

Copyright, Permissions, and Fair Use among Visual Artists and the Academic and Museum Visual Arts Communities

An Issues Report

A REPORT TO THE COLLEGE ART ASSOCIATION

By

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**Copyright, Permissions, and Fair Use among Visual Artists and the Academic and
Museum Visual Arts Communities:**

An Open Letter from the College Art Association

February 2014

In the fall of 2012, motivated by concerns about how the actual and perceived limitations of copyright can inhibit the creation and publication of new work in visual arts communities, particularly in the digital era, the College Art Association commenced a four-phase project to develop and disseminate a Code of Best Practices for Fair Use in the Creation and Curation of Artworks and Scholarly Publishing in the Visual Arts. Supported by generous preliminary funding from the Samuel H. Kress Foundation and a major grant from the Andrew W. Mellon Foundation, CAA engaged Patricia Aufderheide and Peter Jaszi, professors of communications and law, respectively, at American University, both to research the challenges confronting artists, scholars, and curators who seek to use third-party copyrighted material and to assist CAA in developing a code of best practices for fair use.

Professors Aufderheide and Jaszi, with graduate fellows Bryan Bello and Tijana Milosevic, have drafted the attached issues report, which is the culmination of the first phase of this project. Based on interviews with one hundred visual arts professionals and a survey of CAA members, the report documents current practices and attitudes among visual arts practitioners (including artists, scholars, editors, and curators) regarding copyright and fair use.

We are grateful for the assistance of the CAA Task Force on Fair Use, the project advisors, the CAA Committee on Intellectual Property, and the Community Practices Advisory Committee, the last comprising prominent members of the visual arts community, who read earlier drafts of the report. A list of participants is included in Appendix C.

Building on the report, CAA will move ahead with the remaining three phases of the project. In 2014, during Phase 2, in five cities nationwide, CAA will host small group discussions among visual arts professionals, guided by Aufderheide and Jaszi, to ascertain where there is consensus with respect to fair use in particular cases. In 2015, during Phase 3, that consensus will be synthesized into a draft code of best practices, which will also be reviewed by a legal advisory committee. The code will be presented to CAA's Board of Directors for adoption. In the project's final phase, the code will be disseminated widely in the field. CAA hopes that the final document will be adopted by its affiliated societies and other related organizations and institutions.

Developing a code of best practices for fair use will, we hope, reduce some of the present uncertainties surrounding fair use, and facilitate creativity and scholarship. CAA also hopes

that the process of researching and documenting practices with respect to fair use will foster a constructive dialogue among artists, curators, and scholars, many of whom both own and use copyrighted works.

On behalf of the many CAA members who have devoted their time and expertise to shaping this phase of the project, and with enormous gratitude to Professors Aufderheide and Jaszi, we are pleased to be able to share their issues report.

Sincerely,

Anne Collins Goodyear
President

Linda Downs
Executive Director and CEO



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KEY FINDINGS

Visual artists and other visual arts professionals, a term used in this report to include (among others) art historians, educators, professors, editors or publishers, museum professionals, and gallerists, share a common problem in creating and circulating their work: confusion and misunderstanding of the nature of copyright law and the availability of fair use—the limited right to reuse copyrighted material without permission or payment.

- Fair use is flexible, available, and even core to the missions of many visual arts activities.
- Members of the visual arts communities typically overestimate the risk of employing fair use, which leads them to avoid it, even in circumstances where the law permits and so doing would not harm personal relationships necessary for their work.
- They pay a high price for copyright confusion and misunderstanding. Their work is constrained and censored, most powerfully by themselves, because of that confusion and the resulting fear and anxiety.
- The highest cost is scholarship left undone, knowledge not preserved for the next generation, creative use of digital opportunities truncated—the “missing future.”
- Although all members of the visual arts communities of practice share these problems, artists are more likely to use copyrighted material without licensing it, and less likely to abandon or avoid projects because of copyright frustrations.
- There is widespread and often urgent interest within the visual arts communities of practice in finding ways to address a prevalent “permissions culture.”

KEY FACTS AND FIGURES

What is at stake in the field’s uncertainty about fair use? Facts and figures tell the story:

- one-third of visual artists and visual arts professionals have avoided or abandoned work in their field because of copyright concerns
 - one-fifth of artists
 - more than one-half of editors and publishers
 - more than one-third of art historians
- examples of thwarted missions in the visual arts include
 - art historians and editors who avoid modern-era art history, overviews of an artistic movement, and digital scholarship
 - museums that are stalled in developing digital access to their works
 - curators who avoid group exhibitions, controversial exhibitions, and exhibitions where copyright permissions make cost prohibitive
 - artists who avoid collage, pop-culture critiques, digital experiments, and multimedia

- art historians who are thwarted by copyright holders who make use of copyright to stop the publication of unwelcome critiques
- costs are high, both in dollar figures and staff time
 - permissions costs for scholarly publishing, which can run to \$20,000 per book, with costs carried by the author
 - costs for image access fees, sometimes understood as copyright based, which can rival permissions costs
 - staff resources—at publishers, museums, archives, and educational institutions—that are dedicated solely to managing permissions processes

EXECUTIVE SUMMARY

The visual arts communities of practice share a common problem in their confusion about and misunderstanding of the nature of copyright law and the availability of fair use. Their work is constrained and censored, most powerfully by themselves, because of that confusion and the resulting fear and anxiety. More and better work can be done through a fuller understanding of copyright, without impairing the ability of artists and art historians to receive credit for, maintain appropriate control over, and monetize their work.

The visual arts field is pervaded with a “permissions culture,” the widespread acceptance that all new uses of copyrighted material must be expressly authorized. This assumption has taken its toll on practice in every area of the visual arts field, adversely affecting the work of art historians, museums, publishers, and artists. As digital opportunities emerge, old frustrations with this permissions culture have taken on a new urgency.

The permissions culture is expensive in terms of both money and time, but artists and other professionals in this field rarely embrace the copyright doctrine of fair use: the right, under certain circumstances, to use copyrighted material without permission. Sometimes fair use is not a practical option—when, for instance, a rights holder has access to the only material available at the required quality and can dictate terms of use accordingly. But often it is. Still, members of the visual arts communities of practice tend to avoid it. This is in spite of the fact that judicial interpretation of fair use today consistently favors new uses with “transformative” purposes, such as commentary, scholarship, and self-expression. The reasons why visual arts professionals ignore fair use include:

- an exaggerated assessment of risk, because of a lack of clarity around interpretation of fair use, lack of copyright knowledge generally, and excessive fear of litigation
- the importance attached to maintaining good relationships with individuals and entities who hold, or claim, rights
- a determination to honor artistic creativity, the generative force for the entire field

The latter two reasons reflect, in part, tightly interconnected relationships in the visual arts field, and the fact that many professionals play multiple roles. Seeking permission has been seen as the safe, respectful, and—sometimes—unavoidable option where a wide range of uses within the visual arts communities of practice are concerned.

But many in the field need to access copyrighted work without permission in order to accomplish their professional missions. Interviews and survey data show that visual arts professionals hold contradictory views on the topic of copyright permissions culture. They simultaneously believe that the unlicensed use of copyrighted material can be critical to performing their creative or scholarly work and, at the same time, that permissions are uniformly required for any use that may attract public attention. They often lack the

vocabulary to articulate why and when reliance on fair use, designed to facilitate new creativity, is appropriate. Without such a vocabulary, they often default to permissions.

Many visual artists and visual arts professionals are attempting to address aspects of the permissions paradox by creating open resources that make material they themselves control more widely available. Resources such as Creative Commons and open access have many benefits but are, sadly, of no use in the prevalent situation of repurposing copyrighted work that has not been licensed. In the absence of confidence regarding how to take advantage of the right of fair use, professionals cope by overspending on permissions; delaying projects for months, years, or even decades to negotiate permissions; compromising projects by doing without important material; and even abandoning some projects altogether.

Members of the visual arts communities of practice encounter copyright permissions issues in connection with virtually every aspect of fulfilling their professional responsibilities—ranging from an artist’s creation of work that references popular culture to an art historian’s focus on a contemporary artist, to a teacher’s compilation of curriculum materials, to a museum exhibition and catalogue, to scholarly and art publishing.

In all these contexts, the economic and noneconomic consequences of avoiding fair use are significant. Many interviewees indicated that the monetary and opportunity costs of seeking permissions, including not only fees but also salaries and volunteer time, were significant to their institutions. Even more urgently, interviewees and survey respondents registered the cost to the field of delays and inferior work—the largest cost of all being the erasure of the imaginative future, as a result of self-censorship.

One-third of all respondents to a survey administered by the College Art Association reported that they had abandoned or avoided a project because of real or perceived copyright problems. Among editors and publishers, the figure was the highest: 57 percent. One-fifth of artists reported avoiding or abandoning a project because of copyright-related self-censorship.

Interviews revealed examples of the cost of avoiding fair use:

- Art historians have found it necessary to pay licensing fees from their own pockets—in one case, \$20,000 for a single book—for permissions. They avoid writing surveys and historically oriented texts, which are permissions heavy, and often steer clear of the last hundred years of artistic production. They warn graduate students against pursuing certain topics. One interviewee said, “When you’re starting people on their research careers, you have to warn them: ‘Is your research topic going to be too expensive to publish adequately?’”
- Scholarship is published without relevant illustrations, or not published at all. One editor said frankly, “You lose academic freedom because of copyright problems.”

Another said, "I self-censor all the time because I don't want to deal with the headache of getting the image out there." Academic journals cannot be digitized because of the costs of renewing permissions previously obtained for publication.

- Museum curators decide what to exhibit based on copyright issues. "We just avoid certain artists," noted a curator. In one case, an entire exhibition catalogue involving appropriation practice was simply canceled because of copyright concerns. Digital showcases are abandoned or curtailed. According to an experienced archivist and scholar: "We are misleading the world; we are not giving the complete picture of the resources. This is a censored view of the material."
- Artists do not always make the work they want to make. Instead, they sometimes have been forced to use inferior substitutes when permissions to incorporate copyrighted visual material in new work have been requested and refused. Several artists described abandoning multimedia works incorporating music because permissions could not be obtained. Other artists have seen distribution plans wither for work that uses unlicensed material, or have simply avoided experimenting with the possibilities of digital art. Artists were both curious about and wary of digital opportunities. According to one interviewee, "If one had more confidence in what one's [use] rights are, one wouldn't have to cower so much when confronted with these opportunities."

In fact, while permissions may be required for some kinds of artistic and scholarly projects, in many cases they are not. The pervasive permissions culture, exercised as if fair use were not available to the visual arts communities, changes and even deforms the work produced. These losses affect future generations and the future of the field itself. However, these losses affect not only today's future professionals, and all those worldwide who cannot obtain digital access to inspiration that could influence and shape their artistic and career choices, but also students, museumgoers, readers, and others who have previously been considered to be audiences of the visual arts—in a digital era all are cocreators of new culture. They are all being denied work that has had to be aborted, abandoned, or executed in an inferior way because of insecurity about fair use. That denial is simultaneously the erasure of a possible future.

Uncertainty about copyright and fair use within the visual arts communities is a problem that the communities themselves can address. The biggest single issue for professionals is understanding their rights as new users of existing copyrighted material. This can be remedied not only by educational projects but by the formation of a consensus within the communities of practice about the shape of a code of best practices in fair use for the visual arts. Such codes have vastly improved access to fair use for other communities of practice.

INTRODUCTION

This study explores the cost to mission for the professions of College Art Association members as a result of avoiding the copyright doctrine of fair use, which provides a conditional right to reuse others' copyrighted material without first obtaining permission to do so. The study is tightly focused. Its subjects were artists and other visual arts professionals who engage in the activities and generate the new products that define the field. The study focuses only on US-based practice, since fair use is a feature of US law, and even when visual arts professionals use international material, US-based practice depends upon US law.¹ It does not examine copyright issues in general, including open access and licensing approaches such as Creative Commons. These are interesting and sometimes useful tools, and where they function the possibility of fair use need not be considered. Most copyrighted material that visual arts professionals may wish to repurpose, however, is not currently available for use under such licenses.

After providing a platform of knowledge about study methods, copyright, and the visual arts communities of practice, this report looks at the current situation, describes attitudes in the field about copyright and fair use, examines emergent practices that respond to the growing problem of constraint by copyright, and examines the consequences of those practices.

Fair use is of critical importance to the work of visual arts professionals. They share a dedication to the practice and scholarship of visual expression, whether in the creation of art or of work that analyzes, showcases, preserves, disseminates, or fosters discussion about art. All of these individuals play different and critically important roles in generating visual expression and creating social meaning around it.

No one in this field pursues his or her mission alone. Networks are both complex and tightly woven. Artists depend upon dealers, gallerists, curators, educators, art historians, and publishers to circulate their work and provide it with a social location and meaning. Art historians depend on librarians, archivists, museum professionals, and artists and their estates, among others, to maintain and provide access to materials, and on editors and publishers, among others, to circulate their work. Editors, publishers, archivists, and museum professionals similarly depend upon the other professionals in this ecology for their own activities.

Third-party copyrighted material is critical to much daily practice in the field. While images feature prominently in discussions about copyright concerns, in fact visual arts practice also features pervasive use of textual third-party copyrighted material (particularly in scholarship). Increasingly, material from all media—text, sound, images, moving images—is becoming a focus of interest, as artists, museum professionals, art historians, teachers, and editors increasingly adopt multimedia formats.

The current default practice in the field is to request permission for most scholarly and other

discursive uses of actually or presumptively copyrighted material, as well as for its use in the creation of educational materials. This process touches almost everyone's decision making. Many professionals who generate new work also serve as gatekeepers in the permissions process. Art historians sometimes direct student choices of copyrighted material, and editors do the same for art historians. Gallerists may decide whether to represent an artist based on copyright issues, while archivists may decide whether researchers should have access to copyrighted material. Within museums, some staff members may find themselves functioning as gatekeepers in connection with the projects—and, in particular, the online initiatives—of others. In addition, some specialized entities have emerged as intermediaries for permissions (Bielstein, 2006). The Artists Rights Society (ARS) and VAGA represent artists and those who derive rights from them, acting as intermediaries in the permissions process. ARTstor provides a digital repository to which a variety of institutions belong, facilitating open access to visual content in some cases and providing a venue for negotiation in others. In addition, some artists' estates and foundations directly control rights to reproduce images and sometimes also assert right-of-review regarding what is written about the artists they represent.

As indicated in the Executive Summary, members of the visual arts communities of practice encounter copyright-permissions issues in connection with virtually every aspect of fulfilling their professional responsibilities. The use of third-party copyrighted material in specific subfields is involved with activities such as:

- *art*: creating work that engages with contemporary life and culture; that makes a political commentary; or that uses elements of contemporary or recent culture as raw material for formal play or experiment
- *scholarship*: obtaining appropriate material (e.g., images, audio, video, text) to analyze and illustrate analysis; accessing archival materials; executing large-scale academic projects on twentieth- and twenty-first-century art.
- *teaching*: employing material that is relevant to and of the appropriate quality for curricula; developing web-native teaching materials; enabling the circulation of student work
- *museums and archives*: mounting exhibitions involving works of copyright-protected art; producing catalogues, brochures, and other exhibition-related materials, along with relevant educational publications and programs; commissioning new art; preparing digital catalogues and exhibitions; developing researchable websites and digital open archives
- *publishing*: acquiring material that is relevant and of the appropriate quality to inform and illustrate books, articles, websites, and blogs; issuing illustrated ebooks; engaging in the digital distribution of art and scholarship

METHODS AND SOURCES

This report draws upon several kinds of information:

- an online survey administered by CAA, distributed to all past and present individual members²
- one hundred hour-long, open-ended phone interviews with visual artists and other visual arts professionals, selected by the principal investigators and project advisors of the CAA's Fair Use Initiative, Task Force on Fair Use, and Committee on Intellectual Property (see Appendix C), to represent the range of CAA's membership and the field at large, administered according to a protocol approved by the Institutional Review Board for the Protection of Human Subjects of American University
- in addition to the above-mentioned interviews, five interviews with representatives of rights holders or their agents, administered according to a separate protocol
- a review of relevant legal cases
- a literature review of scholarly writing on art and copyright
- information gathered from association meetings, gatherings, and conversations with other principal investigators in this study, CAA staff, project advisors, and the CAA Task Force on Fair Use

This study focuses on the professions represented by CAA membership; those who, "by vocation or avocation are concerned about and/or committed to the practice of art, teaching, and research of and about the visual arts and humanities."³ This includes archivists, artists, art educators, art and architectural historians, art librarians, critics, dealers, designers, editors, gallerists, museum professionals of several kinds, publishers, and students of these fields (see fig. 1). We interviewed, as a percentage of the total pool of interviewees, a greater number of editors, publishers, and museum professionals than are proportionally represented in CAA's membership, in order to understand the experience of copyright considerations in those arenas, knowing they have a great effect on other CAA constituents. Of the one hundred people interviewed, thirty-five are currently CAA members, although all were contacted via the personal networks of CAA members.

