literally necessary to achieve that purpose."<sup>54</sup> In these and other cases, courts have found repeatedly that digital copying of an entire work or works in furtherance of a different purpose than the original constitutes a fair use. In the case of museum copying for storage, conservation, preservation or research, without publication, the individual works are transformed by their inclusion in the whole archive or special collection and the copying thereof is for those different purposes, *i.e.*, there is a transformative act.

Additionally, if the museum's purpose in digitizing an entire archive or other special collection, without publication, is for easier storage, conservation, preservation or to facilitate research, the act of making a complete digital copy would be consistent with the limitations on exclusive rights provided in <u>Section</u> <u>108 of the Copyright Act</u> for reproductions by libraries and archives. Although Section 108 is not explicitly applicable to museums,<sup>55</sup> the basis for the special exception for libraries and archives is to enable copying for such uses as conservation, preservation and storage. As such, a strong argument can be made (under fair use or under Section 108) that a museum may create a digital copy of an entire archive or special collection for purposes of storage, preservation and conservation, as well as to facilitate research.

The second question—whether a museum may publish the entire digital copy of the archive or special collection online to enable scholars and the public to access and use the archive or special collection— presents the more difficult fair use issue and is analyzed below under the Four Factors.

<sup>53</sup> Preceding the fair use analysis, of course, the museum should first review the acquisition document(s) under which the museum acquired the archive or special collection to determine whether copyright was acquired and if contractual restrictions apply. Because the transferor or seller of these types of special collections, which often include materials created by third parties, usually does not own all the rights in the special collection, the transfer document commonly includes a "quit claim" transfer of only such rights as the donor/seller may have. In these circumstances, the museum should not assume that it has acquired copyright in all the contents of the archive or special collection.

<sup>54</sup> See Google.

<sup>55</sup> Section 108 does not, by its terms, apply to museums although there have been numerous efforts to expand Section 108 to include museums. In addition, many museums maintain libraries and archives and may well be covered by Section 108 for the activities of their libraries, which could include the management of archival material, as well as the museum's own archives.

# 1. The First Factor—Purpose/Character

Assuming the creation of a digital copy of an entire archive or special collection is not itself infringing provided that it is undertaken in furtherance of a different, transformative purpose, what additional uses of the digital copy would also constitute a transformative purpose under the first factor? The court in *Google* addressed this directly stating that: "the creation of a full-text searchable database is a quintessentially transformative use...[as] the result of the word search is different in purpose, character, expression, meaning, and message from the page from which it is drawn."<sup>56</sup> Other decisions<sup>57</sup> further support the position that the creation of a searchable, digital archive itself is transformative. (See discussion of online databases in <u>Article IV, Section B, Publications</u>.) In *Kelly*, the Court found that Defendant Arriba's use of the images served a different function than Kelly's use by improving access to information on the internet versus artistic expression. Because Arriba's use did not supersede Kelly's use, but created a different purpose for the images, Arriba's use was deemed transformative.<sup>56</sup> In relying on *Kelly*, the court in *Perfect 10* reinforced the notion that "a search engine transforms the image into a pointer directing a user to a source of information...a search engine provides social benefit by incorporating an original work into a new work, namely, an electronic reference tool.<sup>59</sup>

The addition of a search function to accompany a digital archive, which serves as the electronic equivalent of a finding aid, is essential to rendering the archive usable for research and scholarship purposes. If the search function produces brief excerpts ("snippets") that incorporate the search terms (as in *Google*) and/or low resolution images of visual artistic content included in the archive (as in *Kelly* and *Perfect 10*), the search capability provides "social benefit" by facilitating a deeper exploration of the materials, establishing new connections among archival items, and enhancing the ability to conduct original research.<sup>60</sup> In that respect, the digitization of the entire archive or special collection and the creation of a search function supports the transformative nature of the archive by creating a new purpose (*i.e.*, as a research tool) that is different than the underlying authors' original purposes in creating the individual items for informative, documentary, transactional or aesthetic purposes. If, in addition to being transformative, the digital archive is also made available to the public free of charge, the non-commercial nature of the use would also satisfy the other part of the analysis under the first factor. The creation of a complete digital copy of an archive or special collection that is searchable, and that, as in *Google*, produces only limited excerpts or snippets in response to a search (and that, with respect to visual images from the archive as opposed to texts, reproduces lower resolution copies that are only of a quality

<sup>56</sup> See Google.

<sup>57</sup> See Kelly and Perfect 10.

<sup>58</sup> See Kelly.

<sup>59</sup> See Perfect 10.

<sup>60</sup> A more recent fair use case in the 9<sup>th</sup> Circuit, *Maya v. Monge*, 688 F. 3d 1164 (9<sup>th</sup> Cir. 2012) raised a distinction between a truly transformative use and the same use but for a different purpose. The Court noted that a separate purpose by itself that leaves the inherent character of the content unchanged does not necessarily create new aesthetics or a new work that adds new expression, meaning or message. Although it can be argued that this decision is at odds with Kelly and Perfect 10, in which the inherent character of the images were not changed to create a searchable database, to the extent that a muse-um can enhance and supplement its digital databases of archival materials with additional information including scholarly analysis and links from individual archival items to pertinent and related content, whether on the museum's website or those of third parties, the museum will have strengthened its argument for transformative use.

necessary to fulfill the transformative purpose of the search function), is likely to satisfy the first fair use factor (and to qualify as fair use) under *Google, Kelly, Perfect 10* and related cases.

What is unresolved by these decisions, however, is whether the amount of the digital archive made available to the public can go beyond the production of excerpts or snippets of relevant portions of the archive to encompass publication of full text and images of the entire archive or special collection. To answer this question, distinguishing the facts in Google from the facts associated with publication of an entire archive or special collection is important. Google's 'library' was not an archive that included interrelated materials but instead was comprised of a vast collection of individual and independent works of authorship. Making the full text of all the works in the library available to the public was not necessary to further Google's purpose of providing a searchable database. In contrast, publishing only snippets from individual items in an archive or other special collection would not advance and might actually defeat the museum's "different purpose" of facilitating the public's ability to understand the relationship and interconnectedness of the individual archival items. Publishing the entire archive or other special collection provides historical and aesthetic context and creates a synergy that effectively transforms and infuses each individual archival item with new expression, meaning or message through its relation to and interconnectivity with other archival items in the archive or other special collection. A simple example is the publication of a letter by an artist to someone and the response. The publication of both letters provides new meaning to each. See, e.g., Graham, in which the Second Circuit determined that it was fair use to publish a group of seven related concert posters in their entirety (in reduced size) for the purpose of a biography of the Grateful Dead when the posters were created originally as individual artistic vehicles to advertise concerts. Although the Graham decision is distinguishable from the publication of an entire archive, it nevertheless supports the argument that publication of groups of materials created for one purpose can be fair use if the new purpose is sufficiently different and the amount and size of the material copied is consistent with the purpose.

Without conceding that the publication of an interrelated archive or special collection is not transformative in and of itself, the transformative nature of the publication of the entire archive or other special collection could be enhanced by providing additional content and research functions. For example, providing links from archival items to other archival items or to portions of the museum's website or to third party sources that contain relevant, comparative or supplemental information would enhance and extend the educational purpose of publication of individual archival items and provide additional support for treating the archive or other special collection as a holistic research and educational online resource.

# 2. The Second Factor—Nature of Use

In evaluating the second factor, the nature of the work, the first challenge is to identify the "work." Although this chapter argues that the "work" is the archive or special collection as a whole, because there is no precedent for analyzing a compilation such as an archive or special collection under fair use as a whole, review of this factor is best undertaken by evaluating individual archival items. Those can include many different forms, media and types of materials. Some may be largely factual (e.g., business records) and others may be highly creative (e.g., sketches) and both can exist within the same archive or other special collection. The materials may have been created originally for a wide range of possible purposes—documentary, informative, transactional or aesthetic. Although some archival items may be published, often a majority of archival items in an archive or other special collection is unpublished. Generally, fair use is more difficult to establish when the underlying archival item is unpublished. As one court noted, "[t]he fact that a work is unpublished is a critical element of its 'nature.' Our prior discussion establishes that the scope of fair use is narrower with respect to unpublished works."<sup>61</sup> Another court explained that "we think that the tenor of the [Supreme] Court's entire discussion of unpublished works conveys the idea that such works normally enjoy complete protection against copying any protected expression. Narrower 'scope' seems to refer to the diminished likelihood that copying will be fair use when the copyrighted material is unpublished.<sup>762</sup> Because of the predominance of unpublished materials in a typical archive or other special collection, the analysis under the second factor may be at best inconclusive and at worst negative strictly on legal grounds with respect to the publication of previously unpublished archival items, either on its own or as part of publication of the archive or other special collection as a whole.<sup>63</sup> To be clear, the fact that copyrighted material has been unpublished does not preclude fair use. On the contrary, Section 107 of the Copyright Act provides that: "The fact that a work is unpublished shall not itself bar a finding of fair use if such is made upon consideration of all of the above factors."64

# 3. The Third Factor—Amount Used

Under the third factor, the amount and substantiality of the portion used, this Section of the Guidelines considers the fair use implications of digitizing and making available the entire archive or other special collection (except for individual archival items that may be removed for reasons such as donor restrictions, privacy, publicity, defamation, etc.). If the publication of a whole archive or other special collection, both print and visual images, is arguably transformative, the question under the third factor is whether it is necessary, in order to achieve that transformative purpose, that the whole of the texts and/or the images within the archives or other special collection be published. In the case of images, for reasons explained in other sections of these guidelines, publishing a lower resolution version may be all that is necessary to satisfy the third factor. With regard to textual materials, the third factor may be satisfied if the best and most effective way to achieve the educational, transformative purposes of publication requires posting the full texts of most, if not all, of the archival material.

<sup>61</sup> Harper & Row Publishers v. Nation Enterprises, 471 U.S. 539, 564 (1985).

<sup>62</sup> Salinger v. Random House, 811 F.2d 90 (2d Cir. 1987).

<sup>63</sup> Although the second factor is more difficult to satisfy with regard to unpublished materials than published materials, the latter may present particular challenges with regard to the fourth factor, particularly, for example, if the archive contains a manuscript of an essay, poem, novella or book that has been published and is available for sale in the commercial market. See discussion of the Fourth Factor.

<sup>64</sup> Copyright Act (§ 107).

# 4. The Fourth Factor—Market Effect

With respect to the fourth factor, the effect of the use on the potential market or value of the copyrighted work, examining this factor both with respect to the archive or other special collection as a whole and with regard to its individual components may be necessary. When considered as a whole, many archives and other special collections do not have a substantial commercial market value, although they certainly possess a substantial research and scholarship value. By their nature, archival items received from artists, authors or their estates, for example, tend not to be finished works of art (or writing) that have a commercial market value but rather consist of a body of more ephemeral, contingent works that have historical, critical and analytical value reflecting on the artist's or author's process of creativity.<sup>65</sup> For those archives or other special collections that, as a whole, lack a substantial commercial value, a museum's digitization and posting of the archive or collection, as a whole, is unlikely to violate the fourth fair use factor by interfering with the copyright owner's market. Nevertheless, that may not be the end of the inquiry. Even if an entire archive or special collection lacks a substantial commercial value, application of the fourth factor may produce a different outcome if there is an active or potential commercial licensing market for an individual archival item or group of archival items within the archive or special collection. A museum's posting of the entire archive or special collection could usurp or undermine a valuable licensing market for components of the archive or special collection in a manner that might violate the fourth fair use factor, at least insofar as such individual items are concerned. As a result, a court could find that the fourth factor argues against fair use, certainly as to a specific archival item that is already published and currently commercially available.

# 5. Conclusion

There is a strong argument that the creation of a digital copy of an entire archive or other special collection for storage, conservation, preservation and research purposes (including publication of snippets in response to searches by the public) is fully supported by fair use (see *Google*) and/or <u>Section 108 of the Copyright Act</u>. There is also a defensible argument that publication of all or virtually all of an archive or other special collection for the purpose of providing public access is transformative and noncommercial (if limited for scholarly use and made available for free) and thus will pass muster under the first fair use factor. In addition, the inclusion of a finding aid to accompany the archive or other special collections, the inclusion of a rachives and other special collections, can enhance the transformative nature of the use. If the material has previously been published, or is factual in nature (second factor), and if images are only of a size and resolution that is necessary to support the transformative, educational, goals of publication (third factor), then the publication of the whole archive may, in addition to satisfying the first factor, comply with the second and third fair use factors. If the first three factors favor fair use, then even if the fourth factor (*i.e.*, impact on the market for the original)

<sup>65</sup> Of course there are archives and special collections that do have a substantial market value (*e.g.*, an archive of historic photographs from a prominent magazine; archives of an artist that contain drawings, studies, preparatory sketches, etc.), and, indeed, institutions often pay large sums for important archives.

disfavors the museum's use, a court could still easily find fair use, but in most, if not all, cases, even the fourth factor may favor fair use if the material published does not have an existing commercial market.

In the absence of judicial precedent specifically on point with respect to a museum's wholesale publication of an archive or other special collection, recommending with a very high degree of confidence that a museum may publish an entire archive or other special collection without risking possible infringement claims is difficult. A museum that is unwilling to assume the risk of uncertainty in this area and prefers to take a conservative approach that does not rely on fair use may adopt the same procedures as have been in place prior to digitization, *i.e.*, require a researcher to visit the archives in person and obtain permission from a copyright holder prior to obtaining an entire copy of any of the materials and/or publishing them. If the museum has created a digitized version of the archive, it could be searched by such scholars at the museum, on its servers, rather than being published on the internet. Another option would be for the museum, as in Google, to create a digital copy of the archival items stored on the museum's server and allow the public to search that digital copy with search terms that will yield snippets and references to the original works in the archive. Relying on Kelly and Perfect 10, the museum could also post lower resolution images of visual archival material online, directly or in response to a search term by a third party user. Additionally, if the museum decides to make the entire archive or other special collection available online, the museum would be well advised to adopt applicable safeguards set forth in Article III, Special Considerations, of the Guidelines and might also consider the additional precaution of disabling download features to restrict wholesale copying and publication of the entire archive or other special collection.

# F. On-Site Uses

This section discusses both the on-site display of original works of art owned by museums or on loan to the museum in a gallery or exhibition display or surrounding physical space as well as the on-site display of reproductions of works of art and copyrighted materials in devices. This section does not address live performances of copyrighted material. For purposes of this Section, devices include mechanisms for display of reproductions of works of art and copyrighted materials in and around the museum's facilities by means of kiosks, "video" displays, touch-screens, audio devices, tablets and other similar tools. While the most common use of works of art, whether from the museum's collection or borrowed, is display of an original work in a gallery ("gallery display") or in connection with an exhibition ("exhibition display"), museums also often reproduce or display or publicly perform works of art and other copyrighted materials, including audiovisual material and music, on-site in and by means of devices located in permanent galleries and exhibition spaces as well as other areas within and around the museum's facilities. Materials included in these on-site devices may include works of art, text, video, audio, music, archival materials, and other types of intellectual property that enhance and expand the reach of the works of art, artifacts and related materials on display at the museum or in the museum's permanent collections but not on view. Content displayed on these devices is sometimes, but not necessarily always, made available online or downloadable, although museums are routinely offering visitors "apps"

and other forms of technology to capture and save content provided on-site on smartphones and other devices.

On-site public display by a museum of an original work of art or a "copy lawfully made" is expressly authorized in the <u>Copyright Act in Section 109(c)</u>. The right to such display is conferred on the owner of the original work and the lawfully made copy (for purposes of this Section, the museum), or any person authorized by such owner, without the authority of the copyright owner. Such right extends to the public display of the work and authorized copies to viewers present at the place where the copy is located. The display right<sup>66</sup> is the lifeblood for museums and finding examples in which copyright owners have challenged a museum's right to display works of art owned by the museum or on loan to the museum is extremely rare.<sup>67</sup>

When a museum seeks to display or publicly perform copies of works of art or other copyrighted materials through devices or otherwise, without a license from the copyright holder, a traditional fair use analysis is required. In the context of gallery or exhibition display, copies of works of art and copyrighted materials may be used on devices in the museum to supplement and provide additional context for the gallery or exhibition display itself by providing historical details, supplemental information about the works on display or explanation of relationships between works on display or other works, and for other scholarly and educational purposes. As with other standard museum uses discussed in these Guidelines, the fair use analysis for inclusion of copies of works of art or other copyrighted materials on such devices requires examination of the four factors and, in particular, assessment of whether use of copies of works of art and copyrighted materials in the on-site device context is transformative.

# 1. The First Factor—Purpose/Character

As with the previous sections of these Guidelines that address fair use in the context of on line collections, educational materials, exhibition catalogues and publications, museum brochures, blogs, and scholarly articles, the content produced for on-site display in a device typically consists of a compilation

<sup>66</sup> The display right applies only to the original work and to "copies lawfully made;" it does not apply to all copies. Further, the "display" right does not apply to the "public performance" of audiovisual works, so even if the museum owns a work of film, video, digital or other types of such works, the work cannot be "displayed" or "publicly performed" in the galleries without a license, unless fair use applies.

<sup>67</sup> One scenario in which a museum's right to display an original work might be challenged involves the display of appropriation art. If a museum owns or borrows a work of appropriation art and the owner of the rights to the underlying "appropriated" work claims that the new work is "not lawfully made," the owner of the underlying rights might challenge the museum's display right under Section 109(c). At that point, the museum should consider whether it can continue to display the disputed work of art in reliance on fair use. This would require the four factor analysis for two independent questions: whether the creation of the work of "appropriation art" itself qualified as a fair use (in which case the museum's display is protected because the work was "lawfully made"), and whether, even if the work of "appropriation art" does not satisfy fair use, the museum's display of that work constitutes "fair use" (for example as criticism or commentary or any other use supported by the fair use factors). If the museum is concerned that the work's appropriation or the Museum's display may not qualify as fair use, a museum might elect to remove the work temporarily until the dispute is resolved between the artists or by the courts and the museum's right to display confirmed. In deciding a course of action, the museum should also consider other factors that may be present, including curatorial integrity, loan and acquisition agreement provisions, the risk of setting precedent, and relationships with lenders and artists.

of copyrighted materials consisting of images, text, audio, video, music and/or other content related to the permanent collection or an exhibition. These materials are created to enhance the visitor experience by allowing the visitor to delve more deeply into works included in the gallery or exhibition display and in the museum's permanent collection generally and to explore paths of inquiry and analysis based on the individual interests of the visitor. Materials created for on-site display often connect disparate pieces of information or invite the visitor to connect them and thereby infuse the elements with new meaning and connection. As with other types of materials discussed in previous sections of these Guidelines, these compilations of materials, often copyrighted, meet the transformative test of the first prong of the fair use analysis as articulated in such cases as *Graham*. When these supplemental materials are presented onsite in devices to the public for non-commercial, educational purposes, the remaining prong of the first fair use factor is also satisfied.

## 2. The Second Factor—Nature of Use

With regard to the second fair use factor, the nature of the works of art or copyrighted materials likely to be incorporated into presentations for display on site in devices in whole or in part are often protected by copyright not owned by the museum. To the extent that the works or materials included in presentations for on-site display in devices are creative, this factor would weigh against a finding of fair use.

# 3. The Third Factor—Amount Used

The third factor considers the amount and substantiality of the portion used in relation to the copyrighted work as a whole. For materials created for display on-site in devices, the incorporation of entire works of art or copyrighted materials both quantitatively and qualitatively might render it difficult to satisfy this factor, particularly if such use could be viewed as superseding the original without transforming it. For example, the use of an entire television program from the 1950s to illustrate the design theme of an exhibition could be questionable. As with the other uses discussed in these Guidelines, the fair use argument will be strongest when the materials produced for on-site display in devices include brief excerpts, snippets, reproductions in smaller sizes and lower resolution and details of works of art rather than entire works (if the reproduction of the whole work is not necessary to achieve the transformative purpose of the use).

Music is a common feature of on-site display in devices and can present thorny fair use issues in part due to the complex web of licensing for public performances through entities such as ASCAP, BMI and SESAC. Although exceptions to the licensing schemes might apply to on-site public performance of recorded musical works in connection with an exhibition or other display of works of art or a noncommercial program, reliance on fair use will typically require use of only brief snippets coupled with an explanation of the significance of the music to the exhibition, display or program. Conversely, use of entire or substantial portions of such musical works merely as background or entertainment would be difficult to justify as transformative.

# 4. The Fourth Factor—Market Effect

For the final fair use factor, the effect of the use upon the potential market for or value of the copyrighted work; the more transformative the use the less the courts are influenced by the possible effect on the market for the original. For on-site uses discussed in this section, when the materials are made available in a limited physical location that is accessible only to the museum visitor, specific (as opposed to general admission or special exhibition) fees are not charged to access the content, materials are not made available for download, distributed online or otherwise outside the museum's physical space,<sup>66</sup> and only selected portions are reproduced, the risk of such use interfering with any individual copyright owner's market is remote.

Based on the four-part fair use analysis, a strong argument can be made that the display of works of art and copyrighted materials on devices located in and around the museum's galleries and buildings to supplement and enhance the permanent gallery or exhibition experience would qualify as fair use.

<sup>68</sup> If materials are available for download, distributed online or otherwise outside the museum's physical space, reference is made to Article IV, Sections A, Online Collections and B, Publications.

# ANNEX A-FAIR USE AND THE FOUR FACTORS

Set forth below is a brief analysis of the four factors to be considered when evaluating whether the use of copyrighted materials and works or art is fair use under <u>Section 107 of the United States Copyright Act</u> <u>of 1976</u>. In evaluating any particular use, the museum should consider seeking qualified legal advice.

# 1. FIRST FACTOR: The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.

- Analysis: The case law has addressed this factor by evaluating the extent to which the particular use adds new value to the underlying work (insights, aesthetics, criticism, education or understandings) such that the use will be deemed transformative in nature, rather than a mere copy of the original.<sup>69</sup>
  - At least one court<sup>70</sup> has established the significance and transformative nature of purely illustrative uses of copyrighted work when used as part of a larger work that is different than the original purpose of the work.
  - Courts have consistently reiterated that among "the best recognized justifications for copying from another's work is to provide comment on it or criticism of it."<sup>71</sup>

## • Level of significance:

- Transformation: This first factor often establishes the context for the court's overall fair-use analysis. As set forth in *Kelly*, "The more transformative the new work, *the less important the other factors*, including commercialism [*i.e.*, commercial use of the copyrighted material], become."<sup>72</sup> This does not mean that transformation negates the other factors nor can it, as one court commented, act to protect "lazy appropriators."<sup>73</sup>
- Commercial Nature:

Although it will be considered in a court's evaluation of the purpose and character of the

Authors Guild v. Google, Inc., 804 F.3d 202 (2nd Cir. 2015) ("Google"); Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) ("Campbell"); Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007); and Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003) ("Kelly").

