

March 2012

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

Gretchen Wagner

ARTstor, Gretchen.Wagner@artstor.org

Allan T. Kohl

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

Follow this and additional works at: <https://online.vraweb.org/vrab>



Part of the [Arts and Humanities Commons](#), and the [Law Commons](#)

Recommended Citation

Wagner, Gretchen and Kohl, Allan T. (2012) "Visual Resources Association: Statement on the Fair Use of Images for Teaching, Research and Study," *VRA Bulletin*:Vol. 38: Iss. 1, Article 5.

Available at: <https://online.vraweb.org/vrab/vol38/iss1/5>

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

Abstract

This Statement on the Fair Use of Images for Teaching, Research, and Study describes six uses of copyrighted still images that the Visual Resources Association (www.vraweb.org) believes fall within the U.S. doctrine of fair use. The six uses are: 1) preservation (storing images for repeated use in a teaching context and transferring images to new formats); 2) use of images for teaching purposes; 3) use of images (both large, high-resolution images and thumbnails) on course websites and in other online study materials; 4) adaptations of images for teaching and classroom work by students; 5) sharing images among educational and cultural institutions to facilitate teaching and study; and 6) reproduction of images in theses and dissertations.

Keywords

copyright, fair use, intellectual property, image rights, teaching, research

Author Bio & Acknowledgements

This statement was authored by the VRA Intellectual Property Rights Committee reserving special acknowledgement for Christine Sundt, Allan Kohl, Cara Hirsch, and Gretchen Wagner. The IPR Committee is especially grateful to have received input and guidance from an advisory committee of preeminent copyright scholars and legal experts: Georgia Harper, Jule Sigall, Virginia Rutledge, Jeffrey Cunard, Robert Clarida, and Jackie Ewenstein.

EXECUTIVE SUMMARY

This Statement on the Fair Use of Images for Teaching, Research, and Study describes six uses of copyrighted still images that the Visual Resources Association (www.vraweb.org) believes fall within the U.S. doctrine of fair use. The six uses are: 1) preservation (storing images for repeated use in a teaching context and transferring images to new formats); 2) use of images for teaching purposes; 3) use of images (both large, high-resolution images and thumbnails) on course websites and in other online study materials; 4) adaptations of images for teaching and classroom work by students; 5) sharing images among educational and cultural institutions to facilitate teaching and study; and 6) reproduction of images in theses and dissertations.

The uninhibited flow of information and ideas – including visual information – is essential to advancing our collective state of knowledge in the arts and sciences. Nowhere is this more evident than in the academic context, where teachers, scholars and students, and those who support such individuals (such as visual resources staff and librarians), access and use information to engage in activities that are at the heart of our freedoms of expression: to comment and critique, evaluate, and compare; to create; to encourage the development of new ideas and thought; and to communicate those ideas and thoughts to others. The robust use of images is essential in this context: images uniquely convey information. They are often the only or best means by which certain ideas can be expressed.

The U.S. doctrine of fair use is essential to the use of images for teaching, research and study; without it, educators' and scholars' ability to express themselves would be severely curtailed, as set forth in this Statement. It is for this reason that faculty, scholars and students have actively relied on fair use for more than a century when using images in these contexts.

This Statement aims to provide educators, scholars, and students – as well as members of the Visual Resources Association, librarians, and others – with the tools to rely on fair use with greater certainty when they employ these practices and principles. It draws from the academic community's longstanding practices of fair use (and highlights one area – the use of images in theses and dissertations – where the VRA believes the community should return to its previous practices of being more assertive in relying on fair use). Although not legal advice, the statement relies heavily on fair use jurisprudence. The statement has also benefited tremendously from the guidance of an advisory committee of preeminent copyright scholars and legal experts, whose members include: Robert W. Clarida (Cowan, Liebowitz & Latman), Jeffrey P. Cunard (Debevoise & Plimpton LLC), Jackie Ewenstein (Ewenstein & Young LLP), Georgia K. Harper (Scholarly Communications Advisor, The University Libraries, University of Texas at Austin), Virginia Rutledge (PIPE Arts Group), and Jule Sigall (Associate General Counsel – Copyright, Microsoft; Formerly Associate Register for Policy & International Affairs, U.S. Copyright Office).

* * * * *

VISUAL RESOURCES ASSOCIATION: STATEMENT ON THE FAIR USE OF IMAGES FOR TEACHING, RESEARCH, AND STUDY

Images are essential pedagogical and scholarly materials. They are unique objects whose meaning cannot be adequately conveyed through words or other media. Images may themselves be the object of commentary or critique. In other instances, images are used to facilitate the study of and communication about the objects they depict or document. In many cases, images serve as the only or best means by which to depict an object, providing the context or documentary evidence by which those objects can be understood. In still other instances, images are essential for comparison or contrast of multiple objects, or for other evaluative purposes.

Images are used extensively in teaching and research. In the arts and art historical fields, images are the foundation of the discipline and have been widely and heavily used in the classroom since the last decades of the nineteenth century and early twentieth century.¹ More recently, image use has proliferated among a wide range of other fields such as cultural and area studies, foreign language studies, the life sciences, communications, business, and political science. While images historically appeared in print (or slide) form, images in digital format are now ubiquitous in teaching and research.

Teaching, research and scholarship – the purposes for which images are used in the academic contexts described in this document – are unquestionably public goods. In the classroom, in the scholar’s office, or in the study areas, images are used to facilitate academic inquiry and criticism; to encourage robust discussion, debate and discourse; and to illustrate and enlighten. By their very nature, these educational and scholarly uses further the aims of the Copyright Clause by advancing our collective knowledge in the arts and sciences.

