

Cause for Celebration? Copyright and Scholarship in the Arts
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I want to thank Colum and his colleagues at the Index for inviting me to participate in these important discussions today. I am delighted to join all of you, and do so with the hope that I can bear a bit of good news with respect to that particularly vexing problem of copyright clearances in the context of scholarly publishing in the arts.

I want to start today by talking about Miriam. Not long ago, Miriam received her PhD. As a newly minted art historian, Miriam is seeking to publish an article she recently wrote, which we all know is essential if she is going to have a career as a scholar. She remembers from her recent graduate school days the challenges associated with clearing copyright permissions to reproduce images in her dissertation. She hopes (rather vainly, she suspects) that something has changed since then. She reads the contract with her publisher which, in between all the “whereas” clauses and other legal-ease, makes clear that she must obtain permissions for all third-party copyrighted material incorporated into her article. She knows the publisher is a scholarly press that has no resources to help her with these permissions. So, like her colleagues throughout the field, she begins the process of trying to clear permissions to include the needed images in her article.

But as she starts seeking those permissions, she runs into roadblocks.

In some instances, she cannot identify or locate the copyright owner for a particular work. In other cases, she locates the copyright owner, but is denied permission. Perhaps the artist or estate does not like what she is writing. In other instances, the copyrights in the works she wants to reproduce have expired, but to gain access to the high quality images, she has to seek permissions and pay fees, which adds another layer of complexity and cost. Ultimately, when she hears back from those rights owners who have granted her permissions, she realizes that she will have to pay more than \$10,000 for permissions to publish a small number of images in her scholarly article.

She has heard about this idea of fair use, but when she asks her publisher, she is told to forget about it. The boundaries of the doctrine are unclear to the publisher, and the publisher is unwilling to assume the risks of possible infringement litigation; even if the risks of such a claim being asserted are relatively small, the potential costs associated with such litigation could put the publisher out of business.

Faced with such costs (and with the decision of whether to pay those fees or to buy the used car that she needs to get to work), and faced with the inability to obtain some permissions, she finds herself unable to include all of the desired images in her article. Without the ability to reference some of those images, she finds herself eliminating some of the arguments she has made in her paper. So, at the end of the day, she is unable to express some of her most important points, and while the article proceeds to publication, it is not as compelling as it would have been otherwise.

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I suspect most of us in this room – and in the scholarly community writ large – have heard a story like this. Some of you may have experienced similar challenges firsthand. Indeed, much has been written about the crisis in art history resulting in large part from these copyright clearance requirements and other image reproduction costs.

But copyright clearances are only part of the problem. From my perspective as a lawyer looking at the challenges of reproducing images in scholarly publications, there are really four related, but separate, issues.

The first problem is clearly that of obtaining the needed copyright clearances. We know that this is particularly problematic for several reasons. For starters, images are laden with orphan works, where the copyright owners cannot be reasonably identified or located. In addition, even when copyright owners can be located, we know that there are also relatively few places where permissions can be obtained efficiently. These complexities may be multiplied by the fact that any given image may have multiple copyright clearances associated with it, including the copyright in the underlying work depicted in an image as well as the potential copyright in the photographic work. And then there is the fact that these permission costs may be high enough (either individually or in the aggregate) so as to be rather similar, in effect, to permission being denied outright; the costs may simply be too high given academic salaries.

But copyright clearances are not the only challenge. We also know that clearances are often required to obtain access to the high quality images, even when the works depicted in those photographs are in the public domain and copyright has thus expired (and where the photographs of those works may not be copyrightable). So, obtaining *access* to these high resolution images adds another cost and layer of complexity, putting copyright aside.

The third problem is that the license terms associated with permissions are often not conducive to online publications. Many others have made the argument that art history needs to move online to stay relevant, and I am not going to repeat those arguments here. But what is clear is that many of the license terms for online use, which include licenses for limited terms of duration, and which sometimes limit the size or resolution of images online, are not conducive to online scholarship.

The last but crucial issue related to the current copyright clearance conundrum is the need for change among art historians' perceptions and the perceptions of others in the field. And here I am talking both about art historians' views that scholarship must appear in print form to be of value, as Maureen Whalen and others have suggested, as well as the perceptions that doing the right thing entails clearing permissions in each instance. If we want to make real progress on these issues, those perceptions have to change.

So, I want to talk a bit more about each of these challenges.

Five to six years ago, I would have been skeptical about the possibility that we could make progress on the copyright clearance problems impacting scholarship in the arts. Orphan works legislation, which would have eliminated the need for clearances for those works where the copyright owners of such works could not be reasonably identified or located, had seemed like a

sensible start. But with pushback from a number of sources, including photographers and illustrators, that legislation appeared to die on the vine. In addition, copyright clearance or access costs were continuing to rise, while support for the arts continued to decline. And as art historians found their voice muffled by these clearance problems, they simultaneously peered through the “virtual fence” as billions of images were being reproduced without permissions on the open web.

