



## Programs CAA Fair Use

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### **What is copyright? How is it different from rules against plagiarism?**

Copyright is a limited bundle of rights that the Copyright Act grants to authors of original works, such as novels, plays, essays, works of art, and movies. For a limited time (currently, in the United States, the life of the author plus seventy years, in most cases), copyright gives the author/artist control over who can copy, distribute, publicly perform or display, or create derivative works (such as sequels or translations) based on their work. The purpose of copyright is to encourage the creation and dissemination of new works for the benefit of the public. Copyright is a means to the end of increased access to original works. Copyright provides for exclusive rights that prohibit infringement of these rights. Copyright law, therefore, affords protection that is much broader than the norms against plagiarism. Plagiarism is the presentation of someone else’s work as one’s own; copyright infringement can take place even where the user who infringes the copyright is honest about the work’s true author. Unless your use satisfies one of the exceptions or limitations set out in the Copyright Act, you cannot use someone else’s works that are protected by copyright without permission. Fair use is one of the Copyright Act’s most important limitations to the exclusive rights of a copyright owner.

### **What is fair use?**

Fair use is a provision of the Copyright Act that allows certain uses of copyrighted works, such as making and distributing copies of protected material, without permission. The concept of fair use evolved over time as judges made case-by-case exceptions to copyright to accommodate uses that seemed legitimate and justifiable regardless of the copyright holder’s apparent rights. Typical early fair uses involved criticism, commentary, and uses in an educational or scholarly context. In 1978, after passage of the 1976 revision of the Copyright Act, fair use became part of the text of the act—it’s codified at Section 107. In recent years, fair use has been a valuable way to accommodate innovative new uses that involve technology, such as the VCR, internet search engines, reverse engineering of software, and the like.

As you can see from the text of Section 107, fair use is not a specific exception with clearly defined borders. It continues to evolve as judges consider and apply the four statutory factors to new cases. In every case, however, judges are supposed to consider at least these “four factors”—the purpose of the use, the nature of the work used, the amount and substantiality of the original work used, and the effect on the market for the original, as well as the overall purposes of copyright. In recent decades, however, fair use decisions have placed a strong emphasis on whether a use is “transformative,” a concept first described by Judge Pierre N. Leval in a seminal law review article published in 1990. A recent article by UCLA scholar Neil Netanel concludes that transformativeness has come to dominate fair use decision making in the intervening decades. Courts now also may consider whether a particular use furthers the public interest.

This form of analysis synthesizes the four statutory factors into two key questions:

1. Did you use the work in a different manner or for a different purpose than the original, in Leval’s words: “as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings”?
2. If so, did you use an amount of the original work that is appropriate to your new, transformative purpose?

Illustrative quotations, excerpts, images, and other material used in scholarly writing and teaching can present a very powerful case for transformative use. A recent memo from the US Patent and Trademark Office shows that even copying and distributing entire scholarly articles can be transformative in the right context.

#### **How is fair use different from using Creative Commons (CC) licenses?**

Copyright holders can license their works for whatever specific uses they choose. Creative Commons licensing provides a way for authors to announce publicly that their work is available for certain broad types of uses without granting permission on a case-by-case basis, with certain conditions. Works under a CC license can be used in the ways and on the terms the license specifies. Works licensed under a CC license are also subject to fair use.

#### **How do I know if a work is no longer protected by copyright in the US because it is in the public domain?**

As a general rule, if a work was published in the US before January 1, 1923, it is in the public domain. (Publication has a specific meaning under copyright law but, in general, it refers to a distribution of the work in copies—whether reproductions or not—to the public.) It may also be in the public domain if it was published later; to find out, consult Peter Hirtle’s excellent chart, “Copyright Term and the Public Domain in the United States, at <https://copyright.cornell.edu/resources/publicdomain.cfm>. But note that the chart depends on inputs from other sources, including the records of the US Copyright Office. [These are partially available online](#), but for the pre-January 1, 1978, period, some records must still be searched onsite at the Copyright Office in Washington. [Registration records maintained by the Copyright Office for that period are also available through Google](#). Online public domain calculators that pull data from available sources may soon be available. [One example is the “Durationater”](#).

The law is unsettled as to whether the same analysis applies to works that were first published outside the US. As well, determining the date (or place) of first publication is not always straightforward, especially where works of the visual arts are concerned. Exhibition of a work alone is not publication, but the making and distribution of authorized reproductions may be. The public auction of an art piece also may constitute publication of the work it represents. Where you are unsure as to if and when publication has occurred, it is wise to seek legal advice.