Fig. 1. Demographics of Interviewees, Compared with Demographics of CAA

	<u>Study (100 interviewees)</u>	<u>CAA</u>	
<u>Gender</u>			
Male	41%	30%	
Female	59%	61%	
Undeclared	—	9%	
<u>Geography</u>			
East Coast	52%	43%	
Midwest/South	23%	32%	
West Coast	24%	16%	
Other	1 (England)	—	
Undeclared	—	9%	
<u>Profession*</u>			
---		Not specified	14%
---		Art educator	9%
Art historian/ other humanities scholar**	28%	Art/Architectural historian	36%
Artist	21% **	Artist	25%
Curator	7%	Curator	4%
Other museum professional	17%		
Designer	2%	Designer	1%
Librarian	1%	Librarian	1%
---		Administrator	3%
Publisher/editor	14%	Publisher/editor	<1%
Gallerist	2%	Gallerist	<1%
Archivist	3%	---	
Other	5%	Other	5%

* Note that the categories are different, and also that the professions of 14 percent of CAA membership are unspecified.

** This category includes many individuals who also were or had been educators.

The survey was designed with input from principal investigators and project advisors of CAA's fair use project, and involved questions requesting responses from a specified set of choices as well as open-ended questions. Some of the open-ended questions were subsequently coded, where relevant; other open-ended questions were harvested for the range of replies and for specific anecdotes. The survey respondents generally reflected CAA's membership (see Q2 in Appendix A). The great majority of respondents were based in the United States, with some international contributors; statistical testing showed no significant differences in the responses between domestic and international respondents. Therefore, no segmentation of international responses was made in reporting the results. Survey respondents, as well as professionals interviewed at length, typically were experienced members of their fields. While almost all interviewees had been in their current or related fields for more than a decade, about 17 percent of survey respondents were relatively new to their fields (employed for less than five years). More than two-thirds of respondents, as responses to Q3 show, had more than ten years of experience in their fields.

A review of relevant legal literature, as well as informal conversations and experiences at professional meetings, provided critical background knowledge and is incorporated here where relevant.

Information for this report was garnered under conditions of anonymity, in accordance with our agreement with the Institutional Review Board for the Protection of Human Subjects at American University. All interviewees signed or otherwise approved an informed consent form (Appendix B). Everyone participated under conditions of anonymity. The survey instructions promised confidentiality for all specifics in open-ended answers. Rights holders were not always promised anonymity, as they mainly discussed terms of business, but all requests for confidentiality were honored.

BACKGROUND

To discuss current beliefs and practices around the use of third-party copyrighted material in the fields of visual arts, the discussion below summarizes copyright law, existing literature regarding copyright as it relates to visual arts practices, and copyright litigation in the visual arts.

Copyright and the Doctrine of Fair Use

Never has the copyright doctrine of fair use been so readily available to so many, particularly in the scholarly, educational, and publishing environments. Nor, given the range of copyright claims and remedies now potentially available to rights holders, has the role of fair use ever been so important. Creators, scholars, and others today make decisions about using copyrighted material in a legal environment where more works are protected for longer periods, with potentially draconian punishments for infringement and subject to narrow and sometimes outdated specific exceptions. The fair use doctrine within copyright law nevertheless remains misunderstood and under-used in the visual arts communities.

Fair use is crucial to the policies embedded in US copyright law. The goal of that law is to promote cultural flourishing: to foster the creation of culture and the exchange of ideas. Its best-known feature is the protection of owners' rights. However, copying, quoting, and generally reusing existing cultural material can be a critically important part of generating both new culture and commentary on it. In fact, the value of copying is so well established that it is written into the social bargain at the heart of copyright law. US law confers limited property rights to creators to encourage them to produce science and culture; at the same time, it guarantees that all works eventually will become part of the public domain and, in the meantime, gives other creators and speakers the opportunity to use copyrighted material without permission or payment in some circumstances. In the absence of the second half of the bargain, society could lose important new work.

The first way that US copyright law implements the social bargain is to give creators not only an array of economic rights (against unauthorized copying, adaptation, distribution, display, and the like) but also, in the case of original works of visual art, to provide a very limited set of moral rights—the result of the 1990 amendment of the Copyright Act to include (at section 106A) the provisions of the so-called Visual Artists Rights Act (“VARA”).⁴

**Fair use enables
free expression,
and blocks
private censors.**

The second part of the social bargain conditions those rights, both with limits on what can be copyrighted, and also with exceptions and limitations to copyright. Among these, the so-called fair use right has become the most important.

Fair use is a user’s right and is critical to free expression.⁵ In fact, the US Supreme Court has pointed out that fair use helps resolve conflicts between copyright and the First Amendment;⁶ without fair use and related exceptions, copyright could create an unconstitutional constraint on free expression.

The importance of fair use was driven home in a recent US Commerce Department report:

The fair use doctrine, developed by the courts and codified in the 1976 Copyright Act, is a fundamental linchpin of the U.S. copyright system. Along with the idea/expression dichotomy, the fair use doctrine is a critical means of balancing “the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society’s competing interest in the free flow of ideas, information, and commerce on the other hand.” It is also a vital “built-in First Amendment [accommodation] in copyright law.” [US Department of Commerce Internet Policy Taskforce, 2013, p. 21, quoting *Sony Corp. of America v. Universal Studios, Inc.*, 464 U.S. 417, 229 (1984) and *Golan v. Holder*, 132 S. Ct. 873, 890 (2012)].

Fair use is flexible in interpretation, which gives it its strength. Copyright law does not specify exactly how to apply fair use in any given situation, because needs and practices differ from field to field, over time, and with changes in technology. Therefore, the law avoids a prescriptive formula. Nor is there a “Fair Use Tribunal” or other objective authority to which users can apply for an advance determination. People usually make decisions to employ fair use without asking anyone’s permission, just as they do with their other acts of free expression, and no adverse consequences ensue. Very occasionally, someone complains. In most cases where fair use is disputed, an amicable settlement follows. In the very few cases that go to court, lawyers and judges take all the facts and circumstances into account, to decide whether an unlicensed use of copyrighted material generates social or cultural benefits that are greater than the costs it imposes on the copyright owner. This flexibility can generate uncertainty. However, like any exercise of free expression, employing fair use means applying general principles to specific situations.

Fair use’s flexibility is its strength. Judges believe transformativeness is the key feature.

The preamble to Sec. 107 of the Copyright Act gives examples of the kinds of uses that can qualify as fair in the right circumstances. Some of these (such as “criticism,” “comment,” “teaching,” and “scholarship”) refer to practices common in the visual arts communities; the fact that other such practices (such as the creation of new artworks) are not mentioned is of no particular significance, since the list is merely illustrative. In assessing whether any specific use, listed or not listed in the preamble, is fair, the statutes direct judges to refer to four types

of considerations (the so-called four factors): the nature of the use, the nature of the work used, the extent of the use, and its economic effect. In addition, judges may take other considerations into account, including the general concept of the “public interest.” Over the years attempts have been made to create fair use “guidelines.” Unfortunately, they have more often limited than facilitated fair use (Crews, 2001). In fact, “bright line” tests and the “rules of thumb” so typical of fair use guidelines are no more appropriate to fair use analysis than they would be to any other expressive act. What is a reasonable fair use? The history of fair use litigation shows that judges return again and again to two key questions (Aufderheide and Jaszi, 2011; Jaszi, 2010; Madison, 2004; Netanel, 2011):

- Did the unlicensed use “transform” (repurpose) the material taken from the copyrighted work by using it for a different purpose than that of the original, or did it just repeat the work for the same intent and value as the original?
- Was the material taken appropriate in kind and amount, considering the nature of the copyrighted work and of the use?

These two questions collapse the “four factors.” The first question addresses the first two factors, and the second rephrases the third factor. Both key questions touch on the fourth factor; whether the use will cause excessive economic harm to the copyright owner. If the answers to these two questions are yes, a court is likely to find a use fair, even if the work is used in its entirety. Since the early 1990s, courts have made it clear that in order for a use to be considered “transformative,” it does not have to modify or literally revise copyrighted material. Uses that repurpose or recontextualize copyrighted content in order to present it to a new audience also may qualify. In practice, the argument for considering a use to be transformative is likely to be advanced where the user (or someone on the user’s behalf) can give a coherent account of how and why the material was borrowed.

How judges interpret fair use affects the ability of members of the visual arts communities to employ it; how any community employs it affects judges’ interpretations. For any field of activity, lawyers and judges consider the expectations and practices of a specific community of practice. This is why some communities of practice have asserted their best practices in fair use in consensus documents, which have had remarkable power to affect subsequent practice (Aufderheide and Jaszi, 2011).

Judges look to community practice to know how to decide a fair use, and community members employ fair use more effectively when they have best practices.

Exercising fair use is a right, not an obligation. In the visual arts communities, as in many others, people may choose licensing, either as the path of least resistance or because of the importance of maintaining business or professional relationships, over employing their First Amendment rights. They may have powerful ethical or business reasons to reject the fair use option—for

instance, wanting to honor the rights of indigenous people whose art was created within their own cultural context, or wanting to remain on good terms with an influential artist. Nevertheless, fair use is a powerful, flexible, useful, and sometimes essential tool to accomplish many activities undertaken by members of the visual arts communities of practice.

Fair use involves risks, like every exercise of rights. Perfect safety and absolute certainty are extremely rare in copyright law, as in many areas of law and life. However, people cannot conduct appropriate or responsible risk management without knowledge of current practice or community agreement on acceptable practice. This is especially true given the costs of actual (or even threatened) litigation in terms of time, money, and reputation, and the risk (more theoretical than practical) of high statutory damages. Without more useful grounded knowledge about copyright and fair use, visual artists and other visual arts professionals will inevitably overestimate risk.

This is the situation in which members of the visual arts communities now find themselves. Fair use is accessible, favored in the courts, appropriate for many uses in the field, and yet vastly underused, with serious consequences for the future of the field.

Literature Review

In the fields of practice encompassed by CAA membership, the intersection of copyright, fair use, and creative practice is being addressed in the literature with increasing frequency. However, no work to date has specifically addressed the costs to the field of not employing fair use. Some works address copyright issues as they affect all domains of practice in the art world (Adamson, 2012; Buskirk, 2012; Buskirk and Nixon, 1996; Sinaiko, 2013). Some work produced outside the field discusses practices relevant to and originating within the visual arts world (Aufderheide and Jaszi, 2011; Boyle, 2008; Hyde, 2010; Mazzone, 2008).

Most work generated within the visual arts communities is specific to the location of the authors' community of practice. For archives, museums, and educational entities, little has been written on copyright-related concerns (Weil, 1997), but museum permissions officers have discussed them in the context of the complexities and ambiguities of their duties (Keshet, 1997). A growing literature, however, discusses the problems that copyright compliance can pose for various digital initiatives (Silverman, 2011). Schools and libraries suffer from inappropriate copyright guidance relating to digital uses of content in education (Hall, Evans, and Nixon, 1997; Sundt, 1999). Institutional initiatives to provide comprehensive online documentation of collection holdings and related items (Edwards, 2013; Tanner, 2004; Zorich, 2012) are increasingly fraught as more institutions make relatively high-resolution images available, generally on an open access basis (Kelly, 2013; Shincovich, 2004). One of the

highest-profile recent discussions of collection digitization policy and practice, the Smithsonian Institution's 2013 *Best of Both Worlds* (Clough, 2013), expresses concern about copyright risk.⁷ Nevertheless, the Smithsonian's own public-licensing guidelines encourage the public to take advantage of fair use (www.si.edu/TermsOfUse).

With regard to scholarly work, little scholarship deals directly with copyright and scholarly production, apart from Susan Bielstein's invaluable *Permissions, a Survival Guide: Blunt Talk about Art as Intellectual Property* (Bielstein, 2006). Most recent studies focus, instead, on systematic changes in the production and publication of art history and art criticism (Mainardi, 2011; Rubin, 2011). Some work focuses, though not exclusively, on the implications of new technology (McGill, 2006; Westermann and Ballon, 2006). Concerns for copyright issues figure significantly, though not always centrally, in discussions of digital scholarship. For example, Waltham explores how institutional copyright policies, moving toward open access, might create new opportunities for scholarly publication (Waltham, 2009).

A number of studies of scholarly production and publication touch upon copyright and fair use in the process of considering other issues, and recognize the significant costs of an endemic permissions culture in the visual arts as well as, increasingly, in emergent digital environments. Among explanations for the persistence of the permissions culture evident among art historians are arguments that institutions enforce conservative approaches; that scholarship and publishing reflect assumptions derived from analog practice (Whalen, 2009); that the general culture is increasingly litigious while the art world is commercially overheated (Buskirk 2012); and that changing revenue flows and economic models encourage rights holders to seek additional rents from licensing (Crews and Brown, 2010; Weber-Karlitz, 1983).

In literature on copyright and artistic production, artist-on-artist image appropriation is perhaps the most popular topic. Some of these writings represent serious considerations of difficult issues from the working artist's point of view—for example, Martha Rosler's discussion of the distinctions between art photography and photojournalism (Rosler, 2004), Virginia Rutledge's recent dialogue with Penelope Umbrico (Rutledge, 2013), and the articles collected and recently published by the New Media Coalition from the symposium "Found, Sampled, Stolen: Strategies of Appropriation" (New Media Coalition, 2012). Other helpful contributions have been written by observers of the art scene, focusing on the extent to which the reuse of images has become a convention of artistic practice (Hick, 2011; Pollack, 2012) or reflecting on the consequences of confusion about copyright principles among nonartist professionals such as gallerists and curators (Tully, 2012) and graphic artists (Heller, 1996). Still others consider the semantic disconnect between artists' thinking about copying and the cognate legal framework (Leach, 2002). This strain in the literature began in the mid-1990s (Ames, 1993; Jaszi 1994) and has continued intermittently to the present day (Markellou, 2013), spiking when significant cases relating to this issue are decided in the

courts. Thus, for example, a new spate of articles has begun to appear with commentary on the recent decision in *Prince v. Cariou*; and numerous blog posts have been posted on the Second Circuit Court of Appeals' decision (Boucher; Heddaya; Robertson; Sarmiento; Tasis, all 2013). This work contributes to a larger online literature, both in the art world (visible, for instance, on the aggregator site artsjournal.com) and beyond it.

Copyright Litigation

There are few copyright decisions relating directly to the visual arts practices focused on in this report, and those that do have little predictive value, with one exception: Judge Kaplan's decision in *Bridgeman Art Library v. Corel Corp.*, 25 F. Supp. 2d 421 (S.D. N.Y. 1998). This judgment, resolving a controversy between two private, for-profit entities with significant stakes in the outcome, has matured over fifteen years into a de facto industry standard, despite the fact that it has never been followed (or perhaps because it has never been significantly challenged) in any other court.

Bridgeman, which states that routine photographic documentation of paintings is insufficiently "original" to qualify for copyright protection, has been widely used as precedent to enable the wider circulation of images representing two-dimensional objects in museum and other institutional collections. Many survey respondents and interviewees were aware of this decision, although their understanding of the decision was not always accurate or assured.

Other copyright issues affecting visual arts museum practice appear to have gone unlitigated, as discussed below. This may be because, unlike in *Bridgeman*, the parties in conflict have not deemed the financial stakes around those issues to be great enough to generate serious legal disputes. It may also reflect the fact that conflicts about these issues tend to be resolved through settlements or compromises that leave no public record, but that may nevertheless influence future institutional practice.

Legal decisions on fair use are rare, and have little predictive value for visual arts.