With the onslaught of information over the Web, this state of affairs has seemed particularly problematic. As images and other information have proliferated so rapidly online, the need for those voices that can help provide greater contextualization and curation – that can help all of us make sense of what we are seeing – has seemed especially pressing. But these are precisely the voices that have been drowned out because of these clearance requirements.

As I said, five to six years ago, I would have been highly pessimistic about the prospects for change with respect to these copyright clearance issues. Yet, in the last five years, things have started to change.

For starters, many museums have begun to address the issue of providing greater access to publication quality images of public domain works in their collections.

In 2007, the Metropolitan Museum of Art approached ARTstor about making publication quality images of works from the Museum’s collections available free of charge for scholarly publications. The Museum had wanted to address the image needs of scholars and recognized that permissions costs were having a very tangible, negative impact on scholarship. But they also needed to recoup their distribution costs in providing those images to scholars. ARTstor was asked to assume the distribution costs, and with some modifications to our technological infrastructure, we were able to support the distribution of such images free of charge, on an open access basis. The Images for Academic Publishing Initiative was subsequently launched with over 6,000 publication-quality images from the Museum.

The Met’s work with Images for Academic Publishing was important in several ways. First, the Museum was obviously a pioneer in recognizing that it could make a dent in the crisis facing the art historical field occasioned by these image costs. But the Met was also a leader in perhaps more subtle ways. For starters, the license crafted by the Met eliminated the distinction between commercial and noncommercial use, rightly recognizing that the boundary between something commercial and noncommercial is so porous in this context as to be meaningless. Instead, it opted for a license based on print runs. Although the permitted print runs were quite limited, this was a very important toe in the water. In addition, the Museum also permitted the use of these high resolution images in commercial and noncommercial websites, on an ongoing basis, which was a key step in trying to facilitate digital scholarship. The Met and ARTstor also worked on the mechanics of the permissions process: by developing a simple online form that users could complete before downloading the image, the time associated with clearing these permissions and obtaining the needed image was reduced from weeks or months to a few minutes.

Fast forward to 2012, and the Images for Academic Publishing Initiative is beginning to blossom. There are now 43,000 images available from nine museums and other institutions, and

ARTstor is in active conversations with many more institutions to make their images accessible via this initiative.

Importantly, this next wave of museums has pushed the ball forward in terms of making publication quality images from their collections more accessible. In addition to allowing use of their images in commercial and noncommercial publications, and in online and analog contexts, most of these museums have now eliminated the print run requirement.

A few museums have liberalized their policies even further. Recently, the Yale Center for British Art, the Los Angeles County Museum of Art, the Walters Art Museum, the Rijksmuseum, and the National Gallery of Art, among others, decided to make high resolution images of public domain works in their collections available on an open access basis, for any use. These are available without permissions and with no fee. A number of other museums are in the process of following suit.

This is remarkable progress within the span of a few years.

At the same time, we are beginning to make progress on other aspects of these clearance problems. For starters, we are seeing assertions among many communities that the rights of copyright owners need to be balanced against the rights of users of copyrighted works. This is entirely correct. After all, we all have rights, but those rights are not absolute. I have a First Amendment right to voice my opinions during this talk (subject to all of you not booing me out of the room). But I can't falsely yell "fire" in this crowded conference hall without potentially getting into legal trouble. And that's because my First Amendment rights are not absolute.

There is no question that copyright – like other constitutionally protected rights – is not absolute. This is clear in the copyright statute, which has a number of express exceptions to the rights granted to copyright owners, including fair use. Moreover, the Supreme Court has made clear that fair use is rooted in the Constitution; indeed, fair use is one means by which the Copyright Clause is reconciled with the First Amendment.

Recognizing that these rights must be balanced, a number of different communities have begun to assert their fair use rights. This began in 2005, with a group of documentary filmmakers. Like art historians, documentary filmmakers faced gatekeepers who required that they obtain permission for all third-party content appearing in their films. And, like art historians, documentary filmmakers were finding that because of these clearance requirements, certain films could not be produced, or certain segments or points could not be made. Working with Peter Jaszi and Patricia Aufderheide of the Center for Social Media at American University, the documentary filmmakers developed a set of fair use best practices, in which they articulated certain uses of copyrighted materials in their documentaries that they felt, as a matter of good practice, should be fair.