#### **How do I navigate the sea of guidelines and “rules of thumb” for fair use that I find online?**

The only binding authority on the limits of fair use comes from the text of Section 107, where fair use is codified in the law (though the text merely guides judges; it does not bind them), and the court cases applying that text to particular facts. Guidelines like the ones that were created in 1976 separately from the

Copyright Act do not have the force of law and were never intended to serve as outer boundaries that users are legally required to obey. Guidelines that give a numerical boundary, like “no more than 10 percent or 1000 words,” are especially dubious, as courts have expressly abandoned such limits, focusing instead on the interplay of the four statutory factors and the overarching purposes of copyright. Recent cases have found fair use where entire works were used in certain cases, including highly transformative contexts.

It’s also important to look at the individuals and groups who sponsor the various guidelines, FAQs, and websites about fair use as you try to determine how useful or trustworthy they are. This *Code of Best Practices*, based on two years of research and deliberation, was developed based on a consensus of members of the visual arts professions as to what practices would be regarded as fair.

### **Are there any other guidance documents that might be useful to consult along with the Code?**

The Code represents the most comprehensive effort to date to account for a range of visual arts practices in which fair use of third-party copyright materials may be relevant. But, it does not stand alone. There have been several important—indeed pioneering—previous efforts to address the application of fair use in the visual arts. One is the

Visual Resources Association’s 2011 “Statement on the Fair Use of Images for Teaching, Research and Study, by Gretchen Wagner and Allan T. Cole, at <http://online.vrweb.org/vrab/vol38/iss1/5/>. Also from 2011 is the Association of Art Museum Directors’ “Policy on the Use of ‘Thumbnail’ Digital Images in Museum Online Initiatives,” at <https://aamd.org/sites/default/files/document/Thumbnail%20Images%20Policy.pdf>. Each of these documents deals with certain issues also covered by the Code, and states conclusions that are fully consistent with the Code.

Another possible source of information for users of this Code is [the body of best practices documents](#) generated over the last decade by a variety of practice communities in the US. This may be helpful in several different ways. First, particular codes and statements may deal with specific issues that arise in visual arts practice as well as elsewhere—the incorporation of copyrighted video footage in a new documentary, for example, or a specific problem relating to the use of “orphan works.” Second, the previous documents contain many provisions that parallel (and thus reinforce) the consensus positions that this Code articulates, thus suggesting that a cross-disciplinary understanding of best practices in light of fair use may be developing. In this connection, it is interesting to compare this Code with the Association of Research Libraries’ [Code of Best Practices in Fair Use for Academic and Research Libraries](#).

What probably won’t be helpful are shortcuts like simplified fair use worksheets, and rules of thumb like “10 percent,” “400 words,” and so on. In other words, there is no substitute for working through fair use questions yourself, based on reliable advice.

### **Isn’t fair use pretty vague? I need to have clear guidelines, not just for me, but for my staff.**

The law codifying fair use was designed to be broad and flexible, and judges usually understand that. Fair use will apply differently to different users in different situations. That may seem frustrating, but it can also be liberating, especially for communities that have a code of best practices. It means that fair use law, as it evolves, may be responsive to a profession’s norms and conditions. The Code’s principles and limitations are grounded in the particular practices of the visual arts professions and values, and tailored to key practice contexts. So, although fair use determinations need to be made on a case-by-case basis, some cases come up all the time; decisions based on reason can be applied to the same kind of situation ever more quickly as you and your staff become comfortable with the process.

### **Fair use is a “case-by-case” analysis—I can’t make judgment calls all day long!**

Fair use is a case-by-case decision, but people make such decisions in other areas, such as when to exercise their rights of free speech, with such speed and confidence that they don’t even think about it. That is because in those other areas, they understand what is normal and expectable. Codes of best practices, such as the academic and research librarians’ code, and those created by film scholars, communication scholars, and now visual arts scholars, make it much easier to find the normal and expectable.

General policies can certainly be framed in reliance on fair use, when uses are similar in important ways. Digital video recorders may be used to record broadcasts off-air and search engines depend significantly on fair use. Businesses that make use of these don't have to revisit their fair use analysis every time they make a recording or pull up the results of a search.

**What type of risk do I (or does my institution) assume in relying on fair use?**

Although it is true that the boundaries of fair use are not bright lines or clear demarcations, that does not necessarily mean that taking advantage of fair use is unduly “risky.” Indeed, individuals, institutions, and even major corporations rely on fair use every day. If you are coloring within the lines of the case law as you understand it (one take on which is summarized in Appendix A to the Code of Best Practices), and you are not operating outside the established norms in your practice community (articulated in the Code itself), exercising fair use should not put you or your institution at special risk.

By the way, Section 504(c)(2) of the Copyright Act creates a special safe haven for employees of nonprofit educational institutions who act with a good faith belief that they are within their fair use rights, protecting you from paying damages for some uses should you be found wrong. Fair use creates risks for rights holders, too. It is costly to file a lawsuit, and they can't know for sure ahead of time whether your use is fair. Judges have dismissed cases at early stages in the litigation where the fair use case is very strong, and have even forced rights holders to pay defendants' legal fees.