* * * * *

Within the educational and scholarly context, this fair use statement describes certain uses of copyrighted still images that the Visual Resources Association (VRA) believes fall within the fair use doctrine under United States copyright law. Fair use provides the right to make certain uses of copyrighted materials without seeking permission from, or paying fees to, the copyright owners of those materials.

With the exception of the last use scenario, the uses described in this statement reflect the longstanding practices of the educational community in using images for educational and scholarly purposes and in relying on fair use to engage in such activities. The last section – on the reproduction of images in theses and dissertations – is an area in which the academic community has not in recent years relied as ubiquitously on fair use, but which the VRA believes should nonetheless be fair given the importance to society of advancing scholarship in image-

¹ Howard B. Leighton, “The Lantern Slide and Art History,” *History of Photography*, vol. 8, no. 2 (1984): 107-8; Philip C. Beam, “The Color Slide Controversy,” *College Art Journal*, vol. 2, no. 1 (Jan. 1943): 37. See also Donald N. Wilber, “The Nature, Care, and Projection of Color Transparencies,” *Bulletin* no. 7, Sept. 20, 1940 (Color Slides Cooperative, Princeton, NJ), 3; Frank Roy Fraprie, *Practical Photography: How to Make Lantern Slides* (1918).

dependent fields, and given the fact that many scholarly arguments cannot be made without reference to actual images.

This fair use statement has been reviewed by a group of preeminent legal experts and copyright scholars who, in their personal opinion, have concluded that the uses described herein are reasonable interpretations of the fair use doctrine. This document does not provide legal advice (which applies the law to specific facts and circumstances); rather, the aim of this document is to provide general guidance to educational and scholarly users of images – and to others who help facilitate those educational and scholarly uses – so that they can rely on fair use with greater certainty when employing these practices and principles.

I. Background on the VRA

The VRA (www.vraweb.org) is a multidisciplinary organization dedicated to furthering research and education in the field of image management. Its members consist of visual resource professionals – those individuals working at educational institutions, museums, and other primarily non-profit organizations – whose responsibilities encompass the following types of activities: providing faculty, curators, and others at those institutions with images for teaching, research, and study; developing cataloging and classification standards and practices; addressing issues relating to the integration of technology-based instruction and research in the educational context; maintaining and preserving institutional (and sometimes faculty) visual resource collections; and educating students, faculty, and others about a range of issues, including copyright, in connection with the use and preservation of visual materials. The Association is committed to providing leadership in the visual resources field, developing and advocating standards, and offering educational tools and opportunities for the benefit of the community at large. Through collaboration, partnership, and outreach with the broader information management and educational communities, the Association actively supports the primacy of visual information in documenting and understanding humanity’s shared cultural experience. Currently, the Association has over 800 members across the United States and Canada.

II. Need for this Statement

This statement aims to address uncertainties arising in recent years regarding educational users’ ability to rely on fair use when using images for teaching, research, and study. These uncertainties are the result of: copyright litigation in other contexts and media; the lack of legal decisions or clear guidance regarding the educational and scholarly use of images; the misconception that the fair use doctrine no longer applies, or is not as extensive, when images are used in connection with new technologies or media; and the sometimes overly conservative and restrictive determinations of gatekeepers who are less familiar with these longstanding community practices and with the flexibility afforded by fair use.

Uncertainty surrounding the ability to rely on fair use has had a tangible negative impact on teaching, research, and study: for example, some faculty and students do not have access to the images they need for pedagogical purposes because the images cannot be licensed and because these individuals are unsure of the boundaries of fair use. In other instances, individual institutions are uncertain about their ability legally to preserve image collections and to migrate

them to new formats. In still other cases, some graduate students are tailoring their doctoral dissertation and thesis choices based on perceived licensing barriers.

As noted above, the VRA believes that documentation of these community practices and principles – and clarification of how fair use applies in this context – will help the community of educational and scholarly image users to rely on fair use with greater confidence.

III. What This Statement Is

While the VRA's aims and activities span a wide range of visual materials, including both moving and still images, this statement focuses on still images because they continue to be the primary content for most Association members' activities. Other fair use statements on moving images, such as the *Code of Best Practices in Fair Use for Online Video* and the *Documentary Filmmakers' Statement of Best Practices in Fair Use*, can be found among the best practice codes on the American University Center for Social Media website at <http://www.centerforsocialmedia.org/fair-use/best-practices>.

References are often made in this document to images of art works, as many of the image collections historically and currently used by educational and cultural institutions depict art and cultural objects. However, these principles and practices apply equally to copyrighted images depicting other subjects. Similarly, references are made to educational institutions, but these provisions apply to other educational users, such as cultural institutions making educational uses of images.

Many uses fall under the rubric of “educational use.” This statement addresses the use of images for teaching, research, study, and the incorporation of images into dissertations and theses (and the subsequent inclusion of those dissertations and theses in databases that help facilitate access to, and preserve, those academic works). Other uses, such as the use of images in textbooks, journals, or other publications, are outside the scope of this statement, although such uses – and many others – may well be fair ones.

IV. What This Statement Isn't

Not Defining Limits of Fair Use: This statement does not delineate the outer boundary of fair use, nor does it purport to be exhaustive; many uses of visual materials that do not fall within these practices are fair ones.