Likewise, no legal decisions address directly the manifold issues that visual arts academics face with regard to scholarly publishing. The fair use decision involving Georgia State University, *Cambridge Univ. Press v. Becker*, 863 F. Supp. 2d 1190 (N.D. Ga. 2012), now on appeal, only addresses the use of scholarly texts within the reserve context in higher education.

The case is on appeal, but the district court's decision certainly favors using excerpts from copyrighted content in teaching.

However, there is strong authority for the proposition that even extensive illustrative use of copyright materials can constitute fair use, as in *Sundeman v. Seajay Soc'y*, 142 F. 3d 194 (4th

Cir. S.C. 1998). There is equally robust recent support for the proposition that visual illustrations (including complete images of various dimensions) can constitute fair use in nonscholarly texts, in *Warren Publ'g Co. v. Spurlock*, 645 F. Supp. 2d 402 (E.D. Pa. 2009) and *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F. 3d 605 (2d Cir. 2006). Although scholarly publications in journals and monographs seem to present an even stronger instance of fair use, courts have not spoken to this question.

Finally, in a handful of cases, courts have assessed whether instances of appropriation art infringe copyright. The results, while not wholly consistent, show significant liberalization in the judicial application of the fair use doctrine to such situations over the past twenty years. The three cases involving the artist Jeff Koons—*Rogers v. Koons*, 960 F. 2d 301 (2d Cir. 1992); *United Feature Syndicate v. Koons*, 817 F. Supp. 370 (S.D. N.Y. 1993); and *Blanch v. Koons*, 467 F. 3d 244 (2d Cir. 2006)—illustrate the increasing receptivity of judges to the notion of “transformative” fair use in cases involving the visual arts. They also show the power that artists can exercise over legal outcomes when they provide a clearly stated rationale for their acts of appropriation (Aufderheide and Jaszi, 2011). A decision in *Lang v. Morris*, 823 F. Supp. 2d 966 (N.D. Cal. 2011), in which a group of origami artists challenged the defendant painter’s appropriation of the “crease patterns” from their three-dimensional paper creations in her canvases, might have proved enlightening. Unfortunately for guidance to the field, the case was settled soon after the original complaint was dismissed on procedural grounds.

Two recent decisions involving Mr. Brainwash, the tarnished “star” of the widely discussed film, *Exit through the Gift Shop: A Banksy Film*, suggest that without a narrative an artist faces an uphill battle in establishing himself or herself as a fair user, and that judges may also be influenced by considerations such as the legitimacy of the artist’s claim to that designation. The outcomes of these decisions, in *Friedman v. Guetta*, 2011 U.S. Dist. LEXIS 66532 (C.D. Cal. May 27, 2011), and *Morris v. Guetta*, 2013 U.S. Dist. LEXIS 15556 (C.D. Cal. Feb. 4, 2013), may be of limited precedential value, because the court appears to have decided that Mr. Brainwash was simply not enough of an artist.

When a judge understands how a creator is adding value to a work, it is easier to see the work as transformational.

The Second Circuit Court of Appeals’ recent decision in *Prince v. Cariou*, 714 F. 3d 694 (2d Cir. 2013), failed to be the definitive decision many had hoped. At issue were artist Richard Prince’s reinterpretations of images that photographer Patrick Cariou had taken over the course of six years spent living among Rastafarians in Jamaica; Prince’s techniques involved enlarging and modifying, often by over-drawing, Cariou’s images. The decision concludes that twenty-five of Prince’s large-scale works represent transformative fair use, while sending five back to the district court for further consideration. This judgment cements the general proposition that the doctrine has broad application to the creation of value-added new works

that incorporate preexisting ones. It also reinforces an important, though noncontroversial, proposition: in order to be a fair use of a work, an adaptation need not represent a commentary on that work.

The *Prince v. Cariou* decision also leaves important questions unanswered, among them the relative importance of a creator's narrative about his or her artistic intentions to fair use analysis. On the one hand, the court seems clear that the artist should not have the last word: "What is critical is how the work in question appears to the reasonable observer, not simply what an artist might say about a particular piece or body of work" (707). On the other, its opinion appears to attach significant weight to Prince's testimony that "what I do is I completely try to change it into something that's completely different. . . . I'm trying to make a kind of fantastic, absolutely hip, up to date, contemporary take on the music scene (706–707)." In addition, the court's distinctions between the twenty-five works that the majority considered to be clear examples of fair use and the five about which they were uncertain are difficult to parse.

What is clear from the pattern of fair use law more generally over time, however, is that when judges can understand how a creator is adding value to a work, it is easier for them to see how that work might be transformational (Madison, 2004).

The Shepard Fairey case, widely publicized in all media and especially in visual arts circles, is well known but offers no guidance. Fairey, a noted contemporary and politically engaged artist, circulated a poster during the 2008 election of then-candidate Barack Obama featuring the word "HOPE." When the Associated Press charged that he had infringed on a news photographer's copyright, Fairey himself initiated a lawsuit, and asked the court for a declaratory judgment on his fair use. However, Fairey eventually admitted that he had intentionally deceived the court by lying about which photograph he had used, and the case then was settled. Fairey's case did not set precedent or otherwise affect the reliability and flexibility of fair use law. Even had the courts addressed the fair use issue, their guidance would have been of limited precedential value for the most difficult "appropriation art" scenario, in which an artist reinterprets material drawn from another's work of visual art.

Disputes that never went to court can leave an even stronger impression than settled law, according to our interviews and survey, increasing the chilling effect that results in underemployment of and confusion about fair use. Interviewees typically described rights holders as litigious, and also typically treated cease-and-desist letters as equivalent to the far more significant decision to file an actual lawsuit. A few of the artists we interviewed described experiences where challenges to appropriative uses in their artwork were settled out of court, with the help of their dealers. Likewise, rights holders told us that their issues about unauthorized use were resolved without lawsuits. From their standpoint, as well as that of users, litigation was an undesirable outcome.

Nonetheless, conflicts that invoke copyright without ending in lawsuits are part of the collective memory in the visual arts communities but are often remembered as if they had been lawsuits, and thus feed the exaggeration of risk. For instance, several interviewees referred to Dennis Oppenheim's 1992 public sculpture *Virus*, which featured Disney characters, as an example of the danger of lawsuits. In reality, what happened was simply that, on Disney's demand, the Maguire Thomas company, which had commissioned the work, took it down.⁸ Interviewees also referred to a 2005 public dispute between photographer Susan Meiselas and digital artist Joy Garnett, over Garnett's repurposing of Meiselas's photo in an artwork. In reality, despite the publicity, little happened; Meiselas and Garnett met to talk, and Meiselas withdrew her demands (Aufderheide and Jaszi, 2011).

Finally, there is no litigation and indeed no law whatever on "secondary" liability for an artist's unlicensed use of copyrighted material, although some respondents expressed concern about this. Such perceptions of risk may be based, in part, on misunderstanding of copyright litigation regarding practices such as the file sharing of music. In fact, there is no theory under which such indirect liability could be imposed on, for example, a scholar or museum.

The sparse record of legal decisions, along with rumor and misunderstanding, in this arena gives rise to uncertainty. Uncertainty, in turn, leads all too easily to a generalized and exaggerated sense of risk.⁹ The visual arts communities cannot expect to arrive at a useful understanding of fair use by examining a small handful of factually specific decided cases, nor by waiting for a "test case" that would resolve the uncertainties. Members of these communities, however, could make progress toward better fair use decision making by developing best practices in the field.

STATE OF THE FIELD

In this section we discuss existing practices and attitudes around the use of third-party copyrighted material in visual arts practice, in three respects: the nature of prevailing permissions culture; pressures toward change in that culture; and competing values within the field.

Permissions Culture

To use a term employed by Susan Bielstein and others, there is a “permissions culture” in visual arts communities around third-party copyrighted materials. The problem of permissions is ever present, because copyrighted work is ever present. Among the CAA members surveyed for this study, nearly 70 percent said that they had used the copyrighted work of others in their own work, with much higher rates of use among the nonartist professionals (Q5). Almost everyone in the editors/publishers group had used the copyrighted material of others; the figure is also very high for curators, who here are included under the general category of museum professionals. The smallest percentages were among artists, only 37 percent of whom said they had employed the copyrighted works of others.

Use of Copyrighted Work, by Profession ¹⁰					
	Academics	Editors/ Publishers	Museum Professionals	Artists	Total
Yes	81.4%	94.9%	75.6%	37.3%	69.3%
No	18.6%	5.1%	24.4%	62.7%	30.7%
Total	100%	100%	100%	100%	100%
N	1,375	39	386	625	2,425

Thus, from the perspective of the use of copyrighted materials, the field is bifurcated between artists and all those who depend upon artists’ work to create their own.

Over the last thirty-five years, the permissions culture has grown until it has become the most common way to deal with managing third-party copyright issues in the visual arts, as it has in so many other fields of cultural practice. This is in part a result of the expansion of copyright put in motion by the 1976 reform of the Copyright Act, and reinforced by subsequent legislative and statutory changes. Most cultural and commercial artistic and literary productions from the 1920s to the present—including those never intended for public distribution, such as sketches, notes, and ephemera—are now protected by copyright. In

addition, copyright term extension, the restoration of copyright for foreign works previously in the public domain, changes in the modes by which copyright damages are calculated, and broadening of the so-called adaptation right provided in copyright law, have all contributed to the trend.

Many researchers have noted the pervasiveness of the permissions culture. Patricia Rubin called licensing and permission fees in art history often “prohibitive” (Rubin, 2011), and researcher Diane Zorich argued that the process of finding illustrations for academic research was made “more onerous by the conservative, risk-averse nature of the discipline, which shies away from invoking fair use even in instances where it is clearly applicable. As a result, scholars spend huge amounts of time and large sums of (often their own) money licensing images for their publications” (Zorich, 2012, p. 32). Lawrence McGill found that the costs of publishing in art history had grown more dramatically than in scholarly publishing generally, because of the permissions culture (McGill, p. 3).

Awareness of copyright has grown, and some people we interviewed commented on the changes. One artist who had come of age in the 1980s and recently returned to a project from that era, noted ruefully, “The whole issue has become fraught in the way it wasn’t in the early 1980s.” Because the US recognizes foreign copyrights under international treaties, artists and other visual arts professionals face demands from European museums, archives, and rights holders that may rival and even exceed those of their US counterparts in terms of aggressiveness. Some scholars interviewed believed that adding to the growth of the permissions culture were, paradoxically, attempts to reduce friction resulting from it. They argued that before the advent of ARTstor, which charges subscriptions, university art departments employed fair use routinely, and that the current availability of preauthorized image databases, in which public-domain materials may predominate, not only discourages reliance on fair use but may inadvertently skew academics’ choices of illustrations. ARS and VAGA, both entities created to facilitate permissions, have become major gatekeepers, with a default position that all use requires a license.

Museum professionals interviewed and surveyed almost universally sought permissions for reproductions of related images in connection with exhibitions, and for the creation of accessible digital collections. “We don’t put anything up that we don’t have rights for,” said a museum official. Professionals at one museum said that not only were all images for publications of the museum cleared but that so, too, were all images for brochures, even brochures for pop-up events. The sole exception, they said, was putting images on an easel that was only up for a few hours to direct traffic. The permissions culture in publishing is so entrenched that one interviewee said that getting permissions for images in a book is “something you do routinely, you ask permission for images you use.” One editor remarked, “No one uses fair use at the moment in publishing; everyone is risk averse.”

Professors who were interviewed also participated in the permissions culture, generally acceding to the universality of permissions, often because they saw no other option. Perhaps because of their acceptance of a permissions culture for publication and public circulation generally, they treasured the more private physical spaces of their classrooms (where specific exemptions to copyright law provide a further measure of security).

Although the artists we interviewed typically did not want to think about copyright as they made their work for fear of it interfering with their creativity, they often returned to it in connection with issues around public distribution. One artist explained what he told his students, many of whom were engaged in projects that involved adapting preexisting material: “Always give credit—and if they [the students] ever make money from the work, then they need to go to the agent who represents the artist he or she borrowed from, to get permission or pay for it.”

Proper attribution was a widely shared value across all categories of professionals responding to the survey and participating in interviews. Like members of other creative communities, artists and other visual arts professionals often conflated the felt obligation to attribute, which receives only limited recognition in US copyright law, with the more comprehensively protected economic rights on which the statute focuses.

Art historians faced a second level of permissions fees unrelated to copyright. Custodial institutions often charged them fees for access to images, sometimes purely to recover costs, sometimes to earn revenue, sometimes to ensure the quality of reproduction. These were variously termed access fees, permissions fees, and reproduction fees, and respondents often confused them with copyright permission.

Half the CAA survey respondents had paid image access fees, as distinct from permissions fees, for reproduction of artworks as such (Q26). Some of them believed that these image access fees were part of a copyright obligation rather than a service charge, and interviews suggested that these charges sometimes were represented as copyright-related by the institutions that imposed them. Nonartist professionals were much more likely to pay such fees than artists.

Payment of Access Fees			
	All other professions	Artists	Total
Rarely/never	40.2%	82.9%	51.3%
Frequently/occasionally	59.8%	17.1%	48.7%
Total %	100	100	100
<i>N</i>	1,438	504	1,942

Payments both for copyright licenses and access fees were a significant barrier to accomplishing work. One art historian who was publishing a book was able to obtain what he regarded as a reasonable and low-fee access to an iconic artist’s work, but even so, ARS imposed a fee high enough to add \$20,000 to the cost of publishing the book. The fee was lowered dramatically after the scholar asked the artist’s estate to intervene. Another scholarly interviewee, who works on a period of art history in which all work is in the public domain, also paid about \$20,000 in access fees to institutions for digital images, for the small print run of an academic book. The request process took perhaps one-third of the total research time for the book.

The pervasiveness of the permissions culture was also evident in survey responses. Overall, more than two-thirds of those responding to a question about obtaining permissions to use copyrighted works in their own work (Q9, which was recoded for greater specificity) answered positively. This number was vastly larger in all the professions other than artists themselves, with a particular emphasis on publishing.

Permissions Practices, by Profession¹¹					
	Profession				Total
	Academics	Editors/ Publishers	Museum Professionals	Artists	
Secure permission	38.4%	57.9%	42%	6.6%	30.8%
Sometimes	33.1%	34.2%	26.4%	13.4%	26.8%
No permission	8%	2.6%	5.1%	15.1%	9.4%
Don't use third-party work	20.5%	5.3%	26.4%	64.8%	33.1%
Total %	100	100	100	100	100
<i>N</i>	1,246	38	352	603	2,239

NB: Rounding errors of +/- 1 at .1%

Artists were by far the most likely professional group to report that they did not get permission for work they reused, and were by far the smallest group to always get permission. All other professions were much more likely to secure permission for use, although they did not report doing so invariably.

This qualified, but very real, permissions culture thrives in an environment in which participants are acutely aware of their own rights as monopoly rights holders, whether they produce works of art or scholarship. Overall, three-fourths of the survey respondents said that copyright was important in protecting their own work (Q4 in Appendix A). When respondents considered the value of copyright monopoly to themselves, they responded very similarly across professions. Some 77 percent of academics, 77 percent of editors and publishers, 70 percent of museum professionals, and 80 percent of artists said this right was important to them.

Importance of Asserting Copyright by Profession¹²					
	Scholars	Editors/ publishers	Museum professionals	Artists	Total
Not important	23.4%	22.5%	29.1%	19.3%	23.2%
Very/fairly important	76.6%	77.5%	70.9%	80.7%	76.8%
Total %	100	100	100	100	100
<i>N</i>	1,394	40	388	631	2,453

There was very little variation in their answers among those of different levels of experience.¹³ A significant minority across the population of respondents did not value their own property rights. About one-fourth of the respondents actively rejected an interest in their own copyrighted work. While the proportion of artists was slightly smaller, it too was significant. About one-fifth of all artists responding to the survey said that their own monopoly rights under copyright were not important to them.

Interviewees did not have authoritative information about the economy of licensing image rights. However, most museum professionals said that image access fees (a service charge sometimes, albeit inaccurately, interpreted as copyright based) did not represent an important source of income for their institutions, but they believed that the situation might be different for others. Most museum interviewees said that licensing at their institutions was barely covering costs, if that, but concern about honoring the wishes of living and recently deceased artists or their heirs, as well as exercising control over the quality of reproduction and (to a limited extent) “downstream” uses, fueled continued interest in licensing. Recent scholarship supports the notion that this income is not significant (Crews and Brown, 2010; Kuan, 2012).