**How much trouble could I or my institution get into for making a good-faith decision on fair use that a judge later decided was wrong?**

Probably not as much as you might think. Of course, we don't know exactly, because there are no recent instances of courts actually ruling against a user in the visual arts community who, in good faith, exercised fair use. But consider the possibilities of punishments for an infringer: injunctions (ordering an infringer to stop immediately); “actual” and “statutory” damages; and awards of attorney's fees. The early-1990s court case between Jeff Koons and Art Rogers resulted in an injunction. But recent developments in the law relating to injunctions in intellectual property cases make it clear that today they are by no means inevitable. It's quite possible that in such a case, the court might instead simply order the payment of damages that would approximate a reasonable licensing fee for use of the work.

Actual damages for infringement by visual arts professionals are likely to be small—in most cases no more than a reasonable licensing fee for the past uses involved—except perhaps where an artist-infringer's work commands high prices. But copyright owners can instead decide to recover “statutory damages” (fines) that fall within a range set out in the Copyright Act. These statutory damages can, technically, run as high as \$150,000 for each work infringed—if the user acted willfully, in disregard of a copyright owner's rights. But, a finding of willfulness isn't likely, except for large-scale commercial piracy, and it is extremely unlikely if there is a good faith exercise of fair use. Statutory damages aren't even available in every case—only where the copyrighted work was registered before or very near in time to the beginning of the infringement. Even then, the award against a good faith use by a scholar, teacher, museum, publisher, etc. could be as little as \$200; such damages will be waived entirely where the use was made in a nonprofit educational or library setting.

Courts can grant attorney's fees to the prevailing party in a copyright case, but only if the copyrighted work was registered around the time when the infringement commenced. When available, attorney's fees are awarded only when the judge exercises his or her discretion to do so; this is unusual in cases where even though the users did not win, they had a strong argument (like fair use) on their side.

**Even if I employ fair use correctly, I could still be challenged, and that would cost my institution a lot even if I'm right.**

Although nothing can guarantee that you will be immune from suit in every situation (nothing for instance stops a party guest suing the host for “slip and fall”), plaintiffs usually are aware that they, too, bear some risk in bringing suit. They could lose and their legal costs could be significant. If you have a strong, good-faith story to tell about why what you are doing is fair (for example, that your use is transformative), that

should be a powerful deterrent to a reasonable rights holder. *The Code of Best Practices* can help you by giving you examples of practices that a consensus of members of the visual arts community have thought to be fair. That statement can also be a deterrent to rights holders, because it tells them that the community of practice has endorsed these norms.

**Fair use is a mere defense, not a right.**

This amounts to a technicality. Yes, if you are actually sued, as a procedural matter, you would raise the issue of fair use as a “defense” to the charge of infringement. This is also true for libel—if you are accused of libeling someone, the fact that what you said was true is your “defense.” All that means is that in some situations, you don’t even need to assert a right unless it is challenged. Even the law says (in Section 107) that any use that is fair is “not an infringement.” It’s that simple.

**What good is a document that doesn’t have buy-in from people who might claim I’m infringing?**

Two things: First, courts may find the Code useful. This Code sets out the best practices of users, which need to be defined by the people who are members of the broader community that engages in those practices. Courts care about what a practice community has to say about its own norms of fairness and best practice. The values of the visual arts profession articulated in the Code carry the authority and authenticity of the entire community, creators and users alike. A negotiation that pitted this community consensus against the interests of other groups with other values could not produce a result with the same kind of authority. Second, negotiated guidelines haven’t worked. Either no consensus could be reached, or the negotiating power of user communities has proved too weak to produce agreements with workable terms.

**What authority does this Code have? Why should anyone pay attention to it?**

This best-practices code is the latest in a series of codes developed by professionals faced with the challenge of interpreting fair use for their particular professional needs. In each case, professional associations conducted a survey of some kind with their constituencies, to determine where the needs for employing fair use occur. Then, they gathered in small discussion groups to discuss recurrent practice scenarios and what uses they regarded as fair in these scenarios. The consensus positions expressed in these discussions were then captured in the final code. Subsequently, a distinguished panel of copyright experts reviewed the code and determined that the principles and limitations it expresses are consistent in light of existing fair use law. By articulating how these uses are fair and legitimate according to their own needs and mission, practice communities send a clear message to judges and gatekeepers. To date, these statements have had a powerful effect on practice in the affected communities.

**We can’t expect much help from the fair use doctrine until we get copyright reform.**

Reform is a long and uncertain process. There is no better way to encourage the best kind of copyright reform for employing fair use than by using the doctrine and making that public.