The statement was widely acclaimed by many from within their community, and many other associations endorsed the statement. Moreover, while the fair use statement did not have the force of law, it had two very important effects: First, insurers agreed to insure broadcasters against copyright infringement if the fair uses made of third party materials in films fell within

the boundaries of the fair use statement. So broadcasters could permit fair uses of copyrighted material without facing monetary risks. Second, the statement created a different dynamic within the community of documentary filmmakers, who now understood that “doing the right thing” could mean relying on fair use in some instances.

Following the success of the documentary filmmakers’ statement, fair use codes were developed by different communities in a number of different subject areas, including poetry, dance, open courseware, media literacy, and online video, among others.

Recently, the Visual Resources Association developed a fair use statement on the use of images in research and teaching. I was very involved in the development of this statement, most of which was focused on the use of images for teaching and research – which is clearly of interest to art historians, but did not tackle the publishing challenge. However, the Visual Resources Association also concluded – based on the work that it did in understanding the application of fair use in this context and based on community perceptions of best practices – that the use of images in theses or dissertations should fall within fair use, including when those theses and dissertations were *published* through online (commercial or noncommercial) databases. So, the VRA statement tackled a part of this copyright clearance challenge for a subset of scholarly publications.

Shortly after the promulgation of the Visual Resources Association statement, the Association of Research Libraries also issued its own fair use code, working with the American University folks, which focused on the use of copyrighted material – including images – in the educational and library context. Like other communities, the librarians argued that there needed to be space within the educational context for fair use, and that librarians and others needed to – and should – be able to rely robustly on fair use under certain circumstances.

In addition, at around the same time, the Association of American Museum Directors (the key policymaking body for American museums), issued its own fair use statement on the use of thumbnail images. This statement was important for two reasons. First, it explicitly acknowledged museums’ educational mission and thus the mission-driven need to provide broad exposure to the works in their collections. It was also important in that it clearly recognized that museums were in some instances rights holders and in some instances users of others’ copyrighted content. If we are going to make any progress on these copyright issues, we have to recognize that this line between creators and users of copyrighted works is increasingly blurring for all of us, and so it is in all of our interest to find the right balance between copyright and the First Amendment rights inherent in fair use.

While all of these fair use statements have covered very important ground, they by in large have not addressed the fair use of copyrighted images in the context of scholarly publications (with the exception of part of the VRA statement, as I discussed earlier). The exciting news is that the College Art Association is in the process of developing such a statement. I am quite fortunate to be involved in the development of this statement, which is being spearheaded by CAA’s president, Anne Collins Goodyear, along with CAA’s Executive Director, Linda Downs, and CAA’s longstanding counsel (and renowned copyright scholar and partner of the law firm

Deveboise & Plimpton), Jeffrey Cunard. I can give you a brief overview of the CAA project, although we are quite early in the process and much is still being determined.

This statement will likely cover two sets of activities: First, it will address the use of images in scholarly publications. "Publications" is likely to be broadly defined to cover both online and offline publications, and both formal publications as well as the use of images in less formal contexts like blogs and wikis.

The second part of the statement will address the use of images and other third party copyrighted material in the creation of new artistic works, as well as the curation and exhibition of those new artistic works. There has long been tension between these kinds of artistic statements and copyright, but this issue recently came to a boil as a result of a recent litigation in the Southern District of New York (*Cariou v. Prince*, 784 F. Supp.2d 337 (S.D.N.Y. Mar. 2011)), http://scholar.google.com/scholar_case?case=18222445238017802130&q=prince+v.+cariou&hl=en&as_sdt=2,33&as_vis=1, in which the judge's decision raised significant questions about whether artists could reproduce images of existing copyrighted works in new artistic creations, and whether museums and other repositories online and offline could rely on fair use to curate and exhibit those new artistic works.

Work on this fair use statement is now underway. While we are still early in that process, we anticipate that there are likely to be a number of mechanisms for those who have a stake in such a statement to provide feedback along the way.

The development of this statement is undoubtedly ambitious, but given all of the progress made on fair use in recent years within the broader community, I am very hopeful about the prospects for this statement.

With that, I want to convince you that, while important progress is being made on these challenges, it is critical that all of you do your part. I know that sounds like a campaign slogan in an election year. But I want to convince you that if we are going to succeed in addressing these issues, we need to work together as a community to craft the right solution. More than anything, we need to figure out the right balance for our community between copyright and First Amendment rights. We need to arrive at a set of shared norms that embrace reliance upon fair use in some instances, while respecting the rights of copyright owners. In addition, we need to find or develop mechanisms, like those developed by the documentary filmmakers, that allow us to robustly assert fair use in practice. Such progress is critical for all of us who work in, or care about, the arts; afterall, we are talking about the rights of Miriam and all of us to have a voice - and to stay relevant - in the digital age.