Decisions about permissions appear to be made in light of, but are not necessarily governed by, economic considerations. We received a welter of anecdotal information on economic arrangements and prices, without being made privy to any financial records that could allow greater generalization. Understandably, representatives of ARS and VAGA did not share information about their fees or income. Clearly, these organizations are economically viable under current conditions, and some of the artists and estates they represent may earn meaningful income as a result of their services. ARS and VAGA charge service fees independently of artists’ royalties, even when the rights holder is willing to grant a royalty-free copyright license.

Organizations that facilitate copyright permissions—such as artists’ estates, ARS, and VAGA—are sometimes seen as formidable and even intimidating forces. Many interviewees believed that ARS and VAGA sometimes demanded terms that the rights holders they represented would not. (Respondents from those agencies noted that their job is to represent the artist’s interests and confirmed that they sometimes have conversations with artists to remind them of the possibility of securing licensing revenues.) Some interviewees complained that ARS offered poorer quality images in connection with routine requests, with the option of paying higher fees for better quality. One museum professional expressed frustration at being required to negotiate with ARS for permission to reproduce a work of art that the institution believed was in the public domain (which ARS disputed) and that was in its own collection. In general, interviewees found that ARS and VAGA strongly reinforce a permissions culture. Estate representatives noted in informational interviews, conducted separately from the interviews of the one hundred visual artists and other visual arts professionals, that they often demanded permission not only for financial gain but also to control the quality and nature of the use of the artist’s work.

Although editors and publishers have concerns of their own about the permissions culture, art historians often point to those individuals and institutions as significant gatekeepers, in that they control access to a prerequisite for building academic reputation and securing career advancement. Scholars we interviewed typically perceived publishers as excessively conservative, often imposing blanket requirements for copyright licenses and image permissions on book authors, with the costs usually to be assumed by these scholars. Nonartist professionals also identified significant gatekeepers on the staffs of their own institutions: general counsels, rights and permissions officers, digital-project managers, librarians, or even information technology professionals may be the individuals with the effective final say on permissions and licensing issues. One scholar who faced pushback in connection with digital projects characterized the position of a typical IT staff member as “I’m the one who gets fired if anyone gets angry.” Some interviewees found decision makers on copyright issues, whoever they may be, to be more concerned with risk than with mission. “In library departments there is always one person who is the expert, and they are often very risk averse and provide restrictive disinformation,” said one academic. The general counsel’s office at one museum would only permit work done before 1900 to be accepted as in the public domain—a conservative interpretation of copyright law.

Pressures on the Permissions Culture

There is widespread and growing awareness of the dysfunctionality of the permissions culture, as noted by art scholars and institutional representatives (Zorich, 2012). This was reflected in our conversations as well.

The cost of permissions, and the way in which the permissions culture can sabotage mission, are serious impediments with which the field has lived for a long time. The most visible new source of pressure driving the discussion of dysfunction is the challenge posed by digital opportunities. Current projects include ever more efficient modes of capturing, assembling, and sharing high-quality images and of assembling visual information; sophisticated online resources for the study of images and related text, including capabilities that allow virtual visitors to add their knowledge to the databases; and new artistic approaches employing techniques and insights derived from the worlds of hard science and engineering. Art historians are taking advantage of digital tools to provide better, more precise, and more complete visual illustrations of their arguments; and although obstacles (such as the conservatism of university promotion and tenure processes) stand in the way, many scholars look forward to taking greater advantage of these tools in the near future. The implications of digital publishing—including three-dimensional reproduction—are perhaps most liberating for sculpture and architecture, as one museum professional asserted: “Think about the project as a virtual place, rather than an imitation codex. That’s where all this is going. The difficulty of representing sculpture in a physical book could be trumped by the opportunities of this new format.”

But with each new innovation a host of new copyright challenges emerges. Old distinctions that traditionally facilitated copyright licensing decisions—noncommercial/commercial; educational/consumer based; scholars/general public—are breaking down. Digital publishing itself is evolving awkwardly around obstacles that include but are not limited to copyright

Digital opportunities are putting pressure on the permissions culture.

issues, as Maureen Whalen has noted, and there is continued resistance to the notion of digital publishing in academia (Whalen, 2009). Digital publishing, while enabled by authoring tools such as Scalar, is struggling with formats and software; opportunities exist to go far beyond the mere duplication of fixed pages via an online PDF, including possibilities for close analysis of digital images with rich metadata, but rights problems intervene. Thus, for example, interviews revealed that rights holders have traditionally drawn a distinction for licensing purposes between works with a print run

under 2,000 and those over 2,000. Although this distinction has a rough practicality, many publishers, editors, and scholars described the standard, even in the analog era, as poorly calibrated and severely constraining in relation to their objectives. It is, of course, a useless distinction in a web-based distribution environment for born-digital materials.

Likewise, rights holders have traditionally granted rights on a geographic basis, another concept challenged on the web. In their print-licensing practices, rights holders also distinguished between noncommercial and commercial environments, although in reality many web platforms are nested within commercial environments. Furthermore, many

commercial environments foster nonprofit activities or educational practices conducted both in traditional ways and in crowdsourced modes that do not resemble previous educational practices, at least superficially. The permissions process in the digital environment can be idiosyncratic and ad hoc. A graduate student responding to the survey had obtained all the permissions from rights owners to use copyrighted images in a dissertation both offline and in a digital database, but legal counsel at the university was not satisfied with the wording, and so the images were not included in the dissertation. Another CAA member reported not being able to use a work of art in a Tumblr post, because VAGA objected to the platform's standard terms of service.

Many art museums are developing extensive digital databases of their own holdings. Some, such as the J. Paul Getty Museum, Los Angeles County Museum of Art, National Gallery of Art, Walters Art Museum, Yale Art Gallery, and Yale Center for British Art, are establishing "open access policies" that make high-resolution images of public domain works of art downloadable for use without restriction and free of charge. (We cite only American art museums here; many other types of museums and collections, in the US and abroad, are developing similar policies.) Museums are experimenting with platforms including Facebook and Twitter as publicity mechanisms and as ways for patrons to share and even crowd-curate exhibitions. They are showcasing artistic projects that use real-time input, including contributions from patrons. They publish digitally; they build apps. Policies on reproducing copyright-protected works of art still vary greatly at this rapidly evolving moment in digital technology.

Museums work with third-party content hosts and archives, such as the Digital Public Library of America and the Google Art Project, to mount innovative virtual exhibitions, as well as to mount such exhibitions on their own sites. Rather than online documentation of physical exhibitions, these are increasingly seen as the intended destination for an assemblage of material—presentations designed for virtual space rather than retrofitted to it. "As [content hosts] more and more look to the future of virtual exhibitions, content providers like museums look more and more to them to make that future a reality," said one museum professional.

Academic research increasingly depends upon electronic databases of all kinds, ranging from text archives such as ProQuest and the Getty Research Portal, to image databases such as many museums now provide. ARTstor's Images for Academic Publishing (IAP) initiative makes possible, among other things, the IAP program, which allows museums to make available high-quality images for scholarly use, at least where small print runs are concerned, without negotiation or payment. Academic research itself is increasingly using digital tools to search, reorganize, and even crowdsource content. In particular, scholars are developing "digital humanities" projects that take advantage of these tools to mine and analyze data in unprecedented ways. Professors teach using electronic

Scholarly research, artwork, collections, and curating all find new copyright challenges in the digital environment.

platforms and develop curriculum ranging from the universally accessible, such as Khan Academy's Smarthistory, to the highly specific. Many professors are independently developing databases to support their work and to share with students and colleagues. All of these activities are made more awkward both in conception and development by the permissions culture and its attendant fears.

For artists the new electronic environment pushes the possibilities of art far beyond appropriation-era themes and objectives. Artists are using web imagery, often not created as an aesthetic object, as found art; working with scientists to make art from experimental processes; creating social critiques of commercial culture; producing remixes, mash-ups, and other contemporary versions of collage art; creating self-referential and ironic digital mechanisms; developing art within commercial platforms such as Second Life and Minecraft; and crowdsourcing contributions to their art. Almost all their source materials, however, may be copyright protected, even if they do not represent self-conscious artistic productions. Digital artists are moving far beyond the assumptions of the appropriation era, as one scholar told us: "The internet generation of artists isn't thinking about their actions as appropriating. It is simply the way the internet is meant to be worked with." The legal questions built into work that draws from and reaggregates the phenomenon of a copyrighted culture nevertheless can arise when an artist or the artist's representatives face choices about how to distribute his or her work.

Interviewees noted the broad and enthusiastic appetite of the general public for digital resources and digitally accessible information. They reported that this sense of the public's preference drives many attempts to create comprehensive online representations of collection holdings. Those interviewed believed that they ignore this appetite at their peril. "We think it's important to make images downloadable from our website to reach younger audiences. Social media is important," said one museum professional. "Going to a website and seeing only a thumbnail really annoys people. Visitors see it almost as rude. They think it's ridiculous," said another, who believed that high-resolution access was increasingly important. Nor is this new appetite for images alone. "We get more and more requests for historical documentation, and people expect it to be available digitally," said another interviewee. "We have so much information that people now can only use if they show up in person." The same interviewee found that the failure to provide digital access represents a significant compromise of mission in an era when new technologies make so much more possible.

Many museum professionals interviewed reported a desire to put online more visual and textual content associated with current special exhibitions, accompanied by concerns about the copyright consequences of doing so. Meanwhile, digital services are growing. For institutions and academics, ARTstor offers ways to digitally access the art collections of its member organizations. Critical Commons provides back-end multimedia support for visual

arts analysis, cultural critique, and more. The Society of Architectural Historians makes public a database of architectural images called SAHARA.

These are all arenas in which today's copyright issues are magnified, especially since representatives of rights holders see new museum-based digital platforms as potential sources of additional licensing income. The evolution of these emergent practices, however, depends on clarity about the full range of rights—those of owners and users—that exist under copyright, especially fair use.

As the permissions culture has increasingly clashed with digital practice, there has been an effort to address fair use. Early in 2011, the Association of Art Museum Directors established guidelines for the fair use of digital thumbnails representing artworks (AAMD, 2011). Interviewees noted that although these guidelines had been empowering for many, they had also given rise to doubts about the fair use status of small images that exceeded the stated image sizes—illustrating how, in the fast-moving digital environment, specific fair use guidelines can become outdated.

There has also been a significant attempt to facilitate the employment of fair use by the Visual Resources Association (VRA). In 2012, on behalf of VRA's Intellectual Property Rights Committee, and with the advice of a distinguished panel of legal advisors, Gretchen Wagner (then at ARTstor) drafted the VRA Statement of Fair Use of Images for Teaching, Research and Study (VRA, 2012), which addresses the concerns of visual resources librarians (and by extension educators) about image use. This document provides a powerful affirmation of the applicability of fair use in and around the domain of the visual arts, without directly addressing museum, scholarly publishing, or artistic practice.

Polarized Copyright Attitudes

Interviewees overall expressed a polarized set of attitudes about using copyright in relation to their work. On the one hand, interviewees across professions recognized the value, even the necessity, of activities such as copying and sharing to accomplishing their work, and expressed frustration that the permissions culture can interfere with their achievement of mission. On the other, they wanted to make sure that they paid proper respect to the creativity and hard work of others, and that they maintained positive relationships with them. Copyright concerns were activated in both attitudes. This polarity was particularly evident among nonartist visual arts professionals.

Visual Arts Professionals

Art historians were acutely aware of the need to reference and quote copyrighted work, and understood it to be integral to their scholarship. Some indeed were simply exasperated that scholarly use even involved licensing, since they believed that scholarship performs a different function in the field than does an artwork itself. The fact that they typically receive no revenues from their publishing activities—and indeed often incur permissions costs left uncovered by their publishers or universities—only exacerbated their frustration; while a few scholars reported receiving significant institutional subventions, a considerable majority of those interviewed did not. Professors also saw access to copyrighted material as crucial to their teaching, which they believed kept alive the history of art from one generation to the next, and they believed that access to that history was imperative. One academic working online said that the reuse of copyrighted material was acceptable because “our job is to teach and educate.” Access was particularly important to the study of contemporary artists: “So much of the art world is about appropriation, reimagining images from other artists from other moments,” said one scholar.

Museum professionals universally understood a core feature of their work to be providing access to art, a mission greatly enhanced by digital opportunities. One defined museum work as “seeking the ultimate rewards in educational outcomes, research advances, collections care, and stewardship and public experience.” Another said, “The museums and the libraries are guardians of knowledge, and the constituents we work for are the people of the public as well as the artists.” The following observation was also made: “Our mission says we should make our materials available to scholars throughout the world. In the time of digital humanities, we want to put all this material online.” Other visual arts professionals, especially editors and publishers, noted that artwork was essential to execute and promote scholarship: “Copyright is about scholarship, not about thwarting it.”

At the same time, interviewees, particularly museum professionals, were also very willing to defer to the preferences of real, putative, or potential rights holders. Generally, interviewees understood artists as operating outside the marketplace, which made them and their work culturally significant, while leaving the artists themselves vulnerable and in need of understanding, attention, and (in some cases) remuneration.

This understanding helped some museum professionals justify their own licensing programs, and in some cases to seek licenses from others—for institutional publications, in particular—even while acknowledging that not all licenses might be technically necessary. They were

Visual artists and other visual arts professionals believe both in honoring copyright holders and in unlicensed access. They lack the bridge of fair use across their polarized attitudes.

readier to tolerate reliance on licensing by others, and to engage in it themselves, if the activity to be licensed fell outside their core understanding of mission. Many respondents distinguished between scholarly use, which they privileged, and “commercial” publishing; they tended to associate serious monographs and exhibition catalogues with the former. Many felt that licensing was most appropriate for merchandising uses such as magnets and mugs.

Many visual arts professionals believed that licensing copyrighted material for institutional uses was a way to show respect for artists. As one museum respondent explained, “We want to respect artists and their rights. We decide to err on the side of things that might be copyrighted and thus get copyright whenever the work is not in the public domain or orphaned.” By the same token, they may forego any consideration of fair use as a substitute for licensing. Another museum professional recalled an incident where the work in question might actually have been in the public domain, but nonetheless the institution “felt some obligation to behave protectively of the [dead] artist.” According to another, “We need the author and the circles of authors and the peer community to think we operate with diligence, and that we honor requests.” Some felt a stronger obligation to independent artists than to estates or intermediaries; one online curator, who routinely employs fair use, felt obligated to ask “independent artists” for permissions, “out of respect.”

Many of the visual arts professionals we interviewed found it important to honor the integrity and intent of work entrusted to them through their own image-licensing practices. “We should not make it easy to get quality copies of works when we are partially in charge of representing artists,” said one museum official. An editor noted, “If you’re using the image in a transformative way, but if the transformation takes that image in some way and bastardizes it, flips it in a way that is not the intention of the scholarly work, that’s a concern.” In one case, this editor explained, a third party reused work published by this editor for a politically controversial purpose, which greatly upset the author. “The permissions process lets us assess how the material will be used,” the editor said.

Closely related to the importance they attached to honoring artists was the imperative, expressed by many visual arts professionals, to nurture positive relationships with sources, on whose future goodwill they may be dependent, even when seemingly irrational demands were made. In one case, an institution reedited a video in order to eliminate a background image of an artist’s work, merely because the artist did not want it to appear. The goodwill that derived from modifying the video “was more important than being aggressive and keeping it up there with fair use,” explained the curator. Scholars who focus on one or a few modern artists, and curators whose work involves close relationships with certain rights holders, often felt themselves hostages to those who supplied their images. Moreover, like rights holders for works of art, museums and archives wield enormous power because of their effective control of the representation of works they control; professionals in these fields may

choose to license image rights from museums even when they need not do so (practically or legally) in order to remain on good terms with these sources.

The tension between the two attitudes, which express different parts of their mission, made for hard calls: “How much to privilege the artist’s intent is a constant source of discussion. We see ourselves championing the art of our time for now and for future generations. Those two constituencies will always be of equal concern for us.”