<sup>70</sup> Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605 (2nd Cir. 2006) ("Graham").

<sup>71</sup> See Google.

<sup>72</sup> See Kelly, emphasis added.

<sup>73</sup> *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756 (7th Cir. 2014) ("*Kienitz*"). *Kienitz* also questioned whether "transformative" is actually one of the four factors.

work, the commercial or nonprofit nature of the use is not the deciding element in a case.<sup>74</sup>

Probably most uses by museums will meet the test of noncommercial and nonprofit activity, although there are certainly activities of museums that could be construed as commercial. Even those activities can fall squarely within the definition of fair use and the commercial nature of activity alone should not preclude a fair use analysis. "Given that even the statutory examples of fair use are generally conducted for profit, courts often 'do not make much of this point'."<sup>75</sup>

#### 2. SECOND FACTOR: The nature of the copyrighted work.

- **Analysis:** This factor takes into account the type of work (factual/historical vs. creative/fictional) and whether the work has been previously published.
  - Courts have held that creative works "... are closer to the core of intended copyright protection than are most fact-based works,"<sup>76</sup> therefore making fair use more difficult to establish when creative works are copied.
  - Whether the creative work that is copied has been previously published will also be taken into account (as a factor in favor of fair use).
  - Although both published and unpublished works alike are subject to fair use, courts have sometimes been less ready to recognize fair use when evaluating works that have not been previously published.<sup>77</sup>
- Level of significance: This particular factor "...has rarely played a significant role in the determination of a fair use dispute."<sup>78</sup>

# 3. THIRD FACTOR: The amount and substantiality of the portion used in relation to the copyrighted work as a whole.

- Analysis: Case law applies a "reasonableness" standard to the evaluation of the amount and substantiality of the portion of the work used in the reproduction.
  - As the court held in *Campbell*, the extent of permissible copying depends on the purpose of the use, and the question to be asked is whether the amount and substantiality of the portion used "are *reasonable in relation to the purpose of the copying.*"<sup>79</sup> Another court in discussing the issue noted that so long as users copy only as much as is necessary for their intended uses, this factor will not weigh against them.<sup>80</sup>

<sup>74</sup> See Campbell.

<sup>75</sup> Warner Bros. Entertainment Inc. v. RDR Books, 575 F. Supp. 513 (SDNY 2008) quoting in part Castle Rock Entertainment, Inc. v. Carol Publishing Group, 150 F.3d 132 (2nd Cir. 1998).

<sup>76</sup> See Kelly quoting A&M Records v Napster, Inc., 239 F. 3d 1004 (citing Campbell).

<sup>77</sup> See Kelly.

<sup>78</sup> See Google.

<sup>79</sup> See Campbell, emphasis added.

<sup>80</sup> See Kelly.

- Case law reflects the fact that the closer in size and appearance to the original the new use is, the greater is the risk that the copy is simply a substitute for the original.<sup>81</sup>
- A number of cases have held that copying copyrighted works *in their entirety* is appropriate, and constitutes fair use, "when the copying was reasonably appropriate to achieve the copier's transformative purpose *and was done in such a manner that it did not offer a competing substitute for the original.*"<sup>82</sup> Therefore, the extent to which the amount of the original work reproduced is reasonable, in relation to the transformative purpose of the new use, will influence a court's decision as to whether the new use represents a substitute for the original that could harm the copyright holder's potential market (discussed below under the Fourth Factor).
- Level of significance: This factor is mostly important due to its interaction with:
  - the first factor, because the transformative nature and purpose of the use is taken into account when evaluating the "reasonableness" of the portion used; and
  - the fourth factor, because the size of the reproduction and the amount of work copied will influence a court's analysis of the extent to which the new use harms the market for the copyrighted work.

# 4. FOURTH FACTOR: The effect of the use upon the potential market for or value of the copyrighted work.

- **Analysis:** "This last factor requires courts to consider 'not only the extent of market harm caused by the particular actions of the alleged infringer, but also 'whether unrestricted and widespread conduct of the sort engaged in by [the alleged infringer] . . . would result in a substantially adverse impact on the potential market for the original".<sup>183</sup> Courts have been clear that when evaluating market harm, the relevant harm is not whether there has been any loss of licensing revenue or sales, but rather the harm resulting from a new use that offers a competing consumer a substitute for the original work, "...so as to deprive the rights holder of *significant\_*revenues because of the likelihood that potential purchasers may opt to acquire the copy in preference to the original.<sup>184</sup> In some cases, the courts have found that the copyright holder's practice of not licensing the work for uses similar to those employed by the alleged infringer weigh in favor of fair use.<sup>85</sup>
- Level of significance: This last factor has played a substantial role in the courts' analysis of fair use, because it measures the *harm that the new use can have on the copyright for the original*

<sup>81</sup> See *Graham* and *Kelly*.

<sup>82</sup> See *Google*, emphasis added.

<sup>83</sup> See Kelly, quoting in part Campbell, quoting Nimmer & D. Nimmer, Nimmer on Copyright (1993). In Cambridge Univ. Press v. Patton, 769 F.3d 1232 (11<sup>th</sup> Cir. 2014), the court discussed that the lack of a readily available license not only does not weigh against fair use, it weighs in favor of fair use.

<sup>84</sup> See Google, emphasis added.

<sup>85</sup> Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006).

*work*. One court has suggested that the measurement of this factor is "... whether the contested use is a complement to the protected work (allowed) rather than a substitute for it (prohibited)."\*\*

- The transformative nature of the work will again be considered, as it will figure in the court's analysis of what harm, if any, is being caused to the original market. As one court stated, the adverse impact on the market of the original is *less certain* when the use of the copyrighted work is transformative, as such work is *less likely to serve as a substitute for the original work*.<sup>87</sup>
- Furthermore, the third factor (portion and substantiality of portion used) will also figure in the court's analysis of this final factor.
- Even a reproduction or copy of an entire work will not necessarily be considered harmful to the market of the underlying work, particularly if the copies are substantially smaller in size than the original. Courts have been persuaded that the small size and lesser quality of the copied images were not harmful to the copyright owners' markets, as the copies were not adequate substitutes for the original works such that they could harm the copyright owners' ability to sell or license full-sized versions of the images.<sup>86</sup>

<sup>86</sup> See Kienitz.

<sup>87</sup> See Campbell, emphasis added.

<sup>88</sup> See *Kelly* and *Google*.

# Code of Best Practices in Fair Use for the Visual Arts

**COLLEGE ART ASSOCIATION** 

Funded by the Andrew W. Mellon Foundation Additional support provided by the Samuel H. Kress Foundation

# **Code of Best Practices** in Fair Use for the Visual Arts

**FEBRUARY 2015** 

Funded by the Andrew W. Mellon Foundation Additional support provided by the Samuel H. Kress Foundation

#### **MESSAGE FROM THE CAA PRESIDENT**

The mission of the College Art Association (CAA) is to promote the visual arts and their understanding through advocacy, intellectual engagement, and a commitment to the diversity of practices and practitioners. CAA contributes to the visual arts profession as a whole through scholarly publications, advocacy, exchange of research and new work, and the development of standards and guidelines that reflect the best practices of the field.

The *Code of Best Practices in Fair Use for the Visual Arts* is based on a consensus of professionals in the visual arts who use copyrighted images, texts, and other materials in their creative and scholarly work and who, through discussion groups, identified best practices for using such materials. They included art and architectural historians, artists, designers, curators, museum directors, educators, rights and reproduction officers, and editors at scholarly publishers and journals.

CAA is grateful to Lead Principal Investigators Patricia Aufderheide and Peter Jaszi of American University for their oversight and execution of this project, including their surveying nearly 12,000 CAA members on their use of copyrighted materials, conducting 100 interviews to identify key issues, facilitating discussions with another 120 visual arts professionals to understand and identify points of consensus concerning best practices in use of such materials and, finally, articulating that consensus in the Code of Best Practices.

CAA expresses its deep appreciation to the many visual arts professionals who gave their time and expertise to this project. Special thanks are due to the other principal investigators—Linda Downs, Anne Collins Goodyear, under whose CAA presidency the project began, and Jeffrey Cunard—as well as to Gretchen Wagner, who, with Jeffrey, cochaired CAA's Task Force on Fair Use. CAA also thanks the project advisors, the Legal Advisory Committee, the Task Force on Fair Use, its Committee on Intellectual Property, and its Professional Practices Committee for expert assistance, and Janet Landay, project manager, for orchestrating all logistics. A full list of participants is set out in the credits that follow the Code.

Finally, CAA acknowledges the generous support of the Andrew W. Mellon Foundation and the Samuel H. Kress Foundation, without which this project would not have been possible.

DEWITT GODFREY President, CAA, and Professor, Art and Art History Department, Colgate University

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# Introduction

The *Code of Best Practices in Fair Use* was created with and for the visual arts community. Copyright protects artworks of all kinds, audiovisual materials, photographs, and texts (among other things) against unauthorized use by others, but it is subject to a number of exceptions designed to assure space for future creativity. Of these, fair use is the most important and the most flexible. (Appendix A is an essay by Peter Jaszi presenting a perspective on fair use.) The Code describes common situations in which there is a consensus within the visual arts community about practices to which this copyright doctrine should apply and provides a practical and reliable way of applying it.

Assessing fair use in light of shared professional understandings is a respected practice. Invoking professional practices provides members of a community with a clear framework in which to apply fair use with confidence, knowing the shared norms of their field. Having a code of best practices allows them to share their common understandings with others—including publishing entities, distributors, insurers, and lawyers—who may make decisions on which they depend. In addition to serving as a useful tool for individuals, a code can assist institutions and their counsel in applying the doctrine and developing policies that reflect their particular concerns. Further, a code provides guidance to rights holders as to when it may not make sense for them to claim infringement in light of an appropriate invocation of fair use, it helps courts to become familiar with best practices in a professional community when called upon to rule on fair use.

The right to make fair use of copyrighted materials is a key tool for the visual arts community, although its members may not always choose to take advantage of it. They may still seek copyright permissions, for instance, to maintain relationships, to reward someone deemed deserving, or to obtain access to material needed for their purposes. But, in certain other cases, including those described in the Code, they may choose instead to employ fair use of copyrighted material in order to accomplish their professional goals.

Many members of the visual arts community employ fair use in their professional practices and many do so regularly. For instance, scholars and their editors employ fair use in the context of analytic writing (for example, in using reproductions of copyrighted artworks and quotations). Teachers rely on it—along with other copyright exceptions—to show images of works being discussed during class sessions, and, even more heavily, to provide relevant images for student use outside class. In the museum context, fair use may be employed in exhibitions and publications, and in a range of digital and educational projects. Artists may employ fair use to build on preexisting works, engage with contemporary culture, or provide artistic, political, or social commentary. And the entire visual arts community benefits from fair use when it enables enhanced access to archival materials. These are only some of the most common ways in which fair use is central to visual arts practice.

#### WHY THE CODE?

Artists, scholars, teachers, museum professionals, and others represented in the College Art Association membership are significant producers of copyrighted works and they value their own rights. CAA recognized the value of promoting greater certainty among its members about the appropriate exercise of fair use. The risk posed by widespread uncertainty on this point was underscored by the common default expectation that users of copyrighted material should routinely seek permission to eliminate potential legal liability for unauthorized uses. CAA members were aware that such a culture of permissions could limit the work of the visual arts community and, as a result, deprive the public, especially in a digital era. CAA therefore engaged Patricia Aufderheide and Peter Jaszi, professors at American University and leading experts in copyright and fair use, to assess the current state of the community's practices with respect to the use of third-party copyrighted materials. In 2014, thanks to generous preliminary funding from the Samuel H. Kress Foundation and a major grant from the Andrew W. Mellon Foundation, CAA asked Aufderheide and Jaszi to prepare "Copyright, Permissions, and Fair Use among Visual Artists and the Academic and Museum Visual Arts Communities: An Issues Report."

The Issues Report, which was based on their interviews with 100 visual arts professionals and a survey of CAA members, reported that the practices of many professionals in the visual arts are constrained due to the pervasive perception that permissions to use third-party materials are required even where a confident exercise of fair use would be appropriate. Most commonly the decision not to rely on fair use is made by visual arts professionals themselves. Although members of the community may rely on fair use in some instances, they may self-censor in others, due to confusion, doubt, and misinformation about fair use, leading them to over-rely on permissions. (This is in contrast to self-censorship due to specific, non-copyright-related circumstances, such as a personal relationship with an artist.) Doing so jeopardizes their ability to realize their own full potential, as well as that of the visual arts community as a whole.

Aware of the success of other communities in developing codes of best practices in fair use, and of the opportunity that best practices present to help shape the application of fair use law, CAA decided to create such a code for the visual arts community. The methodology is described in Appendix B.

#### WHEN THE CODE DOES AND DOES NOT APPLY

Fair use is part of US copyright law, and the Code applies to the activities of members of the visual arts community who use copyrighted works in the US in furtherance of their professional goals. The Code applies to any copyrighted work used in the United States regardless of whether the work originated outside the United States. The Code does not apply to reproductions, distributions, performances, and other uses outside the United States, including web-based uses specifically targeted toward other countries, to which those countries' laws may apply.

The Code is not applicable to—and is not needed for—uses of material for which permissions already have been granted to the broader public, such as through Creative Commons licenses, which provide advance permission for a range of uses. Anyone may use such works in ways authorized by the applicable license but may also invoke fair use for other kinds of uses, where appropriate.

Similarly, the Code is not a guide to—and, again, is not needed for—the use of material that is in the public domain. By definition, public domain material is not protected by copyright and may be used without regard to copyright. According to the reasoning of the decision in *Bridgeman Art Library v. Corel Corp.*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999), moreover, copyright-free material also includes faithful photographic reproductions of two-dimensional artworks, which are distinct from the artworks they depict. *Bridgeman*, however, does not on its face apply to still photographs of three-dimensional works, such as sculpture, architecture, and performance art. Nevertheless, such photographs might be used pursuant to fair use in light of the principles and limitations set forth in the Code.

In practice, fair use can be applied only to works for which users can obtain access, including, for example, in the case of visual art, to reproductions, such as analog slides or digital images. Sometimes, however, permission must be sought simply because a "sole source" controls an art object or reproductions thereof even where the work itself is in the public domain. Because demands for permission fees in this context are not based on copyright, fair use cannot be invoked to avoid paying such fees.

Fair use and, therefore, the Code, also do not apply to the extent that a license agreement or other contract controls reproduction or other use. Thus, for example, archives must abide by restrictions imposed by donors, and museums must comply with provisions for rights clearance in distribution contracts that supersede fair use. Sometimes such terms may be found in the "fine print" of agreements that may otherwise be noncontroversial.

#### **APPLYING THE CODE**

Fair use can be applied consistently based on logical principles grounded in factual contexts. The Code describes an approach to reasoning about the application of fair use to issues both familiar and emergent. It does not provide rules of thumb, bright-line rules, or other decision-making shortcuts. For instance, it does not prescribe a uniform size or resolution for digital images that might be appropriate for all online uses. Rather, it calls on a user to consider context in deciding what image size should be employed for any new use, in light of the user's professional goals and other considerations.

Likewise, the Code refers users to generally applicable professional standards, which, in turn, may evolve over time. This is the case, for example, where it invokes the concept of "appropriate metadata" (which might include information about the title, artist, date, medium, provenance, current location, ownership, and other characteristics of a work), the meaning of which may differ according to context.

Finally, it is important to emphasize that decisions about whether to utilize the principles of the Code are not affected or limited by the possibility that others may make further uses of the copyrighted material in question. As the law has been interpreted, such "downstream" uses (scanning a book illustration and placing the image on consumer goods, for example) do not give rise to legal liability on the part of visual arts professionals who themselves have relied appropriately on fair use in making the material available and are not actively aware of widespread misuse of it by others.

The Code that follows states five consensus principles that reflect best practices by members of the visual arts community in applying fair use. Each of the principles is given shape by its associated limitations, which are integral to application of the principle. The Code includes only principles and limitations about which there was near-universal consensus among the discussion groups' participants. As a result, they are not necessarily exhaustive.

More specifically, the Code does not describe all the situations in which fair use might be available to members of the visual arts community. Rather, it addresses only the most common situations that members of the community encounter. By the same token, the Code's principles and limitations are, of course, subject to interpretation.

# The Code of Best Practices: Situations, Principles, and Limitations

#### **ONE: ANALYTIC WRITING**

**DESCRIPTION** Analytic writing focuses attention on artists, artworks, and movements; it includes analyses of art within larger cultural, political, and theoretical contexts. Such writing routinely includes reproductions, in full or in part, of relevant artworks in all media, texts, historical images, digital phenomena, and other visual culture. This material-much of it copyrighted-may be drawn from a variety of sources, including the collections of libraries and archives (generally referred to here as "memory institutions"), notes and photographs taken by the writer, and documentary reproductions created or published by others; some works start out in analog formats and others are born digital. Sometimes the visual or textual works reproduced in connection with analytic writing are the specific subjects of analysis. Sometimes they are used to illustrate larger points about artistic trends and tendencies, or to document a particular point or conclusion. Such writing is published both within traditional academic venues and in everexpanding venues beyond them. It may be published in a variety of formats, including print and electronic books and journals, exhibition catalogues, collection catalogues, blog and social media posts, and contributions to collaborative digital projects, such as wikis (which projects often reside in institutional repositories), or it may be delivered at academic meetings or on similar occasions. The effectiveness of analytic writing about art is improved by the reproduction of the materials that it references. In many instances, particularly for works of visual art, writers may conclude that reproduction of an entire work may be the most appropriate way to make their points.

**PRINCIPLE** In their analytic writing about art, scholars and other writers (and, by extension, their publishers) may invoke fair use to quote, excerpt, or reproduce copyrighted works, subject to certain limitations:

#### Limitations

- The writer's use of the work, whether in part or in whole, should be justified by the analytic objective, and the user should be prepared to articulate that justification.
- The writer's analytic objective should predominate over that of merely representing the work or works used.
- The amount and kind of material used and (where images are concerned) the size and resolution of the published reproduction should not exceed that appropriate to the analytic objective.
- Justifications for use and the amount used should be considered especially carefully in connection with digital-format reproductions of born-digital works,

- where there is a heightened risk that reproductions may function as substitutes for the originals.
- Reproductions of works should represent the original works as accurately as can be achieved under the circumstances.
- The writing should provide attribution of the original work as is customary in the field, to the extent possible.

#### **TWO: TEACHING ABOUT ART**

**DESCRIPTION** Teaching about art in studio and classroom settings, whether in academia or elsewhere, has historically been achieved using reproductions of artwork as illustrations. Today, technology has extended the classroom beyond four walls: teachers may show digital slides or video in classrooms, while also making such works that are related to their courses available to students online by means, for example, of course management platforms. Some institutions also offer their students art courses conducted entirely online. Although specific copyright exceptions are available for some teaching activities, teachers' fulfillment of their mission often is frustrated by the narrow scope of those exceptions. Even where these exceptions may be adequate to cover face-to-face teaching or distance education in real time, they fail to cover many forms of pre- and post-class support that teachers wish to provide to students. In support of their teaching activities, teachers in the visual arts long have maintained collections of exemplary documentation for their own use and that of their students. Sometimes these are maintained in their personal files and sometimes in departmental or other institutional reference collections. Those who maintain such files generally agree that they would prefer to share them more broadly, with peers or related institutions, to create more powerful teaching resources.

**PRINCIPLE** Teachers in the visual arts may invoke fair use in using copyrighted works of various kinds to support formal instruction in a range of settings, as well as for uses that extend such teaching and for reference collections that support it, subject to certain limitations:

#### Limitations

- The works selected should further the teacher's substantive pedagogical objectives.
- The teacher's pedagogical objective should predominate over that of merely representing the work or works used.
- Student access to course management sites where such works are made available should be restricted to those enrolled in the course or otherwise designated by the teacher.
- Images made available to students should, to the extent possible, accurately represent the works they depict.
- If providing downloadable images online is justified by the teacher's objectives, those images should be suitable in size for satisfactory full-screen projection or display on a personal computer or mobile device, but generally not larger.

- When displayed, images should be accompanied by attribution of the original work as is customary in the field, to the extent possible.
- Images and other items in a reference collection should be augmented with appropriate and reasonably available metadata.
- Access to an institutional reference collection should be limited to persons affiliated with the institution and its partner institutions, such as students, faculty, and authorized researchers, subject to a requirement that items in the collection should be used only for legitimate purposes.

#### **THREE: MAKING ART**

**DESCRIPTION** For centuries, artists have incorporated the work of others as part of their creative practice. Today, many artists occasionally or routinely reference and incorporate artworks and other cultural productions in their own creations. Such quotation is part of the construction of new culture, which necessarily builds on existing culture. It often provides a new interpretation of existing works, and may (or may not) be deliberately confrontational. Increasingly, artists employ digital tools to incorporate existing (including digital) works into their own, making uses that range from pastiche and collage (remix), to the creation of new soundscapes and lightscapes. Sometimes this copying is of a kind that might infringe copyright, and sometimes not. But whatever the technique, and whatever may be used (from motifs or themes to specific images, text, or sounds), new art can be generated.

**PRINCIPLE** Artists may invoke fair use to incorporate copyrighted material into new artworks in any medium, subject to certain limitations:

#### Limitations

- Artists should avoid uses of existing copyrighted material that do not generate new artistic meaning, being aware that a change of medium, without more, may not meet this standard.
- The use of a preexisting work, whether in part or in whole, should be justified by the artistic objective, and artists who deliberately repurpose copyrighted works should be prepared to explain their rationales both for doing so and for the extent of their uses.
- Artists should avoid suggesting that incorporated elements are original to them, unless that suggestion is integral to the meaning of the new work.
- When copying another's work, an artist should cite the source, whether in the new work or elsewhere (by means such as labeling or embedding), unless there is an articulable aesthetic basis for not doing so.

#### FOUR: MUSEUM USES

**DESCRIPTION** Museums regularly curate and organize temporary or permanent (i.e., long-term) exhibitions, which include works from their own, other institutional, and private collections. Exhibitions can generate new artistic and scholarly insights and attract and enhance the experience of museum visitors. Frequently, exhibitions

may enhance or confirm the reputations of the artists whose work is included. Museums also routinely prepare print and graphic materials associated with exhibitions, including wall panels that display text and reproductions of related images; make available brochures and educational guides; publish catalogues; and offer related lectures and other public programs. Many museums also offer various kinds of guides (including publicly accessible databases) that reproduce images for many or all of the works in their permanent collections. Increasingly, they are doing all these things using digital and other new technologies. For example, visitors may access electronic information about exhibitions and collections with their own or a museum-supplied portable device, which may be networked. Teachers and students may access exhibition- and collection-related educational or curricular materials (text, mixed media, and video) on the museum's website and social media channels, or through third parties, including for-profit and nonprofit publishers. Physical exhibitions may be complemented by virtual counterparts or online enhancements so that remote visitors can virtually "walk through" the galleries, appreciate the curatorial narrative, and, if desired, focus their attention on particular works. Similarly, online documentation of collections (including collection catalogues and databases of images and metadata) can help to place individual artworks in a larger institutional or cultural context and provides some of the benefits of a physical visit to the museum, as well as providing access to material not currently on display. Such documentation also may prepare the members of the public to interact more fully with art when they visit the museum in person.

