

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.

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 The protection is available to both published and unpublished works.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

COPYRIGHT TERM

Works registered or first published in the US:

- Created before 1923
 - in the public domain
- Created after 1923
 - may need to seek permission to use the image

Works never published or registered:

- Life of the artist + 70 years (or 95 years for corporate authors)
- 120 years from the date of creation applies when
 - works are anonymous
 - the death date of the artist is unknown

Additional factors considered in the length of the copyright term:

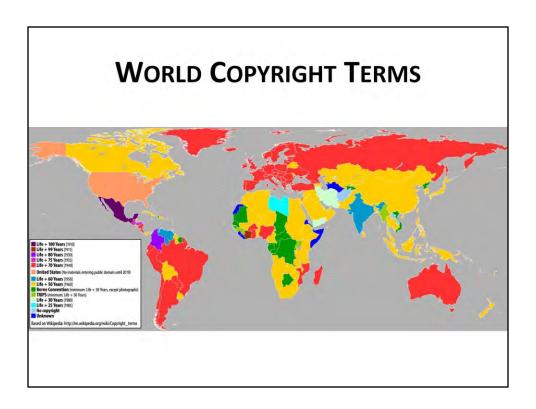
- 1. Type of work
- Whether the work has been published or not
- 3. Whether the work was created by an individual or corporation
- 4. Country of origination

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

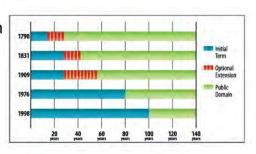


Here you can see a visual representation of the copyright term lengths throughout the world.

http://www.publicdomainday.org/sites/www.publicdomainday.eu/files/World_copyright-terms.jpg

PUBLIC DOMAIN

- · Works in the public domain include those:
 - not covered by copyright
 - copyright has expired
 - copyright has been forfeited
- 1998 US Term Extension
- 1998 DMCA
- 2002 TEACH Act
- Public Domain Day



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. *None of these works will enter the public domain until 2019*. The already diminished public domain has been frozen in time.

1998 - The Digital Millennium Copyright Act (DMCA):

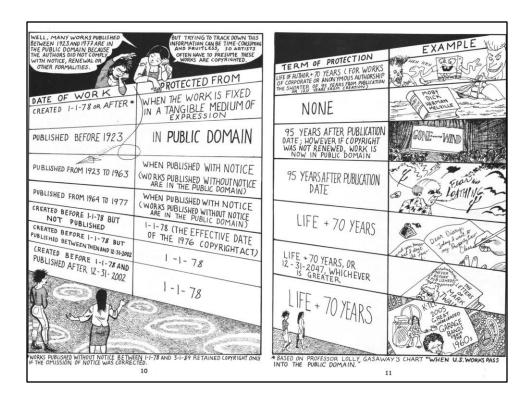
Liability exemptions for Internet service providers in cases of user infringement.

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



Share — Remix — Reuse

A non-profit organization devoted to expanding the range of creative works available for others to build upon legally and to share.

6 Types of Licenses:

Attribution (CC BY)

@ 0 0 Attribution-ShareAlike (CC BY-SA)

(CC BY-ND)

@ ⊕ ⊕ ⊚ Attribution-NonCommercial-ShareAlike (CC BY-NC-SA)

@ ⊕ ⊕ Attribution-NonCommercial-NoDerivs (CC BY-NC-ND)

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."

Attribution

CC BY

This license lets others distribute, remix, tweak, and build upon your work, even commercially, as long as they credit you for the original creation. This is the most accommodating of licenses offered. Recommended for maximum dissemination and use of licensed materials.

Attribution-ShareAlike

CC BY-SA

This license lets others remix, tweak, and build upon your work even for commercial purposes, as long as they credit you and license their new creations under the identical terms. This license is often compared to "copyleft" free and open source software licenses. All new works based on yours will carry the same license, so any derivatives will also allow commercial use. This is the license used by Wikipedia, and is recommended for materials that would benefit from incorporating content from Wikipedia and similarly licensed projects.

Attribution-NoDerivs

CC BY-ND

This license allows for redistribution, commercial and non-commercial, as long as it is passed along unchanged and in whole, with credit to you.

Attribution-NonCommercial

CC BY-NC

This license lets others remix, tweak, and build upon your work non-commercially, and although their new works must also acknowledge you and be non-commercial, they don't have to license their derivative works on the same terms.

Attribution-NonCommercial-ShareAlike

CC BY-NC-SA

This license lets others remix, tweak, and build upon your work non-commercially, as long as they credit you and license their new creations under the identical terms.

Attribution-NonCommercial-NoDerivs

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

THUMBNAILS & FAIR USE

- Association of Art Museum Directors
 - Guidelines on Fair Use of Thumbnail Digital Images (2011)
- Visual Resources Association
 - Statement on the Fair Use of Images for Teaching, Research, and Study (2012)
- Association of Research Libraries
 - Code of Best Practices in Fair Use for Academic and Research Libraries (2012)

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.