Artists

Artists we interviewed and surveyed were less committed to the permissions culture than members of any other professional category. They were less likely than other visual arts professionals to expect that permissions should be required as a default for uses of their own work.

Interviewees were artists other than commercial artists, and they self-consciously understood their work as originating beyond the marketplace—even though many earned significant income from their productions. These artists nearly universally agreed that copying or other use of third-party material was central to their or other artists’ practice—ranging from imitating the work of a precursor to taking found images and reworking them into new works. The artists agreed universally that a work of art that had entered the public sphere was fair game for critical and scholarly commentary.

Artists often celebrated the recombinant and collective element of artistic creation. One artist said, “There are artists who make entire careers on copying as artists, not forgers.” Another said, “The only original art is the first cave painting.” Artists actively asserted their own unlicensed uses as aesthetically vital. One artist whose practice included collage noted, “I always thought that I was making a contribution to culture and art by using collage (and borrowed imagery) in my own creative way.” Artists who came of age during or since the appropriation-art movement of the 1980s felt this especially strongly: “The parallel reality of existing imagery needs to be explored and examined and understood.” Referencing the ubiquity of copyrighted material in the urban streetscape, one artist photographer put it this way: “I started to appropriate because I wanted to deal with things that had happened in the real world. We live in an appropriative culture. Photography is by nature appropriative. If you had to ask permission every time you took a pic on the street, you wouldn’t have street photography.”

Artists prioritize recognition over control and compensation.

Artists whose work had a political or social-commentary cast also were emphatic that typically unlicensed quotation from copyrighted work was a core part of artistic practice. One said, “Part of my premise is that these images [from popular culture] keep coming back, they harm

the same people every time, just when you think they're dead and gone, so their reoccurrence in my work is a comment on that." This artist would not attempt to get permissions for copyrighted material being thus critiqued.

Artists often also expressed impatience or disregard for the niceties of copyright; some believed that knowing more would inhibit their own creative impulses. "Steal whatever you want [during the creative process]—you do have to worry about the legal parts later," said one. "For me to understand copyright law derails me. I shouldn't have to know everything about this—it would hurt my work," said another.

Both in open-ended answers to the survey and in interviews, artists were also relatively relaxed about the prospect of having someone else use their work, compared with the expectations expressed by nonartists. Artists often told about others using their work for one purpose or another. Many viewed the recognition this promoted, even when it occurred without attribution, as a strong positive. One artist said, "Google or go to Flickr and there are tons of images that aren't taken by me or authorized by me. To my mind that's a good thing for me. I benefit because often people put my name on the image and the location name. So then in the searches I show up more. It's good at this point in my career." One artist/teacher expressed a common attitude among artists: "I tell [my students] they would be lucky if someone 'stole' their work and appropriated it in an art piece. It's positive exposure." A sculptor said, "I don't care if people use my work as illustration. I was on TV the other week, and I was happy they used photos of my work without payment." Another noted, "Someone wrote from England recently, to reproduce my work in their PhD dissertation, and I thought it was nice to ask but no need, take what you want from my website. That kind of thing is good for artists; I can't imagine anyone would be worried about it. I've never charged anybody. That would be terrible." An appropriation artist told the interviewer: "I've had other people quote my paintings. I've always felt honored—I also feel that I was honoring Andy Warhol by quoting him." Another artist told us about someone who had attracted major attention for "a point by point copy of my work. But I never thought, 'How dare she do that?'" A gallerist said, in relation to the use of photos for critical or review purposes, "I don't know an artist [in my gallery who] has ever refused to give an image for what was said about them. Most artists are thrilled to be memorialized."

Artists, like members of other visual arts communities, strongly valued attribution, both for the benefits it may confer and as a mark of respect for their hard work and individual creativity. Indeed, they prioritized recognition above control and compensation. An artist who represented a deceased friend's estate was given the hypothetical situation of someone using an image without going through the estate. The artist said, "I would be thrilled that [the deceased artist's] work was getting back into culture. I would just send the author a heads up saying, 'Thanks for doing work with [the artist's creations]; if you wouldn't mind letting me know next time I'd appreciate it—but I wouldn't charge.'" Another artist said, "It's OK to borrow ideas, to study past works, but an artist is obligated to try and create something of his

own. If you have taken their essence, you have crossed a line.” Several artists told of seeing their work or that of their friends misrepresented as the work of others or copied wholesale, always with a strong sense that unethical behavior had occurred. One sent a cease-and-desist letter to a project whose central concept closely echoed work of the artist. A photographer added, “I wouldn’t permit people to crop my image, print in green ink, etc. So copyright is really for me about controlling how my image gets used and of course having my name there.”

The artists interviewed had no general expectation of receiving compensation for a wide range of secondary artistic or scholarly uses of their work. Some, however, said that they might use copyright to block use for a commercial project such as an advertising campaign, if the work was misrepresented in reproduction, or even if it was slavishly copied by another artist. One survey respondent recounted an incident in which a third party had commercialized three images. The respondent succeeded in having the offending item removed, “but if he had taken them, and posted them on his website with the proper attribution for informational purposes only, I wouldn’t have had any problem whatsoever.” One interviewee saw work derivative of the artist’s own work in a department store window and demanded payment; the artist was satisfied when the design was removed from the display.

Overall, interviewees and survey respondents both indicated a desire to respect copyright owners’ monopoly rights, whether it was to honor creativity or to maintain good relations with project partners. At the same time, they all recognized the need for unlicensed access to some copyrighted material in the service of accomplishing their mission. They lacked a shared vocabulary, however, to find a way to implement both values in their work. Fair use would provide the bridge between the two values, which currently are experienced instead—and unnecessarily—as in conflict.

GRAPPLING WITH COPYRIGHT AND FAIR USE

This section discusses approaches to coping with third-party copyrighted material and the challenges of employing fair use in the visual arts communities of practice.

Risk

Exaggerated risk assessment was revealed to be a major obstacle to employing or even considering the employment of fair use. Assessments of risk typically were either grounded in misinformation or altogether ungrounded. Exaggerated perceptions of risk had a greater effect on the work of nonartist professionals than on artists.

Interviewees often equated conservative, even self-censoring choices with acceptable security. This concern crossed freely from the most traditional institutions to the most cutting-edge digital projects. “Better safe than sorry,” said one educator, who was undertaking an ambitious digital endeavor in which fair use was occasionally invoked. Even artists who employed fair use sometimes expressed uneasiness, believing that they had put

themselves at risk. “By design fair use is a gray area, and I knew I had a fair use defense but I decided to get permissions whenever possible,” explained an artist who drew from a range of copyrighted material and did in fact employ fair use in situations where it seemed likely that getting permission would be too difficult.

Art historians considered not only their own risk in using material without licensing it, but their responsibility for others’ later use of the same material. “Downstream concerns do play a role—‘If we go out on a limb, God knows what might happen and who might come after us’—we are all more trained to think that way,” explained a curator. Interviewees appeared unaware that such downstream-liability risks are not likely to arise legally in connection with good-faith cultural initiatives undertaken by museums and other institutions, to say nothing of individual academics.

Art historians feared being sued by entities with far greater resources, and worried that their reputations or positions could be harmed if they were seen to exercise bad judgment. “There’s not enough money in publishing for people to take the risks, even if the threats are almost always empty,” said one scholar. “Scholars and even more their publishers are afraid of being sued even when what they want to do is clearly fair use because the lawsuit itself by a well-funded corporation or other entity would be so expensive that the publisher or scholar could go under by legal costs even if they won.” One museum professional, who is also a scholar, noted the institution’s rigid and extreme permissions policies: “I know that we are too risk-averse, because no one will probably sue us, but. . . .” Said another museum professional,

Visual artists and other visual arts professionals mistake self-censorship for safe conservatism.

“I don’t want to be the test case. I don’t want [my institution] to be sued.” They were also afraid of getting their employers or backers in trouble—often seeing themselves as embattled or threatened by potential accusations about copyright, and worried about their own standing within an organization or with a funder should they precipitate trouble.

Even artists, the population in this group most likely to operate outside the permissions culture, often spoke of their choices as risky. One said, “A lot of times artists play it fast and loose until they play it poorly.” Some artists whose work incorporated that of others believed that their work could be seen as infringing. Some even cultivated an attitude of transgression; thus, artists engaged in social critique saw their copyright choices as a dare to the larger society.

Overall, actual experience of trouble over copyright appears to be small. Indeed, among 2,828 survey respondents, only one person had ever experienced a formal legal conflict (quickly settled out of court) over copyright. Initial survey results may appear alarming; possibly one in ten, or more, of survey respondents seemed to experience challenges. Among survey respondents to Q15, which asks if the respondent has ever been challenged in the use of third-party works, almost 10% said yes; 5% of respondents to Q17 reported a challenge to online work.

However, these results need to be understood within the context of what “challenge” meant to respondents. In their explanations (Q16 and Q18), many revealed that they interpreted “challenge” to include their own self-doubt, queries by colleagues, or established customs of the permissions culture. Thus, for respondents “challenge” often meant either self-censorship or the frustrations, delays, and distortions resulting from something other than a challenge from a rights holder. Furthermore, respondents to Q15 and Q17 were almost entirely overlapping, such that Q17 added only a few respondents to the group who answered that they faced challenges in Q15.¹⁴

Among people who documented, in Q16 and Q18, actions that challenged their uses of third-party material, many of the respondents to both questions referred to automatically generated online takedown or Content ID notices (two kinds of removals on YouTube). Almost universally, the respondents had acquiesced to the takedown or Content ID match, rather than claiming fair use as YouTube permits—a significant form of self-censorship.

Besides the frustrations of uncertainty and existing practice, respondents also complained about rights holders contacting them with financial demands. Some had been contacted by ARS or VAGA, after which they typically reported to have negotiated or paid the asking price. Scholars had received complaints from rights holders who had searched databases such as JSTOR to identify the use of images in their articles. Others had received emails from museums and had negotiated image-licensing terms. Graduate students had been unable to

upload dissertations with all relevant illustrations to ProQuest. Respondents typically acceded to requests or removed images.

Interviewees routinely exaggerated the risk of employing fair use.

In any case, the endemic concern about legal risk is radically out of step with any actual experience of direct challenges, most of which appears, in any event, to be automatically generated or sent by entities with a default position of demanding permissions in all cases. The lived experience of legal action or anything close to it appears to be vanishingly small. By contrast, the belief that copyright is fraught with threatening situations appears pervasive.

Current Copyright Strategies

Interviewees and survey respondents demonstrated great creativity and goodwill in their attempts to find solutions to perceived problems with access to copyrighted material. They shared a variety of coping strategies, but they typically avoided one approach that could have addressed many problems—reliance on fair use—citing risk, uncertainty, a desire to respect artists' wishes, and the fear of offending needed partners.

Solutions other than relying on fair use included:

- *Generate and use material that is copyright free or preauthorized for use.* Some visual arts professionals try to use material that is not subject to copyright restrictions, whether because it is clearly in the public domain or because it is part of a licensed package available to some academics and students through their institutions. These professionals often gravitate to the public domain, and institutions that are creating public image databases are focusing attention on licensed or public-domain materials. Several interviewees pointed out that most of art history—from cave paintings to work produced before roughly 1900—is in the public domain, and these interviewees were comfortable working within that time frame; this obviously is not a possible resort for those working in the twentieth and twenty-first century. Creative Commons and open access alternatives that anticipate and authorize use by the public were not widely employed, since much historical and commercial material is unavailable under such licenses. Nevertheless, some artists responded in open-ended comments in the survey that they routinely licensed their own new work under Creative Commons licenses, and tried to promote the use of such licenses, hinting at a larger body of available material in the future. Some scholars looked forward to the growth of open-access journals and repositories, which depend upon the generosity of contributors to provide general advance permissions for use. Today, however, even scholars who

donate to such open access sites must often, in the current environment, forgo use of existing copyrighted material in their own writing.

- *Make private deals.* Some hoped to create what are effectively private treaties among large institutions, such as museums, to share some kinds of material in certain circumstances. Several museum professionals expressed the hope that field-wide agreements could result in more efficient, digital-appropriate, and uniform practice. The Images for Academic Publishing project was widely cited as an ARTstor innovation that alleviated the pressures of the permissions culture: “People could help themselves based on the blanket terms they were agreeing to. It was best for everybody. The best example of the way all parties can work together.”
- *Negotiate, negotiate, negotiate.* Visual arts professionals often spoke of long negotiations—one scholar used the phrase “wearing them down”—even for use of a single image. Publishers and editors reported gradually winning more appropriate contract terms from rights holders with this method. Several said proudly that they had won agreements “in perpetuity” for certain electronic publishing projects, using persistence and term-negotiating skills. Many depended upon well-maintained relationships to make the permissions process easier; such relationships also facilitated extensive negotiations. Interviewees told story after story about how the assiduous and long-term cultivation of contacts at an artist’s estate—with agents or representatives, or with an artist himself or herself—paid off in terms of executing research, publishing a book, or mounting an exhibition. Interviewees often described these protracted “charm offensives” as fraught with risk, as they staked their professional credentials on the outcome. Regarding one failure, a museum professional said, “I’m a peacemaker and a peacekeeper, and [when the relationship didn’t thrive] that felt really awful.”
- *Beg.* In some cases, academic interviewees tried pleading for lower rates because they were resourceless academics, promising to use the work only for a nonprofit purpose or in the small print run for a monograph. (They often, however, pointed out that even very low rates could add up to significant fees for a book that required many illustrations.) Rights holders and their representatives explained that they expect and are open to negotiations, with special sympathy for scholarship that circulates with small print runs. Museums appear to be fairly open about this practice where image licenses are concerned, while rights holders and their representatives do not make this option public. In addition, there is some ambiguity around what constitutes nonprofit work, particularly in academic publishing; notably, working definitions based on print run do not translate comfortably into the domain of digital publishing.

- *Go without.* Interviewees reported struggles to find work-arounds for objects that were too difficult to clear—downsizing lists of illustrations or substituting second-choice images, using line drawings rather than photographs of artifacts, choosing images of lesser value to the argument, and even stripping images from dissertations and ebooks. These decisions were reported with regret but also with acceptance, since such behavior is commonplace in the field.
- *Hear no evil.* Students and artists sometimes ignored copyright and tried to maintain ignorance, in order to do their work uninhibited; some of those openly dreaded the day when they would have to confront realities they had avoided—leaving open the question of how much, whatever their intent, copyright considerations may have influenced their creative choices.

Some of these approaches involve enormous costs, especially in time. Some are degrading, and at least one—the last—could be risky. None is working particularly well in the digital environment. Interviews in general were suffused with the anxiety, concern, frustration, and bafflement resulting from the gap between what is technically possible (and being encouraged in the wider culture) and the limits of current mechanisms and practices for the resolution of permission deadlocks. One discouraged museum professional said, “Our staff is whipped. We’re paralyzed.” In particular, as interviewees repeatedly explained, these adaptive mechanisms to cope with permissions culture are not working well in a digital era. The permissions culture is simply not compatible with the missions of museums—or, by extension, other members of visual arts communities—in the digital era.

Fair Use Employed

Interviewees and survey respondents (the latter in open-ended questions) occasionally reported the successful employment of fair use—always without any negative consequences. Sometimes these were last-resort scenarios, once all other options had been exhausted. Sometimes fair use was undertaken subject to extra, self-imposed conditions. One museum, for instance, puts watermarks on all images of works distributed under fair use (as well as those in the public domain). The interviewee explained that this was to prevent inappropriate uses by others. Sometimes professionals even felt obligated to alert rights holders to the use, and even to ask rights holders if fair use was acceptable. In general, those who relied successfully on fair use did not seem to share their positive experiences with others.

One area in which fair use is being employed comfortably is the use of small images, or “thumbnails,” on websites. Interviewees and survey respondents reported that some institutions are relying on court rulings to the effect that small referential images produced by search engines constitute fair use, as well as on 2011 guidelines by the Association of Art

Museum Directors that the use of thumbnail images of a certain size could be fair use. This “safe” approach, while having the benefit of making a reference image available, may also unintentionally limit practice, because many online visitors to museum websites have legitimate purposes that extend well beyond simple reference.