**PRINCIPLE** Museums and their staffs may invoke fair use in using copyrighted works, including images and text as well as time-based and born-digital material, in furtherance of their core missions, subject to certain limitations:

#### Limitations

- When copyrighted works are used in connection with physical or virtual exhibitions, the use should be justified by the curatorial objective, and the user should be prepared to articulate that justification.
- The amount of a work used in museum publications, the size and resolution of published reproductions, and the level of fidelity of those reproductions should be appropriate to the analytic or educational purpose.
- Downloadable images made available online should be suitable in size for full-screen projection or display on a personal computer or mobile device, but generally not larger.
- When image details and support for "close looking" are offered online through large or high-resolution images, downloading should not be facilitated unless a special justification is present.
- Images provided to the public should be accompanied by attribution of the original work as is customary in the field, to the extent possible.
- Images and other documentation of museum collections should be associated with all appropriate and reasonably available metadata.

Images and documentation of museum collections should honor institutional policies designed to protect noncopyright interests of third parties, including the privacy of individuals and the cultural sensitivities of communities.

## FIVE: ONLINE ACCESS TO RELATED COLLECTIONS IN MEMORY INSTITUTIONS

**DESCRIPTION** Many institutions, including academic libraries, art schools, museums, archives, and study centers, maintain collections of art-related documentation, including the sketches and studies, manuscripts, financial records, personal photographs, and book collections of artists, collectors, dealers, and others. Unless subject to use restrictions, including those imposed by donation agreements, these memory institutions typically make such documentation available for study and personal copying by scholars and members of the public. Much of this valuable and often unique study material—some unpublished and some difficult to trace to rights holders—may be under copyright. Online access resulting from digitization of these collections greatly expands their utility for scholars, students, artists, and the public; it also contributes to the protection of the information they contain against theft, disaster, and decay.

**PRINCIPLE** Memory institutions and their staffs may invoke fair use to create digital preservation copies and to enable digital access to copyrighted materials in their collections and to make those collections available online, with appropriate search tools, subject to the following limitations:

#### Limitations

- Material made available online should be redacted to protect the privacy and other noncopyright interests of third parties, in accordance with prevailing professional standards.
- Visitors to the site should be informed that the materials they access are provided for their personal and/or scholarly use, and that they are responsible for obtaining any copyright permissions that may be required for their own further uses of that material.
- Institutions should prominently offer such users a point of contact for further information and correspondence and they should respond promptly to user complaints, corrections, and questions.
- When provided, downloadable images provided online should be suitable in size and resolution for full-screen projection or display on a personal computer or mobile device, but generally not larger.
- Materials made available should be accompanied by attribution as is customary in the field, to the extent possible.
- Items should be augmented with all appropriate and reasonably available metadata.

# **Appendix A: Fair Use Today**\*

Some background information about the fair use doctrine, seen in the context of copyright law and its objectives, may be helpful in thinking about how to use the Code. The goal of US copyright law is to promote the progress of knowledge and culture. Its best-known feature is protection of owners' rights. But copying, quoting, recontextualizing, and reusing existing cultural material can be critically important to creating and spreading knowledge and culture.

That is why there is a social bargain at the heart of copyright law. That bargain is: Our society offers creators some exclusive rights in copyrighted works, to encourage them to produce culture. The compensation that creators receive from exploiting their copyrights is important as an incentive to this ultimate end; it is not an end in itself. Society also limits copyright in important ways, so that the primary intended beneficiary of copyright law—the public—can benefit from those works. Most basically, copyright lasts for a limited time, and then works enter the public domain, where they are free for use by all. Other limitations allow the use of works protected by copyright without permission or payment to the copyright owner. Without those uses, creative and scholarly activities would suffer, and the public would lose out on important new work that builds on the past.

As Section 107 of the Copyright Act of 1976 provides, " fair use of a copyright work... is not an infringement of copyright."<sup>†</sup> Fair use is the most important limit on copyright monopoly rights. It has been part of US copyright law for more than 170 years. Where it applies, fair use is a right and not a mere privilege. Because copyright law describes fair use in general terms, the fair use doctrine can adjust to evolving circumstances, and the fact that it is asserted procedurally as an affirmative defense should not affect this characterization.

\* Peter Jaszi wrote this section and is solely responsible for it.

<sup>†</sup> § 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- 1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- 2. the nature of the copyrighted work;
- 3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- 4. the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

As a comparison, for example, freedom of expression is a right that is also asserted as a defense in defamation cases. Rather than following a formula, lawyers and judges assess whether a particular use of copyrighted material is "fair" according to an "equitable rule of reason." This means taking into account all facts and circumstances to decide if an unlicensed use of copyrighted material generates social or cultural benefits greater than the cost imposed on the copyright owner.

Judicial decisions on fair use can give practitioners strong positive guidance about how to apply the doctrine. In 1976, Congress inscribed the venerable judge-made rule into Section 107, codifying the familiar "four factors." It also included a preamble, listing examples of uses that were eligible to be treated (as fair use. Notably, some of these (like "criticism, comment, . . . teaching, scholarship, [and] research") are core activities of many visual arts professionals. There then ensued a decade of generally cautious and even conservative court opinions, calling into question the real utility of the doctrine for those who make and comment on culture.

Since the early 1990s, however, the case law has taken a dramatic turn. By 2002, when the US Supreme Court affirmed the strong connection between fair use and First Amendment freedom of expression in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), the doctrinal landscape already had changed dramatically. In the intervening time, the courts had indicated that a generally critical consideration in evaluating the fair use factors is whether the use can be considered "transformative"— whether it "adds something new, with a further purpose or different character," as the Supreme Court put it in *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994).

Since then, cases have reinforced the notion that for a use to be considered "transformative," it need not—as, in fact, it usually does not—entail a literal modification or revision of the original material. Instead, it is crucial that it has put that material in a new context where it performs a new function. Thus, the reproduction of an image to illustrate the argument of a scholarly article could qualify, just as could the use of copyrighted material in new art.

Where a use is transformative, the first statutory factor (looking to "purpose and character") will weigh strongly in favor of fair use even if the new use is "commercial" in character. The second factor (which implicates the nature of the work used) tends to favor transformative uses as well. This factor functions to provide certain imaginative works extra protection from unfair exploitation; however, this concern loses much of its force when they are used for new purposes. Moreover, where the third factor is concerned, courts will measure the appropriateness of the amount of copyrighted material used against the transformative purpose of

Note that although the factors are often viewed as representing the four corners of fair use analysis, the list is made explicitly nonexclusive; thus, courts can and (from time to time) do take other considerations into account, including the "public interest," in allowing the use under consideration to go forward. This may be of particular relevance to educational users and those associated with memory institutions, who can marshal strong arguments about the social utility of their activities. that use; where visual imagery is concerned, use of an entire work often will qualify, as in *Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18 (1st Cir. 2000).

And crucially, a transformative use is likely to weigh in favor of fair use under the fourth factor (directed toward the market harm suffered by the copyright holder), because (as increasing numbers of courts have recognized) copyright owners are not entitled to control the "transformative markets" for their works, as exemplified by *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006), which involved graphic art reproduced to illustrate a historical narrative. The unlicensed use of reference images (so-called "thumbnails") in internet search engines has been found to be fair on this basis, an example being *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007). But, conversely, the transformativeness test also safeguards rights holders from the invasion of commercially significant markets or potential markets that they are entitled to exploit. When a use merely substitutes for an authorized use in a copyright owner's core market, for example, the photographic image of a statue chosen and used for its visual appeal on a postage stamp in *Gaylord v. United States*, 595 F.3d 1364 (Fed. Cir. 2010), it is less likely to be considered fair.

Where a use is deemed nontransformative, the market-harm test of factor four is likely to play a more important role in the analysis. Thus, for example, a textbook author's failure to license summaries of various artists' careers adopted from a proprietary website could weigh against a fair use finding. Alternatively, the reproduction of an "orphan" work that is not being actively exploited might be deemed fair on the same grounds.

As might be expected, these developments in the case law have been questioned by some, who have criticized the transformativeness test as too subjective in its application, too harsh (where the interests of copyright owners are concerned) in effect, and somehow inconsistent with the fact that copyright owners are granted an "exclusive right" to "prepare derivative works" under Section 106(2) of the Copyright Act. Only time may tell how well justified some of these objections are. But, as to the last, it is worth noting that all the exclusive right spanted in Section 106 are qualified. It is not clear why the derivative work right should be any less subject to fair use than, for example, the rights of "reproduction," "distribution," or "performance."

Certainly, controversy remains about how fair use should apply to so-called appropriation art, the case law concerning which was discussed at some length in the Issues Report that helped frame the issues addressed in this Code. The particular application of the transformativeness test in Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013), involving new works created by defendant's overpainting of photographs taken from plaintiff's book, continues to attract critics as well as defenders. This Code offers a balanced approach to invoking fair use in this area of visual arts practice, as in others.

In general, there has never been as strong a general judicial consensus about the nature of the fair use doctrine as the one that exists today. In making fair use decisions about issues such as those that confront the visual arts community, judges today generally focus, in effect, on two key analytic questions:

- Did the use "transform" the copyrighted material by using it for a purpose significantly different from that of the original, or did it do no more than provide consumers with a "substitute" for the original?
- Was the material taken appropriate in kind and amount, considering the nature of both the copyrighted work and the use?

These two questions effectively collapse the four factors. The first question contains the first two factors—the purpose of the use and nature of the work used. Thus, for example, the unpublished nature of a work could weigh against fair use if a deceased artist's copyrighted private letters were being used for gratuitous and sensational effect, but it should have little bearing if the use were for an academic (and thus transformative) purpose. The second question rephrases the third factor, which looks to the quantity and quality of the material used. Both of the key questions touch on the fourth factor, focusing on economic harm the use will cause to the owner's relevant market. This is because courts have made it clear that substitutional harm is what matters in applying factor four. Thus, if Artist B's "parodies" of Artist A's works actually supplant purchases of Artist A's works, that might result in such harm, but if Artist A's work, as a result, loses popularity or marketability, that would not.

In other words, if the answer to these two questions is clearly in the affirmative, a court is likely to find a use fair, even if the work is used in its entirety. Where that is the case, a rights holder also might conclude that it ought not to challenge the use.

Court decisions also show that it can be helpful to the fair use argument for the user to explain the new function, purpose, or context of the use. The case law further suggests that the more coherent an account the user can give of how and why it was appropriate to employ the copyrighted work, the easier it is for judges to understand if and whether and why the use would be considered transformative.

The flexibility of fair use can lead users to wish for clearer rules or brighter lines. But the flexibility of fair use is its strength. Courts have emphasized that fair use analysis is fact- and situation-specific. In most cases, however, it is also quite predictable. Moreover, it can be made more so. Even without case law specifically addressing a use, judges and lawyers consider expectations and practice—whether the user acted reasonably and in good faith in light of standards of accepted practice in a particular field. One way of creating better understanding of what fair use permits is, therefore, to document the considered attitudes and best practices of a professional community.

Finally, it is worth noting that legal experts disagree on how much a user's show of good faith adds to a claim of fair use—although, of course, it cannot hurt. Nevertheless, the members of the visual arts community who met to devise the consensus reflected in the Code believed in its importance. Thus, the Code reflects some widely and strongly held community values not tied to language of the Copyright Act, in particular the importance of attribution, and of safeguarding noncopyright interests such as privacy and cultural sensitivities (including those of indigenous communities).

# **Appendix B: How The Code Was Created**

In five cities—New York, Washington, DC, Dallas, Chicago, and Los Angeles two groups, each of ten to fourteen visual arts professionals, met with facilitators Aufderheide and Jaszi for four-hour, closed, deliberative discussions. Each group brought together practitioners from across the spectrum of the visual arts, including artists, scholars, museum professionals, editors, and others. They were asked to speak as individuals rather than as representatives of particular organizations. To encourage open discussion, participants' anonymity and the confidentiality of their individual views were guaranteed.

In each session, participants considered issues drawn from the situations described in the Issues Report. Participants discussed their reasons for using third-party materials in such situations and, in light of their missions, they explored the limits of those rationales. Each group considered areas of consensus identified in previous groups' discussions as well as points that had not been clarified fully in those earlier discussions.

The facilitators summarized, in a draft code, the areas of consensus identified in the discussion groups. The other principal investigators, the project advisors, CAA's Task Force on Fair Use, its Committee on Intellectual Property, and its Professional Practices Committee reviewed and provided comments on that draft. After a further revision by the facilitators, the draft Code was presented to a Legal Advisory Committee of five experts in copyright law and fair use. That committee was charged with ensuring that the Code's articulation of principles and limitations fell within the bounds of reason and was generally consonant with fair use doctrine. The Code was then revised in light of the committee's comments. With the exception of Appendix A, no part of this document represents the individual views of any contributor. The final version of this document, including the Code, was presented to the Board of Directors of the College Art Association, which approved it on January 12, 2015.

# Credits\*

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\*Institutional affiliations are provided for purposes of identification only.

#### Endorsements

American Library Association Art Libraries Society of North America (ARLIS/NA) Association of Art Museum Curators Association of College and Research Libraries Association of Research Libraries (ARL) Society of Architectural Historians

#### Statements of Support

American Alliance of Museums Association of Art Museum Directors

Please feel free to reproduce this work in its entirety. For excerpts, please employ fair use.

Note to Readers: This *Code of Best Practices* is available online at the College Art Association website: www.collegeart.org/fair-use. In conjunction with the publication, CAA's website also includes Frequently Asked Questions and other materials that facilitate the use of the Code. The Code and related materials are also available online on the websites of American University's Center for Media and Social Impact (www.cmsimpact.org/fair-use) and the Washington College of Law's Program on Information Justice and Intellectual Property (www.wcl.american.edu/pijip/go/fair-use).

Funded by the Andrew W. Mellon Foundation. Additional support provided by the Samuel H. Kress Foundation.



www.cmsimpact.org/fair-use



PROGRAM ON INFORMATION JUSTICE AND INTELLECTUAL PROPERTY

www.wcl.american.edu/pijip/go/fair-use



www.collegeart.org/fair-use





**ANNUAL MEETING HANDOUT** 

# TECH TUTORIAL Digital Copyright and Privacy (Beginners)

This tutorial outlined copyright and privacy issues in museums, and provided guidelines for mitigating legal risk and being responsible digital citizens.

## **Presenters**

- » Nathan Kerr, Intellectual Property Coordinator, Oakland Museum of California
- » Anne Young, Manager of Rights and Reproductions, Indianapolis Museum of Art

# Annual Meeting & MuseumExpo

As the museum field's premier professional development opportunity, the Alliance's Annual Meeting & MuseumExpo showcases the best thinking from practitioners and visionaries on major issues confronting museums and the communities they serve.

This session handout is from the 2014 Annual Meeting in Seattle.



American Alliance of Museums 1575 Eye Street NW, Suite 400, Washington, DC 20005 202-289-1818 www.aam-us.org

## TECH TUTORIAL: DIGITAL COPYRIGHT & PRIVACY

Wednesday, May 21, 2014

Produced by the AAM Media and Technology Network

Anne M. Young Manager of Rights and Reproductions Indianapolis Museum of Art ayoung@imamusuem.org | @AYoungRandR

## Nathan Kerr

Intellectual Property Coordinator Oakland Museum of California nkerr@museumca.org

## COPYRIGHT GIVES EXCLUSIVE RIGHTS TO THE ARTIST TO...

- 1. ...allow reproduction
- 2. ...allow distribution
- 3. ...allow public performance
- 4. ...allow public display
- 5. ...allow derivative works
- 6. ...the moral/intellectual rights

**Copyright** is a form of legal protection provided by the laws of the United States (**Title 17, U.S. Code**) to the authors of "original works of authorship" fixed in a tangible form of expression. The protection is available to both published and unpublished works.

Copyright is a set granted to the creator of an original work or their assignee for a limited period of time in exchange for public disclosure of the work.

In most jurisdictions copyright arises upon fixation and does not need to be registered.

Uses covered under limitation and exceptions to copyright, such as fair use, do not require permission from the copyright owner. All other uses require permission.

Copyright owners can license, permanently transfer, or assign their rights to others.

Copyrightable works include intellectual property such as web sites, computer code, software, databases, literary works, music, lyrics, dramatic works, writings, poetry, graphic and sculptural works, motion pictures, audiovisual works, sound recordings, and architecture.

Copyright owners have the exclusive statutory right to exercise control over copying and other exploitation of the works for a specific period of time, after which the work is said to enter the public domain.

### Visual Artists Rights Act (VARA) of 1990

Before VARA - owners, not artists, had complete control of works

In addition to and independent of the U.S. Code, VARA grants artist the rights to

- claim authorship of his/her work
- prevent the use of his/her name in the event of distortion, mutilation or other modifications of a work which would be prejudicial to his/her honor or reputation
- prevent any intentional distortion, mutilation, or modification of the artists' work
- prevent any destruction of the work



Additional factors considered in the length of the copyright term:

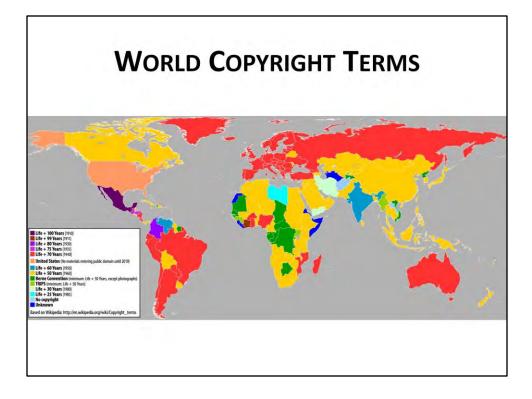
- 1. Type of work
- 2. Whether the work has been published or not
- 3. Whether the work was created by an individual or corporation
- 4. Country of origination

For most of world, default length is life of the author/creator plus either 50 or 70 years.

In the US, the term for many existing works is a fixed number of years after the date of creation of publication.

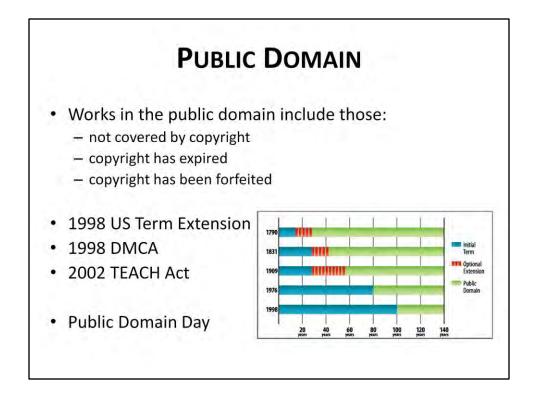
For most countries, copyright expires at the end of the calendar year in question.

Copyright Term & Public Domain in the US



Here you can see a visual representation of the copyright term lengths throughout the world.

http://www.publicdomainday.org/sites/www.publicdomainday.eu/files/World\_copyright-terms.jpg



### 1944

## 1998 – The Sonny Bono Copyright Term Extension Act:

Increased the copyright term to life plus 70 years and 95 years for corporate authors — was not only granted to future works. It was retroactively applied to works that had already been created and enjoyed their full copyright term, and were set to enter the public domain. <u>None of these works will enter the public domain until 2019</u>. The already diminished public domain has been frozen in time.

## 1998 – The Digital Millennium Copyright Act (DMCA):

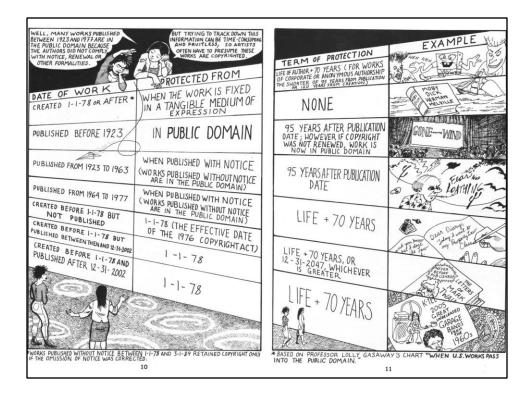
Liability exemptions for Internet service providers in cases of user infringement.

## 2002 – The Technology, Education, and Copyright Harmonization (TEACH) Act:

Provided use of copyrighted works by accredited nonprofit educational institutions in distance education

## Public Domain Day:

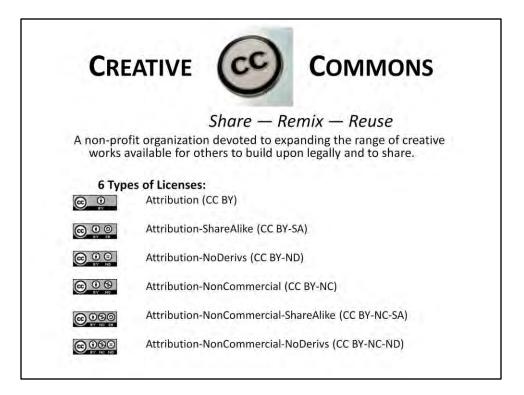
Every year on New Year's Day, due to the expiration of copyright protection terms on works produced by authors who died several decades earlier, thousands of works enter the public domain - that is, their content is no longer owned or controlled by anyone, but it rather becomes a **common treasure**, available for anyone to freely use for any purpose.



From: Tales from the Public Domain: Bound by Law?

Free digital versions available for download through Creative Commons licensing from the Center for the Study of the Public Domain at Duke University:

www.law.duke.edu/cspd/comics/digital.php



The organization has released several copyright licenses known as Creative Commons Licenses. These licenses allow creators to communicate which rights they reserve, and which rights they waive for the benefit of recipients or other creators.

#### Share, remix, reuse:

- legally — under their licenses as specified by artists (or anyone, for that matter) – to control or release – or anything in between - their works

Creative Commons provides free tools that let authors, scientists, artists, and educators easily mark their creative work with the freedoms they want it to carry. You can use CC to change your copyright terms from "All Rights Reserved" to "Some Rights Reserved."

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#### CC BY-NC-ND

This license is the most restrictive of our six main licenses, only allowing others to download your works and share them with others as long as they credit you, but they can't change them in any way or use them commercially.