Not about Contracts or Digital Rights Management: This statement does not address contractual restrictions, or the use – or circumvention – of encryption and other digital rights management restrictions. Educational users should be aware that contracts might legally restrict what would otherwise be a fair use under copyright law; often, educational users can avoid this result by including language in contracts that preserves their fair use rights.

Not about the TEACH Act or other Provisions of Copyright Law Outside of Fair Use: This document does not address the requirements of section 110 of the United States Copyright Act – the section explicitly addressing the unauthorized use of copyrighted materials for teaching (the “TEACH Act”), nor other provisions of the Copyright Act other than fair use (under section

107). Although the TEACH Act may be useful in some contexts, it has often been insufficient with respect to the use of images for teaching. For example, section 110 does not sufficiently address course websites and similar teaching materials and resources that have become a staple of teaching, and that provide new and innovative means of educating students. As the TEACH Act makes clear, the TEACH Act does not limit the contours of fair use. The fair use doctrine provides the means to develop reasonable, community-based practices that meet the needs of academic image users, while respecting the rights of copyright owners.

Not about Other Countries' Copyright Laws: This statement is not directed to copyright laws outside of the United States. While educational users outside the United States have all of the same image needs as educators in the United States, and the uses they make serve the same purposes, the doctrine of fair use is based on U.S. law and may not extend to image users in other jurisdictions.²

Not about Obtaining Permissions: Finally, this statement does not address the licensed use of images. There may be many legitimate reasons to obtain permissions from copyright owners, including the desire for greater certainty in some contexts, or the desire to build relationships with rights holders. Judicial decisions make clear that seeking permission does not prevent you from subsequently relying on fair use: if you are denied a license, or if you determine that the terms of such a license are unreasonable, you may still under some circumstances validly rely on fair use.³ To the extent that courts look at a user's good faith in making fair use determinations, reliance on fair use in accordance with these established community standards should help demonstrate a user's good faith even when a licensing option is not pursued or is rejected.

V. The Fair Use Doctrine in the Context of Using Images for Teaching, Research and Study.

Fair use plays a critical role in copyright law. For the benefit of society, it allows certain uses of copyrighted works without obtaining permission from, or paying fees to, copyright owners. Fair use has been an established part of copyright law for over 150 years, and – as the U.S. Supreme Court has recognized – helps reconcile copyright principles with the First Amendment.

Fair use is a fact-based doctrine. It is intentionally flexible, permitting the doctrine to endure as society evolves, and as new media and technologies develop and evolve. Originally judge made, fair use was codified in the 1976 Copyright Act. The statute (currently at 17 U.S.C. § 107) cites four factors that typically guide fair use determinations, although these factors are not exhaustive and other facts and considerations may be taken into account. These four factors are:

² The jurisdictional question of which country's laws should apply to a given use of a copyrighted work can in some instances be complex, particularly when websites and electronic communications are disseminated globally. This statement is aimed at uses of images made in the United States, where fair use will almost always apply; for uses outside of the United States (or where distribution may be occurring outside the United States), it may be appropriate to seek further guidance, and to take steps aimed at addressing, or minimizing, the risks associated with these jurisdictional questions.

³ Citations to specific case law have been deliberately omitted from this document, as specific cases may be interpreted or treated differently over time. To see references to, and obtain copies of, relevant case law, please see the Intellectual Property Rights Resources section of the VRA website, which is periodically updated, at www.vraweb.org/organization/committees/ipr/ipr_resources.html.

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

In the preamble to these four non-exclusive factors, the statute also enumerates a number of favored purposes – including criticism, commentary, teaching (including multiple copies for classroom use), scholarship, and research – for which the use of a copyrighted work will typically be fair (although such uses must still be considered in light of the four factors and the underlying purpose of copyright law to “promote the progress of science and the useful arts”).

In making fair use determinations, courts frequently – and increasingly – ask whether the purpose for which a copyrighted work is being used furthers a societal good. As noted above, it is unquestionable that teaching, research, scholarship and study are public goods that facilitate academic inquiry, discourse and debate, and that advance our collective knowledge. In addition, research, teaching and study are the kinds of not-for-profit, educational uses that are at the core of fair use, as indicated in the language of the statute.⁴

In assessing whether a use is fair, courts also frequently ask whether a use is “transformative.” Previously, courts tended to define “transformative” somewhat narrowly, asking whether the copyrighted work was itself being altered or employed for a different use than that made by the creator. More recently, however, courts have adopted a more expansive definition of the term, finding that a use is transformative if it places the copyrighted work within a different context, or presents new and significant material alongside the copyrighted work, such that the work is being used for a different purpose than that made by the creator.

The scholarly or educational use of an image will often be different in purpose than that of its creator, which is frequently aesthetic in nature. An educator or scholar may display an image or series of images to convey a scholarly argument, or to convey information: she may show images of paintings to demonstrate a historical trend or movement, or display an image or group of images to illustrate how artists have conveyed war over time, for example. But even if an image is being shown in the classroom for its aesthetic purposes (such as to demonstrate the brushstrokes used in a work), or even if the creator has created an image for educational or informative purposes (such as a documentary photographer photographing a protest to convey newsworthy information about that protest), images used in the course of teaching or scholarship are typically accompanied by significant, additional commentary or critique, or are placed alongside other images or media, such that the purpose served by the image is to advance a

⁴ While the uses here are typically not-for-profit and non-commercial in nature, we do not mean to suggest that commercial uses cannot be fair ones; on the contrary, many commercial uses have been found to fall well within fair use.

scholar, professor or student's own argument in the context of an educational lecture or paper. This is very often a quite different purpose than that being made by the creator of the image.⁵

Turning to the second and third factors, while many images are creative in nature (thus deserving of heightened copyright protection), and educational users typically need to use the entire image (or an image of an entire work) to make their point, courts have repeatedly found that these factors are not determinative if the fair use analysis otherwise points towards a use being fair.