**What we really need is a “test case” that makes it clear what we can and cannot do.**

Although trends in cases over time provide important clues as to how future cases will be decided, the value of any one test case may be limited. Lawsuits can take an extraordinarily long time to wend their way through courts. They may be argued on the merits, or on something else. Parties may (in fact usually do) settle instead. And most important, if your use differs in a significant way from the “test case,” even a final fair use determination after a well-mounted defense could be of little use to you.

**I’m a creator and copyright holder myself. Is fair use a threat to my copyrights?**

Absolutely not. Fair use is only available in situations where authors/artists do not have a legitimate claim to demand permission or payment. Fair use will allow people to use your work to illustrate a larger trend or idea, to comment on or interpret your work, to teach students about your work and how it fits into the history of the field, or to make a new work that adds value to and is different from yours. It will not let them sell copies of your work without permission, or make any other use that displaces a market you should be able to exploit. Making your works available for these kinds of uses is part of the social bargain inherent in fair use.

**I thought fair use was only for copying small parts of a work, and I often need to make the whole thing available. What then?**

This is another common myth about fair use. Although it's certainly true that one of the four statutory factors asks judges to consider how much of a work is used, that factor is supposed to be balanced against the other three factors and the overall purposes of copyright, and it is not always the case that the less you use, the better. In reality, judges consider whether the amount used is appropriate to a legitimate fair use purpose, and in some cases the use of entire works can still be a fair use. Rather than following arbitrary maximums, or erring on the side of using less, focus on the legitimate purpose and tailor your use to that accordingly.

**If my work is noncommercial, can I claim fair use? And if it isn't, is fair use out for me?**

"Noncommercial" and "commercial" in practice just don't mean much in terms of deciding on fair use. Although the word "noncommercial" is referred to in the law as one possible consideration in considering the context of use, it is just that—one contextualizing consideration, and not a strong one. In fact, most of the important court victories for fair use over the past twenty years have been won by defendants whose activities were unabashedly commercial, including movie studios, popular publishers, and artists who sell their work (sometimes at substantial prices).

Another reason not to rest your fair use case on "noncommercialness" is that there is no agreement on what "commercial" means. Could it mean any use in connection with which consumers are charged a fee or price? Then a nonprofit museum or school would qualify under this definition. Or should it mean activities designed to generate a profit? Or any avoidance of paying a fee—which is to say practically all potential fair uses? People have argued all these things. But, if your decision to exercise fair use is well grounded on other legitimate considerations, especially transformativeness, you won't have to worry about how to define "commercial" at all.

**Do you need to know what the "transformative" purpose of a fair use is when you make it?**

It's generally wise to be able to explain what transformative purpose you had in mind, and to be able to show that the material you used was appropriate to that purpose. It's most effective to know that when you are doing it. But the Code does not say how you should establish or record that knowledge, and that is on purpose. Certainly knowing your transformative purpose can underline your good-faith approach, which can be valuable later. A cautious institution might ask its employees (say, curators or teachers) to keep notes explaining their decisions to use copyrighted material without a license, or even sometimes ask for those justifications in advance of the use. For instance, a publisher might ask an author for the rationale for employing fair use for an illustration. But there are no requirements in the Code about how to do it.

But, in other situations, this kind of deliberation and record keeping may not be consistent with particular practices. In the making of art, for example, sometimes an artist's process may not allow for it. Artists may not always know their intent in advance; the significance may become apparent only later or they may be unwilling to explain their purposes. Artists in this position ought not, for this reason alone, fare worse in a fair use analysis. In those cases, however, artists employing fair use probably should not expect the doctrine to support them as powerfully as it otherwise would.

**The Code refers throughout to "appropriate" use of copyrighted material, to justify fair use. How much is "appropriate," in what situation?**

There are no fixed, bright-line rules about how much is appropriate, which is a strength of the fair use doctrine. The user needs to align choices about how much, or what kind of material, is used with the new purpose behind the use. What is used does not need to be justified as essential or necessary, merely as appropriate (or proportionate). This approach permits the doctrine to fulfill its mission to further the creation of culture without undue harm to copyright holders. For example, a scholar who wants to make a fair use of an image to illustrate a point need not argue that his or her point could not be made otherwise, but only that it can be made better, more clearly, or more fully if the image is provided, or provided at a particular size or quality. To provide another example, if a museum website's goal is to fairly represent the material in the collection, staff may evaluate the appropriateness of using an image that is larger or of higher-resolution than a thumbnail.