## WHEN TO UTILIZE FAIR USE

- Scholarship, research & education
- Commentary, criticism & reporting
- Non-commercial

## **DETERMINING FAIR USE**

- 1. Purpose and character of use
- 2. Original nature of the copyrighted work
- 3. Amount and substantiality of work used
- 4. Effect of the use upon the work

Fair use is a doctrine in US copyright law that allows limited use of copyrighted material without acquiring permission from the rights holders.

Under U.S. Copyright law, "fair use" of a copyrighted work is allowed for the <u>limited</u> purposes of non-commercial comment, criticism, news reporting, scholarship, classroom use, or research and is not an infringement of copyright.

The four-factor balancing test is used to determine when you can use and/or claim fair use:

- 1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes
- 2. The nature of the copyrighted work
- 3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole
- 4. The effect of the use upon the potential market for, or value of, the copyrighted work



Taking fair use a step further, the Association of Art Museum Directors, the Visual Resources Association, and the Association of Research Libraries have all come forward with statements related to the practice of fair use in different capacities.

The AAMD guidelines states, succinctly, that the display of thumbnail images of collection works is fair use and museums should not pay licensing fees for the use. The IMA does not pay fees for this use.

The VRA statement takes this a step further that images should be provided free of licensing fees for scholarly publications, research, and teaching.

The ARL code identifies the relevance of fair use in eight common situations that librarians are dealing with on a daily basis and provides a framework for how to approach dealing with them.



Assertion that it is fair use to place thumbnail images of collection works on the Museum's web site.

Social media is rapidly changing/pushing what has been traditionally considered fair use.

TAP tours, iPad applications, mobile devises are changing the way works can be interacted with in the gallery space and what educational and contextualizing opportunities are available (i.e. additional images on an iPad in addition to the more traditional placement on wall labels and didactics).

Digital & eBooks rapidly changing the licensing terms, dissemination, and fees for reproductions.

## SO, CAN I USE THAT IMAGE OR NOT?

The short answer...

...MAYBE?!?!

## **Things to Consider:**

How will the image be used? Artist known? Artist alive? Date work created? Work in IMA collection?

How to determine if you need to clear copyright permissions:

How is the image being used?

For research or study purposes (i.e. fair use) = ok to use the image For publication (print or online) = seek permission to use the image What is the death date of the artist?

Died before 1942 = work in the public domain & ok to use the image Died after 1942 = may need to seek permission to use the image Who took the photograph of the work of art?

Staff photographer or other staff member = **ok to use the image** Photographer outside of the institution = **seek permission to use the image** 

Who do I need to contact to clear copyright permissions?

The artist or their studio

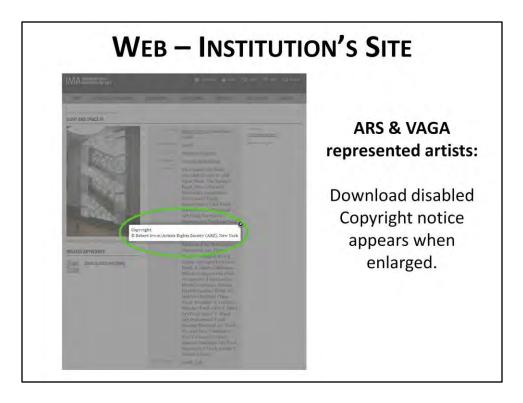
The artist's representative:

Gallery Estate Heir Rights Administrator (i.e. – ARS or VAGA) The museum/collection that holds the work in their collection

	DIANAPOLIS ISEUM OF ART		🛍 calendar 💼 shop 🧿 locin 📜 cart Q search				
VISIT	EVENTS & PROGRAMS	EXHIBITIONS	COLLECTIONS	RESEARCH	GIVE & JOIN	ABOUT	
Home - Collectio	ord = Browse the Collection = B <b>Y</b> I						
		artist	Hopper, Edward 1882-1967	l   American	collection <u>American</u>	de se de	
		creation date	1943			tly on view	
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	Irces section IMA website	Three nameless Lobby.	guests and a desk	clerk occupy th	e disquieting, ai	rless space of <i>Hotel</i>	
		The should see	and of the former in	anhanced by the	lack of rapport	among the figures.	

IMA follows the AAMD guidelines for the use of thumbnail images our collection works on our website.

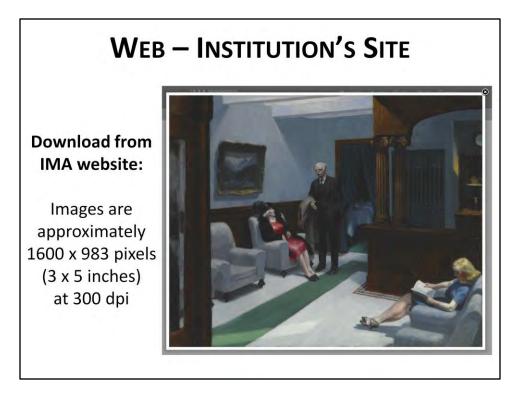
That said, we only follow the size restraints of 250 x 300 pixels for copyrighted works that are represented by either ARS or VAGA, which is the size you see in this screenshot.



To further restrict access to works by artists represented by ARS or VAGA, enlargement is disabled.

Rather, when a visitor right-clicks the image on the collection page, a pop-up box appears containing either the ARS or VAGA copyright line.

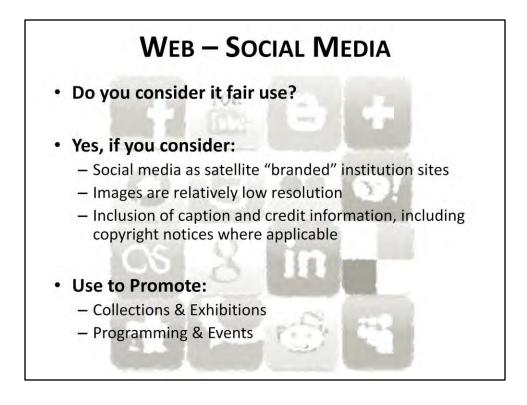
We are looking to expand this language to better inform our visitors about the copyright restrictions behind why the image is so small.



Now, for all other copyright works in our collection that are not represented by ARS or VAGA we work to complete our non-exclusive licensing agreement and even where these are still a work in progress we believe the use of thumbnail images is fair use and put the images online, BUT...

Unlike copyrighted works represented by ARS or VAGA we put these thumbnails up at a much larger size that are available for download.

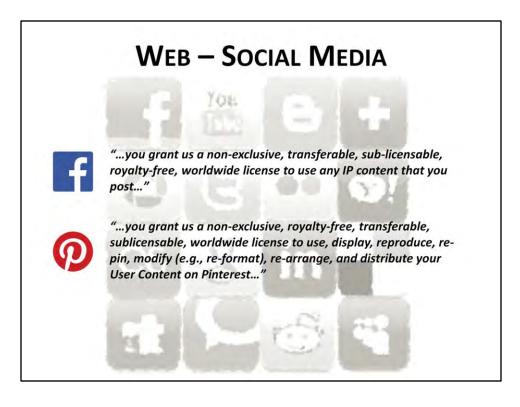
This provides our visitors with the ability to view the works larger online and to download a file that is large enough for most study, research, and PowerPoint presentation purposes FREE of charge.



The IMA's social media accounts provide an informal avenue to reach a wide audience and increase exposure to our collections, exhibitions, and programming.

It is the IMA's stance that the use of low-res thumbnail images on these satellite IMA "branded" web sites constitutes fair use.

To further validate this claim, we always include relevant copyright notices where applicable.

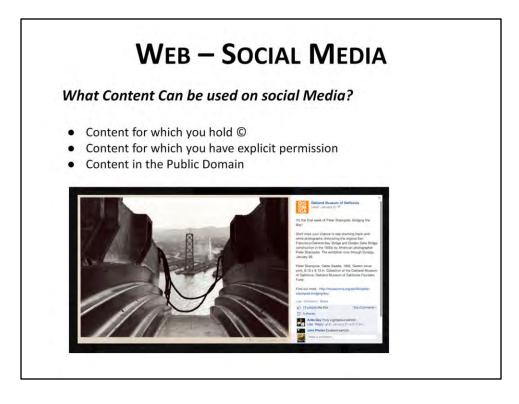


Why is use of  $\mathbbm{C}$  material on social media different from use on museum website / blog / etc.

Terms of service agreement mean you are providing a the service with a license to use the material you upload to the service

To do this you need to have the ability to grant this license.

These seem scary, but arte mostly for the purpose of maintaining and hosting the service, though those some are not clearly limited to this..



AT OMCA there are three basic types of content that we will use on social media:

- Content for which we hold ©
- Content for which we have explicit permission / license
- Content in the Public Domain

reproductions vs. gallery views

Stackpole show – incorporating social media in non-exclusive license



These informal interactions often spark a series of comments, likes, and reminds visitors to come see the artworks they love.

In addition to highlighting current or upcoming exhibitions, works in our collections, or related programing and events, our accounts with Facebook, Instagram, Twitter, and Flickr give us the unique opportunity to show visitors interacting with our artworks.

Our Facebook page allows us to highlight current exhibitions through our cover photo.

We are able to list upcoming events and programs.

Informal interactions with our visitors are most evident on our Facebook page through our Friday Photos that highlight different pieces in our collection.

These often spark a series of comments, likes, and reminders to visitors to come back and see the artworks they love.



The IMA's Pinterest account provide us with an additional way to reach a new audience using one of the latest tools available to share images from the collection.

Pinterest allows us to organize images by our varied collections – types of art, historic properties, gardens and grounds.

Through Pinterest and all of our social media sites, we encourage reposting of content and invite two-way participation with the images.



Anecdote of William Gedney photo from Duke /university Library Digital collections. – importance of attribution in social media...

OMCA as © holder for Lange's work

Other misattributed photos -Einstein – Arthur Sasse 1951 -Cat on a Sofa

-Mary Ellen Mark

## **EXHIBITIONS – PR & MARKETING**



### Press/Media:

· Generally free

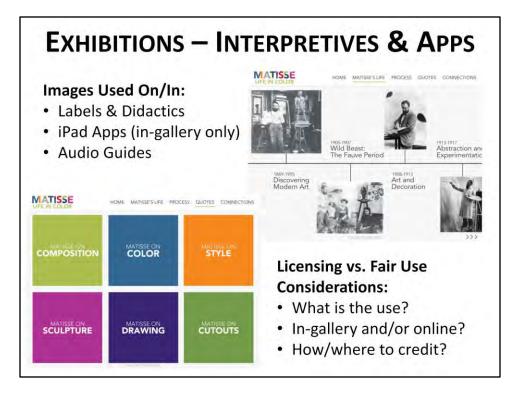
### Marketing:

- Often restrictions on uses permitted
- Fees usually apply based on print run and distribution

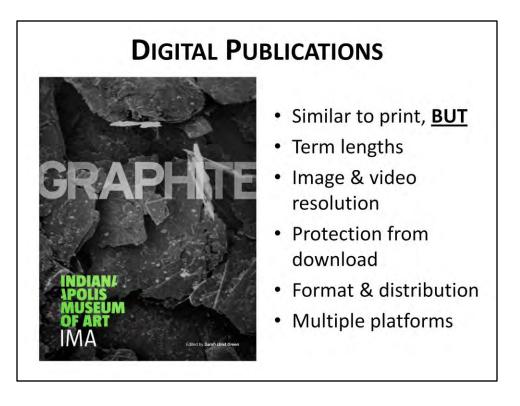
### Multiple reviewers:

- Organizing institution(s)
- Artist(s) and/or studio(s)
- Rights holder(s)/ representative(s)

Inclusion of image caption/ copyright credit <u>AND</u> exhibition organization credit.



- Comparative/supplemental use
- Licensing for short-term installations
- Licensing for permanent gallery spaces
- Inclusion of caption/credit information



Digital publication provide the opportunity for additional content, like videos, external sources, and conservation views and treatments are possible.

While you can aggregate data and media in new ways with digital publications, the need for licensing and image credits is largely still the same as with their print counterparts, but fees, terms and conditions, and length of licenses are vastly inconsistent.

In working on *Graphite*, the IMA's first digital-only exhibition catalogue, the biggest challenge I faced was consistency in term lengths. We asked everyone we were licensing from for permissions either in perpetuity or for 10 years – less than 10 years (several wanting to only give 5 years) is an unbelievably short time to have to renew licenses.

This was particularly important in this project where there is no print counterpart.

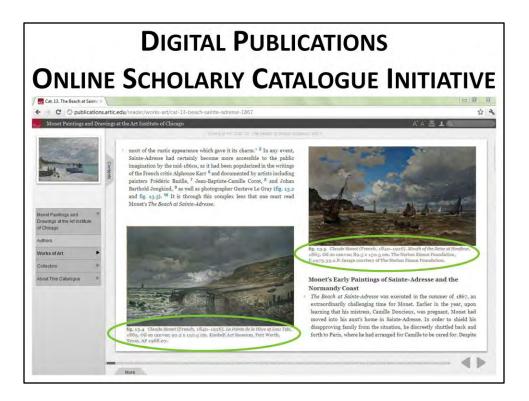
I am happy to say, I was able to get everyone to agree to a 10 year minimum – including licenses from ARS, VAGA, and Art Resource.



As there is this shift to digital publications, it is important to think about if a publication makes sense to be both print and digital or not.

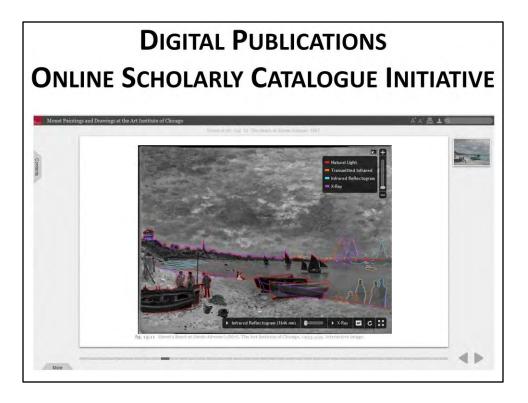
The *Graphite* publication, which is available now as an iBook did present some unique challenges, particularly for the location of the caption/credit/copyright information.

Due to the formatting constraints of iBooks Author there were areas where the design and placement was dictated by the tools and not the designers ideal location.



The IMA Lab has developed a suite of tools, in collaboration with the Art Institute of Chicago, that is all open-source software for use in the Online Scholarly Catalogue Initiative platform.

Here you can see an example of one of the first publications done with the Art Institute, where the caption information is easily included directly below the images.



In this image you can transition between the work as viewed in or by different types of light: x-ray, natural, transmitted, and infrared.

## PRIVACY

## Do I need permission to use someone's likeness?

- In general, no release is required for publication of a photo taken of an identifiable individual when the person is in a public space unless the use is for trade or direct commercial use, which is defined as *promoting a product, service, or idea*.
- If a photograph shows a identifiable individual then you must have the individual's consent to use the image. If none of the faces in an image are individually distinguishable then you do not need to seek consent.
- The most common form of consent is a standard *model release*, a document signed by the individual pictured granting permission to publish the photo.



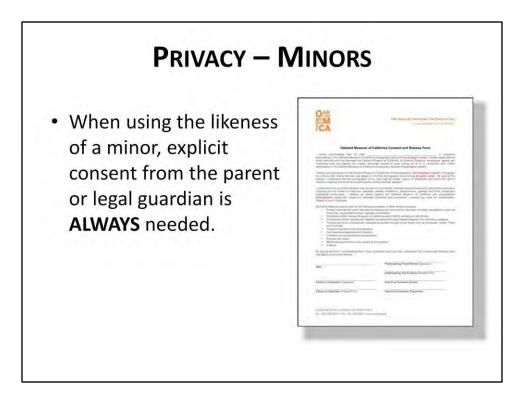
If a photograph shows a recognizable individual then you must have the individual's consent to use the image. If none of the faces in an image are individually distinguishable then you do not need to seek consent. In general, no release is required for publication of a photo taken of an identifiable person when the person is in a public space unless the use is for trade or direct commercial use, which is defined as promoting a product, service, or idea.

Also the photo at left is a good example of Gallery view vs. Reproduction...



The Oakland Museum of California is photographing and or filming this event or exhibit and intends to use the photos and video for non-commercial, educational purposes, including promotion of the programs and exhibits of the Oakland Museum of California.

By being present at or participating in the event or exhibit, you consent to use of your appearance, likeness, and voice by the Oakland Museum of California, its Licensees, designees, or assignees, in all media, in perpetuity.



Waive any interest in copyright and allow use of likeness for specified purposes...

My child's likeness may be used for the following purposes or other similar purposes: Printed materials for public educational settings and promotional materials including reproductions such as brochures, large-scale banners, signage, and posters Exhibitions at the Oakland Museum of California and in OMCA exhibitions held offsite

Promotional and/or educational materials accessible through Oakland Museum of California's websites

Promotional and/or educational materials accessible through online hosts such as Facebook, Twitter, Flickr and YouTube

Program evaluation and documentation

Informational presentations for funders

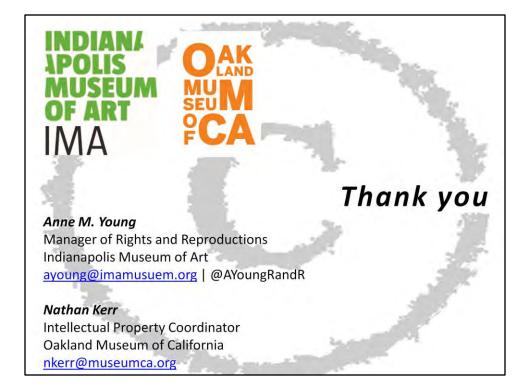
Conference and educational presentations

Educational videos

Multimedia productions in any media on any platform

Publicity

RESOURCES
Copyright Advisory Office
Section 108 Copyright Spinner
The WATCH File
The Fair Use Network
Digital Copyright Slider
Fair Use Evaluator
VRA, Intellectual Property Rights Committee
Design and Artists Copyright Society (DACS)
Artists Rights Society (ARS)
Visual Artists and Galleries Association (VAGA)
Copyright Term and the Public Domain in the United States
US Copyright Office
Museum IP
<b>Rights &amp; Reproductions for Museum Professionals (RARIN)</b>
Creative Commons
Center for the Study of the Public Domain
Teaching Copyright



## TECH TUTORIAL: DIGITAL COPYRIGHT & PRIVACY

Produced by the AAM Media and Technology Network

## TAKE THE SURVEY:

www.surveymonkey.com/s/AAMTechTutorial



# AAMD POLICY ON THE USE OF "THUMBNAIL" DIGITAL IMAGES IN MUSEUM ONLINE INITIATIVES

January 19, 2011

### **AAMD Mission Statement**

The Association of Art Museum Directors promotes the vital role of art museums throughout North America and advances the profession by cultivating leadership and communicating standards of excellence in museum practice.

### Preamble

The principal purpose of art museums is education. While the purpose remains the same, the means and methods of accomplishing this goal continue to evolve, nowhere more so than with respect to the internet. In particular, the need for the availability of scholarly materials on the internet grows in importance as use of the internet escalates. While acknowledging that the technology of electronic information changes and transforms on an almost daily basis, this dynamic growth demonstrates the need for the application of basic principles so that the integrity of the image, the interests of museums and the publics they serve and the rights of the artist can all be harmonized. Integral to the museum's accomplishment of its mission to educate is the statutory right of fair use<sup>1</sup> embodied in United States copyright law. AAMD reaffirms the critical importance of this legal exception to the missions of its members and believes that the application of fair use to internet media can be enhanced through reasonable guidelines to be established and followed by art museums.

### Definitions

For purposes of this Policy, the following terms have the meanings set forth below:

**Artists** mean living artists and/or artists and/or entities whose works are protected under copyright laws of the United States. The term also includes estates, foundations, artists' rights organizations or other legal entities that hold copyright or represent the artist.

**Collections image database** means any digital compilation or a website, including unrestricted websites, maintained by the museum or an affiliate of the museum of digital images of

<sup>1</sup> An extract from the U.S. Copyright Office FL-102, revised May 2009, is attached as Annex A.

objects from the museum's collection maintained primarily to support education or research and to foster interest in museum collections.

**Digital Image** means a two dimensional image using ones and zeroes (binary).

**Digital Imaging** means a process whereby an electronic photograph, scanned document, or image is converted into a series of electronic dots called "pixels."<sup>2</sup>

**Collateral materials** means magazines, articles, flyers and related materials made available electronically by a museum, at no cost to the recipient, to promote its exhibitions, collections and programs.

**Online scholarly publications** means an educational publication made available (i) on a website whose primary purpose does not include paid advertising or the selling of merchandise, or (ii) on a subscription-based website with no more than 2,000 subscribers, provided, multiple end users accessing content through one subscription agreement shall be considered one subscription, or (iii) on a website that provides archival versions of the publication in non-profit electronic archives such as JSTOR and/or in for-profit electronic library content providers such as EBSCO or ProQuest.

**Thumbnail image** means a low resolution, small version of less than commercial quality (less than 250 x 300 pixels) of a digital image that is typically used in a collection image database, on a web page, or in an online publication to represent an image or to provide a link to other content, such as a larger version of the image. Thumbnail images may or may not link to higher resolution images.

**Website** means a collection of related web pages, images, videos, or other digital assets that are addressed relative to a common Uniform Resource Locator (URL), often consisting of only the domain name or the IP address and the root path ('/') in an internet protocol-based network accessible via the internet. A website may be static or interactive and may include retail options.

<sup>2 &</sup>quot;Pixels" is an acronym for "picture elements."

### **Policy Statement**

- A. AAMD encourages member museums to develop clear written intellectual property and/or digital imaging policies and guidelines.
- B. Member museums must comply with all applicable laws in the reproduction of works in their collection and the use and dissemination of images of those works. Member museums must respect the rights of artists and copyright holders to protect the integrity of their works and to receive the benefits of the rights, including financial rights, accorded to artists and copyright holders by law, but those rights do not preclude the museum from exercising its statutory rights to fair use of images.
- C. Without intending to limit any other fair use thereof and recognizing that there are many uses of thumbnail images by museums that meet the statutory fair use test, AAMD supports the position that a museum's use of thumbnail images in the museum's collections image database, promotional materials to identify works in a museum's collection, and online scholarly publications are fair uses under applicable provisions of the United States copyright law.
- D. Museums should not be requested or required to pay fees for the fair use of such thumbnail images in the museum's collections image database, promotional materials to identify works in the museum's collection, or online scholarly publications.
- E. Except in extraordinary circumstances or where such information is unknown, the Museum should provide with such thumbnail images appropriate information as to artist, title and owner of the work.

### ANNEX A

#### Fair Use (from US Copyright Office FL-102, Revised May 2009)

One of the rights accorded to the owner of copyright is to reproduce or to authorize others to reproduce the work in copies or phonorecords. This right is subject to certain limitations found in sections 107 through 118 of the copyright law (title 17, U. S. Code). One of the more important limitations is the doctrine of "fair use." The doctrine of fair use has developed through a substantial number of court decisions over the years and has been codified in section 107 of the copyright law.