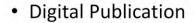
The AAMD guidelines states, succinctly, that the display of thumbnail images of collection works is fair use and museums should not pay licensing fees for the use. The IMA does not pay fees for this use.

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.

COPYRIGHT & DIGITAL APPLICATIONS

- Web
 - Institution's Site
 - Social Media
- Exhibition
 - PR & Marketing
 - Interactives & Apps





Edward Hopper (American, 1882–1967), *Hotel Lobby*, 1943, Indianapolis Museum of Art, William Ray Adams Memorial Collection, 47.4 © Edward Hopper

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)

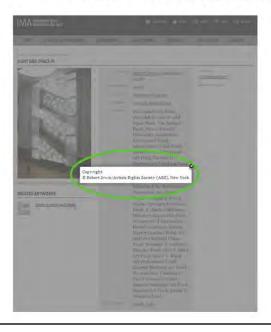
The museum/collection that holds the work in their collection



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.

WEB - INSTITUTION'S SITE



ARS & VAGA represented artists:

Download disabled Copyright notice appears when enlarged.

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.

WEB - INSTITUTION'S SITE

Download from IMA website:

Images are approximately 1600 x 983 pixels (3 x 5 inches) at 300 dpi



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.

WEB - SOCIAL MEDIA

- · Do you consider it fair use?
- · Yes, if you consider:
 - Social media as satellite "branded" institution sites
 - Images are relatively low resolution
 - Inclusion of caption and credit information, including copyright notices where applicable
- Use to Promote:
 - Collections & Exhibitions
 - Programming & Events

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.

WEB - SOCIAL MEDIA



"...you grant us a non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any IP content that you post..."



"...you grant us a non-exclusive, royalty-free, transferable, sublicensable, worldwide license to use, display, reproduce, repin, modify (e.g., re-format), re-arrange, and distribute your User Content on Pinterest..."

Why is use of © 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..

WEB - SOCIAL MEDIA

What Content Can be used on social Media?

- Content for which you hold ©
- Content for which you have explicit permission
- Content in the Public Domain



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.

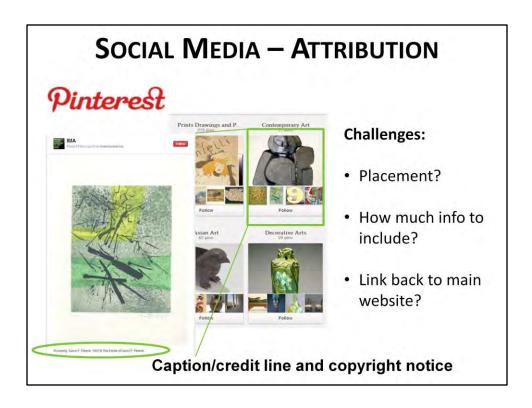
In addition to highlighting current or upcoming exhibitions, works in our collections, or related programing and events, our accounts with Facebook, Instagram, Twitter, and Flickr give us the unique opportunity to show visitors interacting with our artworks.

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





Press/Media:

· Generally free

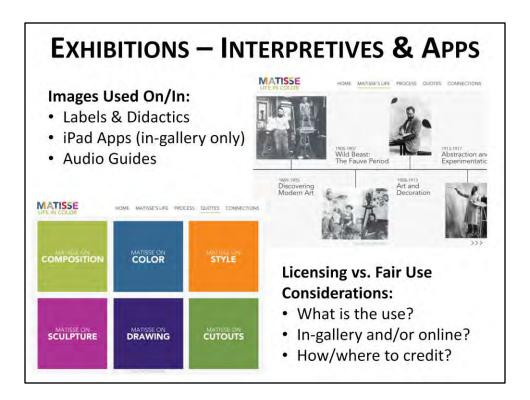
Marketing:

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

Multiple reviewers:

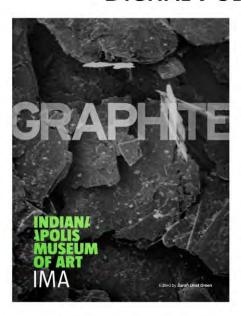
- Organizing institution(s)
- Artist(s) and/or studio(s)
- Rights holder(s)/ representative(s)

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 PUBLICATIONS



- Similar to print, <u>BUT</u>
- Term lengths
- Image & video resolution
- Protection from download
- Format & distribution
- Multiple platforms

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.

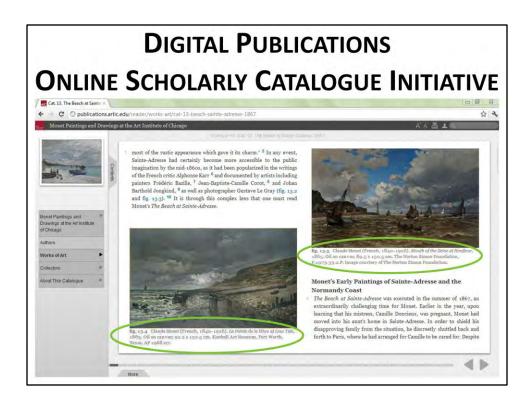
I am happy to say, I was able to get everyone to agree to a 10 year minimum – including licenses from ARS, VAGA, and Art Resource.