A few museum professionals reported their institutions relied on fair use when posting larger images on digital collection sites. In one case, images were represented at sizes that rights holders argued exceeded fair use, and the museum kept the images at that size anyway. A professional at one museum said that the institution relied on fair use with comfort, because it offered an easy way for rights holders to request takedown: “The method of ‘put it up’ and then ‘take it down’ if someone complains has not harmed [our institution].”

Interviewees also talked about other situations in which they employed fair use. Museums sometimes include art objects in exhibitions and reproduce images of them in catalogues when they believe they have a fair use argument. A museum professional whose institution is launching an app said that the inclusion of some items relied on fair use. Another respondent

Interviewees sometimes employed fair use, often as a last resort, and always without incident.

decided to employ fair use when a negotiation with an artist’s intermediary organization collapsed because of high prices. “So I said, ‘We’ll have to agree to disagree on that.’ We never paid, and we never heard anything.” Several interviewees at museums said that they employ fair use if a work is “orphaned” (that is, when its copyright owner, if any,

cannot be identified with reasonable effort). Some impose higher standards than others for determining when this is the case. Finally, some museums are dropping bans on photography within museums, perhaps reflecting declining concern with downstream uses of copyrighted material. In some cases, indeed, museums encourage posting and tweeting images from the galleries.

Tenured senior scholars reported occasional reliance on fair use, without adverse consequences. Editors and publishers sometimes employ fair use, driven by deadline and mission. “When we permit fair use applications, we would have expected [the author] to have made a best effort to identify copyright holders. Sometimes this is not possible. . . . So we ask the author to at least acknowledge the source in that case,” explained one editor. An independent digital publisher interviewed had executed a large digital project, involving both text and image, mostly under fair use, without a problem. In the case of the catalogue of a controversial exhibition published by a university, the latter proceeded with publication under fair use as an act of free scholarly expression when the artist’s estate refused permission. The scholar in question reported that rights holders “threatened to sue and ultimately did not.” Another scholar, whose latest work featured crowdsourced curating, noted wryly, “Fair use is arrived at, even if not articulated, by virtue of economic realities that make permissions impossible.”

Some publishers are more public about the trend toward employing fair use than others. Two editors of art journals reported consistently employing fair use in their publications, and both believed their approaches should be more common. Notably pioneering in this area is the University of Chicago Press, which has judiciously expanded its employment of fair use. Editor Susan Bielstein noted that, as a result, the press has been able to issue works that depend extensively on fair use, such as Geoff Kaplan's *Power to the People: The Graphic Design of the Radical Press and the Rise of the Counter-Culture, 1964–1974*. In certain areas, such as film-frame enlargements, "there is not even a question of seeking permissions." This liberalization appears to be taking place by fits and starts at other publishing houses as well. An editor at another major press noted that screen shots are now acceptable. Further, the interviewee said, editors not only talk to authors about getting permissions, "but we also talk to them in some cases about not needing to acquire permissions because of working in the context of scholarly review."

Again, editors and publishers reported no adverse consequences in connection with their reliance on fair use. A journal publisher whose publication often makes fair use of images noted, "Sometimes we get emails from some of the larger institutions. They usually go away once we explain to them who we are and why we did this. The specter of a court case in which [a major museum] trashes a tiny nonprofit would make them look evil. Some back down because of that and some because it's not worth it." The editor also recounted an incident in which the editors sought permission, but the price turned out to be too high. "We went to the original photographer, and he gave [the images] to us for free. When the licensor (a museum) complained, we said, 'Well, the fee was not reasonable.' We never heard back from them."

Artists were more likely than other visual arts professionals to identify fair use as a tool in their work process, although their rationales were sometimes interlaced with an element of willed ignorance. For instance, one artist who had participated in the early heyday of new media art, explained:

I know the broad contours; I try not to get caught up in the details. A big part of me wants to just be able to make my work and not worry about it and not get permission and not be bothered about it. I draw a line between appropriation for creative purposes and appropriation for the purposes of consumption. I pay for movies and songs when I download them for my own pleasure. I'm not a copyright anarchist, but I do feel fair use ought to be much more protective of artists, especially when the use is noncommercial.

Some artists we spoke with made art from a variety of found objects, including newspapers, maps, photographs, sketches, and digital imagery. One artist created such work believing that it would never be able to be published. After an exhibition, however, a university did publish a

catalogue including reproductions, without asking for or procuring any permissions. Artists interviewed also reported exploring three-dimensional printing techniques replicating artwork, making digital copies of works of commercial culture, copying the work of earlier artists, and reassembling work digitally. In some cases, museums have implicitly ratified an artist’s fair use judgment by acquiring work incorporating third-party materials without including the boilerplate contract language that requires indemnification from the artist for any copyright infringement.

Sources of Copyright Information

Members of the professions represented in CAA are not only surrounded by copyright issues, but are also immersed in a culture in which much copyright information is shared, particularly about the permissions process. At the same time, very little information is provided that would allow anyone to make a reliable fair use determination.

Many of the people we interviewed, and the large majority we surveyed (more than two-thirds) had received no formal copyright education or training, either in their own education or at their workplace (Q23). Among those who said that they did not receive formal education (Q24), respondents mentioned as sources of information their own institution’s lawyers, “the internet,” advice from colleagues “on the job,” listservs in which peers consult each other, gatekeepers’ comments, or even, in the words of one survey respondent, “rumor.” Some attended workshops and sessions at annual professional conferences, and some reported that the topic had been addressed in graduate school.

Copyright knowledge in the field is partial or skewed.

Copyright Education, by Profession¹⁵					
	Academics	Editors/ publishers	Museum professionals	Artists	Total
Informal learning	77%	71.1%	72.4%	70.4%	74.5%
Formal education	23%	28.9%	27.6%	29.6%	25.5%
Total %	100	100	100	100	100
N	1,144	38	301	537	2,020

In general, current copyright knowledge is catch-as-catch-can, highly situational, and not authoritative. One museum professional noted, "Information is circulated with complete confusion. Everybody knows, but everybody doesn't know." Another said, "People share information haphazardly."

Nonetheless, the majority of respondents to the survey expressed confidence in their copyright understanding (Q22). Nearly two-thirds rated their copyright understanding as excellent or good, and only 5 percent as poor. Apparently, formal copyright education boosted confidence; 53.3 percent of those who reported an excellent understanding had received formal copyright education. Editors, publishers, and art historians rated their knowledge higher than other nonartist professionals.

Given the lack of employment of fair use and overreliance on permissions, this confidence suggests that when members of the professions in CAA consider copyright education, they think of it in terms of requirements to get permissions, rather than the range of options under copyright. This is reinforced by the fact that editors and publishers, who often reluctantly play a gatekeeper role with respect to permissions and often fail to make use of available fair use rights, are both the most confident professional group and the most likely to report having received formal training. It also suggests that members find informal knowledge an appropriate source of information for the knowledge that they depend on to do their work.

The visual arts communities of practice find reinforcement for adherence to a permissions culture in workshops, in advice or demands from supervisors, lawyers, and other gatekeepers, and from peer networks. Formal education on copyright appears to increase tendencies to overestimate risk and underuse fair use. Overall, copyright knowledge tends to be partial and skewed.

EFFECTS ON VISUAL ARTS PRACTICES

Although the consequences of copyright confusion and failure to employ fair use in visual arts are specific to particular practices, there are commonalities. These include:

- unnecessary delay and expense
- subordination of creative decision making to the availability of materials and the cooperativeness of providers
- removal of projects and specific kinds of projects from institutional and personal agendas
- limiting the number and scope of projects undertaken
- failure to innovate in the digital environment

Avoiding and Abandoning Work, by the Numbers

Fully one-third of CAA survey respondents said (Q13) that they had avoided or abandoned a project due to actual or perceived inability to obtain permission to use third-party works. Among all professions, the most likely to say that they have been unable to execute their work as a result of copyright problems were editors and publishers, a majority of whom have avoided or abandoned a project for copyright reasons.

Avoided or Abandoned a Project, by Profession¹⁶					
	Academics	Editors/ Publishers	Museum Professionals	Artists	Total
No	61.2%	43.2%	64.9%	79.4%	66.3%
Yes	38.8%	56.8%	35.1%	20.6%	33.7%
Total %	100	100	100	100	100
N	1,157	37	305	540	2,039

Although artists surveyed were least likely among the visual arts communities of practice to have suffered inhibition and deformation of their work processes because of copyright, fully one-fifth of those surveyed testified to abandoning or avoiding a project for copyright reasons. Of artists who had abandoned or avoided a project, only 29 percent also said that they used others' copyrighted works frequently. Thus, the great majority of those who had abandoned projects were artists who had not chosen an artistic style or form that routinely involves the use of copyrighted material. This result points directly at self-censorship of an

entire genre of artistic project. Does the mindset portrayed in the responses summarized in these pages also affect what people might do in the future? Survey responses suggest that it will. Across the board, the majority of survey respondents said that they would do new work differently if copyright were not in the way (Q20). Sixty-six percent of all those who reported that they had abandoned or avoided a project because of an actual or perceived inability to obtain permissions said they would be “very likely” to use copyrighted works of others more than they have in the past were permissions not needed.¹⁷

Would Use Third-Party Work if Permission Not Needed, By Profession¹⁸					
	Academics	Editors/ publishers	Museum professionals	Artists	Total
Not at all likely	4.3%	2.9%	6.7%	20.8%	9%
Not very likely	17.6%	17.1%	25.5%	33.8%	23.1%
Somewhat likely	26.1%	22.9%	29.9%	27.0%	26.8%
Very likely	52%	57.1%	37.9%	18.5%	41.1%
Total %	100	100	100	100	100
<i>N</i>	1,140	35	298	530	2,003

NB: Rounding error of +/- 1 at .1.

Those professions most likely to undertake new work if permissions were not required were those most likely to have canceled projects under the current regime: editors and publishers. Among all nonartist professionals, three-quarters said they would be somewhat or very likely to undertake new projects (with editors/publishers most likely, and museum professionals least likely). Among artists, almost half were more likely to make work incorporating third-party material if they did not need to worry about copyright—a very large number, but still much lower than that for editors and publishers. This reinforces the distinction evident throughout the survey between artists and other visual arts professionals in terms of fair use conservatism. Artists’ responses to Q20 matched expectably the proportions for answers to Q5 (In your own work, do you use the copyrighted works of others?). At the same time, artists who had abandoned or avoided a project were more likely than their peers to say that they would undertake new work if copyright did not stand in their way.

This experience of both avoiding and curtailing certain kinds of work was fleshed out in stories told in interviews, and in responses to open-ended questions. This information provides ample evidence that the cost of copyright ignorance and confusion, reluctance to use the balancing features of the law, and gatekeeper pressure to enforce a permissions culture have resulted in the deformation of mission. Work has been delayed, made more expensive, or even abandoned because of the strictures of the permissions culture.

Permissions culture changes and deforms the nature of what is done in the visual arts community.

Art Scholarship, Publishing, and Teaching

Scholars, editors, and publishers who were interviewed reported consistently that the production of art scholarship suffers delays and costs because of a widespread belief that permission is required for all images used as illustrations in a publication, even though some editors at academic presses also said that such permission is not required in all cases. “[This] slows research and publication down,” one scholar noted. Another scholar said that copyright questions overshadowed the work process as a whole: “In my own writing, I’m worrying all the time.”

The costs of compliance fall disproportionately on those with the least resources, namely, graduate students, junior faculty, and academics at institutions that do not cover permissions costs, along with scholars and independent curators, who only sometimes receive help from editors and institutions in finding out how to obtain permissions. Graduate students learn the permissions culture by spending many hours working on permissions for their professors’ work—in the process learning to avoid permissions-heavy research topics.

Most academics regard the process as an exasperating distraction from their work. Individual scholars pay rights holders hundreds, thousands, and even tens of thousands of dollars to publish a monograph with a small print run. While costs can be modest for an academic article, a scholar reported that in one case costs came to between \$2,000 and \$3,000. Others mentioned higher figures for monographs. Period surveys often prove to be prohibitively expensive, with costs of \$20,000 and beyond for permissions, but single-artist monographs can be just as high. One editor who had received an estimate from a rights agency for images to illustrate a major twentieth-century survey, requiring between 300 and 400 reproductions, reported that the cost per image was quoted at \$375 (for permissions and a high-resolution image file). Even assuming a discount could be negotiated and some images obtained at no cost from galleries, rights and reproductions cost for such a book easily could approach \$100,000. Today, the editor noted, when a trade art book’s typical print run rarely exceeds 4,000 to 5,000, sales can support only a fraction of that amount, perhaps \$20,000 or less.

Even where museum policies favor the open access use of images, information about the specific application of those policies can be hard to come by. In general, the work of securing permissions can add months or even years to production time for a project; one scholar estimated that permissions could occupy one-third of the total research time. Academics see this investment of time as most threatening to the careers of tenure-track professors. “I do worry about younger scholars entering the field,” said a senior scholar. “In tenure decisions here, time from degree to publication is very important.” The hurdles can turn into stop signs. They may make some scholars simply give up for lack of resources—whether time, money, or patience—or out of anxiety—even when they can obtain a subsidy from their own institutions.

Permissions roadblocks result in deformed or even abandoned work. Exhibition catalogues may be issued without relevant images because rights cannot be cleared. Editors of art scholarship reported journal articles going to print with blank spots where reproductions should be,

“I worry about younger scholars entering the field.”

because artists’ representatives disagreed with the substance of the article; and one book was published with last-minute revisions and deletions of all images because of a dispute with an estate—with disastrous results for sales. Journal editors have had to substitute articles or go without an article altogether because an author could not arrange permissions in time for publication. In one case, after an

author’s manuscript was completed, an estate changed position, compelling the author both to rewrite and to draw substitute illustrations. Among other things, the cost of permissions leads to less work that features historical overviews and comparisons, and more monographs and case studies.

Scholarship itself is distorted and even censored by the operation of the permissions culture. Work is represented incompletely, in a different format from the one preferred by the scholar and publisher, or not at all. Rights holders impose aesthetic restrictions that amount to a claim to the artist’s significance within the context of the scholarship—for example, demanding that a work only be reproduced at a certain size or be exclusive to a page. “Aesthetic stipulations placed on scholars by rights holders often eliminate the possibility of using the work outright, given parameters of the publication,” said one scholar. Negotiating such demands is extremely time consuming, and the process can easily change or kill a project. Scholars sometimes even substitute their own drawings for reproductions of works to which they refer. Inferior images are used simply because they could be obtained without either copyright fees or permissions fees.

In some cases, the demands of rights holders have extended to altering or censoring the scholarly argument about a work. Catalogue copy sometimes is altered because scholarly arguments and perspectives are unacceptable to rights holders. These actions are in some cases explicitly seen as censorship. “I think of copyright as a cudgel, and I have been

repeatedly forestalled and censored because I have not been able to obtain copyright permission," said one scholar whose work was not approved by the artist's estate. "For those of us who work against the grain of [the] market-driven arts economy, their one recourse for controlling us is copyright." Another said, "In many cases I have encountered artists' estates and sometimes artists who refuse rights to publish (even when clearly fair use) unless they like the interpretation in the text. This is censorship and very deleterious to scholarship and a free public discourse on images."

Scholars, editors, and even rights and reproductions experts express exasperation and at times outrage when they see the scholarly mission thwarted. An author argued, "The

"You lose academic freedom because of copyright problems."

academy is a place of contestation. Unless you can make a case publicly and have other scholars engage it, the academy as a structure isn't working. These copyright situations keep us from doing our work." One editor called the consequences of the permissions culture "criminal" and said, "Having to pull images

from books due to inappropriate requirements of foundations greatly affects the arguments scholars make and the types of works publishers publish." Another editor said frankly, "You lose academic freedom because of copyright problems."

A museum professional, who is also a scholar, reported:

If you want to publish an article, you're already asking yourself, can I work around reproducing this painting? If you want to reproduce a Picasso painting, give up in advance. You can't pay for it. You go into a different direction in your scholarship, to something that you wouldn't like to do. Your copyright problems interfere with your scholarly thinking, and in my view that is the worst part of this whole thing. It interferes with the scholarly work.

At a time when many graduate students enter programs wanting to focus on the study of modern and contemporary art, professors steer their students away from those subjects toward the nineteenth and earlier centuries, where only access fees are involved, and away from studying artists who themselves, or whose estates, might resist permissions. One scholar said, "When you're starting people on their research careers, you have to warn them: 'Is your research topic going to be too expensive to publish adequately?'"