Section 107 contains a list of the various purposes for which the reproduction of a particular work may be considered fair, such as criticism, comment, news reporting, teaching, scholarship, and research. Section 107 also sets out four factors to be considered in determining whether or not a particular use is fair:

- 1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes
- 2. The nature of the copyrighted work
- 3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole
- 4. The effect of the use upon the potential market for, or value of, the copyrighted work

The distinction between fair use and infringement may be unclear and not easily defined. There is no specific number of words, lines, or notes that may safely be taken without permission.

Acknowledging the source of the copyrighted material does not substitute for obtaining permission.

The 1961 Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law cites examples of activities that courts have regarded as fair use: "quotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations, in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported."

Copyright protects the particular way an author has expressed himself. It does not extend to any ideas, systems, or factual information conveyed in the work.

The safest course is always to get permission from the copyright owner before using copyrighted material. The Copyright Office cannot give this permission.

When it is impracticable to obtain permission, use of copyrighted material should be avoided unless the doctrine of fair use would clearly apply to the situation. The Copyright Office can neither determine if a certain use may be considered fair nor advise on possible copyright violations. If there is any doubt, it is advisable to consult an attorney.

U.S. Copyright Office 101 Independence Avenue SE Washington, DC 20559-6000 (202) 707-3000

# **VRA Bulletin**

Volume 38 Issue 1 *The inaugural electronic edition of the VRA Bulletin* 

Article 5

3-20-2012

# Visual Resources Association: Statement on the Fair Use of Images for Teaching, Research and Study

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#### **Recommended** Citation

Wagner, Gretchen and Kohl, Allan T. (2011) "Visual Resources Association: Statement on the Fair Use of Images for Teaching, Research and Study," *VRA Bulletin*: Vol. 38: Iss. 1, Article 5. Available at: http://online.vraweb.org/vrab/vol38/iss1/5

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# Visual Resources Association: Statement on the Fair Use of Images for Teaching, Research and Study

### Abstract

This Statement on the Fair Use of Images for Teaching, Research, and Study describes six uses of copyrighted still images that the Visual Resources Association (www.vraweb.org) believes fall within the U.S. doctrine of fair use. The six uses are: 1) preservation (storing images for repeated use in a teaching context and transferring images to new formats); 2) use of images for teaching purposes; 3) use of images (both large, high-resolution images and thumbnails) on course websites and in other online study materials; 4) adaptations of images for teaching and classroom work by students; 5) sharing images among educational and cultural institutions to facilitate teaching and study; and 6) reproduction of images in theses and dissertations.

### Keywords

copyright, fair use, intellectual property, image rights, teaching, research

### Author Bio & Acknowledgements

This statement was authored by the VRA Intellectual Property Rights Committee reserving special acknowledgement for Christine Sundt, Allan Kohl, Cara Hirsch, and Gretchen Wagner. The IPR Committee is especially grateful to have received input and guidance from an advisory committee of preeminent copyright scholars and legal experts: Georgia Harper, Jule Sigall, Virginia Rutledge, Jeffrey Cunard, Robert Clarida, and Jackie Ewenstein.

### **EXECUTIVE SUMMARY**

This Statement on the Fair Use of Images for Teaching, Research, and Study describes six uses of copyrighted still images that the Visual Resources Association (<u>www.vraweb.org</u>) believes fall within the U.S. doctrine of fair use. The six uses are: 1) preservation (storing images for repeated use in a teaching context and transferring images to new formats); 2) use of images for teaching purposes; 3) use of images (both large, high-resolution images and thumbnails) on course websites and in other online study materials; 4) adaptations of images for teaching and classroom work by students; 5) sharing images among educational and cultural institutions to facilitate teaching and study; and 6) reproduction of images in theses and dissertations.

The uninhibited flow of information and ideas – including visual information – is essential to advancing our collective state of knowledge in the arts and sciences. Nowhere is this more evident than in the academic context, where teachers, scholars and students, and those who support such individuals (such as visual resources staff and librarians), access and use information to engage in activities that are at the heart of our freedoms of expression: to comment and critique, evaluate, and compare; to create; to encourage the development of new ideas and thought; and to communicate those ideas and thoughts to others. The robust use of images is essential in this context: images uniquely convey information. They are often the only or best means by which certain ideas can be expressed.

The U.S. doctrine of fair use is essential to the use of images for teaching, research and study; without it, educators' and scholars' ability to express themselves would be severely curtailed, as set forth in this Statement. It is for this reason that faculty, scholars and students have actively relied on fair use for more than a century when using images in these contexts.

This Statement aims to provide educators, scholars, and students – as well as members of the Visual Resources Association, librarians, and others – with the tools to rely on fair use with greater certainty when they employ these practices and principles. It draws from the academic community's longstanding practices of fair use (and highlights one area – the use of images in theses and dissertations – where the VRA believes the community should return to its previous practices of being more assertive in relying on fair use). Although not legal advice, the statement relies heavily on fair use jurisprudence. The statement has also benefited tremendously from the guidance of an advisory committee of preeminent copyright scholars and legal experts, whose members include: Robert W. Clarida (Cowan, Liebowitz & Latman), Jeffrey P. Cunard (Debevoise & Plimpton LLC), Jackie Ewenstein (Ewenstein & Young LLP), Georgia K. Harper (Scholarly Communications Advisor, The University Libraries, University of Texas at Austin), Virginia Rutledge (PIPE Arts Group), and Jule Sigall (Associate General Counsel – Copyright, Microsoft; Formerly Associate Register for Policy & International Affairs, U.S. Copyright Office).

\* \* \* \* \*

### VISUAL RESOURCES ASSOCIATION: STATEMENT ON THE FAIR USE OF IMAGES FOR TEACHING, RESEARCH, AND STUDY

Images are essential pedagogical and scholarly materials. They are unique objects whose meaning cannot be adequately conveyed through words or other media. Images may themselves be the object of commentary or critique. In other instances, images are used to facilitate the study of and communication about the objects they depict or document. In many cases, images serve as the only or best means by which to depict an object, providing the context or documentary evidence by which those objects can be understood. In still other instances, images are essential for comparison or contrast of multiple objects, or for other evaluative purposes.

Images are used extensively in teaching and research. In the arts and art historical fields, images are the foundation of the discipline and have been widely and heavily used in the classroom since the last decades of the nineteenth century and early twentieth century.<sup>1</sup> More recently, image use has proliferated among a wide range of other fields such as cultural and area studies, foreign language studies, the life sciences, communications, business, and political science. While images historically appeared in print (or slide) form, images in digital format are now ubiquitous in teaching and research.

Teaching, research and scholarship – the purposes for which images are used in the academic contexts described in this document – are unquestionably public goods. In the classroom, in the scholar's office, or in the study areas, images are used to facilitate academic inquiry and criticism; to encourage robust discussion, debate and discourse; and to illustrate and enlighten. By their very nature, these educational and scholarly uses further the aims of the Copyright Clause by advancing our collective knowledge in the arts and sciences.

\* \* \* \* \*

Within the educational and scholarly context, this fair use statement describes certain uses of copyrighted still images that the Visual Resources Association (VRA) believes fall within the fair use doctrine under United States copyright law. Fair use provides the right to make certain uses of copyrighted materials without seeking permission from, or paying fees to, the copyright owners of those materials.

With the exception of the last use scenario, the uses described in this statement reflect the longstanding practices of the educational community in using images for educational and scholarly purposes and in relying on fair use to engage in such activities. The last section – on the reproduction of images in theses and dissertations – is an area in which the academic community has not in recent years relied as ubiquitously on fair use, but which the VRA believes should nonetheless be fair given the importance to society of advancing scholarship in image-

<sup>&</sup>lt;sup>1</sup> Howard B. Leighton, "The Lantern Slide and Art History," *History of Photography*, vol. 8, no. 2 (1984): 107-8; Philip C. Beam, "The Color Slide Controversy," *College Art Journal*, vol. 2, no. 1 (Jan. 1943): 37. See also Donald N. Wilber, "The Nature, Care, and Projection of Color Transparencies," Bulletin no. 7, Sept. 20, 1940 (Color Slides Cooperative, Princeton, NJ), 3; Frank Roy Fraprie, Practical Photography: How to Make Lantern Slides (1918).

dependent fields, and given the fact that many scholarly arguments cannot be made without reference to actual images.

This fair use statement has been reviewed by a group of preeminent legal experts and copyright scholars who, in their personal opinion, have concluded that the uses described herein are reasonable interpretations of the fair use doctrine. This document does not provide legal advice (which applies the law to specific facts and circumstances); rather, the aim of this document is to provide general guidance to educational and scholarly users of images – and to others who help facilitate those educational and scholarly uses – so that they can rely on fair use with greater certainty when employing these practices and principles.

# I. Background on the VRA

The VRA (www.vraweb.org) is a multidisciplinary organization dedicated to furthering research and education in the field of image management. Its members consist of visual resource professionals - those individuals working at educational institutions, museums, and other primarily non-profit organizations – whose responsibilities encompass the following types of activities: providing faculty, curators, and others at those institutions with images for teaching, research, and study; developing cataloging and classification standards and practices; addressing issues relating to the integration of technology-based instruction and research in the educational context; maintaining and preserving institutional (and sometimes faculty) visual resource collections; and educating students, faculty, and others about a range of issues, including copyright, in connection with the use and preservation of visual materials. The Association is committed to providing leadership in the visual resources field, developing and advocating standards, and offering educational tools and opportunities for the benefit of the community at large. Through collaboration, partnership, and outreach with the broader information management and educational communities, the Association actively supports the primacy of visual information in documenting and understanding humanity's shared cultural experience. Currently, the Association has over 800 members across the United States and Canada.

## II. Need for this Statement

This statement aims to address uncertainties arising in recent years regarding educational users' ability to rely on fair use when using images for teaching, research, and study. These uncertainties are the result of: copyright litigation in other contexts and media; the lack of legal decisions or clear guidance regarding the educational and scholarly use of images; the misconception that the fair use doctrine no longer applies, or is not as extensive, when images are used in connection with new technologies or media; and the sometimes overly conservative and restrictive determinations of gatekeepers who are less familiar with these longstanding community practices and with the flexibility afforded by fair use.

Uncertainty surrounding the ability to rely on fair use has had a tangible negative impact on teaching, research, and study: for example, some faculty and students do not have access to the images they need for pedagogical purposes because the images cannot be licensed and because these individuals are unsure of the boundaries of fair use. In other instances, individual institutions are uncertain about their ability legally to preserve image collections and to migrate

them to new formats. In still other cases, some graduate students are tailoring their doctoral dissertation and thesis choices based on perceived licensing barriers.

As noted above, the VRA believes that documentation of these community practices and principles – and clarification of how fair use applies in this context – will help the community of educational and scholarly image users to rely on fair use with greater confidence.

### III. What This Statement Is

While the VRA's aims and activities span a wide range of visual materials, including both moving and still images, this statement focuses on still images because they continue to be the primary content for most Association members' activities. Other fair use statements on moving images, such as the *Code of Best Practices in Fair Use for Online Video* and the *Documentary Filmmakers' Statement of Best Practices in Fair Use*, can be found among the best practice codes on the American University Center for Social Media website at <a href="http://www.centerforsocialmedia.org/fair-use/best-practices">http://www.centerforsocialmedia.org/fair-use/best-practices</a>.

References are often made in this document to images of art works, as many of the image collections historically and currently used by educational and cultural institutions depict art and cultural objects. However, these principles and practices apply equally to copyrighted images depicting other subjects. Similarly, references are made to educational institutions, but these provisions apply to other educational users, such as cultural institutions making educational uses of images.

Many uses fall under the rubric of "educational use." This statement addresses the use of images for teaching, research, study, and the incorporation of images into dissertations and theses (and the subsequent inclusion of those dissertations and theses in databases that help facilitate access to, and preserve, those academic works). Other uses, such as the use of images in textbooks, journals, or other publications, are outside the scope of this statement, although such uses – and many others – may well be fair ones.

## IV. What This Statement Isn't

*Not Defining Limits of Fair Use:* This statement does not delineate the outer boundary of fair use, nor does it purport to be exhaustive; many uses of visual materials that do not fall within these practices are fair ones.

*Not about Contracts or Digital Rights Management:* This statement does not address contractual restrictions, or the use – or circumvention – of encryption and other digital rights management restrictions. Educational users should be aware that contracts might legally restrict what would otherwise be a fair use under copyright law; often, educational users can avoid this result by including language in contracts that preserves their fair use rights.

*Not about the TEACH Act or other Provisions of Copyright Law Outside of Fair Use:* This document does not address the requirements of section 110 of the United States Copyright Act – the section explicitly addressing the unauthorized use of copyrighted materials for teaching (the "TEACH Act"), nor other provisions of the Copyright Act other than fair use (under section

107). Although the TEACH Act may be useful in some contexts, it has often been insufficient with respect to the use of images for teaching. For example, section 110 does not sufficiently address course websites and similar teaching materials and resources that have become a staple of teaching, and that provide new and innovative means of educating students. As the TEACH Act makes clear, the TEACH Act does not limit the contours of fair use. The fair use doctrine provides the means to develop reasonable, community-based practices that meet the needs of academic image users, while respecting the rights of copyright owners.

*Not about Other Countries' Copyright Laws:* This statement is not directed to copyright laws outside of the United States. While educational users outside the United States have all of the same image needs as educators in the United States, and the uses they make serve the same purposes, the doctrine of fair use is based on U.S. law and may not extend to image users in other jurisdictions.<sup>2</sup>

*Not about Obtaining Permissions:* Finally, this statement does not address the licensed use of images. There may be many legitimate reasons to obtain permissions from copyright owners, including the desire for greater certainty in some contexts, or the desire to build relationships with rights holders. Judicial decisions make clear that seeking permission does not prevent you from subsequently relying on fair use: if you are denied a license, or if you determine that the terms of such a license are unreasonable, you may still under some circumstances validly rely on fair use.<sup>3</sup> To the extent that courts look at a user's good faith in making fair use determinations, reliance on fair use in accordance with these established community standards should help demonstrate a user's good faith even when a licensing option is not pursued or is rejected.

# V. The Fair Use Doctrine in the Context of Using Images for Teaching, Research and Study.

Fair use plays a critical role in copyright law. For the benefit of society, it allows certain uses of copyrighted works without obtaining permission from, or paying fees to, copyright owners. Fair use has been an established part of copyright law for over 150 years, and – as the U.S. Supreme Court has recognized – helps reconcile copyright principles with the First Amendment.

Fair use is a fact-based doctrine. It is intentionally flexible, permitting the doctrine to endure as society evolves, and as new media and technologies develop and evolve. Originally judge made, fair use was codified in the 1976 Copyright Act. The statute (currently at 17 U.S.C. § 107) cites four factors that typically guide fair use determinations, although these factors are not exhaustive and other facts and considerations may be taken into account. These four factors are:

<sup>&</sup>lt;sup>2</sup> The jurisdictional question of which country's laws should apply to a given use of a copyrighted work can in some instances be complex, particularly when websites and electronic communications are disseminated globally. This statement is aimed at uses of images made in the United States, where fair use will almost always apply; for uses outside of the United States (or where distribution may be occurring outside the United States), it may be appropriate to seek further guidance, and to take steps aimed at addressing, or minimizing, the risks associated with these jurisdictional questions.

<sup>&</sup>lt;sup>3</sup> Citations to specific case law have been deliberately omitted from this document, as specific cases may be interpreted or treated differently over time. To see references to, and obtain copies of, relevant case law, please see the Intellectual Property Rights Resources section of the VRA website, which is periodically updated, at www.vraweb.org/organization/committees/ipr/ipr\_resources.html.

- The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational uses;
- The nature of the copyrighted work;
- The amount and substantiality of the portion of the work used in relation to the copyrighted work as a whole; and
- The effect of the use upon the potential market for or value of the copyrighted work.

In the preamble to the these four non-exclusive factors, the statute also enumerates a number of favored purposes – including criticism, commentary, teaching (including multiple copies for classroom use), scholarship, and research – for which the use of a copyrighted work will typically be fair (although such uses must still be considered in light of the four factors and the underlying purpose of copyright law to "promote the progress of science and the useful arts").

In making fair use determinations, courts frequently – and increasingly – ask whether the purpose for which a copyrighted work is being used furthers a societal good. As noted above, it is unquestionable that teaching, research, scholarship and study are public goods that facilitate academic inquiry, discourse and debate, and that advance our collective knowledge. In addition, research, teaching and study are the kinds of not-for-profit, educational uses that are at the core of fair use, as indicated in the language of the statute.<sup>4</sup>

In assessing whether a use is fair, courts also frequently ask whether a use is "transformative." Previously, courts tended to define "transformative" somewhat narrowly, asking whether the copyrighted work was itself being altered or employed for a different use than that made by the creator. More recently, however, courts have adopted a more expansive definition of the term, finding that a use is transformative if it places the copyrighted work within a different context, or presents new and significant material alongside the copyrighted work, such that the work is being use for a different purpose than that made by the creator.

The scholarly or educational use of an image will often be different in purpose than that of its creator, which is frequently aesthetic in nature. An educator or scholar may display an image or series of images to convey a scholarly argument, or to convey information: she may show images of paintings to demonstrate a historical trend or movement, or display an image or group of images to illustrate how artists have conveyed war over time, for example. But even if an image is being shown in the classroom for its aesthetic purposes (such as to demonstrate the brushstrokes used in a work), or even if the creator has created an image for educational or informative purposes (such as a documentary photographer photographing a protest to convey newsworthy information about that protest), images used in the course of teaching or scholarship are typically accompanied by significant, additional commentary or critique, or are placed alongside other images or media, such that the purpose served by the image is to advance a

<sup>&</sup>lt;sup>4</sup> While the uses here are typically not-for-profit and non-commercial in nature, we do not mean to suggest that commercial uses cannot be fair ones; on the contrary, many commercial uses have been found to fall well within fair use.

scholar, professor or student's own argument in the context of an educational lecture or paper. This is very often a quite different purpose than that being made by the creator of the image.<sup>5</sup>

Turning to the second and third factors, while many images are creative in nature (thus deserving of heightened copyright protection), and educational users typically need to use the entire image (or an image of an entire work) to make their point, courts have repeatedly found that these factors are not determinative if the fair use analysis otherwise points towards a use being fair.

With respect to the fourth factor (the impact of the use upon the copyright owner's potential market for, or value of, the work), it should be noted that an image (or a work depicted in an image) may well *increase* in value by being incorporated into, or actively used in, the teaching canon. Indeed, the more a work is studied and examined, especially in a scholarly or academic context, the more likely in general that recognition for the work – and perhaps by extension other works of the creator – will increase, making the image more likely to be sought after by art aficionados, curators, and others.<sup>6</sup>

Moreover, to the extent that courts look at whether copyright owners are currently licensing their works for the purposes being made by the user, it is important to note that permissions can rarely be obtained for educational uses of images. Even when permissions are sought (regardless of whether they are legally necessary), many copyright owners of images cannot be reasonably identified or located, effectively rendering their works "orphans," which weighs strongly in favor of fair use. More importantly, however, even when the copyright owner can be identified and located, the vast majority of copyright holders in images, or the underlying works depicted in images, do not license their images (or images of their works) for the educational and scholarly purposes described in this statement.<sup>7</sup> Thus, efforts to obtain permissions are often stymied by the lack of a response, or by a response that requires lengthy discussions or negotiations (and are therefore often not conducive to teaching or scholarship and, in some instances, can delay the timeline in obtaining a degree).<sup>8</sup>

A relatively small number of images have been actively licensed (typically by a small number of photographers) for teaching purposes (referred to in this document as "photographer-licensed images"). These have tended to be photographic images of art works, buildings, or archaeological sites, or other publicly accessible sites.<sup>9</sup> In more recent years, the number of

<sup>&</sup>lt;sup>5</sup> It is worth noting that uses that facilitate a public good may still be fair uses, even if they are not transformative.

<sup>&</sup>lt;sup>6</sup> Of course, to the extent that a work is subject to scholarly criticism, that kind of criticism is protected under the First Amendment, regardless of the impact on the copyright owner's market for the work.

<sup>&</sup>lt;sup>7</sup> As noted below, while a student is more likely to be able to obtain a license for the reproduction of an image in a thesis or dissertation (the last use scenario in section VI), the VRA believes that the use of images in such theses or dissertations should constitute fair use regardless, as described in more detail below.

<sup>&</sup>lt;sup>8</sup> For an interesting description of one effort to obtain permissions on a large scale from the relevant copyright owners of visual images that was ultimately abandoned when the copyright owners could not be identified, or did not respond, *see* Lise Hawkos, "Copyright Compliance in the Visual Resources Collection," *VRA Bulletin*, vol. 27, no. 2 (Summer 2001).

<sup>&</sup>lt;sup>°</sup>Historically, a directory of sources for such slides and digital images for art and architecture appeared in a slide buyers' guide and, subsequently, in an image buyers' guide. The last directory for such images

these licensors has dwindled considerably, with only a very few entities or individuals licensing images for teaching.<sup>10</sup>

Many educational institutions have not asserted fair use with respect to photographer-licensed images. The VRA recognizes that these photographers often work closely with educational institutions in developing image collections that meet institutions' specific educational needs, provide high quality, unique images for teaching and research. These photographers therefore provide an important service to the educational community. Consistent with these traditions and relationships, the VRA believes that, in general, there are important reasons to continue to license these particular images, rather than to rely on fair use.<sup>11</sup> In addition, to the extent that courts assessing fair use emphasize the impact of the use made upon the potential market for the copyrighted work, this could also tend to support the licensing of such photographer-licensed images in some instances. (However, in other instances, other facts may outweigh any market impact in a fair use analysis, and the VRA does not mean to suggest a conclusion to the contrary herein.)

In addition to these four non-exclusive statutory factors, courts examining fair use have increasingly asked whether a user is acting in "good faith" in using a copyrighted work. While good faith may be difficult to ascertain in some contexts, reliance on the community's longstanding practices – and the community's fair use traditions – should in itself be an indication of good faith. In this vein, in the guidelines in section VI below, there are several instances where attributions to the copyright owner are suggested (except for those circumstances when such attributions would not be appropriate, as in the context of an exam), although attributions are not typically required under fair use. Given the educational community's longstanding traditions of providing citations (where known), especially in print materials, attributions may be one means of demonstrating both the scholarly and educational context in which the images are being used, as well as the good faith of the user.