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.

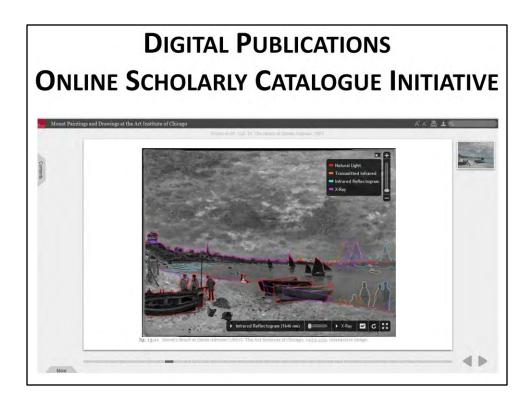
The *Graphite* publication, which is available now as an iBook did present some unique challenges, particularly for the location of the caption/credit/copyright information.

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.



Determining if you need permission, two examples:





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...

PRIVACY — OBTAINING CONSENT Signage informing visitors of filming /

photography in Gallery

Placed in visible location

- Document use
- · Does not cover minors





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.

PRIVACY - MINORS

 When using the likeness of a minor, explicit consent from the parent or legal guardian is
 ALWAYS needed.



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
- Rights & Reproductions for Museum Professionals (RARIN)
- Creative Commons
- · Center for the Study of the Public Domain
- Teaching Copyright





Thank you

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

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 1 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

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."²

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.

^{2 &}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

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

Gretchen Wagner

ARTstor, Gretchen.Wagner@artstor.org

Allan T. Kohl

Minneapolis College of Art and Design, allan_kohl@mcad.edu

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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 (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.

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. 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-

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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 http://www.centerforsocialmedia.org/fair-use/best-practices.

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.²

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.³ 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:

aimed at addressing, or minimizing, the risks associated with these jurisdictional questions.

² 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

³ 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.⁴

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

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⁴ 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.⁵

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 afficionados, curators, and others.⁶

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. 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).

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.⁹ In more recent years, the number of

⁶ 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.

⁵ It is worth noting that uses that facilitate a public good may still be fair uses, even if they are not transformative.

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.

⁸ 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).

⁹Historically, 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.¹⁰

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. ¹¹ 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" (7th ed. 1999). Following that edition, Donald, Beetham, the Manager of Visual Resources at Rutgers, also posted a website listing a number of image vendors. http://www-rci.rutgers.edu/~beetham/newvenz.htm. An updated list of these sources is forthcoming on the VRA website at www.vraweb.org.

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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, www.artstor.org, 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.

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. Across decades of these practices, such teaching materials, primarily 35-millimeter 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. 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.¹⁴

Historically, images were also reproduced in dissertations and theses without obtaining permissions from the copyright owners in such images. Because of the clearly academic, non-commercial 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

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¹² See note 1.

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.

14 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. ¹⁵

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

¹⁵ 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. ¹⁶

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.¹⁷

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

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.

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. 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 these 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

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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 degreegranting 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) http://www.vraweb.org/resources/ipr/dirc/index.html and the Copy Photography Computator http://www.vraweb.org/resources/ipr/computator/index.html, 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 http://www.centerforsocialmedia.org/fair-use/best-practices.

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.

LEGAL ADVISORY COMMITTEE

Robert W. Clarida

Cowan Liebowitz & Latman

Jeffrey P. Cunard

Debevoise & Plimpton LLP

Jackie Ewenstein

Ewenstein & Young LLP

Georgia K. Harper

Scholarly Communications Advisor, The University Libraries, University of Texas at Austin

Virginia Rutledge

PIPE Arts Group

Jule Sigall

Associate General Counsel - Copyright, Microsoft Formerly Associate Register for Policy & International Affairs, U.S. Copyright Office







FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES

JANUARY 2012

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COORDINATORS

Association of Research Libraries

Center for Social Media, School of Communication, American University

Program on Information Justice and Intellectual Property, Washington College of Law, American University

CODE OF	BEST PRAC	TICES IN FAI	R USE FOR A	ACADEMIC A	AND RESEARC	CH LIBRARIES	;

January 2012

INTRODUCTION

The mission of academic and research librarians is to enable teaching, learning, and research.¹ 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.

^{1.} 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 long-form 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.² 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.

^{2.} 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.

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.³

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.

^{3.} 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.⁴

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.⁵ 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.

^{4.} 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.

^{5.} 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. 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. However, we know that

^{6.} See Kenneth Crews, "The Law of Fair Use and the Illusion of Fair-Use Guidelines," 62 *Ohio State Law Journal* 602 (2001).

^{7.} 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. Hathi'Trust, 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.

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:⁸

- 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

^{8.} 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.⁹

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.¹⁰

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.

^{9.} 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.

^{10.} 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).

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.¹¹

^{11.} 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).

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

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.

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, 12 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

^{12.} 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 costrecovery 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 collection-building, 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 library-held 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), cofounded 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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