With respect to the fourth factor (the impact of the use upon the copyright owner's potential market for, or value of, the work), it should be noted that an image (or a work depicted in an image) may well *increase* in value by being incorporated into, or actively used in, the teaching canon. Indeed, the more a work is studied and examined, especially in a scholarly or academic context, the more likely in general that recognition for the work – and perhaps by extension other works of the creator – will increase, making the image more likely to be sought after by art aficionados, curators, and others.⁶

Moreover, to the extent that courts look at whether copyright owners are currently licensing their works for the purposes being made by the user, it is important to note that permissions can rarely be obtained for educational uses of images. Even when permissions are sought (regardless of whether they are legally necessary), many copyright owners of images cannot be reasonably identified or located, effectively rendering their works “orphans,” which weighs strongly in favor of fair use. More importantly, however, even when the copyright owner can be identified and located, the vast majority of copyright holders in images, or the underlying works depicted in images, do not license their images (or images of their works) for the educational and scholarly purposes described in this statement.⁷ Thus, efforts to obtain permissions are often stymied by the lack of a response, or by a response that requires lengthy discussions or negotiations (and are therefore often not conducive to teaching or scholarship and, in some instances, can delay the timeline in obtaining a degree).⁸

A relatively small number of images have been actively licensed (typically by a small number of photographers) for teaching purposes (referred to in this document as “photographer-licensed images”). These have tended to be photographic images of art works, buildings, or archaeological sites, or other publicly accessible sites.⁹ In more recent years, the number of

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

⁶ Of course, to the extent that a work is subject to scholarly criticism, that kind of criticism is protected under the First Amendment, regardless of the impact on the copyright owner's market for the work.

⁷ As noted below, while a student is more likely to be able to obtain a license for the reproduction of an image in a thesis or dissertation (the last use scenario in section VI), the VRA believes that the use of images in such theses or dissertations should constitute fair use regardless, as described in more detail below.

⁸ For an interesting description of one effort to obtain permissions on a large scale from the relevant copyright owners of visual images that was ultimately abandoned when the copyright owners could not be identified, or did not respond, see Lise Hawkos, “Copyright Compliance in the Visual Resources Collection,” *VRA Bulletin*, vol. 27, no. 2 (Summer 2001).

⁹Historically, a directory of sources for such slides and digital images for art and architecture appeared in a slide buyers' guide and, subsequently, in an image buyers' guide. The last directory for such images

these licensors has dwindled considerably, with only a very few entities or individuals licensing images for teaching.¹⁰

Many educational institutions have not asserted fair use with respect to photographer-licensed images. The VRA recognizes that these photographers often work closely with educational institutions in developing image collections that meet institutions' specific educational needs, provide high quality, unique images for teaching and research. These photographers therefore provide an important service to the educational community. Consistent with these traditions and relationships, the VRA believes that, in general, there are important reasons to continue to license these particular images, rather than to rely on fair use.¹¹ In addition, to the extent that courts assessing fair use emphasize the impact of the use made upon the potential market for the copyrighted work, this could also tend to support the licensing of such photographer-licensed images in some instances. (However, in other instances, other facts may outweigh any market impact in a fair use analysis, and the VRA does not mean to suggest a conclusion to the contrary herein.)

In addition to these four non-exclusive statutory factors, courts examining fair use have increasingly asked whether a user is acting in "good faith" in using a copyrighted work. While good faith may be difficult to ascertain in some contexts, reliance on the community's longstanding practices – and the community's fair use traditions – should in itself be an indication of good faith. In this vein, in the guidelines in section VI below, there are several instances where attributions to the copyright owner are suggested (except for those circumstances when such attributions would not be appropriate, as in the context of an exam), although attributions are not typically required under fair use. Given the educational community's longstanding traditions of providing citations (where known), especially in print materials, attributions may be one means of demonstrating both the scholarly and educational context in which the images are being used, as well as the good faith of the user.

Finally, while relying on community practices may be one factor in demonstrating good faith, this should not be interpreted to mean that those traditional practices must always be adhered to in order to rely on fair use. For example, some gatekeepers or others who are not familiar with the doctrine of fair use and the flexibility it affords have questioned whether fair use may be

was produced in 1999. See Sandra C. Walker and Donald W. Beetham, "Image Buyers Guide" (7th ed. 1999). Following that edition, Donald, Beetham, the Manager of Visual Resources at Rutgers, also posted a website listing a number of image vendors. <http://www-rci.rutgers.edu/~beetham/newvenz.htm>. An updated list of these sources is forthcoming on the VRA website at www.vraweb.org.

¹⁰ Over the last decade, there have also been a number of efforts to create digital databases, collectives, or libraries, of images for educational use. One of these efforts, the ARTstor Digital Library, www.artstor.org, currently makes available a library of over 1.2 million images – shared by a wide variety of sources, including museums, archives, artists, photographers, scholars and others – for educational use. The ARTstor Digital Library is not distributed by a set of copyright holders, but by a not-for-profit organization that in some instances relies on fair use and in some instances obtains permissions to distribute images for teaching, research and study.