Finally, while relying on community practices may be one factor in demonstrating good faith, this should not be interpreted to mean that those traditional practices must always be adhered to in order to rely on fair use. For example, some gatekeepers or others who are not familiar with the doctrine of fair use and the flexibility it affords have questioned whether fair use may be

was produced in 1999. See Sandra C. Walker and Donald W. Beetham, "Image Buyers Guide" (7<sup>th</sup> ed. 1999). Following that edition, Donald, Beetham, the Manager of Visual Resources at Rutgers, also posted a website listing a number of image vendors. <u>http://www-rci.rutgers.edu/~beetham/newvenz.htm</u>. An updated list of these sources is forthcoming on the VRA website at <u>www.vraweb.org</u>.

<sup>10</sup> Over the last decade, there have also been a number of efforts to create digital databases, collectives, or libraries, of images for educational use. One of these efforts, the ARTstor Digital Library, <u>www.artstor.org</u>, currently makes available a library of over 1.2 million images – shared by a wide variety of sources, including museums, archives, artists, photographers, scholars and others – for educational use. The ARTstor Digital Library is not distributed by a set of copyright holders, but by a not-for-profit organization that in some instances relies on fair use and in some instances obtains permissions to distribute images for teaching, research and study.

<sup>11</sup> At the same time, when images of the same work or object are available from multiple sources (and only one of these images is a vendor image), educational users should not feel obligated to use the vendor image. They may use an image of the same underlying work from another source (and often they may reasonably rely on fair use in doing so).

asserted in the context of new technologies or media. However, courts have repeatedly made clear that – provided the underlying purpose remains the same – the use should remain fair, regardless of the media or technology in which it is employed.

### A Brief History of the Educational Community's Reliance on Fair Use in Using Images

For more than a century, the educational community has relied on the fair use doctrine when using images for research, teaching, and study. In the late nineteenth century, images – in the form of slides and photographs – began to be used in the classroom, primarily for teaching in the arts and art history.<sup>12</sup> Across decades of these practices, such teaching materials, primarily 35millimeter slides (and now digital images) became indispensable in disciplines such as the arts and art history. As generations of artists, art historians and other scholars, curators, art aficionados and patrons, and others were educated using these slides, educational institutions (and other institutions, such as some museums) amassed thousands - and sometimes hundreds of thousands – of these slides.<sup>13</sup> Individual faculty members similarly built their own slide collections that were tailored to their particular pedagogical needs.

In photographing these materials for use in the classroom, in distributing the slides to professors for their teaching, in displaying the slides in the classroom, and in storing the images for later use (which sometimes required re-copying slides to replace or preserve the content), educational institutions and professors have relied on the U.S. doctrine of fair use. This has been partly due to the fact that, historically, opportunities for licensing or purchasing high quality slides (and subsequently digital images) were rare, and this continues to be the case today.

As a result, for generations, faculty and scholars have photographed images appearing in books, postcards, journals and other print sources, making slides from those photographs that could be used for teaching. Copystand photography -a camera setup that was designed to facilitate the creation of slides from existing print materials – was widely promoted and used.<sup>14</sup>

Historically, images were also reproduced in dissertations and theses without obtaining permissions from the copyright owners in such images. Because of the clearly academic, noncommercial nature of theses and dissertations, and because access to theses or dissertations was typically confined to an academic, library setting, for decades there seemed to be little dispute that the incorporation of such images into theses or dissertations was a fair use.

In more recent years, however, as the 1976 Copyright Act brought a greater focus on copyright issues, and as theses and dissertations began to be posted to online repositories and websites that sought to preserve and provide access to these papers, the publishers of these repositories and

<sup>&</sup>lt;sup>12</sup> See note 1.

<sup>&</sup>lt;sup>13</sup> Gretchen Wagner, "Sharing Digital Visual Arts Images for Educational Use: Finding a New Angle of Repose, EDUCAUSE Review, vol. 42, no. 6 (Nov./Dec. 2007) 8, citing Virginia M.G. Hall, "Fair Use or Foul Play? The Digital Debate for Visual Resources Collections," presentation, Association of College and Research Chapters, New England Chapter, conference on November 8, 1997, available at www.vraweb.org/resources/ipr/papers/fairfoul.html; Christine L. Sundt, "Testing the Limits: The CONFU Digital-Images and Multimedia Guidelines and Their Consequences for Libraries and Educators," Journal of American Society for Information Science, Vol. 50, no. 14 (1999): 1329.

<sup>&</sup>lt;sup>14</sup> Hall, "Fair Use of Foul Play?" 3; Sundt, "Testing the Limits," 1329.

websites often contractually required – as a way of managing their own risks – that graduate students posting theses to their repositories obtain copyright permissions for any third party works, including images, incorporated into their theses or dissertations. As set forth in greater detail below, these contractual clearance requirements have had a significant deleterious effect on scholarship in image-dependent disciplines.

In sum, fair use has long been – and continues to be – critical to the use of images for teaching, research and scholarship.

### VI. Statement of Fair Use Practices and Principles

This statement focuses on six types of image uses that academic users confront regularly. These scenarios are not meant to be the only situations in which fair use should apply, but reflect the most common practices involving copyrighted images made by educational users.

It is important to note that none of the uses described in this document have been "tested" under the law. There has been very little fair use litigation in the academic context, especially with respect to images. This may well reflect the belief, among many copyright owners as well as users, that these uses are consistent with fair use, as well as the fact that there is little to be gained monetarily from such litigation. It may also reflect the fact that some academic users are required to follow the guidance of risk adverse gatekeepers, who are hesitant to openly assert their fair use rights because of concerns about potential liability, regardless of how remote.

### 1. Preservation: Storing Images for Repeated Use in a Teaching Context; Transferring Images to New Formats.

*Background:* As noted above, for many decades, educational institutions, some cultural institutions, as well as many individual scholars, have amassed and maintained collections of images for teaching, research, and other educational uses. As important and sometimes unique resources that are often heavily used for teaching and research, these collections need to be preserved on an ongoing basis.

While digital technologies offer the possibility of providing better means of preserving images that often degrade in other formats (as well as making them more accessible for research and scholarship), some institutions have raised questions about whether certain images under copyright can be legally transferred to digital format. Although Section 108 of the Copyright Act explicitly permits such preservation efforts by libraries and archives, it also imposes a number of conditions and restrictions on such practices that many institutions feel are not workable. For example, as noted by the Dance Heritage Coalition's *Statement of Best Practices in Dance-Related Materials* at the Center for Social Media website, http://centerforsocialmedia.org/fair-use/related-materials/codes/best-practices-fair-use-dance-related-materials, although reproduction is allowed if an original is "damaged, deteriorating, lost or stolen" or if the equipment to access the copy is no longer reasonably available in the commercial marketplace, institutions have sometimes interpreted this language to mean that images must show deterioration or degradation before they can be preserved within the scope of section 108. Fortunately, section 108 does not limit in any way fair use or other exceptions to copyright.

*Principle:* Preservation of such materials – as a means of facilitating teaching, research and study, and preserving the scholarly record – should generally be permissible as an exercise of educators' fair use rights.

Suggestions: Educational users may be best positioned to assert fair use if they:

- Make only that number of copies reasonably necessary to achieve the teaching and research needs of the institution or individual (as well as the associated needs in preserving that content for such purposes). Such copies can include copies that are readily accessible for teaching and research purposes, as well as those that may be placed in a "dark" or typically inaccessible archive.
- Undertake good faith efforts to notify end users of the archive, preferably through clickthrough terms of use or other mechanisms, that copyrighted images in the archive are only being made available for the educational uses for which the archive was assembled. Although terms of use and similar mechanisms are not a requirement of fair use, such mechanisms are likely to be viewed by courts as an indication of an educational user's good faith in asserting fair use.

### 2. Use of Images for Teaching Purposes.

*Background:* As noted above, images are essential to teaching in the arts and other fields. Images are used to comment and critique; to uniquely describe and document objects or other subjects; to make or further scholarly arguments; to facilitate comparisons and evaluations; and in general to further academic inquiry. Used for these not-for-profit, academic purposes, images are unique objects of information that advance the core aims of Copyright. Frequently, as noted above, the use of images for teaching will also be transformative.

*Principle:* For the reasons described in this statement, the reproduction and use of images for teaching – whether in face-to-face teaching, non-synchronous teaching activities, or non-course related academic lectures – should be consistent with fair use.<sup>15</sup>

*Suggestions:* Educational institutions and faculty reproducing, displaying, or providing access to, images for teaching purposes may be best positioned to rely on fair use if they:

- Undertake good faith efforts when distributing images to individual users to notify those users preferably in writing through click-through terms of use or similar mechanisms that copyrighted images are being made available for teaching, study, and research only. Although terms of use are not a requirement of fair use, such mechanisms may indicate an educational user's good faith in asserting fair use.
- Consider employing access restrictions, to the extent that images are accessible through websites or other online resources that limit access to educational users. Although access restrictions are not a requirement of fair use, they may be useful as a means of

<sup>&</sup>lt;sup>15</sup> Note the discussion of photographer-licensed images in section V above.

demonstrating a good faith intention to limit use of the images to teaching, research and study.

- Provide attributions to known copyright owners of the images (and any works depicted in the images). Although not legally required under fair use, such attributions may help demonstrate a user's good faith in adhering to the broader scholarly traditions of providing citations when using others' works.
- Maintain the educational, not-for-profit context, to the extent that educational institutions or faculty members utilize third parties (such as image-sharing websites and image databases) as a means of providing access to those images.

# **3.** Use of Images (both Large, High-Resolution Images and Thumbnails) on Course Websites and in Other Online Study Materials.

*Background:* Increasingly, technologies are being utilized in teaching to either complement or facilitate traditional forms of instruction. Course websites, blogs, and interactive tools are just a few of the ways in which technology is being harnessed to further education. These methods of instruction are increasingly important as new generations expect to encounter such technological tools and resources in their study, and to uncover content through those tools and resources. Moreover, such tools and resources engage educational users in different ways, and allow for previously impossible, often innovative forms of study and scholarship.

In addition to their larger, higher resolution counterparts, "thumbnail images" (low resolution, small images), serve a transformative purpose, rendering an aesthetic work into a finding aid, or serving as a factual "data point" about the nature or identity of materials in particular websites or online resources. As the amount of information grows on the Web, these kinds of sorting, linking, and identification tools on course websites and other online tools are becoming increasingly important, especially in a research, educational, or scholarly context.

*Principle:* To the extent that use of a specific image for teaching or research is a fair use, then placing those same images in course websites or in other interactive teaching media for the same purposes should also be fair. Such uses should be fair regardless of the media formats or resolution in which those materials appear. This is the case whether or not those materials remain within such sites or media on an ongoing basis, or on a shorter basis, so long as they continue to serve an educational or scholarly purpose.

*Suggestions:* Educational institutions or individual faculty members who are providing students and other individual users with direct access to copyrighted images through course websites or other electronic study materials may be best positioned to claim fair use if they:

• Undertake good faith efforts when distributing images to individual users to notify those users – preferably in writing through click-through terms of use or similar mechanisms – that copyrighted images are being made available for teaching, study, and research only. Although terms of use are not a requirement of fair use, such mechanisms may indicate an educational user's good faith in asserting fair use.

- Consider employing access restrictions that limit access to educational users. Although access restrictions are not a requirement of fair use, they may be useful as a means of demonstrating a good faith intention to limit use of the images to teaching, research and study.
- Provide attributions to known copyright owners of the images (and any works depicted in the images). Although not legally required under fair use, such attributions may help demonstrate a user's good faith in adhering to the broader scholarly traditions of providing citations when using others' works.
- Maintain the educational, not-for-profit context, to the extent that educational institutions or faculty members utilize third parties (such as image-sharing websites and image databases) as a means of providing access to those images.

## 4. Adaptations of Images for Teaching and Classroom Work by Students.

*Background:* For centuries, students of the arts (and future artists) have learned – and the arts have progressed – from copying and adapting other artists' works. These adaptations may take any number of forms, including mash-ups, reorientations, colorizations, placing images in different contexts, or changing the features of a work, to name a few. As a society, we have collectively benefitted from these adaptations, as new generations of artists and other creators have developed their skills and techniques by copying or adapting existing works, and as artists (including emerging artists) and other creators have used adaptations of others' works to generate and communicate new ideas and meaning. Adaptations of existing works are also increasingly important for teaching and study outside of the arts, as images are being adapted in disciplines such as film studies, cultural studies, foreign language classes, social studies, and religious studies, to name a few. To continue the evolution of our collective knowledge in the arts and other fields, and to facilitate the education of artists and other creators, it is critical that students, scholars, and faculty be able to make adaptations of copyrighted images and to display and distribute them in educational contexts.

*Principle:* Subject to the cautions below, adaptations of copyrighted images for purposes of study, research, and teaching – such as for course assignments – should fall within the doctrine of fair use.

Although one factor cited in the fair use statute is the amount of a copyrighted work being used in relation to the work as a whole, use of substantial portions of a copyrighted work – or an entire work – should not preclude a finding of fair use in a classroom or research context. For example, a student in an art class may copy and incorporate major portions of a work in her own work to improve her brushstrokes or other techniques. A scholar may reproduce an entire work but alter the sense of perspective in the image to highlight the importance of that element within the work. Both of these uses should fall within fair use. The point is that the educational context matters, and even if the entire work is used, and even if the underlying work is not transformed through the addition of substantial new content, these uses within the academic context should be fair ones. (This is not to say that adaptations or reproductions outside of the educational context will not be fair uses, but such uses are beyond the scope of this document). *Suggestions:* Educational users may be particularly well positioned to assert fair use in adapting copyrighted images if they:

- Clearly use the work in a learning, research, or similar educational context.
- Consider employing access restrictions as noted in the third guideline above, to the extent that such adaptations are being distributed via course websites or similar online vehicles. Although not a requirement of fair use, such steps may demonstrate a good faith intention to limit use of the images to teaching, research and study.
- Provide an indication of the educational context in accompanying descriptive materials, to the extent that adaptations are displayed beyond the classroom (*e.g.*, in an end-of-semester exhibition).

# 5. Sharing Images Among Educational and Cultural Institutions to Facilitate Teaching and Study.

*Background:* Today, classrooms often blur physical, institutional boundaries. Students may be able to access courses from home or other locations via the Web. Faculty members often teach at multiple institutions within the same semester. Some educational institutions participate in consortia or multi-campus systems that require sharing across campus borders.

Images may be shared via the Web or other electronic means simultaneously across different physical classrooms. Such sharing often provides innovative opportunities for learning, with the ability to create dialogue among disparate communities of academic users that previously could not be engaged collectively, and through which copyrighted images may be used in new, meaningful, and transformative ways.<sup>16</sup>

*Principle:* To the extent that each institution is relying on fair use to reproduce, display or adapt the same visual work for teaching, study, and research, then sharing a copy or copies of that same visual work for these same limited purposes across the same institutions should also be fair use. While there are, as noted above, potentially significant educational benefits from such sharing, the impact on the copyright owner's market is no greater if one copy of his or her work is used collectively for these educational purposes than if each individual institution makes its own copy of the same work for these limited purposes.<sup>17</sup>

Suggestions: Educational users of images may be best positioned to assert fair use if they:

<sup>&</sup>lt;sup>16</sup> Shared image collections also provide significant efficiencies and other advantages, as described in a white paper produced by the Visual Resources Association White Paper Task Force entitled, "Advocating for Visual Resource Management in Educational and Cultural Institutions," available at www.vraweb.org/resources/general/vra\_white\_paper.pdf.

<sup>&</sup>lt;sup>17</sup> Note the VRA's position with respect to photographer-licensed images in section V above.

- Undertake good faith efforts when distributing images to individual users, to notify those users preferably in writing through click-through terms of use or similar mechanisms that copyrighted images are being made available for teaching, study, and research only. Although terms of use are not a requirement of fair use, such mechanisms may indicate an educational user's good faith in asserting fair use.
- Consider employing access restrictions, to the extent that images are accessible through websites or other online resources, that limit access to educational users. Although access restrictions are not a requirement of fair use, they may be useful as a means of demonstrating a good faith intention to limit use of the images to teaching, research and study.
- Provide attributions to known copyright owners of the images (and any works depicted in the images). Although not legally required under fair use, such attributions may help demonstrate a user's good faith in adhering to the broader scholarly traditions of providing citations when using others' works.
- Maintain the educational, not-for-profit context, to the extent that educational institutions or faculty members utilize third parties (such as image-sharing websites and image databases) as a means of providing access to those images.

## 6. Reproduction of Images in Theses and Dissertations.

*Background:* To obtain a masters or doctoral degree, graduate students are required to produce a thesis or dissertation. Frequently, the dissertation or thesis must provide an original contribution to the state of knowledge in a particular field and be in principle worthy of publication in a peer-reviewed context.

Historically, most universities have also required that a thesis or dissertation be submitted in typed, bound format to the institution's library for preservation or archiving, and for access by others conducting research at that institution's facilities. In more recent years, online databases and other websites have served as such preservation repositories (indeed, one – UMI Dissertation Publishing – serves as the Library of Congress' official offsite repository for the preservation of digital dissertations and theses), both ensuring long-term maintenance as well as centralized access to such dissertations and theses. Increasingly, making a thesis or dissertation available through such online databases is a degree-granting requirement.

Students incorporate images into their theses or dissertations for the same reasons that images are used in scholarship more broadly: Sometimes the images – or the works or persons depicted in those images – are the focus of commentary, critique, or scholarship. In other instances, the images uniquely or most effectively illustrate points made by the author. In still other cases, images are used for purposes of comparison or contrast to facilitate certain scholarly arguments.

As noted above, historically, graduate students have not obtained permissions from the relevant copyright owners of such images (or of the works depicted in the images) when incorporating those images into their theses or dissertations. In more recent years, however, as these theses have been posted to online repositories, the owners or operators of these repositories, both

academic institutions and distributors of online databases (distributors), have often required – as a way of managing their own risks – that graduate students obtain all copyright permissions for images incorporated into their theses or dissertations.

As a result of these risk-management efforts on the part of distributors, students are now required to address a range of additional copyright issues simply to obtain their academic degrees. This has had a number of deleterious effects: First, distributors typically require students to pay any copyright licensing fees for such images, which – depending on the nature of the thesis or dissertation – can be very significant and in some cases prohibitive. In other cases, clearances cannot be obtained (copyright owners cannot be ascertained or located, or when contacted they do not respond or – in some instances – refuse to provide permissions), leaving students in the unenviable position of either rewriting their theses or dissertations to eliminate reference to the image or images in question, or breaking or renegotiating their contracts with the distributor and relying on fair use.<sup>18</sup> As a consequence, there are anecdotal reports of students choosing thesis or dissertation topics to avoid or minimize these copyright issues and the associated expenses. In addition, students are spending significant time to locate rights owners and clear uses, thereby increasing the time to complete graduation requirements for their degrees.

*Principle:* The thesis or dissertation is a core degree-granting requirement, and such scholarship needs to be recorded and preserved and made broadly accessible to advance scholarly inquiry. Images incorporated into such dissertations or theses for the purpose of advancing or documenting a scholarly argument or point should be consistent with fair use, even when those theses or dissertations are then distributed through online repositories and databases. Just as printed material can be freely quoted with attributions, the inclusion of reference images (images of sufficient resolution to convey the author's point) in academic dissertations or theses is critical to advancing our collective knowledge in the arts and sciences, and should be consistent with fair use.

As noted in section V above, the use of images in scholarship is fundamental to the advancement of our collective knowledge and to the exercise of our First Amendment rights. Moreover, this conclusion is supported by the fact that the inclusion of images in scholarly theses or dissertations is inherently transformative. Essential to theses and dissertations is the need to add original argument and therefore to place images in a different context from the original, typically aesthetic, aim of the copyright owner of the image.

Inclusion of an image in a dissertation or thesis also frequently benefits the creator of that image (and the creator of any work depicted in the image). For example, inclusion of such an image may provide greater exposure to that artist's work, may introduce or advance that artist's works within the teaching canon, or may spark other academic or curatorial inquiry regarding that artist's works.

Therefore, while the desire among academic repository operators and database distributors to reduce potential copyright infringement risks is understandable, scholarship is at the core of our collective progress in the arts and sciences, and these uses of copyrighted images are both

<sup>&</sup>lt;sup>18</sup> Although beyond the scope of this document, students and educational institutions might consider pressing publishers for greater latitude to include images in their dissertations in reliance on fair use.

necessary and sufficiently transformative such that the reproduction of images should be consistent with fair use. In coming to this conclusion, we note that courts have found that incorporating images into publications are fair uses of those images, even when a market mechanism exists for obtaining a license to those images, and even when the publishers of those publications are commercial in nature.

*Suggestions:* Graduate students (and libraries, or publishers of online repositories of theses and dissertations) may be best positioned to assert fair use if:

- Significant commentary, or other original content, accompanies images included in the thesis or dissertation (as is almost uniformly the case);
- Images included in a dissertation or thesis are the subject of commentary, or are included to illustrate a scholarly argument, and are not included for purely aesthetic purposes;
- Images are incorporated at a size or resolution necessary to make the best scholarly argument (for example, large images may be best or even required to illustrate small background elements or obscure details, but in other instances, smaller reference images may suffice).
- Attributions are provided to the copyright owners of the images (and any works depicted in the images), where known. Although not legally required under fair use, attributions may help demonstrate a user's good faith in adhering to the broader scholarly traditions of providing citations when using others' works (which traditions are especially strong in the context of publications).
- The circulation and distribution of the dissertation or thesis through online websites or repositories is consistent with academic practices or requirements set forth by the degree-granting institution.

## VII. How This Statement Was Created

This Statement was drafted by Gretchen Wagner, in her capacity as a chair (and now former chair) of the VRA's Intellectual Property Rights Committee, in close consultation with other members of the Committee. Members of the Committee include both lawyers and visual resource professionals long practiced in using images in the educational context.

This Statement draws from the Digital Image Rights Calculator (DIRC) <u>http://www.vraweb.org/resources/ipr/dirc/index.html</u> and the Copy Photography Computator <u>http://www.vraweb.org/resources/ipr/computator/index.html</u>, two sets of VRA materials that themselves reflect the community's longstanding practices and principles surrounding the fair use of images. In developing the DIRC and the Copy Photography Computator, as well as this Statement, the Committee has relied on the expertise of its members (many of whom have decades of experience working with images and fair use), as well as existing documentation surrounding the longstanding practices of image use in educational contexts. The Statement also takes note of fair use jurisprudence and the other best practice statements and codes available at the American University Center for Social Media website, at <a href="http://www.centerforsocialmedia.org/fair-use/best-practices">http://www.centerforsocialmedia.org/fair-use/best-practices</a>.

Finally, the Statement draws significantly on the guidance and expertise of its Legal Advisory Committee members, who are preeminent legal experts and copyright scholars. The Visual Resources Association is deeply indebted and grateful to the Legal Advisory Committee members for sharing so generously of their time and expertise.