In the same way that it is wise to have a rationale for the transformativeness of a fair use, it is wise to have one for the appropriateness of any particular choice of material, and these are, of course, related. It will be helpful to go beyond the argument that more material or more fidelity would be aesthetically pleasing, since frequently the core market serves this function. But, viewer expectations certainly do matter. If, for example, color reproduction is the standard in a particular journal, the author of a particular article probably should not be required to choose black and white in order to claim fair use successfully. Where decisions about how much use is appropriate present close calls, it's good to talk

the question over with colleagues. Just as the vitality of the Code itself depends on the fact that so many members of the visual arts community participated in developing the consensus on which it is based, the quality of decision making in the situations the Code describes can be enhanced by robust and informed discussion.

### **Does the Code help me make a call on fair use in “orphan works”?**

Indirectly, it does, because the logic of fair use is the same for orphan works as for any other copyrighted material. Indeed, it may be even stronger.

“Orphan works” usually is taken to refer to works still in copyright but for which the copyright holder cannot be identified or located. Controversially, some people also use the term to include copyrighted works the owners of which do not respond to permissions requests or other correspondence. Since 1998, when the US extended copyright protection by twenty years, the number of orphan works has increased dramatically, creating growing problems for many individual and institutional users. It acutely affects collections of ephemeral culture.

In the field research on practice, and in small-group discussions, visual arts community members identified orphan works as a pervasive problem. But they didn't believe that the fair use questions raised by orphan works were different from the questions raised by fair use in general. So it is not a stand-alone topic in the Code.

Nonetheless, when visual arts community members wish to use orphan works, they can use the Code to guide their reasoning on fair use. The Principles of the Code with respect to fair use generally apply to orphan works with the same force as they do to anything else. Moreover, because the copyright owner (if one exists) of an orphan work is not exploiting it, and thus not deriving revenue from it, there typically will be no basis on which the owner can claim meaningful market harm. Because of this second point, it is important to carefully document any efforts to identify, locate, and contact the copyright owner.

In some cases, memory institutions, such as libraries, museums, or archives, may want to deal with large numbers of works, in projects where dealing with items on a case-by-case basis is simply not possible. For such situations, consult the [2014 Best Practices in Fair Use of Collections Containing Orphan Works for Libraries, Archives, and Other Memory Institutions](#).

### **Why do I need fair use? Aren't there exemptions from copyright law specifically for various academic and scholarly uses??**

It's true that the law includes specific exceptions that benefit teachers and their students. In particular, Section 110 gives teachers special rights to use some works in the classroom and online without asking permission. These provisions can be extraordinarily helpful where they apply, and they apply in some very important situations. The same is true for preservation work.

They do not cover every situation, however. Indeed, critics have long argued that these specific exceptions are too limited and do not adequately serve the needs of their intended beneficiaries. Fair use is a broad, general, flexible doctrine that can fill important gaps in these specific exceptions, enabling important activities that might fall just beyond the limits of other exceptions.

**I teach art history. Don't I already have an exemption for teaching in the Copyright Act? Why do I need fair use?**

You do, but you may also find you need fair use. For example, the Copyright Act (Section 110[1]) lets teachers show copyrighted images *in the course of instruction in a conventional classroom* without needing to obtain the permission of the copyright owners; in that context and setting, you don't need fair use. Section 110(2) (the "TEACH Act") allows teachers to do the same in virtual classrooms, although it also has some wrinkles that are hard to understand and sometimes difficult to comply with. But both Section 110 provisions apply only to real-time activities *in* the physical or virtual classroom; they

do not permit such uses once you leave the physical or virtual room—for instance, if your students show their remixed work in the hallways, or you put materials on electronic course platforms. Then you need fair use.

**But don't the specific exemptions preempt fair use?**

Not at all. Uses not explicitly covered by other exceptions can still be covered by fair use. Indeed, legislative history shows that Congress specifically intended for fair use to be available to cover "near-miss" cases when it wrote specific exceptions like Section 110(2). Likewise, Section 108(f)(4) makes it clear that fair use is available to complement and supplement the specific exceptions relating to preservation.

**What does "formal instruction" mean in the Code?**

Participants in the small group discussions that formed the basis for the consensus that is reflected in this Code—both educators and noneducators—believed that the educational purpose of the activity is what matters. They thought of formal instruction as including situations where a class meets on multiple, scheduled occasions over a fixed period of time with a defined group of students. Likewise, they regarded fair use as equally applicable to special invited lectures. They also believed some considerations were not relevant, among them: the institutional auspices under which instruction occurs, whether the instructional activity is part of a degree program, whether the learners are "school age" or older, and whether the classes occur in a physical space or a virtual one. The Code leaves some possible future cases unaddressed, including the question of how fair use would or should apply to a large-scale educational enterprise organized in a for-profit enterprise, which might present a different paradigm.

**Does that rule out any use of fair use in informal education?**

No. Some uses in educational environments that do not neatly fit the within-the-core definition of "formal education" could have very strong fair use claims. An example might be a series of videos about art history offered to the public at large through a content-sharing site, offering serious content in accessible formats.