¹¹ At the same time, when images of the same work or object are available from multiple sources (and only one of these images is a vendor image), educational users should not feel obligated to use the vendor image. They may use an image of the same underlying work from another source (and often they may reasonably rely on fair use in doing so).

asserted in the context of new technologies or media. However, courts have repeatedly made clear that – provided the underlying purpose remains the same – the use should remain fair, regardless of the media or technology in which it is employed.

A Brief History of the Educational Community's Reliance on Fair Use in Using Images

For more than a century, the educational community has relied on the fair use doctrine when using images for research, teaching, and study. In the late nineteenth century, images – in the form of slides and photographs – began to be used in the classroom, primarily for teaching in the arts and art history.¹² Across decades of these practices, such teaching materials, primarily 35-millimeter slides (and now digital images) became indispensable in disciplines such as the arts and art history. As generations of artists, art historians and other scholars, curators, art aficionados and patrons, and others were educated using these slides, educational institutions (and other institutions, such as some museums) amassed thousands – and sometimes hundreds of thousands – of these slides.¹³ Individual faculty members similarly built their own slide collections that were tailored to their particular pedagogical needs.

In photographing these materials for use in the classroom, in distributing the slides to professors for their teaching, in displaying the slides in the classroom, and in storing the images for later use (which sometimes required re-copying slides to replace or preserve the content), educational institutions and professors have relied on the U.S. doctrine of fair use. This has been partly due to the fact that, historically, opportunities for licensing or purchasing high quality slides (and subsequently digital images) were rare, and this continues to be the case today.

As a result, for generations, faculty and scholars have photographed images appearing in books, postcards, journals and other print sources, making slides from those photographs that could be used for teaching. Copystand photography – a camera setup that was designed to facilitate the creation of slides from existing print materials – was widely promoted and used.¹⁴

Historically, images were also reproduced in dissertations and theses without obtaining permissions from the copyright owners in such images. Because of the clearly academic, non-commercial nature of theses and dissertations, and because access to theses or dissertations was typically confined to an academic, library setting, for decades there seemed to be little dispute that the incorporation of such images into theses or dissertations was a fair use.

In more recent years, however, as the 1976 Copyright Act brought a greater focus on copyright issues, and as theses and dissertations began to be posted to online repositories and websites that sought to preserve and provide access to these papers, the publishers of these repositories and

¹² See note 1.

¹³ Gretchen Wagner, “Sharing Digital Visual Arts Images for Educational Use: Finding a New Angle of Repose,” *EDUCAUSE Review*, vol. 42, no. 6 (Nov./Dec. 2007) 8, citing Virginia M.G. Hall, “Fair Use or Foul Play? The Digital Debate for Visual Resources Collections,” presentation, Association of College and Research Chapters, New England Chapter, conference on November 8, 1997, available at www.vraweb.org/resources/ipr/papers/fairfoul.html; Christine L. Sundt, “Testing the Limits: The CONFU Digital-Images and Multimedia Guidelines and Their Consequences for Libraries and Educators,” *Journal of American Society for Information Science*, Vol. 50, no. 14 (1999): 1329.

¹⁴ Hall, “Fair Use of Foul Play?” 3; Sundt, “Testing the Limits,” 1329.

websites often contractually required – as a way of managing their own risks – that graduate students posting theses to their repositories obtain copyright permissions for any third party works, including images, incorporated into their theses or dissertations. As set forth in greater detail below, these contractual clearance requirements have had a significant deleterious effect on scholarship in image-dependent disciplines.

In sum, fair use has long been – and continues to be – critical to the use of images for teaching, research and scholarship.

VI. Statement of Fair Use Practices and Principles

This statement focuses on six types of image uses that academic users confront regularly. These scenarios are not meant to be the only situations in which fair use should apply, but reflect the most common practices involving copyrighted images made by educational users.

It is important to note that none of the uses described in this document have been “tested” under the law. There has been very little fair use litigation in the academic context, especially with respect to images. This may well reflect the belief, among many copyright owners as well as users, that these uses are consistent with fair use, as well as the fact that there is little to be gained monetarily from such litigation. It may also reflect the fact that some academic users are required to follow the guidance of risk adverse gatekeepers, who are hesitant to openly assert their fair use rights because of concerns about potential liability, regardless of how remote.

1. Preservation: Storing Images for Repeated Use in a Teaching Context; Transferring Images to New Formats.

Background: As noted above, for many decades, educational institutions, some cultural institutions, as well as many individual scholars, have amassed and maintained collections of images for teaching, research, and other educational uses. As important and sometimes unique resources that are often heavily used for teaching and research, these collections need to be preserved on an ongoing basis.

While digital technologies offer the possibility of providing better means of preserving images that often degrade in other formats (as well as making them more accessible for research and scholarship), some institutions have raised questions about whether certain images under copyright can be legally transferred to digital format. Although Section 108 of the Copyright Act explicitly permits such preservation efforts by libraries and archives, it also imposes a number of conditions and restrictions on such practices that many institutions feel are not workable. For example, as noted by the Dance Heritage Coalition’s *Statement of Best Practices in Dance-Related Materials* at the Center for Social Media website, <http://centerforsocialmedia.org/fair-use/related-materials/codes/best-practices-fair-use-dance-related-materials>, although reproduction is allowed if an original is “damaged, deteriorating, lost or stolen” or if the equipment to access the copy is no longer reasonably available in the commercial marketplace, institutions have sometimes interpreted this language to mean that images must show deterioration or degradation before they can be preserved within the scope of section 108. Fortunately, section 108 does not limit in any way fair use or other exceptions to copyright.