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PROGRAM ON INFORMATION JUSTICE AND INTELLECTUAL PROPERTY



# CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES

**JANUARY 2012** 

# CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES

**JANUARY 2012** 

COORDINATORS

Association of Research Libraries

Center for Social Media, School of Communication, American University

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#### CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES

January 2012

### INTRODUCTION

The mission of academic and research librarians is to enable teaching, learning, and research.<sup>1</sup> Along with serving current faculty, researchers, and students (especially graduate students), these librarians also serve the general public, to whom academic and research libraries are often open. Finally, academic and research librarians are committed to faculty, researchers, and students of the future, who depend on the responsible collection, curation, and preservation of materials over time.

Copyright law affects the work of academic and research librarians pervasively and in complex ways, because the great bulk of these librarians' work deals with accessing, storing, exhibiting, or providing access to copyrighted material. The rights of copyright holders create incentives for the publication of important work that forms the core of library collections, while at the same time constraining academic and research librarians in the exercise of their mission. Similarly, limitations on and exceptions to copyright rights enable academic and research librarians to use copyrighted materials in important ways, but impose limits and responsibilities of their own.

In addition to specific exceptions for libraries and educators, academic and research librarians use the important general exemption of fair use to accomplish their mission. Fair use is the right to use copyrighted material without permission or payment under some circumstances, especially when the cultural or social benefits of the use are predominant. It is a general right that applies even—and especially in situations where the law provides no specific statutory authorization for the use in question. Consequently, the fair use doctrine is described only generally in the law, and it is not tailored to the mission of any particular community. Ultimately, determining whether any use is likely to be considered "fair" requires a thoughtful evaluation of the facts, the law, and the norms of the relevant community.

<sup>1.</sup> This code was developed by and for academic and research librarians. While some of the ideas and principles in the code may be helpful to librarians in other contexts, any reference to "librarians" in this document refers to academic and research librarians, not to all librarians.

### HOW THIS DOCUMENT WAS CREATED

The first step in creating this code was to conduct an in-depth survey, using longform interviews, with 65 librarians at a diverse array of academic and research institutions in the United States, from Ivy League colleges to rural satellite campuses. The results demonstrated clearly both that fair use is an essential component of copyright exemptions for librarians, and also that they lacked a clear sense of what they and their peers might agree to as appropriate employment of fair use in recurrent situations.<sup>2</sup> As a result, librarians frequently did not use their fair use rights when they could have, and they overestimated the level of conflict between the strictures of copyright law on the one hand and their respective libraries' missions on the other. The cost of this uncertainty was amplified because many research and academic librarians routinely act as the de facto arbiters of copyright practice for their institutions and the constituencies they serve.

Working librarians with many different institutional roles at a wide range of institutions then gathered together in a series of small group discussions about fair use held in five cities between October 2010 and August 2011. In each conversation, participants were asked to discuss a series of brief hypothetical examples designed to raise questions about fair use and its limitations. Conversations revealed that members of this community understand that their mission depends on copyright, both the protection it provides for those who have already produced knowledge and the important rights it creates for those who need access to copyrighted material to enable learning, scholarship, and creativity. Their understanding of fair use, represented below, is grounded in this understanding of copyright balance. To ensure that the applications of fair use represented by the principles fall within the bounds of reason, an outside panel of distinguished copyright experts reviewed this document. However, this document is not intended and should not be construed as representing their legal advice. With this information in hand, each institution can undertake its own legal and risk analysis in light of its own specific facts and circumstances.

<sup>2.</sup> See Association of Research Libraries et al., *Fair Use Challenges in Academic and Research Libraries* (2010), http://www.arl.org/bm-doc/arl\_csm\_fairusereport.pdf.

### WHAT THIS IS

This is a code of best practices in fair use devised specifically by and for the academic and research library community. It enhances the ability of librarians to rely on fair use by documenting the considered views of the library community about best practices in fair use, drawn from the actual practices and experience of the library community itself.

It identifies eight situations that represent the library community's current consensus about acceptable practices for the fair use of copyrighted materials and describes a carefully derived consensus within the library community about how those rights should apply in certain recurrent situations. These are the issues around which a clear consensus emerged over more than a year of discussions. The groups also talked about other issues; on some, there seemed not to be a consensus, and group members found others to be less urgent. The community may wish to revisit this process in the future to deliberate on emerging and evolving issues and uses.

### WHAT THIS ISN'T

This code of best practices was not negotiated with rights holders. This code is the work of the academic and research library community and arises from that community's values and mission. It presents a clear and conscientious articulation of the values of that community, not a compromise between those values and the competing interests of other parties.

This code of best practices does not exhaust the application of fair use rights when copyrighted material is concerned. The objective of this code is not to constrain librarians' reliance on fair use, but to enable it. The principle of fair use can and does operate in a wide diversity of contexts, along with the ones specifically addressed below.

Although the code incorporates consensus-based community standards relating to commonly experienced conflicts between library practice and perceived copyright constraints, it is not a comprehensive or exhaustive guide to all possible applications of fair use in and around libraries—even in the recurrent situations detailed below. Institutions may be able to make persuasive arguments for fair use that go beyond the shared norms expressed here. Likewise, institutions engaging in their own "risk management" may choose policies that do not take full advantage of these consensus principles.

#### CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES

This dynamic legal doctrine will no doubt continue to evolve along with educational, scholarly, and artistic practice. One area in which further developments certainly can be expected is that of so-called "orphan works"—texts (or images or music) that can no longer be reliably traced to a known copyright owner, and therefore cannot be licensed for use. Although the principles below address this problem obliquely, they do not by any means exhaust the range of possible solutions —including those based in the application of fair use.

This code is not a guide to using material that people give the public permission to use, such as works covered by Creative Commons licenses. While fair use applies to such works, anyone may use those works in ways their owners authorize in addition to ways permitted by the fair use doctrine. Similarly, it is not a guide to the use of works that are in the public domain; those works may be used without any copyright limitation whatever, including uses that otherwise would far exceed the bounds of fair use.

Copyright law is "territorial," which means that fair use applies to uses of copyrighted material in the United States, regardless of where in the world it originates. Hence, the principles in this code also apply regardless of a work's origin, so long as the use takes place in the U.S. By the same token, these principles will not necessarily apply to uses outside the U.S., where fair use may have little or no legal status.<sup>3</sup>

Under some circumstances, fair use rights can be overridden by contractual restrictions. Thus, these principles may not apply if a library has agreed, in a license agreement, donor agreement, or other contract, to forgo the exercise of fair use with respect to some set of collection materials. If fair use rights are to be preserved, library personnel in charge of acquisitions and procurement should be vigilant as they negotiate and enter into contracts related to collections materials.

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<sup>3.</sup> At this time, the issue of "choice of laws" in copyright disputes that cross national boundaries is unclear, whether or not those disputes involve the Internet. See Peter K. Yu, "Conflicts of Laws Issues in International Copyright Cases" (2001), http://www.peteryu.com/gigalaw0401.pdf.

### **COPYRIGHT AND FAIR USE**

The goal of copyright law and policy is to foster the progress of science, the creation of culture, and the dissemination of ideas. Its best-known feature is protection of owners' rights. But copying, quoting, and generally re-using existing cultural and scientific material can be a critically important part of generating new research and culture and promoting intellectual exchange. In fact, the value of these practices is so well established that it is written into the social bargain at the heart of copyright law. We as a society give limited property rights to creators to encourage them to produce science and culture; at the same time, we guarantee that all works eventually will become part of the public domain and, in the meantime, we give other creators and speakers the opportunity to use copyrighted material without permission or payment in some circumstances. Without the second half of the bargain, we could all lose important new work and impoverish public discourse.

Fair use is widely and vigorously employed in many professional communities. For example, historians regularly quote both other historians' writings and primary sources; filmmakers and visual artists use, reinterpret, and critique copyrighted material; scholars illustrate cultural commentary with textual, visual, and musical examples. Fair use is also healthy and vigorous in broadcast news and other commercial media, where references to popular films, classic TV programs, archival images, and popular songs are frequently unlicensed. Trade and academic publishers regularly rely on fair use to justify the incorporation of third-party material into books they produce. Librarians likewise need fair use to execute their mission on a daily basis.

No group of institutions, no matter how important their cultural function, is immune from the operation of copyright law. Academic and research libraries are not-for-profit institutions, but they still must build collections by buying books and subscribing to journals and databases. Likewise, they get no "free pass" simply because their function is to support education. That said, the United States Copyright Act is particularly solicitous of educational and academic uses in many circumstances. That solicitude is reflected in several structural features that benefit users of copyrighted material in and around the academic or research library. These include the specific exceptions contained in Sections 108, 110, and 121 of the Copyright Act and the special protections granted by Section 504(c)(2). Even when, as is often the case, specific exceptions don't literally reach the proposed library activities, the policies behind them may help to guide the interpretation of fair use as it applies to schools and libraries.<sup>4</sup>

As legislative history makes clear, these provisions were designed to complement rather than to supplant fair use, which has been part of copyright law for 170 years and remains the most fundamental of such structural features.<sup>5</sup> Section 107 of the Act, which codified the fair use doctrine in 1976, specifically includes references in its preamble to a number of activities associated with the academic and research library mission, including "criticism, comment..., teaching..., scholarship, [and] research."

Fair use is a user's right. In fact, the Supreme Court has pointed out that it is fair use that keeps copyright from violating the First Amendment; without fair use and related exceptions, copyright would create an unconstitutional constraint on free expression. Creators, scholars, and other users face new challenges as copyright protects more works for longer periods, with increasingly draconian punishments and narrow, outdated specific exceptions. As a result, fair use is more important today than ever before.

Because copyright law does not specify exactly how to apply fair use, the fair use doctrine has a useful flexibility that allows the law to adjust to evolving circumstances and works to the advantage of society as a whole. Needs and practices differ with the field, with technology, and with time. Rather than following a prescriptive formula, lawyers and judges decide whether a particular use of copyrighted material is "fair" according to an "equitable rule of reason." In effect, this amounts to taking all the facts and circumstances into account to decide whether an unlicensed use of copyrighted material generates social or cultural benefits that are greater than the costs it imposes on the copyright owner.

<sup>4.</sup> See Jonathan Band, "The Gravitational Pull of Specific Exceptions on Fair Use" (Sept. 1, 2011), unpublished manuscript, http://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1966593.

<sup>5.</sup> See, e.g., 17 U.S.C. § 108(f)(4), ("[Nothing in this section] in any way affects the right of fair use as provided by section 107..."); U.S. Copyright Office, *The Section 108 Study Group Report 22* (2008), ("[S]ection 108 was not intended to affect fair use. Certain preservation activities fall within the scope of fair use, regardless of whether they would be permitted by section 108"); memorandum from Randolph D. Moss, acting assistant attorney general to the general counsel, Department of Commerce (April 30, 1999), ("Section 108 of the 1976 Act does not narrow the protection for fair use provided by the common law doctrine codified in section 107"), http://www.justice.gov/olc/pincusfinal430.htm.

This flexibility in the law can lead to uncertainty among librarians (as in other practice communities) about whether specific uses are fair. However, fair use is flexible, not unreliable. Like any exercise of expressive freedom, taking advantage of fair use in education and libraries depends on the application of general principles to specific situations. One way of easing this application is to document the considered attitudes and best practices of the library community as it works to apply the rules.

In weighing the balance at the heart of fair use analysis, judges generally refer to four types of considerations mentioned in Section 107 of the Copyright Act: the nature of the use, the nature of the work used, the extent of the use, and its economic effect (the so-called "four factors"). Over the years, attempts have been made to promulgate so-called "fair use guidelines," with the goal of reducing uncertainty about the application of this formula—even at a cost to flexibility. Unfortunately, the processes by which most guidelines have been developed are suspect, and the results are almost universally over-restrictive.<sup>6</sup> In fact, "bright line" tests and even "rules of thumb" are simply not appropriate to fair use analysis, which requires case-by-case determinations made through reasoning about how and why a new use repurposes or recontextualizes existing material.

How judges have interpreted fair use affects the community's ability to employ fair use. There are very few cases specifically involving libraries.<sup>7</sup> However, we know that

<sup>6.</sup> See Kenneth Crews, "The Law of Fair Use and the Illusion of Fair-Use Guidelines," 62 *Ohio State Law Journal* 602 (2001).

<sup>7.</sup> At the time of this writing, there are no judicial opinions describing in any detail the scope of fair use in a nonprofit educational context. Courts have examined unlicensed copying in for-profit copy shops, but those cases have explicitly distinguished commercial enterprises from nonprofit ones (see, e.g., Princeton University Press v. Michigan Document Svces, 99 F. 3d 1381, 1389 (6th Cir. 1996), ("We need not decide [the status of nonprofit uses], however, for the fact is that the copying complained of here was performed on a profit-making basis by a commercial enterprise"). Several cases involving fair use were filed against universities in the last year or two. Of these, one has been dismissed without a clear finding on the issue of fair use (AIME et al. v. Regents of Univ. of Cal. et al., No. CV 10-9378 (C.D. Cal. Oct. 10, 2011)). (AIME subsequently filed an amended complaint, which is pending at the time of this writing, while two others await decision.) See Cambridge U.P. v. Patton, No. 08-1425 (N.D. Ga. filed April 15, 2008); Authors' Guild, Inc. v. HathiTrust, No. 11-6351 (S.D.N.Y. filed Sept. 12, 2011). The path of litigation is typically long and unpredictable, and even a final decision in one case may not provide clear guidance to users in other judicial districts or whose uses may differ in important ways.

#### CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES

for any particular field of activity, lawyers and judges consider expectations and practice in assessing what is "fair" within that field. Moreover, the history of fair use litigation of all kinds shows that judges return again and again to two key analytical questions:<sup>8</sup>

- Did the use "transform" the material taken from the copyrighted work by using it for a broadly beneficial purpose different from that of the original, or did it just repeat the work for the same intent and value as the original?
- Was the material taken appropriate in kind and amount, considering the nature of the copyrighted work and of the use?

These two questions effectively collapse the "four factors." The first addresses the first two factors, and the second rephrases the third factor. Both key questions touch on the so-called "fourth factor," whether the use will cause excessive economic harm to the copyright owner. If the answers to these two questions are "yes," a court is likely to find a use fair—even if the work is used in its entirety. Because that is true, the risk of a challenge to such a use is dramatically reduced.

Fair use ensures that copyright owners do not have a monopoly over transformative uses of their works. The converse is also true. When a use merely supplants a copyright owner's core market rather than having a transformative purpose, it is unlikely to be fair. Thus, for example, a library clearly cannot acquire current books for its collection simply by photocopying or scanning published editions.

In cases decided since the early 1990s, the courts have made it clear that in order for a use to be considered "transformative," it need not be one that modifies or literally revises copyrighted material. In fact, uses that repurpose or recontextualize copyrighted content in order to present it to a new audience for a new purpose can qualify as well. The courts also have taught that the more coherent an account the

<sup>8.</sup> See Neil Netanel, "Making Sense of Fair Use," 15 *Lewis & Clark L. Rev.* 715, 768 (2011), surveying data about fair use cases decided between 1978 and 2011 and concluding that "the key question" is whether the use is transformative, and, if so, whether the amount taken is appropriate to the transformative purpose.

user can give of how and why the material was borrowed, the more likely the use is to be considered transformative.<sup>9</sup>

A final consideration influencing judges' decisions historically has been whether the user acted reasonably and in good faith in light of standards of accepted practice in his or her particular field. Among the eight other communities of practice that established codes of best practices in fair use for themselves between 2005 and 2012, all have benefited from establishing a community understanding of how to employ their fair use rights. Documentary filmmakers, for example, changed business practice in their field; errors-and-omissions insurers, whose insurance is essential to distribution, now accept fair use claims routinely, as a direct result of the creation of such a code. Groups that followed in creating codes include K-12 teachers, open educational resources providers, dance archivists, film and communications scholars, and poets. No community has suffered a legal challenge for creating a code of best practices in fair use. Nor have members of any community with a code been sued successfully for actions taken within its scope.<sup>10</sup>

Exercising fair use is a right, not an obligation. There will always be situations in which those entitled to employ fair use may forgo use or obtain permission instead; people may, for instance, choose easy licensing or a continued low-friction business relationship over employing their fair use rights. Seeking selected permissions from known, reasonable, and responsive rights holders may be an appropriate risk management strategy for large-scale digitization or web archiving projects, for example, even when the fair use analysis seems favorable. But the choice to seek a license or ask permission should be an informed one.

<sup>9.</sup> Courts also have applied and will continue to apply the fair use doctrine to uses that do not fall neatly into the "transformative" rubric, but are nevertheless important aspects of users' rights. Examples include the transient digital copies that are incidental to valid uses, as well as time- and space-shifting for personal uses.

<sup>10.</sup> Documentary filmmakers won a high-profile dispute with Yoko Ono and EMI records over a parodic use of John Lennon's "Imagine." Fair use experts collaborated with the filmmakers to vet the film, and ultimately prevailed in a precedent-setting order that held the filmmakers had made a fair use of the song. Ono and EMI dropped their suit in light of the court's findings on fair use. See Lennon v. Premise Media, 2008 U.S. Dist. LEXIS 42489 (S.D.N.Y. June 2, 2008).

#### CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES

Some librarians express concern that employing one's fair use rights in good faith may inadvertently make material available for potential misuse by others. But just as they must now—all future users will have to engage in fair use analysis for themselves and in their own context. Libraries should of course be prepared to assist students and others who have questions about how to exercise their own rights with regard to library materials, but the ultimate responsibility will lie with the user, not the library. But—just as they do now—libraries that employ fair use responsibly to make material available to students, to researchers, or even to public view are unlikely to have legal liability for uninvited and inappropriate downstream uses.

Perfect safety and absolute certainty are extremely rare in copyright law, as in many areas of law, and of life. Rather than sit idle until risk is reduced to zero, institutions often employ "risk management," a healthy approach to policy making that seeks to enable important projects to go forward despite inevitable uncertainty by identifying possible risks (legal and otherwise) and reducing them to acceptable levels. This code of best practices should be of great assistance in arriving at rational risk management strategies, as it provides a more accurate picture of the risk (or lack thereof) associated with exercising legitimate fair use rights. Indeed, simply by articulating their consensus on this subject, academic and research librarians have already lowered the risk associated with these activities.<sup>11</sup>

<sup>11.</sup> The law bars statutory damages for unauthorized reproduction of copyrighted works where employees of nonprofit educational institutions or libraries have "reasonable grounds for belief" that their use was fair, even if the court ultimately decides the use was not fair. See 17 U.S.C. 504(c)(2).

# **GENERAL POINTS ABOUT THE PRINCIPLES**

This code of best practices identifies eight sets of common current practices in the use of copyrighted materials in and around academic and research libraries, to which the doctrine of fair use can be applied. It articulates **principles** describing generally how and why fair use applies to each such practice or situation. Each principle is accompanied by a list of considerations that the library community believes should inform or qualify it: **limitations** that should be observed to assure that the case for fair use is strong, and **enhancements** that could further strengthen that case. Please note that enhancements represent what the community believes are additional practices that demonstrate "above and beyond" efforts to add value to existing material or accommodate the interests of other stakeholders; such measures are laudable when they will not cause undue hardship but are not prerequisite to support a strong fair use rationale.

Some of the limitations and suggested enhancements involve the use of technical protection measures (TPMs) to help ensure that material intended for a particular institutional audience is confined to that audience. In some circumstances, the use of TPMs may be a meaningful demonstration of "good faith" on the part of the library in question. However, TPMs come in many varieties; for a library's purposes, less obtrusive ones (password protection or watermarking) may be as or more appropriate than, for example, encryption.

Because, in the opinion of some courts, fair use is sensitive to whether a use is undertaken in good faith, some of the principles include limitations or enhancements that address broader ethical concerns. While issues such as respecting privacy and including proper attribution may seem unrelated to copyright at first, they show good faith and serve the same overarching goals of responsible stewardship of library collections. These values are central to academic and research libraries, of course, but it is worth noting that by doing what comes naturally, libraries are also strengthening their fair use case.

In addition, the code refers at several points to providing copyright holders an opportunity to register concerns or complaints about a library's decision to employ fair use. The library community believes that engaging in such a process should not necessarily lead to automatic removal of content. Rather, it would trigger a conversation between the library and the rights holder, which would inform the institution's decision about whether to remove or maintain the material. Welcoming this interaction with a rights holder shows the library's good faith and provides an opportunity to develop voluntary arrangements that benefit all parties.

The fair use doctrine draws no blanket distinctions among different media or among different formats. Librarians felt strongly that except in narrow, specific instances, all kinds of content (e.g., text, image, audiovisual, music) should be subject to the same principles. Likewise, they did not distinguish generally between uses in various media. So, except as otherwise indicated, a digital copy should be considered on the same footing as an analog one for purposes of fair use.

The situations below concern the fair use of copyrighted materials, not the way the user acquires the copy from which she works. When a user's copy was obtained illegally or in bad faith, that fact may negatively affect fair use analysis; similarly, special contractual restrictions (such as conditions on the use of donated material) may circumscribe fair use. The principles therefore assume the library or user has obtained a copy in good faith and that it is not subject to conflicting license or contract restrictions.

While the principles address separate situations, in practice these areas are sure to overlap from time to time; some special collections will need digitizing for both scholarly access and preservation, for example, implicating both the third and fourth principles. Libraries should feel free to consult multiple principles to determine the best fair use rationale to apply to their specific situations.

# ONE: SUPPORTING TEACHING AND LEARNING WITH ACCESS TO LIBRARY MATERIALS VIA DIGITAL TECHNOLOGIES

### **DESCRIPTION:**

Academic and research libraries have a long, and largely noncontroversial, history of supporting classroom instruction by providing students with access to reading materials, especially via physical on-site reserves. Teachers, in turn, have depended on libraries to provide this important service. Today, students and teachers alike strongly prefer electronic equivalents (e-reserves for text, streaming for audio and video) to the old-media approaches to course support. Section 110(2) of the Copyright Act provides specific protection for some streaming and other uses, but it does not cover the entire variety of digital uses that are becoming increasingly important to twenty-first-century instruction. Over time, a set of practices has grown up around the related but distinct practice of providing students with physical "course packs," which typically occurs outside the library setting. The following principle is not intended to address that activity, but rather to focus on emerging digital uses in the library context. Fair use will play an important role in making these uses possible.

