


Code of Best Practices in Fair Use for the Visual Arts

COLLEGE ART ASSOCIATION

Funded by the Andrew W. Mellon Foundation
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MESSAGE FROM THE CAA PRESIDENT

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

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

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

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

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

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Introduction

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

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

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

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

from fair use when it enables enhanced access to archival materials. These are only some of the most common ways in which fair use is central to visual arts practice.

WHY THE CODE?

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

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

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

WHEN THE CODE DOES AND DOES NOT APPLY

Fair use is part of US copyright law, and the Code applies to the activities of members of the visual arts community who use copyrighted works in the US in furtherance of their professional goals. The Code applies to any copyrighted work used in the United States regardless of whether the work originated outside the United States. The Code does not apply to reproductions, distributions,

performances, and other uses outside the United States, including web-based uses specifically targeted toward other countries, to which those countries' laws may apply.

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

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

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

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

APPLYING THE CODE

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

Likewise, the Code refers users to generally applicable professional standards, which, in turn, may evolve over time. This is the case, for example, where it invokes the concept of “appropriate metadata” (which might include information

about the title, artist, date, medium, provenance, current location, ownership, and other characteristics of a work), the meaning of which may differ according to context.

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

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

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

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

ONE: ANALYTIC WRITING

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

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

Limitations

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

where there is a heightened risk that reproductions may function as substitutes for the originals.

- Reproductions of works should represent the original works as accurately as can be achieved under the circumstances.
- The writing should provide attribution of the original work as is customary in the field, to the extent possible.

TWO: TEACHING ABOUT ART

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

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

Limitations

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

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

THREE: MAKING ART

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

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

Limitations

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

FOUR: MUSEUM USES

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

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

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

Limitations

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

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

FIVE: ONLINE ACCESS TO RELATED COLLECTIONS IN MEMORY INSTITUTIONS

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

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

Limitations

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

Appendix A: Fair Use Today*

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

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

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

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

[†] § 107. Limitations on exclusive rights: Fair use

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

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

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

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

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

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

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

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

Note that although the factors are often viewed as representing the four corners of fair use analysis, the list is made explicitly nonexclusive; thus, courts can and (from time to time) do take other considerations into account, including the “public interest,” in allowing the use under consideration to go forward. This may be of particular relevance to educational users and those associated with memory institutions, who can marshal strong arguments about the social utility of their activities.

that use; where visual imagery is concerned, use of an entire work often will qualify, as in *Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18 (1st Cir. 2000).

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

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

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

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

In general, there has never been as strong a general judicial consensus about the nature of the fair use doctrine as the one that exists today. In making fair use decisions about issues such as those that confront the visual arts community, judges

today generally focus, in effect, on two key analytic questions:

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

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

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

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

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

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

Appendix B: How The Code Was Created

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

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

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

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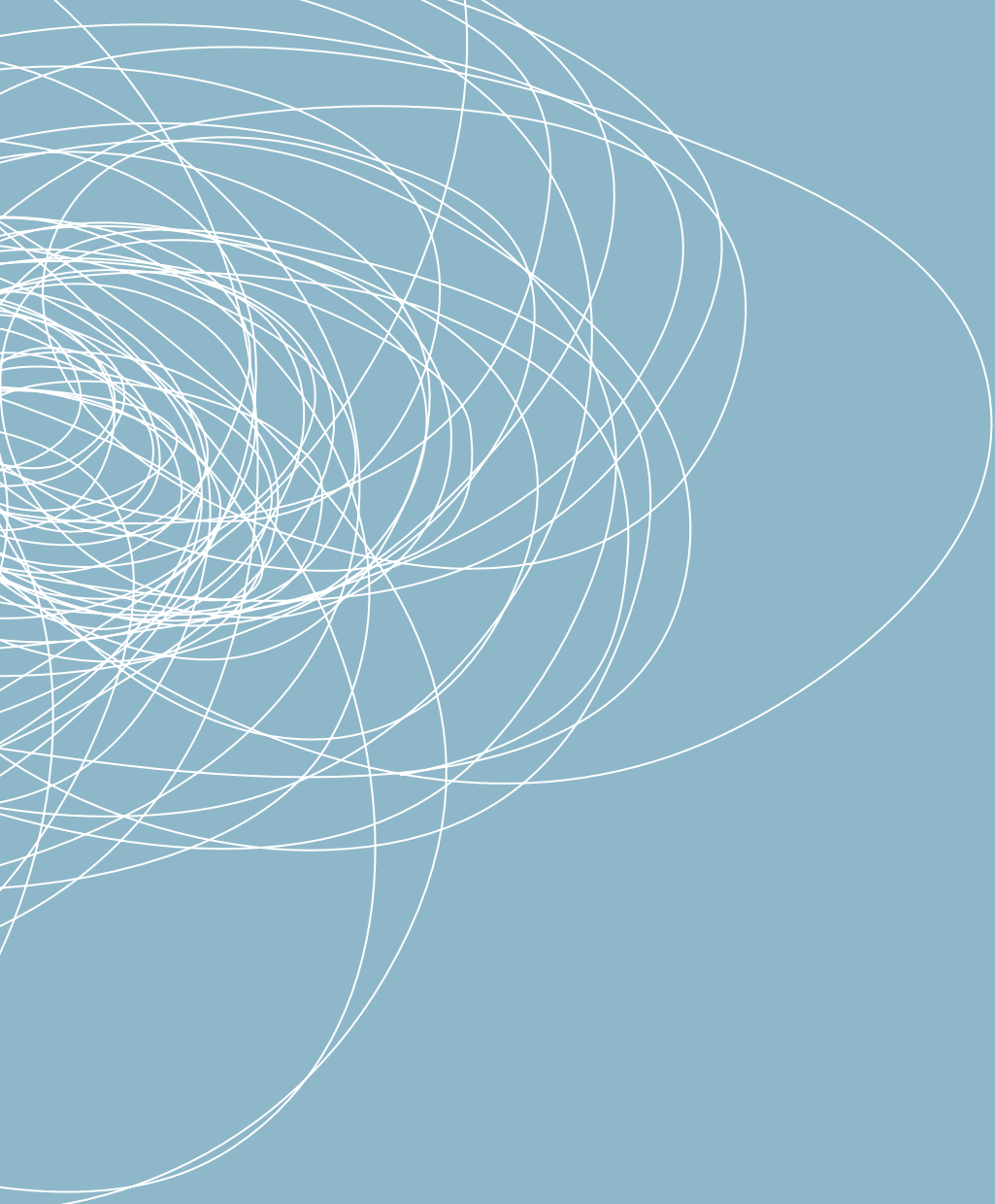
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