Principle: Preservation of such materials – as a means of facilitating teaching, research and study, and preserving the scholarly record – should generally be permissible as an exercise of educators’ fair use rights.

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

- Make only that number of copies reasonably necessary to achieve the teaching and research needs of the institution or individual (as well as the associated needs in preserving that content for such purposes). Such copies can include copies that are readily accessible for teaching and research purposes, as well as those that may be placed in a “dark” – or typically inaccessible – archive.
- Undertake good faith efforts to notify end users of the archive, preferably through click-through terms of use or other mechanisms, that copyrighted images in the archive are only being made available for the educational uses for which the archive was assembled. Although terms of use and similar mechanisms are not a requirement of fair use, such mechanisms are likely to be viewed by courts as an indication of an educational user’s good faith in asserting fair use.

2. Use of Images for Teaching Purposes.

Background: As noted above, images are essential to teaching in the arts and other fields. Images are used to comment and critique; to uniquely describe and document objects or other subjects; to make or further scholarly arguments; to facilitate comparisons and evaluations; and in general to further academic inquiry. Used for these not-for-profit, academic purposes, images are unique objects of information that advance the core aims of Copyright. Frequently, as noted above, the use of images for teaching will also be transformative.

Principle: For the reasons described in this statement, the reproduction and use of images for teaching – whether in face-to-face teaching, non-synchronous teaching activities, or non-course related academic lectures – should be consistent with fair use.¹⁵

Suggestions: Educational institutions and faculty reproducing, displaying, or providing access to, images for teaching purposes may be best positioned to rely on fair use if they:

- Undertake good faith efforts when distributing images to individual users to notify those users – preferably in writing through click-through terms of use or similar mechanisms – that copyrighted images are being made available for teaching, study, and research only. Although terms of use are not a requirement of fair use, such mechanisms may indicate an educational user’s good faith in asserting fair use.
- Consider employing access restrictions, to the extent that images are accessible through websites or other online resources that limit access to educational users. Although access restrictions are not a requirement of fair use, they may be useful as a means of

¹⁵ Note the discussion of photographer-licensed images in section V above.

demonstrating a good faith intention to limit use of the images to teaching, research and study.

- Provide attributions to known copyright owners of the images (and any works depicted in the images). Although not legally required under fair use, such attributions may help demonstrate a user's good faith in adhering to the broader scholarly traditions of providing citations when using others' works.
- Maintain the educational, not-for-profit context, to the extent that educational institutions or faculty members utilize third parties (such as image-sharing websites and image databases) as a means of providing access to those images.

3. Use of Images (both Large, High-Resolution Images and Thumbnails) on Course Websites and in Other Online Study Materials.

Background: Increasingly, technologies are being utilized in teaching to either complement or facilitate traditional forms of instruction. Course websites, blogs, and interactive tools are just a few of the ways in which technology is being harnessed to further education. These methods of instruction are increasingly important as new generations expect to encounter such technological tools and resources in their study, and to uncover content through those tools and resources. Moreover, such tools and resources engage educational users in different ways, and allow for previously impossible, often innovative forms of study and scholarship.

In addition to their larger, higher resolution counterparts, "thumbnail images" (low resolution, small images), serve a transformative purpose, rendering an aesthetic work into a finding aid, or serving as a factual "data point" about the nature or identity of materials in particular websites or online resources. As the amount of information grows on the Web, these kinds of sorting, linking, and identification tools on course websites and other online tools are becoming increasingly important, especially in a research, educational, or scholarly context.

Principle: To the extent that use of a specific image for teaching or research is a fair use, then placing those same images in course websites or in other interactive teaching media for the same purposes should also be fair. Such uses should be fair regardless of the media formats or resolution in which those materials appear. This is the case whether or not those materials remain within such sites or media on an ongoing basis, or on a shorter basis, so long as they continue to serve an educational or scholarly purpose.

Suggestions: Educational institutions or individual faculty members who are providing students and other individual users with direct access to copyrighted images through course websites or other electronic study materials may be best positioned to claim fair use if they:

- Undertake good faith efforts when distributing images to individual users to notify those users – preferably in writing through click-through terms of use or similar mechanisms – that copyrighted images are being made available for teaching, study, and research only. Although terms of use are not a requirement of fair use, such mechanisms may indicate an educational user's good faith in asserting fair use.

- Consider employing access restrictions that limit access to educational users. Although access restrictions are not a requirement of fair use, they may be useful as a means of demonstrating a good faith intention to limit use of the images to teaching, research and study.
- Provide attributions to known copyright owners of the images (and any works depicted in the images). Although not legally required under fair use, such attributions may help demonstrate a user's good faith in adhering to the broader scholarly traditions of providing citations when using others' works.
- Maintain the educational, not-for-profit context, to the extent that educational institutions or faculty members utilize third parties (such as image-sharing websites and image databases) as a means of providing access to those images.

4. Adaptations of Images for Teaching and Classroom Work by Students.

Background: For centuries, students of the arts (and future artists) have learned – and the arts have progressed – from copying and adapting other artists' works. These adaptations may take any number of forms, including mash-ups, reorientations, colorizations, placing images in different contexts, or changing the features of a work, to name a few. As a society, we have collectively benefitted from these adaptations, as new generations of artists and other creators have developed their skills and techniques by copying or adapting existing works, and as artists (including emerging artists) and other creators have used adaptations of others' works to generate and communicate new ideas and meaning. Adaptations of existing works are also increasingly important for teaching and study outside of the arts, as images are being adapted in disciplines such as film studies, cultural studies, foreign language classes, social studies, and religious studies, to name a few. To continue the evolution of our collective knowledge in the arts and other fields, and to facilitate the education of artists and other creators, it is critical that students, scholars, and faculty be able to make adaptations of copyrighted images and to display and distribute them in educational contexts.