There are multiple bases on which these library uses can be considered fair ones. These modes of course support occur in a nonprofit educational environment, can be persuasively analogized to activities specifically authorized by Congress in Section 110 of the Copyright Act, may be supported by a "place-shifting" argument,<sup>12</sup> and are susceptible to a compelling transformativeness rationale. Most of the information objects made available to students, in whatever format, are not originally intended for educational use. For example, works intended for consumption as popular entertainment present a case for transformative repurposing when an instructor uses them (or excerpts from them) as the objects of commentary and criticism, or for purposes of illustration. Amounts of material used for online course support should be tailored to the educational purpose, though it will not infrequently be the case that access to the entire work (e.g., an illustrative song in a class on the history of popular music) will be necessary to fulfill the instructor's pedagogical purpose. It is also reasonable for works to be posted repeatedly from semester to semester to the

<sup>12.</sup> Space-shifting is a theory of fair use often employed in the context of new technological uses of media. See, e.g., David Hansen, "Why Can't I Digitize My (Institution's) Library?," *Scholarly Communications @ Duke*, July 27, 2011, http://blogs.library.duke.edu/scholcomm/2011/07/27/why-can't-i-digitize-my-institution's-library.

extent that they are the most appropriate, relevant, and still timely materials for the course.

#### PRINCIPLE:

It is fair use to make appropriately tailored course-related content available to enrolled students via digital networks.

#### LIMITATIONS:

- Closer scrutiny should be applied to uses of content created and marketed primarily for use in courses such as the one at issue (e.g., a textbook, workbook, or anthology designed for the course). Use of more than a brief excerpt from such works on digital networks is unlikely to be transformative and therefore unlikely to be a fair use.
- The availability of materials should be coextensive with the duration of the course or other time-limited use (e.g., a research project) for which they have been made available at an instructor's direction.
- Only eligible students and other qualified persons (e.g., professors' graduate assistants) should have access to materials.
- Materials should be made available only when, and only to the extent that, there is a clear articulable nexus between the instructor's pedagogical purpose and the kind and amount of content involved.
- Libraries should provide instructors with useful information about the nature and the scope of fair use, in order to help them make informed requests.
- When appropriate, the number of students with simultaneous access to online materials may be limited.
- Students should also be given information about their rights and responsibilities regarding their own use of course materials.
- Full attribution, in a form satisfactory to scholars in the field, should be provided for each work included or excerpted.

### ENHANCEMENTS:

- The case for fair use is enhanced when libraries prompt instructors, who are most likely to understand the educational purpose and transformative nature of the use, to indicate briefly in writing why particular material is requested, and why the amount requested is appropriate to that pedagogical purpose. An instructor's justification can be expressed via standardized forms that provide a balanced menu of common or recurring fair use rationales.
- In order to assure the continuing relevance of those materials to course content, libraries should require instructors of recurrently offered courses to review posted materials and make updates as appropriate.

# TWO: USING SELECTIONS FROM COLLECTION MATERIALS TO PUBLICIZE A LIBRARY'S ACTIVITIES, OR TO CREATE PHYSICAL AND VIRTUAL EXHIBITIONS

# **DESCRIPTION:**

Academic and research libraries have always sought publicity of a certain kind—in order to introduce themselves, their services, and their valuable holdings to potential students, scholars, and others, as well as to attract donors of materials and to assure administrators and funders of their fidelity to mission. Just as libraries have chosen in the past to display their holdings through on-site exhibitions, or through in-house publications ranging from simple newsletters to glossy magazines, they now use the Internet as a tool for making themselves known. Library websites have become extremely important modes of access for library patrons, and most temporary physical exhibitions now have permanent virtual counterparts. While the lawfulness of past practices has been widely (and correctly) assumed, the use of new technology adds a new dimension to the issue. The wider audience that online exhibits reach, and the possibility of downstream misuse, could lead librarians to avoid online uses, but in fact these uses can be just as fair as their physical counterparts.

Section 109(c) of the Copyright Act provides a safe harbor for certain on-site exhibits. However, exhibition and related illustrative uses, whether physical or virtual, can also be transformative. They highlight and publicize library collections and stimulate interest in the individual original works of which they are comprised. Exhibits place original works in a new context to convey information and illustrate themes and ideas that can be quite different from those of the single work. Curation, in-line commentary, and juxtaposition add to the transformative nature of exhibits, displays, and other illustrative uses.

# PRINCIPLE:

It is fair use for a library to use appropriate selections from collection materials to increase public awareness and engagement with these collections and to promote new scholarship drawing on them.

# LIMITATIONS:

- Full attribution, in a form satisfactory to scholars in the field, should be provided for each work included or excerpted in an exhibit, to the extent it can be determined with reasonable effort.
- The amount of any particular work used and the format in which it is displayed should be appropriate to the illustrative purpose, i.e., tailored to support the goals of the exhibit or other illustrative project. The use of a work (other than a single image) in its entirety is likely to require a special level of justification. Similarly, larger-scale, high-resolution images should be displayed only when appropriate to the pedagogical or illustrative purpose of the exhibit.
- This principle does not apply to the sale of souvenirs and other nonprint merchandise in connection with an exhibit.

### **ENHANCEMENTS:**

- For publications such as catalogs of exhibitions, the case for fair use will be stronger when the material is offered to the public without charge, or on a cost-recovery basis.
- Where library websites are concerned, fair use claims will be enhanced when libraries take technological steps, reasonable in light of both the nature of the material and of institutional capabilities, to discourage downloading.
- Fair use claims will be further enhanced when libraries provide copyright owners a simple tool for registering objections to use of copyrighted works, such as an e-mail address associated with a full-time employee.

• Fair use arguments will be enhanced when curation is overt and visible rather than implicit—for instance, when commentary is being provided on the illustrative objects, whether by means of express written or spoken commentary by critics or curators, through selection and juxtaposition of works in a larger context, or both. For example, when exhibited works and excerpts are viewable online in isolation from the larger exhibit or display, it may be helpful to use graphical cues or navigational elements to ensure that visitors who find the item via a deep link can perceive and easily move to the larger exhibit of which the item is a part.

# THREE: DIGITIZING TO PRESERVE AT-RISK ITEMS

## **DESCRIPTION:**

Preservation is a core function of academic and research libraries. It involves not only rescuing items from physical decay, but also coping with the rapid pace of change in media formats and reading technologies. Even when libraries retain the originals of preserved items, digital surrogates can spare the original items the wear and tear that access necessarily inflicts. Section 108 of the Copyright Act authorizes some preservation activities, but does not address some of today's most pressing needs: the preemptive preservation of physical materials that have not yet begun to deteriorate but are critically at risk of doing so, and the transfer to new formats of materials whose original formats (such as VHS magnetic tape) are not yet obsolete (as the term is narrowly defined in section 108(c)) but have become increasingly difficult for contemporary users to consult.

The primary purpose of preservation is indubitably beneficial and arguably strongly transformative: ensuring access to aspects of our cultural heritage for future generations, well past the limited term of copyright protection. Furthermore, responsible preservation is a necessary precursor for future scholarly use in a variety of transformative contexts, including criticism, commentary, and teaching. A broader, four-factor analysis further supports digital preservation: Its purpose is non commercial and educational, the amount of the work used is appropriate to the purpose (preserving only parts of works would be unsatisfactory), the nature of the works will in many cases be scholarly nonfiction (although this may be less likely in the case of VHS tapes), and preservation in the absence of a suitable replacement

copy has no negative effect on the potential market of the preserved work (indeed, preserving the work for posterity should have a positive effect, if any). To justify the effort and expense of digital preservation, the works preserved will typically be unique, rare, or, in any event, out-of-commerce, and the library's activities therefore will not be mere substitutes for acquisition of a new digital copy of the work. Works in obscure, near-obsolete formats present access challenges as well as preservation ones, but the same fair use rationales will apply. Works trapped in decaying and increasingly obscure formats will disappear completely without diligent work from librarians to migrate them to usable formats.

#### **PRINCIPLE:**

It is fair use to make digital copies of collection items that are likely to deteriorate, or that exist only in difficult-to-access formats, for purposes of preservation, and to make those copies available as surrogates for fragile or otherwise inaccessible materials.

#### LIMITATIONS:

- Preservation copies should not be made when a fully equivalent digital copy is commercially available at a reasonable cost.
- Libraries should not provide access to or circulate original and preservation copies simultaneously.
- Off-premises access to preservation copies circulated as substitutes for original copies should be limited to authenticated members of a library's patron community, e.g., students, faculty, staff, affiliated scholars, and other accredited users.
- Full attribution, in a form satisfactory to scholars in the field, should be provided for all items made available online, to the extent it can be determined with reasonable effort.

#### **ENHANCEMENTS:**

• Fair use claims will be enhanced when libraries take technological steps to limit further redistribution of digital surrogates, e.g., by streaming audiovisual media, using appropriately lower-resolution versions, or using watermarks on textual materials and images.

• Fair use claims will be further enhanced when libraries provide copyright owners a simple tool for registering objections to use of digital surrogates, such as an e-mail address associated with a full-time employee.

# FOUR: CREATING DIGITAL COLLECTIONS OF ARCHIVAL AND SPECIAL COLLECTIONS MATERIALS

# DESCRIPTION:

Many libraries hold special collections and archives of rare or unusual text and nontext materials (published and unpublished) that do not circulate on the same terms as the general collection. The copyright status of materials in these collections is often unclear. Despite the investments that have been made in acquiring and preserving such collections, they frequently are of limited general utility because they typically can be consulted only on-site, and in some cases using only limited analog research aids. The research value of these collections typically resides not only in the individual items they contain (although such items are often unique in themselves), but also in the unique assemblage or aggregation they represent. Special collections can have a shared provenance or be organized around a key topic, era, or theme. Libraries and their patrons would benefit significantly from digitization and off-site availability of these valuable collections. While institutions must abide by any donor restrictions applicable to their donated collections, and they will inevitably consider practical and political concerns such as maintaining good relations with donor communities, librarians will benefit significantly from knowing their rights under fair use.

Presenting these unique collections as a digital aggregate, especially with commentary, criticism, and other curation, can be highly transformative. Works held in these collections and archives will serve a host of transformative scholarly and educational purposes relative to their typically narrower original purposes. Materials in special collections typically include significant amounts of primary sources and artifacts (correspondence, institutional records, annotated volumes, ephemeral popular entertainment) whose value as historical objects for scholarly research is significantly different from their original purpose. The new value created by aggregating related documents in a single, well-curated collection is also significant. In addition to access for scholarly purposes, digitization facilitates novel

transformative uses of the collection as a whole—see principle seven below regarding digitization for search and other nonconsumptive uses.

## PRINCIPLE:

It is fair use to create digital versions of a library's special collections and archives and to make these versions electronically accessible in appropriate contexts.

### LIMITATIONS:

- Providing access to published works that are available in unused copies on the commercial market at reasonable prices should be undertaken only with careful consideration, if at all. To the extent that the copy of such a work in a particular collection is unique (e.g., contains marginalia or other unique markings or characteristics), access to unique aspects of the copy will be supportable under fair use. The presence of non-unique copies in a special collection can be indicated by descriptive entries without implicating copyright.
- Where digitized special collections are posted online, reasonable steps should be taken to limit access to material likely to contain damaging or sensitive private information.
- Full attribution, in a form satisfactory to scholars in the field, should be provided for all special collection items made available online, to the extent it is reasonably possible to do so.

#### **ENHANCEMENTS:**

- The fair use case will be even stronger where items to be digitized consist largely of works, such as personal photographs, correspondence, or ephemera, whose owners are not exploiting the material commercially and likely could not be located to seek permission for new uses.
- Libraries should consider taking technological steps, reasonable in light of both the nature of the material and of institutional capabilities, to prevent downloading of digital files by users, or else to limit the quality of files to what is appropriate to the use.
- Libraries should also provide copyright owners with a simple tool for registering objections to online use, and respond to such objections promptly.

- Subject to the considerations outlined above, a special collection should be digitized in its entirety, and presented as a cohesive collection whenever possible.
- Adding criticism, commentary, rich metadata, and other additional value and context to the collection will strengthen the fair use case.
- The fair use case will be stronger when the availability of the material is appropriately publicized to scholars in the field and other persons likely to be especially interested.

# FIVE: REPRODUCING MATERIAL FOR USE BY DISABLED STUDENTS, FACULTY, STAFF, AND OTHER APPROPRIATE USERS

## **DESCRIPTION:**

Print-disabled academic and research library patrons require access to readable text in order to function as full members of an academic community; likewise, hearingdisabled patrons require captioned audiovisual materials, while those with physical disabilities may require the electronic delivery of materials outside the library setting. Relatively new electronic technologies make these kinds of accommodations possible at relatively low cost. True accommodation for these patrons means access to any materials in the library's collection for any reason the patron may have (required reading, voluntary study, or recreation), i.e., access that is equivalent to the access afforded to students without disabilities. In addition to moral and mission-related imperatives to serve all patrons, there are also legal obligations to accommodate scholars and researchers with diverse needs. Although Section 121 of the Copyright Act authorizes the reproduction of copyrighted materials to meet these needs under some circumstances, there is continued controversy over its exact scope. Some stakeholders insist, however unreasonably, that Section 121 does not cover academic libraries' efforts to provide accessible materials to print-disabled members of a college or university community. No specific exception to copyright even arguably addresses the needs of patrons with disabilities related to media other than print.

Making library materials accessible serves the goals of copyright, not to mention the goals of a just and inclusive society, and has no negative consequence for rights holders who have not entered the market to serve these users. Such uses add value to a work by making it available to communities that would otherwise be excluded,

presenting the work in a format the rights holder has not provided and to an audience that the rights holder is not serving. Making this material available to disabled patrons, furthermore, should not penalize other potential constituents, for instance, by removing the original copy for the time that the version for the disabled is available.

## PRINCIPLE:

When fully accessible copies are not readily available from commercial sources, it is fair use for a library to (1) reproduce materials in its collection in accessible formats for the disabled upon request, and (2) retain those reproductions for use in meeting subsequent requests from qualified patrons.

## LIMITATIONS:

- Libraries should provide patrons with information about their own rights and responsibilities regarding works provided to them in this way.
- When appropriate (taking into consideration the needs of the disabled patron), the requester's use of the materials should be time-limited by analogy to the limits the library imposes on use by other persons.
- Libraries should coordinate their response to requests with the university's disability services office, or the equivalent, and observe standard conventions on the identification of individuals entitled to service.

### **ENHANCEMENTS:**

- Claims for fair use may well be further reinforced if technological protection measures are applied to assure that limitations on the use of accessible copies are observed.
- The fair use case will be enhanced by programs that are well publicized to the affected communities together with policies that are widely and consistently applied.

# SIX: MAINTAINING THE INTEGRITY OF WORKS DEPOSITED IN INSTITUTIONAL REPOSITORIES

# **DESCRIPTION:**

Many libraries that serve postsecondary institutions are developing digital institutional repositories (or IRs) that house and provide access to a variety of different kinds of material directly related to their institutions' activities, including scholarship of faculty and graduate students as well as documentation of institutional histories. The collection and maintenance of electronic theses and dissertations (ETDs) is a related issue. Access to ETDs and other material in IRs may be restricted to individuals with institutional affiliations, but many libraries aspire to make their contents available to the general public. Many deposited works quote or incorporate third-party material in ways that represent appropriate fair use by the faculty member or student in question. Librarians can and should respect the integrity of deposited materials that include selections from copyright works incorporated in reliance on fair use.

Use of quotations, still frames, illustrative excerpts, and the like is common practice in scholarly writing, and is at the heart of fair use. Libraries respect the authors' fair use rights when they accept these materials intact into the IR and make them available unchanged to the public. Libraries that operate IRs can and should respect and maintain the integrity of materials they accept for deposit, rather than insisting on unnecessary permissions or requiring unnecessary deletions. Fair use makes this possible. Many institutions use vendors to host and maintain ETDs and IRs, and libraries should work to ensure that vendors also respect authors' fair use rights.

### PRINCIPLE:

It is fair use for a library to receive material for its institutional repository, and make deposited works publicly available in unredacted form, including items that contain copyrighted material that is included on the basis of fair use.

### LIMITATIONS:

• In the case of publicly accessible IRs, libraries should provide copyright owners outside the institution with a simple tool for registering objections to the use of materials in the IR, and respond to such objections promptly.

- Libraries and their parent institutions should provide depositing authors with useful information about the nature and the scope of fair use, and the proper forms of attribution for incorporated materials, in order to help them make informed uses in their own work. This information should specifically address the fact that fair use is context-specific, and that what is fair use within the academy may not be fair use when a work is more broadly distributed.
- Full attribution, in a form satisfactory to scholars in the field, should be provided for all incorporated third-party materials included in works deposited to the IR, to the extent it is reasonably possible to do so.

### ENHANCEMENTS:

- The fair use case will be stronger when institutions have developed or adopted a clear institutional policy about appropriate use of quotations, illustrations, etc., in faculty and student scholarship.
- Likewise, libraries may consider providing individualized advice on the appropriate use of copyrighted material in scholarship to members of the community upon request.

# SEVEN: CREATING DATABASES TO FACILITATE NON CONSUMPTIVE RESEARCH USES (INCLUDING SEARCH)

### **DESCRIPTION:**

In addition to making specific collection items available to patrons for intensive study, librarians have always played an important role in conducting and supporting scholarship in disciplines that examine trends and changes across broad swaths of information, e.g., information science, linguistics, bibliography, and history of science. Developing indexing systems and finding aids is also a core part of the library mission. Digital technology offers new possibilities where both of these traditional functions are concerned. Libraries can offer scholars digital databases of collection items on which to perform computerized analyses, and they themselves can employ such databases to develop new and powerful reference tools. Because they do not involve ordinary reading or viewing of the processed works, these uses are often referred to as nonconsumptive.

Nonconsumptive uses are highly transformative. Digitizing and indexing works for purposes such as statistical meta-analysis and search creates a powerful new scholarly resource that is not at all a mere substitute for the original work. The analyses facilitated by scanning for nonconsumptive use do not use the works for their original intended purposes; no person ever "reads" the underlying work or works. Instead, this kind of analysis focuses on the underlying facts about a collection of works (how many times a word appears across an author's body of work, how frequently scientists used a particular species of mouse as test subject, and so on) rather than the protected expression of any single work. Courts have found search engines, which copy millions of web pages into their indexed databases in order to help users find relevant sites, to be fair uses for precisely this reason.

Nonconsumptive uses are an emerging phenomenon at many libraries, and despite their obvious transformative character, there is a risk that the opportunity to make use of these techniques will be lost due to overly restrictive licensing provisions. If librarians agree to licensing restrictions that prohibit such uses, they lose their ability to exercise or permit others to exercise their fair use rights. Librarians should be mindful of this as they negotiate license agreements and should work to preserve their patrons' rights to conduct nonconsumptive research across licensed database materials.

#### PRINCIPLE:

It is fair use for libraries to develop and facilitate the development of digital databases of collection items to enable nonconsumptive analysis across the collection for both scholarly and reference purposes.

#### LIMITATION:

• Items in copyright digitized for nonconsumptive uses should not be employed in other ways (e.g., to provide digital access for ordinary reading) without independent justification, either by a license from the rights holder or pursuant to a statutory exception. Search access to database materials should be limited to portions appropriate to the nonconsumptive research purpose.

#### **ENHANCEMENTS:**

- The case for fair use will be at its strongest when the database includes information such as rich metadata that augments the research or reference value of its contents.
- Assertions of fair use will be particularly persuasive when libraries cooperate with other institutions to build collective databases that enable more extensive scholarship or reference searching.

# EIGHT: COLLECTING MATERIAL POSTED ON THE WORLD WIDE WEB AND MAKING IT AVAILABLE

### **DESCRIPTION:**

Gathering impressions of ephemeral Internet material such as web pages, online video, and the like is a growth area in academic and research library collectionbuilding, with activities typically focusing on areas in which the institution has an established specialty, or on sites specific to its local area. Such collections represent a unique contribution to knowledge and pose no significant risks for owners of either the sites in question or third-party material to which those sites refer. In the absence of such collections, important information is likely to be lost to scholarship.

Selecting and collecting material from the Internet in this way is highly transformative. The collecting library takes a historical snapshot of a dynamic and ephemeral object and places the collected impression of the site into a new context: a curated historical archive. Material posted to the Internet typically serves a time-limited purpose and targets a distinct network of users, while its libraryheld counterpart will document the site for a wide variety of patrons over time. A scholar perusing a collection of archived web pages on the Free Tibet movement, or examining the evolution of educational information on a communicable disease, seeks and encounters that material for a very different purpose than the creators originally intended. Preserving such work can also be considered strongly transformative in itself, separate from any way that future patrons may access it. Authors of online materials often have a specific objective and a particular audience in mind; libraries that collect this material serve a different and broader purpose and a different and broader network of users. Libraries collect not only for a wide range of purposes today, but also for unanticipated uses by future researchers.

### PRINCIPLE:

It is fair use to create topically based collections of websites and other material from the Internet and to make them available for scholarly use.

### LIMITATIONS:

- Captured material should be represented as it was captured, with appropriate information on mode of harvesting and date.
- To the extent reasonably possible, the legal proprietors of the sites in question should be identified according to the prevailing conventions of attribution.
- Libraries should provide copyright owners with a simple tool for registering objections to making items from such a collection available online, and respond to such objections promptly.

#### **ENHANCEMENTS:**

- Claims of fair use relating to material posted with "bot exclusion" headers to ward off automatic harvesting may be stronger when the institution has adopted and follows a consistent policy on this issue, taking into account the possible rationales for collecting Internet material and the nature of the material in question.
- The more comprehensive a collection of web impressions in a given topic area is, the more persuasively the inclusion of any given item can be characterized as fair use.

For more information, consult arl.org/fairuse centerforsocialmedia.org/libraries pijip.wcl.edu/libraries

# COORDINATING ORGANIZATIONS:

The Association of Research Libraries (ARL) is a nonprofit organization of 126 research libraries at comprehensive, research-extensive institutions in the U.S. and Canada that share similar research missions, aspirations, and achievements. The association's importance and distinction is born from its membership and the nature of the institutions represented. ARL member libraries make up a large portion of the academic and research library marketplace, spending more than \$1 billion every year on library materials.

# The Program on Information Justice and Intellectual Property (PIJIP), co-

founded by Prof. Peter Jaszi, promotes social justice in law governing information dissemination and intellectual property through research, scholarship, public events, advocacy, and provision of legal and consulting services. The program is a project of the Washington College of Law at American University in Washington, D.C.

**The Center for Social Media** (CSM), founded and led by Prof. Patricia Aufderheide, has run the Fair Use and Free Speech project in coordination with PIJIP and Prof. Jaszi since 2004. The center is a project of the School of Communication at American University in Washington, D.C.

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Special thanks to Carrie Russell and Kara Malenfant for their help with outreach to the librarian community; to Jonathan Band, Sharon Farb, and Peter Hirtle for their conscientious counsel; and to all the librarians and library directors who gave so generously of their time and insight in interviews and discussion sessions over the last two years.

### FUNDING:

Supported by a grant from The Andrew W. Mellon Foundation

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#### **FUNDING**

Supported by a grant from The Andrew W. Mellon Foundation

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