Some PhD theses are being archived digitally by ProQuest and in the students' own institutional repositories without relevant, and sometimes crucial, images—although progress is being made on this front, thanks to the increasing recognition of fair use by ProQuest and schools alike. However, the future publication of such dissertations as monographs may be jeopardized if the researcher is discouraged from proceeding further because the topic involves too many permissions.

Professors cannot teach with the materials they prefer, and sometimes avoid teaching contemporary material.

Professors also found copyright issues to complicate the daily work of teaching, the crucial transmission of knowledge to the next generation. To a large extent, they are constrained by the limited digital-image resources of their own institutions, or their private collections—which they are unable to share freely with colleagues elsewhere. They resort to inferior-quality images because they cannot get access to those of higher quality. They often do not discuss the work of contemporary artists, images of whose work are hard to get.

And they are often discouraged from making images of copyrighted work available to students online, and are thus driven to select topics that they can illustrate with images of public-domain works. Curriculum materials cannot be distributed widely because of licensing issues.

Digital-native scholarship faces uncertain timetables and budgets, because of uncharted territory and the inappropriate nature of current licensing terms. An online multimedia project, for instance, was delayed eighteen months so that popular music referenced in some of the work could be cleared. Everyone knows that digital projects face legal ambiguity around rights, so both institutions and scholars hesitate to take them on. A scholar asked about undertaking digital exhibitions echoed the sentiment: “I don’t want that headache.”

Access to digital culture and its affordances is also crippled by the permissions culture. In one case, entire articles in a journal had to be rewritten because they referenced popular commercial culture, and the relevant media companies did not grant permission for digital distribution. The digitization of back issues of one journal proceeded with blank spots where images should be, because of permissions problems. In another case, a publisher is undertaking the arduous process of reclearing all images for the thirty-year run of a journal, in order to post previous issues online. An editor in digital publishing said, “I self-censor all the time because I don’t want to deal with the headache of getting the image out there.”

Museums and Archives

Delay, expense, and abandonment of work are a daily consequence of the permissions culture plaguing museums. The frustration is endemic. Some museum professionals used words such as “criminal,” “nightmare,” “holdup,” and “extortion” to describe the actions of some rights holders and their representatives. Museums usually have staff dedicated to permissions, individuals whose time is not devoted to the core mission. One respondent bemoaned the “wasted” time and money in

Permissions problems profoundly affect choices in museum curation and publishing: “We just avoid certain artists.”

copyright permissions: “We have several people doing nothing else than just looking into this copyright situation, and we would love to have that money and time for scholarly work.”

The cost in time, money, and stress imposed by the permissions culture profoundly affects museum curation. Because of rights problems, “We just avoid certain artists,” noted one curator. Another stated that there are fewer group shows than previously, because of licensing problems. “Depending on how much time or money I have, I choose images that are different than I would in a perfect world—both because of money or refusal of permission,” noted a curator. One institution (to the curator’s exasperation) sought clearance for all the original material in collages that were composed of popular-culture objects, resulting in extensive staff effort and delay. After an artist refused to lend to a show organized by a curator with whose perspective the artist disagreed—effectively attempting to censor the exhibition—the curator borrowed examples of the artist’s work from other museums. However, the artist also refused to allow any images of his work to appear in the accompanying catalogue, which left the curator unable to accurately discuss the historical context of the exhibition.

Museums may choose not to publish certain catalogues at all because of rights problems, creating, as one professional explained, a loss of cultural memory. In one case, an entire exhibition catalogue involving appropriation practice was simply canceled because of the concern for risk. Educational programs are limited; the potential for museum-based online education is extensive but goes partly unrealized because institutions comply with exacting policies on permissions, even for this purpose. Thus, one museum’s project to create an extended visual portrayal of the history of art was severely compromised with respect to work dating after 1922, solely for copyright reasons. Likewise, museums miss out on the opportunity to capitalize on the potential for digital distribution of collection- and exhibition-related educational materials to schools.

Some digital projects at museums are stalled, and others are truncated.

Museums are slowed or stalled in pursuing digital innovations due to copyright concerns. Thus, for example, they have been frustrated in their attempts to provide digital installation photographs of their on-site exhibitions. One museum professional explained:

ARS and the estates said, ‘We can identify the works in these exhibition views and you need to pay rights. ‘We were outraged. It was hard to swallow. There has been a lot of pushback recently. We have started to try and use exhibition history as a rich part of our website. And to have to pay rights for all that is ridiculous.

Born-digital exhibitions are limited, changed, or not attempted. In general, digital projects are limited by the perceived need for permissions, as well as by misplaced concerns about liability for downstream uses. One museum professional described the development of an app that

repackages information already available on the museum’s website, explaining that it is being challenged by ARS on copyright grounds. Smaller institutions have scrapped plans for online collections because of copyright concerns. One interviewee described a project to digitally showcase multimedia-based art that is trapped in beta because of copyright problems. The result is that valuable potential resources remain unavailable. “We have so much history not available to the public on the web, and that is becoming more and more apparent as we get more requests for our historical documentation. There are a select few who can see everything we have in person,” said one museum professional.

The limiting of digital opportunities because of copyright issues is felt with particular acuity in institutional research archives, where significant portions of the holdings— some visual, some textual—may be under copyright, and where the archives typically do not control the

“We are misleading the world. . . . This is a censored view of the material.”

copyright. Vast swaths of such material have been digitized, but institutions have been stymied in their efforts to make them available; what is available is overwhelmingly skewed to the public domain. In one case of a stalled database designed to make scholarship more accessible, a museum professional said, “Our philanthropic mission is being prevented.” At risk is “more democratic accessibility—here, in Peru, China, India, wherever.” One editor noted that the terms of use placed on digital collections use has in some cases helped scholars, but not the layperson or nonscholarly user, whose uses might indeed generate new creativity.

All agree that the cost is significant but its full extent is impossible to measure, because the mission of cultural institutions to make art accessible is limited in unknowable ways. “So much documentation of American and cultural history is denied a public life in the refusal to exhibit materials not completely copyright cleared,” said another. An experienced archivist and scholar put it this way: “We are misleading the world; we are not giving the complete picture of the resources. This is a censored view of the material.”

Artists

In spite of their generally more relaxed approach to the incorporation of copyrighted material in their work than reported by other visual arts professionals, the artists interviewed nevertheless spoke of projects that were bogged down by permissions. In one case, an artist producing a collage wanted to excerpt and recontextualize work from a book, but felt obliged to obtain permission from its publisher. When denied, the artist then sought inferior substitutes. Another artist chose to incorporate into an artwork quotations from a public-domain translation of a classic text, rather than the preferred contemporary version. Some artists said they slant their choices toward public domain when sampling, appropriating, or remixing. Posting their work online creates anxiety and sometimes results in a decision not to

exhibit. More generally, artists are both curious and wary about digital opportunities. One said, "If you had more confidence in what one's [use] rights are, you wouldn't have to cower so much when confronted with these opportunities."

In open-ended answers to Q14 and Q21, artists also told stories of altered or blocked work. Several described having to abandon multimedia works incorporating music because permission could not be obtained. Some found that completed work incorporating

Artists have had to alter their work, and withdraw work from public view.

copyrighted material could not be distributed or even shown.

One respondent completed a film composed solely of photojournalistic images, but the costs for permissions were prohibitively high and only available for limited periods.

Another artist made a series of collages incorporating enlarged, rephotographed images of published dust-jacket photographs of authors. Advised to be cautious because the original works could be recognized despite alterations, the respondent withdrew the work from public view. One survey respondent said that a work of art could not be televised unless the respondent obtained permissions for "all aspects of the work," causing its distribution to be limited.

THE MISSING FUTURE

For all the communities in the visual arts, potentially the greatest consequences are in the areas about which our interviewees were largely silent: the areas in which they do not even consider any action.

People repeatedly expressed a preemptive decision not to pursue an idea. A curator told of offhandedly raising an idea for a pathbreaking modernist exhibition while standing in the doorway of a colleague, then, in the midst of articulating the idea, abandoning the thought. A survey respondent wrote, "I will write only about objects for which images are freely available, or I won't illustrate what I write." A graduate student wrote, "There are parts of my dissertation that I will most likely not attempt to publish because the images referenced are in a museum that charges a very high fee for use of the images. I can't make my case well without them, and I can't afford the cost."

Indeed, entire areas of art scholarship may be missing from the record, because of discouraged scholars and researchers who tacitly agree that rights holders may be arbiters of the very subject matter of art scholarship. Art history professors simply avoid teaching about some artists, effectively erasing them from institutional memory. "Aggressive rights holders prevent the existence of field specialists, or make the existence of such specialists very tenuous, as that scholar's entire existence is tied to the appeasement of that estate," said one scholar. Studio art professors said that their students preemptively steer away from some topics: "My students say, 'I was going to do this with an image, but that would be infringement.' Despite these students being well versed in appropriation art history like Warhol, they have also heard enough about lawsuits that they censor themselves."

Some artist respondents found themselves simply discouraged from particular lines of creative inquiry or entire artistic genres—and some even changed their entire approach in response to copyright concerns. One commented, "I used to work in montages with found imagery but found the specter of corporate blocks, mostly in the music industry, very intimidating." Another said, "I did not receive the permission—I changed the idea so that I do not need the permission."

These missed opportunities are not mere inconveniences or expensive exigencies. They fundamentally distort mission. Beyond these oblique hints at what is not being done is uncharted territory. It will remain unmapped to the extent that visual artists and other visual arts professionals permit rights holders alone to determine the contours of these fields, rather than defining the boundaries themselves, consistent with fair use.

CONCLUSION

Visual arts communities of practice share a common problem in confusion about and misunderstanding of the nature of copyright law and the availability of fair use. Their work is constrained and censored, most powerfully by themselves, because of that confusion and the resulting fear and anxiety. Better and more work can be done through a better understanding of copyright, without impairing the ability of artists and art historians to receive credit for, maintain appropriate control over, and monetize their work.

The biggest single problem for visual artists and other visual arts professionals in copyright knowledge is understanding the rights of new users of existing copyrighted material. Within that area of knowledge, fair use is the most significant element. Fair use is a reliable right of free expression, and one that courts including the Supreme Court have celebrated as a tool to generate new culture. However, deciding when to invoke fair use must also be made on a case-by-case basis, grounded not only in the core concepts of transformativeness and appropriateness, but also in the mission of the specific community of practice. Current education and experience have distorted the understanding of fair use's value in the visual arts communities. Risk has been magnified, and the ambiguities of fair use have been exaggerated, in part through the lack of employment of the doctrine.

The primary problem in regard to copyright constraints faced by the visual arts communities of practice is members' own confusion and reluctance to use legal options. Because there is such a vital set of reciprocal relationships in this field, with professionals functioning both as creators and as gatekeepers, they themselves can address this problem. They can identify and clarify what are best practices in interpreting fair use within their communities of practice, and thus help further their work as scholars, museum professionals, and artists.

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Appendix A: CAA Creativity and Copyright Survey: Summary of Non-Open-Ended Questions

CAA Creativity and Copyright Survey



1. Where do you live?		Response Percent	Response Count
United States		88.0%	2,464
Other (please specify)		12.0%	336
		answered question	2,800
		skipped question	28

2. What is your primary professional relationship to the visual arts?

		Response Percent	Response Count
Administrator		2.6%	73
Architect		0.2%	6
Art/Architectural Historian		33.6%	946
Art Educator		12.5%	352
Artist		21.1%	595
Conservator		3.9%	110
Critic		0.5%	15
Curator		4.6%	131
Dealer/Gallerist		0.5%	15
Designer		1.5%	42
Editor		1.5%	42
Librarian		5.1%	144
Museum professional other than curator		3.7%	104
Other (please specify)		8.6%	243
		answered question	2,818
		skipped question	10

3. How long have you practiced professionally in this area?

		Response Percent	Response Count
Less than 5 years		17.0%	479
At least 5 but less that 10 years		18.4%	517
At least 10 years		25.7%	723
More than 20 years		38.8%	1,092
		answered question	2,811
		skipped question	17

4. How important to you is asserting copyright to protect your own work?

		Response Percent	Response Count
Very important		40.5%	1,088
Fairly important		36.5%	980
Not important		23.0%	616
If either of the first two, why is copyright important to protecting your work?			1,087
		answered question	2,684
		skipped question	144

5. In your own work, do you use the copyrighted works of others?

		Response Percent	Response Count
Yes		70.2%	1,863
No		29.8%	791
		answered question	2,654
		skipped question	174

6. How often do you use copyrighted works of others in your work?

		Response Percent	Response Count
Frequently		57.3%	952
Occasionally		34.4%	571
Rarely		8.4%	139
		answered question	1,662
		skipped question	1,166

7. What kinds of copyrighted works of others do you use?

	Response Count
	1,621
	answered question 1,621
	skipped question 1,207

8. Why do you use the copyrighted works of others?

	Response Count
	1,580
answered question	1,580
skipped question	1,248

9. If you use copyrighted works of others, do you:

		Response Percent	Response Count
Get permission for use		45.5%	758
Use without permission		13.4%	223
Other (please specify)		41.1%	684
	answered question		1,665
	skipped question		1,163

10. If you maintain personal collections of others' copyrighted works (such as slides or digital files), do you ever share copies of them with others?

		Response Percent	Response Count
Yes		39.5%	935
No		35.5%	841
Not Applicable		25.0%	592
	answered question		2,368
	skipped question		460

11. If yes, can you tell us about the situations in which you did this?

	Response Count
	940
answered question	940
skipped question	1,888

12. If no, can you tell us why not?

	Response Count
	675
answered question	675
skipped question	2,153

13. Have you ever avoided or abandoned a project due to your actual or perceived inability to obtain permission to use others' copyrighted works?

		Response Percent	Response Count
Yes		34.0%	758
No		66.0%	1,473
	answered question		2,231
	skipped question		597

14. If yes, can you tell us more about the project and the kinds of works for which you were unable to obtain permission?

	Response Count
	718
answered question	718
skipped question	2,110

15. Has including another's copyrighted work in one of your projects ever been challenged?

		Response Percent	Response Count
Yes		9.7%	214
No		90.3%	1,985
	answered question		2,199
	skipped question		629

16. If yes, could you tell us more about that challenge, what form it took, and what you did in response?

	Response Count
	219
answered question	219
skipped question	2,609

17. Has your use of another's copyrighted work online, in connection with conducting or disseminating your work, ever been challenged?

		Response Percent	Response Count
Yes		5.3%	115
No		94.7%	2,053
answered question			2,168
skipped question			660

18. If yes, could you tell us more about that challenge, what form it took, and what you did in response?

	Response Count
	133
answered question	133
skipped question	2,695

19. Has a student of yours ever had to delete or omit another's copyrighted work from a dissertation, thesis, or final art project due to concerns about the inability to obtain permission?

		Response Percent	Response Count
Yes		15.5%	342
No		40.7%	899
N/A		43.8%	969
answered question			2,210
skipped question			618

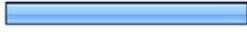
20. If permission to use the copyrighted works of others in your own projects were not needed, how likely is it that you would use such works more than you do now?

		Response Percent	Response Count
Highly likely		41.2%	902
Somewhat likely		27.1%	593
Not very likely		22.8%	500
Not at all likely		8.9%	195
		answered question	2,190
		skipped question	638

21. If you are likely to use such works more than you do now, to any extent, please describe what different or additional projects or approaches might you undertake?

	Response Count
	1,034
answered question	1,034
skipped question	1,794

22. Describe your understanding of copyright as it affects your decision to use the copyrighted works of others.

		Response Percent	Response Count
Excellent		17.2%	381
Good		46.2%	1,023
Fair		29.8%	661
Poor		5.1%	113
N/A		1.7%	37
		answered question	2,215
		skipped question	613

23. Did you ever get any formal education or training in copyright?

		Response Percent	Response Count
Yes		26.5%	586
No		69.2%	1,529
Can't recall		4.3%	95
		answered question	2,210
		skipped question	618

24. If yes, where?

	Response Count
	592
answered question	592
skipped question	2,236

25. What are your other sources of information, if any, regarding copyright?

	Response Count
	1,563
answered question	1,563
skipped question	1,265

26. Apart from copyright permissions, how frequently are you required to obtain other permissions to use a work of art (e.g., you are asked to pay a permission fee to get a copy of a digital image or slide or to photograph a work)?