Principle: Subject to the cautions below, adaptations of copyrighted images for purposes of study, research, and teaching – such as for course assignments – should fall within the doctrine of fair use.

Although one factor cited in the fair use statute is the amount of a copyrighted work being used in relation to the work as a whole, use of substantial portions of a copyrighted work – or an entire work – should not preclude a finding of fair use in a classroom or research context. For example, a student in an art class may copy and incorporate major portions of a work in her own work to improve her brushstrokes or other techniques. A scholar may reproduce an entire work but alter the sense of perspective in the image to highlight the importance of that element within the work. Both of these uses should fall within fair use. The point is that the educational context matters, and even if the entire work is used, and even if the underlying work is not transformed through the addition of substantial new content, these uses within the academic context should be fair ones. (This is not to say that adaptations or reproductions outside of the educational context will not be fair uses, but such uses are beyond the scope of this document).

Suggestions: Educational users may be particularly well positioned to assert fair use in adapting copyrighted images if they:

- Clearly use the work in a learning, research, or similar educational context.
- Consider employing access restrictions as noted in the third guideline above, to the extent that such adaptations are being distributed via course websites or similar online vehicles. Although not a requirement of fair use, such steps may demonstrate a good faith intention to limit use of the images to teaching, research and study.
- Provide an indication of the educational context in accompanying descriptive materials, to the extent that adaptations are displayed beyond the classroom (*e.g.*, in an end-of-semester exhibition).

5. Sharing Images Among Educational and Cultural Institutions to Facilitate Teaching and Study.

Background: Today, classrooms often blur physical, institutional boundaries. Students may be able to access courses from home or other locations via the Web. Faculty members often teach at multiple institutions within the same semester. Some educational institutions participate in consortia or multi-campus systems that require sharing across campus borders.

Images may be shared via the Web or other electronic means simultaneously across different physical classrooms. Such sharing often provides innovative opportunities for learning, with the ability to create dialogue among disparate communities of academic users that previously could not be engaged collectively, and through which copyrighted images may be used in new, meaningful, and transformative ways.¹⁶

Principle: To the extent that each institution is relying on fair use to reproduce, display or adapt the same visual work for teaching, study, and research, then sharing a copy or copies of that same visual work for these same limited purposes across the same institutions should also be fair use. While there are, as noted above, potentially significant educational benefits from such sharing, the impact on the copyright owner's market is no greater if one copy of his or her work is used collectively for these educational purposes than if each individual institution makes its own copy of the same work for these limited purposes.¹⁷

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

¹⁶ Shared image collections also provide significant efficiencies and other advantages, as described in a white paper produced by the Visual Resources Association White Paper Task Force entitled, "Advocating for Visual Resource Management in Educational and Cultural Institutions," available at www.vraweb.org/resources/general/vra_white_paper.pdf.

¹⁷ Note the VRA's position with respect to photographer-licensed images in section V above.

- Undertake good faith efforts when distributing images to individual users, to notify those users – preferably in writing through click-through terms of use or similar mechanisms – that copyrighted images are being made available for teaching, study, and research only. Although terms of use are not a requirement of fair use, such mechanisms may indicate an educational user’s good faith in asserting fair use.
- Consider employing access restrictions, to the extent that images are accessible through websites or other online resources, that limit access to educational users. Although access restrictions are not a requirement of fair use, they may be useful as a means of demonstrating a good faith intention to limit use of the images to teaching, research and study.
- Provide attributions to known copyright owners of the images (and any works depicted in the images). Although not legally required under fair use, such attributions may help demonstrate a user’s good faith in adhering to the broader scholarly traditions of providing citations when using others’ works.
- Maintain the educational, not-for-profit context, to the extent that educational institutions or faculty members utilize third parties (such as image-sharing websites and image databases) as a means of providing access to those images.

6. Reproduction of Images in Theses and Dissertations.

Background: To obtain a masters or doctoral degree, graduate students are required to produce a thesis or dissertation. Frequently, the dissertation or thesis must provide an original contribution to the state of knowledge in a particular field and be in principle worthy of publication in a peer-reviewed context.

Historically, most universities have also required that a thesis or dissertation be submitted in typed, bound format to the institution’s library for preservation or archiving, and for access by others conducting research at that institution’s facilities. In more recent years, online databases and other websites have served as such preservation repositories (indeed, one – UMI Dissertation Publishing – serves as the Library of Congress’ official offsite repository for the preservation of digital dissertations and theses), both ensuring long-term maintenance as well as centralized access to such dissertations and theses. Increasingly, making a thesis or dissertation available through such online databases is a degree-granting requirement.

Students incorporate images into their theses or dissertations for the same reasons that images are used in scholarship more broadly: Sometimes the images – or the works or persons depicted in those images – are the focus of commentary, critique, or scholarship. In other instances, the images uniquely or most effectively illustrate points made by the author. In still other cases, images are used for purposes of comparison or contrast to facilitate certain scholarly arguments.

As noted above, historically, graduate students have not obtained permissions from the relevant copyright owners of such images (or of the works depicted in the images) when incorporating those images into their theses or dissertations. In more recent years, however, as these theses have been posted to online repositories, the owners or operators of these repositories, both

academic institutions and distributors of online databases (distributors), have often required – as a way of managing their own risks – that graduate students obtain all copyright permissions for images incorporated into their theses or dissertations.