I work with our museum's archives and preservation programs. Doesn't the Copyright Act permit preservation in Section 108? Shouldn't I go by that rather than fair use?

The Copyright Act in Section 108 permits preservation for certain activities in library and archives—but not museums. It also does not permit preservation before the process of degradation has begun (although it would be better to preserve something before it degrades), and it defines "obsolete formats" narrowly. Its limitations on digital preservation also are out of step with good professional practice. This provision doesn't supplant fair use. In fact, Section 108(f)(4) makes it clear that fair use can complement and supplement the specific exceptions.

**Our website is internationally accessible and we distribute publications worldwide. What national law(s) apply to our uses when copyrighted works are made available outside the United States?**

The law is undecided here, even though we would all like certainty. This problem comes up because copyright law is territorial and each country's law only applies to uses of a copyrighted work made within that country. A threshold question in any international use of copyrighted material is "which law applies" to different kinds of uses (online or physical) that cross national boundaries. So far, courts have not resolved many of these so-called "choice of laws" questions. They matter (among other reasons), because, unlike the US, most of the rest of world does not have a "fair use" doctrine. Other nations do have exemptions in their copyright laws, however, but they are different both in scope and in their logic. Some may nonetheless apply

to particular uses that are considered “fair” under US law. One thing seems clear: Whatever the rule is, it can’t be one that routinely subjects individuals and institutions from one country to the laws of large numbers of other countries on a more-or-less routine basis. That would represent a “race to the bottom,” at least where copyright limitations are concerned. While we wait (and it may be a long wait) for a satisfactory overall resolution of the question, following the basic rule of “use the law in the country you are working in,” plus some common sense, seems like a reasonable approach. Certainly, a US-based entity producing material intended for a US audience, but that finds its way into various corners of the

world, can rely on fair use, just as it must otherwise comply with US law. At the same time, a US author can’t necessarily rely on the US law doctrine of fair use to justify using illustrations, without permission, for an article targeted at an international audience, such as an international scholarly journal; a US publisher who enters into a formal copublication agreement with an international firm probably should seek legal advice about how that nation’s copyright law should affect editorial practice; and a US website that deals primarily with, say, the art of a particular Spanish-speaking country, including using materials in Spanish and seeking Spanish visitors, would be reckless not to take that country’s copyright law into account.

### **The Code refers to the “core missions” of museums and their staffs—how is that defined?**

The Code does not seek to establish an overall definition of mission of any specific community or organization. Generally speaking, however, the visual arts community members whose deliberations formed the consensus on which the Code is founded referred to museums’ missions in three dimensions: (1) public-facing museum activities that present visual culture to the general public, through exhibitions, educational programs, publications, online initiatives, and otherwise; (2) museum collection, conservation, and preservation activities that attempt to assure the survival of the record of artistic creativity and responses to it; and (3) the various forms of support that museums provide for advanced study and scholarship. Well-considered uses of copyrighted images, texts, and other works in connection with these kinds of activities are particularly amenable to analysis under the doctrine of fair use.

### **So is anything not in a museum’s “core mission”?**

The Code does not explicitly embrace activities such as merchandising or fundraising as core to a museum’s mission. That said, such activities may actively support that mission, and (in any event) fair use may play a role in them, depending on the situation. Imagine, for instance, a book that results from an educational program, including the author-illustrator’s and children’s impressions of famous twentieth-century artworks, which is sold in the museum shop.

Here, as in general, the Code indicates those kinds of activities that are most likely to qualify; it does not rule out situations in which fair use might apply.

### **My museum has agreements with artists, estates, and other museums. Can we employ fair use in spite of those agreements?**

The terms of the contract control. That is why it is so important to look carefully at contract language.

When an enforceable contract includes language that bars or limits some uses by one party of material controlled by another, the contract supersedes copyright law’s default exceptions, including fair use. A contract need not mention the words “fair use” in order to effectively extinguish the right; it can describe the situation without invoking the phrase. Some agreements, however, may be deemed unenforceable because both parties did not really agree, such as terms of service only accessible through an inconspicuous link at the bottom of a website.

Therefore, the terms of a contract are critical, and it is important to negotiate, when possible, for terms that may be more accommodating of practices that are within fair use. For example, a museum that negotiates a contract to reproduce an artwork on a decorative poster need not, in that agreement, undertake to negotiate licenses for all future uses of that image, or other images controlled by that licensor. One way to avoid giving up fair use rights is to ask for language in a contract stating that contractual restrictions on use will operate except “where the use is authorized by law.”

All this is why the people who will be most affected by these terms—the people directly charged with executing the mission of the institution, including management—need to consider contractual provisions carefully. That is also true of business agents and lawyers.