		Response Percent	Response Count
Frequently		24.2%	513
Occasionally		24.4%	519
Rarely		20.9%	443
Never		30.5%	648
	answered question		2,123
	skipped question		705

27. For what purpose have you sought such permissions?

	Response Count
	1,349
answered question	1,349
skipped question	1,479

28. What is your understanding of why these permissions are required?

	Response Count
	1,373
answered question	1,373
skipped question	1,455

29. Have you ever paid a permission fee to use a photograph you, a student or a colleague has taken?

		Response Percent	Response Count
No		90.0%	1,895
Yes. Please describe.		10.0%	211
answered question			2,106
skipped question			722

30. Have your ever paid a permission fee to use a photograph or slide of a work of art you understand to be in the public domain?

		Response Percent	Response Count
No		79.8%	1,671
Yes. Please describe.		20.2%	424
answered question			2,095
skipped question			733

31. Have demands for fees of the kind described in this section ever inhibited your use of a work?

		Response Percent	Response Count
No		59.1%	1,217
Yes. Please describe.		40.9%	841
answered question			2,058
skipped question			770

32. Please enter any additional comments below.

	Response Count
	534
answered question	534
skipped question	2,294

Appendix B: Informed Consent Form

Consent to Participate in Research

Identification of Investigators and Purpose of Study

We hope you will participate in a study conducted by Patricia Aufderheide and Peter Jaszi from American University, in conjunction with the College Art Association and with funding from the Andrew W. Mellon Foundation. The purpose of this study is to understand how artists, art scholars, and art curators make creative decisions in line with their understanding of copyright law.

Research Procedures

Should you decide to participate, you will be asked to sign this consent form once all your questions have been answered to your satisfaction. This study consists of a series of interviews we will conduct on the phone. You will be asked to discuss how you think about the creative decisions to make in light of how you understand copyright infringement and fair use.

Time Required

We hope to be able to talk with you for about an hour.

Risks

We do not perceive more than minimal risks from your involvement in this study. We do understand, though, that we will be talking about some sensitive issues, sometimes touching upon questions of the law. We believe that you may feel concerned about sharing experiences in which you might have doubts about the legality of your choices, or in which you do not know if you are within the norms of your community of practice.

Therefore, we want to assure you that our conversation will be confidential. We promise to keep any notes from the conversation on a passworded website, not to use your name in the final report, and to carefully scrutinize any anonymous quotes or descriptions of situations for information that could link back to you. We will check with you, in fact, if we do use any quoted material, both to ensure that we have accurately caught your sentiment and to ensure that there is no information in that quote that you believe could link back to you personally. At the end of this study, we will delete all interview notes and other documents that include your personal information.

Benefits

We believe there are real benefits to your spending the time to talk to us. We believe our report can help artists, art scholars, and art curators to better understand what copyright-related problems in their field are.

Participation and Withdrawal

Of course, your participation is entirely voluntary, and you can withdraw at any time without consequences of any kind. You may also refuse to answer any individual question without consequences.

Questions about the Study

If you have questions or concerns during the time of your participation in this study, or after its completion, or you would like to receive a copy of the final aggregate results of this study, please contact Peter Jaszi at pjaszi@wcl.american.edu or (202)274-4216.

Questions about Your Rights as a Research Subject

Would you like to know more about the Institutional Review Board process that helped shape this informed consent form? Here are two more sources:

Dr. David Haaga	Matt Zembrzuski
Chair, Institutional Review Board	IRB Coordinator
American University	American University
(202)885-1718	(202)885-3447
dhaaga@american.edu	irb@american.edu

Giving of Consent

I have read this consent form and I understand what is being requested of me as a participant in this study. I freely consent to participate. I have been given satisfactory answers to my questions. The investigator provided me with a copy of this form. I certify that I am at least 18 years of age.

Name of Participant (Printed)

Name of Participant (Signed)

Date

Appendix C: Participants in the College Art Association Fair Use Initiative

Principal Investigators

Patricia Aufderheide, University Professor, School of Communication, American University, and codirector, Center for Media & Social Impact*

Jeffrey P. Cunard, partner, Debevoise & Plimpton LLP, and counsel to College Art Association

Linda Downs, executive director and chief executive officer, College Art Association

Anne Collins Goodyear, codirector, Bowdoin College Museum of Art, and president, College Art Association

Peter Jaszi, professor of law and faculty director, Washington College of Law's Glushko-Samuelson Intellectual Property Clinic at American University*

Gretchen Wagner, vice president and general counsel, Save the Children; former general counsel, ARTstor; and member, CAA's Committee on Intellectual Property

*Research team

Project Manager

Janet Landay, College Art Association

Project Advisors

Virginia Rutledge, art historian, advisor and lawyer, PIPE Arts Group

Maureen Whalen, associate general counsel, J. Paul Getty Trust

CAA Task Force on Fair Use

Cochairs

Jeffrey P. Cunard, partner, Debevoise & Plimpton LLP, and counsel, College Art Association

Gretchen Wagner, vice president and general counsel, Save the Children; former general counsel, ARTstor; and member, CAA Committee on Intellectual Property

Members

Suzanne Preston Blier, Allen Whitehill Clowes Professor of Fine Arts and of African and African American Studies, Harvard University, and vice president for publications, College Art Association

Linda Downs, executive director and chief executive officer, College Art Association

DeWitt Godfrey, associate professor of sculpture, Department of Art and Art History, Colgate University, and vice president for committees and president-elect, College Art Association

Anne Collins Goodyear, codirector, Bowdoin College Museum of Art, and president, College Art Association

Randall C. Griffin, professor, Department of Art History, Southern Methodist University, and formerly vice president for publications, College Art Association

Joe Hannan, editorial director, College Art Association

Betty Leigh Hutcheson, director of publications, College Art Association

Paul Jaskot, professor of the history of art and architecture, College of Liberal Arts and Social Sciences, DePaul University, and former president, College Art Association

Patricia McDonnell, executive director, Wichita Art Museum, and secretary, College Art Association

Christine Sundt, editor, *Visual Resources: An International Journal of Documentation*

Charles A. Wright, professor of sculpture and chair, Department of Art, Western Illinois University, and board member, College Art Association

Community Practices Advisory Committee

Max Anderson, director, Dallas Museum of Art

Susan Bielstein, executive editor, University of Chicago Press

Martha Buskirk, professor of art history and criticism, Montserrat College

Paul Catanese, chair, interdisciplinary arts, Columbia College, and past chair, CAA New Media Caucus

Kenneth Hamma, consultant, intersection of cultural heritage and IT

Alan Newman, chief, digital imaging and visual resources, National Gallery of Art, Washington, DC

Mari Carmen Ramirez, curator of Latin American Art and director, International Center for the Arts of the Americas, Museum of Fine Arts, Houston

Timothy Rub, director, Philadelphia Museum of Art, and president, Association of Art Museum Directors

Christine Sundt, editor, *Visual Resources: An International Journal of Documentation*

CAA Committee on Intellectual Property

Chair

Benjamin Binstock, adjunct assistant professor, Faculty of Arts and Sciences, The Cooper Union

Members

Suzanne Preston Blier, Allen Whitehill Clowes Professor of Fine Arts and of African and African American Studies, Harvard University, vice president for publications, College Art Association, and board liaison (ex officio)

Kenneth Cavalier, Faculty of Law, University of British Columbia, Vancouver, BC Canada

Jeffrey P. Cunard, partner, Debevoise & Plimpton LLP; counsel, College Art Association; and board liaison (ex officio)

Charlotte Frost, professor of digital art and design, Writtle School of Design, Essex, UK

Joe Hannan, editorial director, College Art Association, staff liaison (ex officio)

Betty Leigh Hutcheson, director of publications, College Art Association, staff liaison (ex officio)

Elaine Koss, freelance editor, New York

Judy Metro, editor in chief, National Gallery of Art, Washington, DC

Anne Norcross, assistant professor of art history and coordinator, Visual Resource Collection, Kendall College of Art and Design, Ferris State University

Doralynn Pines, independent scholar and consultant, New York, board liaison (ex officio)

Christine Sundt, editor, *Visual Resources: An International Journal of Documentation*

Cynthia Underwood, US Patent and Trademark Office, Washington, DC

Gretchen Wagner, vice president and general counsel, Save the Children; former general counsel, ARTstor; and member, CAA Committee on Intellectual Property

Appendix D: Biographies of Report Authors

Coprincipal investigator **Patricia Aufderheide** is University Professor in the School of Communication at American University in Washington, DC, and director of its Center for Media & Social Impact. She is the coauthor with Peter Jaszi of *Reclaiming Fair Use: How to Put Balance Back in Copyright* (University of Chicago Press, 2011), and author of, among other publications, *Documentary: A Very Short Introduction* (Oxford, 2007), *The Daily Planet* (University of Minnesota Press, 2000), and *Communications Policy in the Public Interest* (Guilford, 1999). She has been a Fulbright and John Simon Guggenheim fellow and has served as a juror at the Sundance Film Festival, among others. Aufderheide has received numerous journalism and scholarly awards, including a research award from the International Communication Association (2011), a Woman of Vision award from Women in Film and Video (Washington, DC; 2010), a career achievement award from the International Digital Media and Arts Association (2008), and the Scholarship and Preservation Award from the International Documentary Association (2006). She received a PhD in history from the University of Minnesota.

Coprincipal investigator **Peter Jaszi** is a professor in the Washington College of Law at American University, where he helped to establish the Program on Intellectual Property and Information Justice, and the Glushko-Samuels Intellectual Property Law Clinic. He is coauthor with Patricia Aufderheide of *Reclaiming Fair Use: How to Put Balance Back in Copyright* (University of Chicago Press, 2011). With Craig Joyce, Marshall Leaffer, and Tyler Ochoa, he coauthors a standard copyright textbook, *Copyright Law* (Lexis, 9th ed., 2013). Alone and with Martha Woodmansee, he has written several articles on copyright history and theory; together they edited *The Construction of Authorship* (Duke University Press, 1992); with Mario Biagioli, they were editors of another collection, *Making and Unmaking Intellectual Property* (University of Chicago Press, 2011). In 1994 Professor Jaszi was a member of the Librarian of Congress's Advisory Commission on Copyright Registration and Deposit, and in 1995 he was an organizer of the Digital Future Coalition. He has been a trustee of the Copyright Society of the U.S.A., and is a member of the editorial board of its journal. In 2007 he received the American Library Association's L. Ray Patterson Copyright Award; in 2009 the Intellectual Property Section of the District of Columbia Bar honored him as the year's Champion of Intellectual Property; and in 2011 he was recognized by Public Knowledge with its IP3 award.

Bryan Bello is an MA student in the film program at American University, and was a graduate fellow of the Center for Media & Social Impact (then the Center for Social Media) in 2012–13. With an interest in visual anthropology and community narrative, he is building the nonprofit Street Sense's first-ever film-making workshop for homeless participants. He currently works at *Science News*.

Tijana Milosevic is a PhD student in the School of Communication at American University, where her research is concerned with media effects, and a graduate fellow at the Center for Media & Social Impact in 2013–14. She has previously worked at the Public Diplomacy Council in Washington, DC, and has lectured in media psychology at a private university in Belgrade, Serbia, her home country. In her free time Tijana blogs at the Huffington Post and is finishing a documentary film, *The House that Jack Built*, about the underground urban-dance culture in Washington, DC.

NOTES

¹ US law is usually the primary source of law with which US-based professionals need be concerned. In general, under US law, it is the country where a work of art or scholarship is made or made available whose law applies to issues of authorship. The law of the country where the work is being used applies to questions of infringement. Thus, the fact that copies of US-published books or articles may find their way into the hands of foreign readers does not mean that US law should first be considered where the assessment of the volume's compliance with copyright in obtaining permissions to use third-party material is concerned. Of course, when work done in the US is intended primarily or substantially for distribution outside the US, other bodies of law may come into play. Analysis of these situations where foreign copyright law should be considered, however, falls outside the scope of this report. Notably, however, in light of CAA's core membership, the "fair dealing" provisions of Canadian copyright are moving, as a result of both legislative and judicial action, toward becoming a functional equivalent of US "fair use."

² The survey was sent to 35,000 people, including past and present members, and drew 2,828 replies, with 2,100 completing the survey. This was a 6 percent rate of return. The overwhelming majority of respondents, we estimate, were current members. If only current members were considered, this would be a rate of return of opened surveys of 24 percent and of completed surveys of 18 percent of CAA's 11,720 individual members at the time (Appendix A). The average rate of the return of seven recent CAA current-member-only surveys is, by contrast, 13 percent.

³ CAA website: www.collegeart.org/about

⁴ Significantly, VARA includes a guarantee of proper attribution for qualifying works—although like its other provisions, this one is made fully and explicitly subject to fair use. The other dimensions of VARA—prohibition of the mutilation or destruction of original works of visual art—are not generally relevant to this report, since few, if any, of the activities of visual arts professionals and artists with which it deals involve physical interference with such original works.

⁵ Procedurally, fair use is an "affirmative defense," i.e., a defendant who relies upon it in an infringement lawsuit must assert and prove that the doctrine applies to his or her situation—just as an individual charged with assault has the procedural burden of showing that he or she was acting in self defense! In daily practice, however, both fair use and self-defense

function as individual rights. The existence of a “right of fair use” is specifically acknowledged in the Copyright Act. See 17 U.S.C. § 108(f)(4). For more background, consult Aufderheide and Jaszi 2011.

⁶ An example is *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003).

⁷ “[P]ublic access to copyrighted materials has in some cases led to legal action, an issue which remains to be resolved” (Clough, 2013, p. 45). This may refer to pending litigation in *Authors Guild, Inc. v. Hathitrust*, 902 F. Supp. 2d 445 (S.D. N.Y. 2012), now on appeal to the Second Circuit Court of Appeals. In this lawsuit, copyright owners unsuccessfully challenged the large-scale digitization of books in academic library collections for purposes such as preservation, search, and accessibility for the print disabled—all of which were determined to be fair uses.

⁸ Amy Plumb Oppenheim (Dennis Oppenheim studio) personal correspondence to the authors, September 26, 2013.

⁹ For more information on fair use case law, see <http://fairuse.stanford.edu/overview/fair-use/cases/>.

¹⁰ A chi-square test indicated that the use of copyrighted works of others varies on the basis of profession: $\chi^2(3, N = 2,425) = 414.98, p < 0.001$.

¹¹ A chi-square test indicated that the use of copyrighted works of others without permission varies on the basis of profession: $\chi^2(9, N = 2239) = 510.39, p < 0.001$.

¹² A chi-square test indicated that the “importance of asserting copyright in one’s own work” varies on the basis of profession: $\chi^2(3, N = 2453) = 12.95, p < 0.05$.

¹³ A chi-square test indicated that the “importance of asserting copyright in one’s own work” did not vary significantly on the basis of length of experience: $\chi^2(3, N = 2677) = 4.13, p = 0.248$.

¹⁴ Both questions ask about challenges to the use of copyrighted material; Q17 asks specifically about online challenges. More than half (51 percent) of the “yes” respondents to Q17 had already said “yes” in Q15. While 10 percent of those who answered the question said “yes” on Q15, only 5 percent said “yes” on Q17. Thus, the answer for Q17 encompasses most

of the respondents for Q15. Only 7 percent of those who said “no” on Q17 said “yes” on Q15. Therefore, Q17 adds very few people to those who had reported problems in Q15.

¹⁵ A chi-square test indicated that formal copyright education varied on the basis of profession: $\chi^2 (3, N = 2020) = 9.47, p = .024$.

¹⁶ A chi-square test indicated that “avoiding or abandoning a project” varies on the basis of profession: $\chi^2 (3, N = 2039) = 64.29, p < 0.001$.

¹⁷ A chi-square test indicated that the relationship between the likelihood of abandoning a project and the actual or perceived inability to obtain permissions is significant: $\chi^2 (3, N = 2184) = 334.02, p < 0.001$.

¹⁸ A chi-square test indicated that “the likelihood of using other people’s work had the permissions not been needed” vary on the basis of profession: $\chi^2 (9, N = 2185) = 45.83, p < 0.001$.