As a result of these risk-management efforts on the part of distributors, students are now required to address a range of additional copyright issues simply to obtain their academic degrees. This has had a number of deleterious effects: First, distributors typically require students to pay any copyright licensing fees for such images, which – depending on the nature of the thesis or dissertation – can be very significant and in some cases prohibitive. In other cases, clearances cannot be obtained (copyright owners cannot be ascertained or located, or when contacted they do not respond or – in some instances – refuse to provide permissions), leaving students in the unenviable position of either rewriting their theses or dissertations to eliminate reference to the image or images in question, or breaking or renegotiating their contracts with the distributor and relying on fair use.¹⁸ As a consequence, there are anecdotal reports of students choosing thesis or dissertation topics to avoid or minimize these copyright issues and the associated expenses. In addition, students are spending significant time to locate rights owners and clear uses, thereby increasing the time to complete graduation requirements for their degrees.

Principle: The thesis or dissertation is a core degree-granting requirement, and such scholarship needs to be recorded and preserved and made broadly accessible to advance scholarly inquiry. Images incorporated into such dissertations or theses for the purpose of advancing or documenting a scholarly argument or point should be consistent with fair use, even when those theses or dissertations are then distributed through online repositories and databases. Just as printed material can be freely quoted with attributions, the inclusion of reference images (images of sufficient resolution to convey the author’s point) in academic dissertations or theses is critical to advancing our collective knowledge in the arts and sciences, and should be consistent with fair use.

As noted in section V above, the use of images in scholarship is fundamental to the advancement of our collective knowledge and to the exercise of our First Amendment rights. Moreover, this conclusion is supported by the fact that the inclusion of images in scholarly theses or dissertations is inherently transformative. Essential to theses and dissertations is the need to add original argument and therefore to place images in a different context from the original, typically aesthetic, aim of the copyright owner of the image.

Inclusion of an image in a dissertation or thesis also frequently benefits the creator of that image (and the creator of any work depicted in the image). For example, inclusion of such an image may provide greater exposure to that artist’s work, may introduce or advance that artist’s works within the teaching canon, or may spark other academic or curatorial inquiry regarding that artist’s works.

Therefore, while the desire among academic repository operators and database distributors to reduce potential copyright infringement risks is understandable, scholarship is at the core of our collective progress in the arts and sciences, and these uses of copyrighted images are both

¹⁸ Although beyond the scope of this document, students and educational institutions might consider pressing publishers for greater latitude to include images in their dissertations in reliance on fair use.

necessary and sufficiently transformative such that the reproduction of images should be consistent with fair use. In coming to this conclusion, we note that courts have found that incorporating images into publications are fair uses of those images, even when a market mechanism exists for obtaining a license to those images, and even when the publishers of those publications are commercial in nature.

Suggestions: Graduate students (and libraries, or publishers of online repositories of theses and dissertations) may be best positioned to assert fair use if:

- Significant commentary, or other original content, accompanies images included in the thesis or dissertation (as is almost uniformly the case);
- Images included in a dissertation or thesis are the subject of commentary, or are included to illustrate a scholarly argument, and are not included for purely aesthetic purposes;
- Images are incorporated at a size or resolution necessary to make the best scholarly argument (for example, large images may be best or even required to illustrate small background elements or obscure details, but in other instances, smaller reference images may suffice).
- Attributions are provided to the copyright owners of the images (and any works depicted in the images), where known. Although not legally required under fair use, attributions may help demonstrate a user's good faith in adhering to the broader scholarly traditions of providing citations when using others' works (which traditions are especially strong in the context of publications).
- The circulation and distribution of the dissertation or thesis through online websites or repositories is consistent with academic practices or requirements set forth by the degree-granting institution.

VII. How This Statement Was Created

This Statement was drafted by Gretchen Wagner, in her capacity as a chair (and now former chair) of the VRA's Intellectual Property Rights Committee, in close consultation with other members of the Committee. Members of the Committee include both lawyers and visual resource professionals long practiced in using images in the educational context.

This Statement draws from the Digital Image Rights Calculator (DIRC) <http://www.vraweb.org/resources/ipr/dirc/index.html> and the Copy Photography Computator <http://www.vraweb.org/resources/ipr/computator/index.html>, two sets of VRA materials that themselves reflect the community's longstanding practices and principles surrounding the fair use of images. In developing the DIRC and the Copy Photography Computator, as well as this Statement, the Committee has relied on the expertise of its members (many of whom have decades of experience working with images and fair use), as well as existing documentation

surrounding the longstanding practices of image use in educational contexts. The Statement also takes note of fair use jurisprudence and the other best practice statements and codes available at the American University Center for Social Media website, at <http://www.centerforsocialmedia.org/fair-use/best-practices>.

Finally, the Statement draws significantly on the guidance and expertise of its Legal Advisory Committee members, who are preeminent legal experts and copyright scholars. The Visual Resources Association is deeply indebted and grateful to the Legal Advisory Committee members for sharing so generously of their time and expertise.

LEGAL ADVISORY COMMITTEE

Robert W. Clarida

Cowan Liebowitz & Latman

Jeffrey P. Cunard

Debevoise & Plimpton LLP

Jackie Ewenstein

Ewenstein & Young LLP

Georgia K. Harper

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

Virginia Rutledge

PIPE Arts Group

Jule Sigall

Associate General Counsel - Copyright, Microsoft

Formerly Associate Register for Policy & International Affairs, U.S. Copyright Office