### **What does the Code mean by “metadata”?**

This term refers to information about a work’s characteristics, as well as about the conditions under which it is being housed. Classically, information of this kind was found in, for example, a library card catalogue. Today, our capacity to enter metadata electronically and associate it with representations of the work itself (image or text) has led to new discussions of the concept. Metadata standards for artworks and other information objects (including textual documents) are in flux, and professionals may apply different standards in different situations. Usually, though, such information is both technical (information on digital location, for example) and descriptive (what is the nature of the work). Where the Code refers to the importance of providing metadata in connection with the use of copyrighted material, it refers to metadata of the descriptive kind—for instance, the artwork’s title, medium, genre, period, date, physical characteristics, location, artist’s name, and so on. Information about any claims of copyright ownership associated with an object generally is not considered to be core metadata, but may nevertheless be helpful to provide where known. For a very readable description of various institutional efforts to standardize metadata in the visual arts, see Murtha Baca, “A Picture Is Worth a Thousand Words: Metadata for Art Objects and Their Visual Surrogates,” at <http://www.columbia.edu/cu/libraries/inside/units/bibcontrol/osmc/MBaca.pdf>.

### **At my museum, we would like to put some of our collection online, so people can see what we are keeping in storage as well as what is on our walls. But we’re not sure if our activities are covered by Principle Five of the Code, which allows institutions with archival and related collectives to “make [these] available online” with certain limitations.**

This principle covers both local electronic access to digitized collections, at the physical site of the collection, and remote access via the World Wide Web. Among other things, it extends certain practices already in use in and around physical reading rooms to virtual reading rooms online. The members of the visual arts community who discussed this situation believed that users who could not travel to the site should not, in effect, be disadvantaged. They also believed that providing online archives represented another level of repurposing. Not only were these materials being offered for purposes of study rather than for their own inherent characteristics alone, but they were being offered to a large and significant new audience, made up of interested members of the general public.

### **Could I be held responsible if a user makes an unlawful use of a work that I included on my website under fair use? Do I have any “secondary liability” from someone else’s use?**

Generally, the law holds individuals responsible only for their own acts and the acts of those they control or are in active cooperation with. Under certain circumstances, however, an individual or entity can be held legally responsible for copyright infringements committed by someone else. Thus, if the president of a company ordered an employee to copy a protected image, the executive might have so-called “vicarious liability,” and if the operator of a print shop knowingly printed infringing books for a customer, “contributory liability” might apply. If a nightclub owner booked bands for the venue and encouraged them to play unlicensed arrangements, “inducement liability” could result. But in all these examples, direct infringement itself can be proved, and the same exceptions and limitations, such as fair use, apply. Thus, for example, a scholar and publisher who made fair use of an image for a monograph on the work being illustrated should not have any infringement liability if a purchaser of the book scanned the image and sold posters generated from the scan. That is because those who are legitimately exercising fair use have no control over or specific knowledge of the infringing use by the book’s purchaser. If use of the image is fair because it is new or transformative, bad behavior by others doesn’t change anything for the user—even if that user had some awareness that such behavior was possible.

Legal experts disagree about one particular situation where secondary liability might apply to uses in the visual arts community. What would happen, for example, if a museum put copyrighted materials on its website, on the basis of fair use, but then became actively aware that those materials were being widely reproduced and sold by different businesses who downloaded them from the website? Some believe that

secondary liability might apply to the museum in that situation; others do not. For most visual arts professionals in most situations, though, secondary liability is not an issue.

**Can I use fair use to avoid so called “permissions fees” or “access fees” a museum charges me for giving me a copy of the work?**

The Code notes: “Sometimes, however, permission must be sought simply because a ‘sole source’ controls an art object or reproductions thereof—even where the work itself is in the public domain. Because demands for permission fees in this context are not based on copyright, fair use cannot be invoked to avoid paying such fees.”

Basically, fair use lets you use copyrighted material without licensing it. But the kinds of access fees referred to in the quoted passage are not paid in exchange for copyright licenses, however they may be described. Access fees are charged simply because someone has control over a work or a copy of a work (such as a slide or a digital image)— even if the work itself is in the public domain—and therefore may charge you for providing a copy or for the privileging of reproducing it. If you need access to that image and need to make that reproduction, fair use won’t help because your rights are controlled by the terms set out in the license agreement.

Of course, a collection may have a legitimate reason for charging something for the work. If the object has never been photographed, for example, the institution may believe that the user should share the costs of initial documentation. In other circumstances, if finding the work requires a large amount of staff time, the institution may also have a reason to charge the user.

**Is fair use only applicable to non-commercial uses?**

Fair use is applicable whether the use is commercial or non-commercial. That fact is very well established in law. Recently, the appeals court decision supporting Google Books’ use of copyrighted books as fair use explicitly says, “Google’s profit motivation does not in these circumstances [that is, Google’s transformative use of the information] justify denial of fair use.” The same would be true when an otherwise qualifying fair use occurred in the setting of a print publication offered for sale.

This is not a new or novel proposition. In fact, for the last 175 years, almost all of the creators who successfully asserted fair use have been engaged in commerce, in a big or small way. That’s because, under the prevailing definition copyright law, most things that we do in our professional lives (write, make art, publish books) are “commercial.” If money will or may change hands, that’s enough – even if the transaction is done without the expectation of profit. So treating commerciality as a knock-out factor would be the death knell of a meaningful fair use doctrine.

It is true that the non-commercial character of a use may be one feature that can add to a fair use claim. But it is not a particularly important one. Likewise, the size of the print run generally is not a relevant consideration in assessing the validity of fair use. The key to fair use is making sure your use is “transformative,” that is, using the material for a different purpose than the market purpose.

There’s more about this at pages 15-16 of the Code.

**Is the Code only applicable to the so-called fine arts? What about artists working in design or photography?**

The Code is carefully crafted to provide a reasoning framework in five common situations in the visual arts: analytic writing, teaching, making art, museum work, and archive/collections digital display. Any artist, teacher, writer, or curator can apply the Code’s fair use reasoning if they are engaged in one (or several) of these activities. So can students in the field, and so can independent visual arts professionals, and even amateurs. Many of the activities that graphic designers and photographers engage in give rise to the same

copyright questions that confront other visual arts professionals. Sometimes, however, their work may involve other issues—trademark questions, for example, contractual disputes, that fall outside the scope of the Code. The important point is that fair use is for everyone, not just for a privileged few.

**What if rights holders or brokers such as ARS and VAGA don't accept my fair use claim?**

In the first instance, of course, what is (or isn't) fair use is for the user to decide. Rights holders and their agents don't have the last word (or any word) on this determination. And, at least so far, they haven't chosen to make a case of any situation in which a user proceeded without license. If your uses are made within the terms of the Code, and you are able to explain how that is true, you have such a solid argument for fair use that rights holders will be in deep peril of wasting their money and time by bringing any legal action. That doesn't mean that "nastygrams"—letters demanding payment or expressing outrage and issuing threats of legal action—couldn't be sent. People are free to write whatever they want in letters, even if it is not true.

You may decide, of course, not to employ fair use if you think rights holders may see it as an unfriendly act, and decide not to like you any more. Personal relationships matter in any field.

But if a rights holder threatens action in an unrelated area—for instance, threatening to withhold access to an artist for a later project, or to raise fees for an unrelated work to cover the lost license—you might want to document it. This might be an illegal act on their part.

**How big can images get under fair use on a website? We used to have the pixel sizes that AAMD prescribed, but they have retired those, and currently refer us to the Code. But the Code has no specifics on that.**

The Code offers no specific recommendations on image size for any purpose, and that is a deliberate choice. The heart of fair use is repurposing material and using what is appropriate for that new purpose. Therefore, individual visual arts professionals need to ask themselves what size is appropriate for any image used to accomplish their objectives. The question always is the same: what amount is (or what reproduction quality) is reasonable. And the answer to this question will always vary according to circumstance. The requirements of a scholarly monograph, for example, may be different from those of a local art blog. No one wants a document that provides a reasoning framework across fields to offer numerical prescriptions. That would not only be hazardous legally (uses have to be appropriate to the specific transformative purpose), but would run the risk of being sadly and quickly outdated, given the fast pace of digital change.

The decision of the AAMD to withdraw its 2011 recommendations on the size of "thumbnails" is an illustration of this fact. Only a few years ago, this was a pioneering document, but as visual arts professionals have become more familiar with fair use, and both practices and expectations around the use of images to support discourse (especially on-line) changed, what had once offered freedom came quickly to feel like a straitjacket.

Of course, institutions may still choose to adopt rules of thumb on image size for internal use, to simplify day-to-day decision-making. But these always should yield to case-by-case consideration when they stand in the way of completing worthwhile projects.

**I don't understand how to employ fair use when I have to get an image from a museum or archive. Often, they will want to charge me a fee just to obtain that reproduction.**

Yes, if you need someone's permission to get access to material you need, you can't rely on fair use to get it. As a practical matter, fair use only can be employed by someone who already has independent access to the same or similar documentation. The flip side of this proposition, of course, is that if you can find appropriate documentation from another source, you don't have to pay reproduction or access fees to the collection that holds the original. Reproduction and access fees are common; many collections still use them

to cover the costs of serving you. Sometimes people confuse these with copyright licenses, but it should be clear in the contract what exactly you're paying for. Increasingly, public museums are posting images, particularly of works in the public domain, to digital platforms. Their goal is to increase public access and limit the amount of work their own staffs have to do.

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