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# Transcript of Fair Use Guidelines Q & A Forum at 2012 VRA Conference

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# Transcript of Fair Use Guidelines Q & A Forum at 2012 VRA Conference

## **Abstract**

During the 2012 VRA conference, the question and answer forum on the Visual Resource Association's Statement on the Fair Use of Images for Teaching, Research, and Study included discussion of the context for creating a code of best practice, an overview of the statement elements, and audience member's questions and concerns about the statement's application. Allan Kohl, Visual Resources Librarian at the Minneapolis College of Art and Design, discusses the VRA statement on fair use as an extension of the VRA's decades-long efforts to provide guidance to its members on the application of fair use. These efforts have included participation in the CONFU conference in 1998, the creation of Image Collection Guidelines document in 1998, the creation of Copy-photography Computer in 2001, and the creation of Digital Image Rights Calculator in 2007. Cara Hirsh, Deputy Counsel for ARTstor, relates these efforts to the increasingly prevalent use of codes of best practice within communities that regularly rely on fair use, citing the documentary filmmaker community and the Center for Social Media as examples. These codes of best practice establish a community's custom and practice which, she notes, is looked to by courts when considering whether or not a use is fair.

Gretchen Wagner, General Counsel, Secretary, and Vice-President of Administration of ARTstor, follows with an overview of the VRA Statement on Fair Use, noting the experts consulted, the principles followed, and the carve-out made for vendor-supplied images. While the majority of the use case scenarios outlined in the VRA Statement address non-controversial uses, Ms. Wagner notes the inclusion of a use case scenario in which images appearing in theses and dissertations are considered to be fair. Audience questions cover topics ranging from advocacy, limited duration and limited geographic licenses, the crisis in academic publishing, and concerns over risk assessments and open-web publishing. The session concludes with an exhortation to share the VRA Statement on Fair Use with colleagues, counsel, and those concerned with the use of images in teaching, research, and study.

## **Keywords**

Fair Use, VRA Fair Use Guidelines, copyright, academic publishing, image use, code of best practice

## **Author Bio & Acknowledgements**

Allan Kohl, Visual Resources Librarian at the Minneapolis College of Art and Design, and Cara Hirsh, Deputy Counsel for ARTstor, are the current Co-Chairs of the VRA Intellectual Property Rights Committee. Former Co-Chair of the Intellectual Property Rights Committee, Gretchen Wagner is General Counsel, Secretary, and Vice President of Administration for ARTstor. Molly Tighe, transcriber, is Archivist at the Mattress Factory Museum in Pittsburgh, PA and Archives Consultant for the Pittsburgh Symphony Orchestra.

Whenever I return from a conference, I look over the notes I jotted down for a refresher on all the topics and tools covered. Usually, these snippets serve as a sufficient reminder of the salient points from each session; however, the topics of copyright, intellectual property, and fair use are extremely complex—and the discussion that occurred in the Fair Use Guidelines Question & Answer Forum at the 2012 Visual Resources Association conference was so nuanced, that even the most assiduous note-taker could have easily missed a critical point. Given this possibility, the session speakers and I, the official note-taker, agreed that making a complete transcript available in the *VRA Bulletin* would allow the Visual Resources community to take advantage of the expert advice and detailed explanations that were offered during the session. It is our hope that this transcript will be a useful resource in conversations with other members of the information management community, with legal counsel, and in advocacy efforts aimed at encouraging fair and ethical uses of copyrighted material in the academic and creative sectors.

Molly Tighe  
Archivist, Mattress Factory Museum  
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### **Fair Use Guidelines Q & A Forum**

Allan Kohl:

Good Afternoon and welcome to this afternoon's session brought to you by the [Visual Resources Association Intellectual Property Rights] Committee about the Statement on the Fair Use of Images in Teaching, Research, and Study. We'll be providing a bit of an introduction, background, an overview of the project and then plenty of time for questions and answers.

The concept of fair use is an important but frequently misunderstood component of the United States Copyright Law. Fair use allows for portions -- or in some cases the entirety -- of otherwise copyrighted works to be used for purposes such as "criticism, commentary, news reporting, teaching, scholarship, or research."

Because the law itself offers only general parameters, and is not specific as to the nature and extent of fair use, various attempts have been taken to provide greater clarity and guidance. I'll begin this session with a brief overview of some of these attempts through the past two decades to determine equitable fair use practices for both rights holders -- content owners -- and for those of us who use this content.

Cara Hirsch will then continue with an account of recent efforts by various entities to document community practices in regard to their non-profit use of still and moving images, especially in the networked environment, and to represent these practices in formal statements reviewed and supported by competent legal authority.

Gretchen Wagner will then give us an account of how the Visual Resources Association developed its own Fair use Guidelines: how we assembled information for the statement, how we addressed fair use jurisprudence in the statement, how we described community practices within the statement; followed by a brief walk through each of the six use case scenarios addressed in these Guidelines.

We're going to try to keep our formal presentations relatively brief so that we have lots of time for your questions....

But first, a bit of a history lesson...

[“Long past?” said Scrooge. “Nay, *your* past,” replied the Spirit.]

We'll begin with the Conference on Fair use (better known by its acronym CONFU), a project of the Working Group on Intellectual Property Rights, established under congressional authority to advise the federal government on a national strategy for promoting the development of the National Information Infrastructure, and to make recommendations on possible changes to U.S. intellectual property law and policy in the emerging digital environment.

Following public hearings in November 1993 and the review and analysis of both solicited written comments and extensive public comments that were submitted, the Working Group released a preliminary draft of its report (the “Green Paper”) in June of 1994. Following release of the Green Paper, the Working Group heard testimony from the public in four days of hearings in Chicago, Los Angeles, and Washington, D.C., in September. The Green Paper expressed significant concerns over the ability of the fair use provisions of the Copyright Act to provide the public with adequate access to copyrighted works transmitted digitally. While recognizing that the principles underlying the guidelines for library and educational use of printed matter and music should still apply, the Working Group believed it would be “difficult and, perhaps, inappropriate, to apply the specific language of some of those guidelines in the context of digital works and on-line services.”

Consequently, the Working Group convened the Conference on Fair use (CONFU) to bring together copyright owner and user interests to discuss fair use issues and, if appropriate and feasible, to develop mutually-agreeable guidelines for fair uses of copyrighted works by librarians and educators. Meeting regularly in public sessions, CONFU grew from the forty groups that had been invited initially to participate in the first meeting on September 21, 1994, to approximately one hundred organizations participating as of May 1998. Participants included content owners and providers; educational and cultural heritage organizations (who often acted as both content creators and owners on the one hand, content consumers on the other); and user communities that included among the latter the College Art Association (CAA), the Art Libraries Society of North America (ARLIS), and the Visual Resources Association (VRA).

Eventually, after much acrimonious discussion and hard-fought compromises, these negotiations produced five draft statements, later expanded to include a sixth:

Digital Images  
Distance learning  
Educational multimedia  
Electronic reserve systems  
Interlibrary loan and document delivery  
Use of computer software in libraries

The working groups met and negotiated throughout 1995 and most of 1996, concurrently with monthly plenary sessions to discuss issues and drafts of voluntary guidelines with the entire group of participants. However, it became apparent by 1998 that a significant number of organizations—including the VRA—opposed endorsement of the guidelines on the basis that many of the proposed requirements in the guidelines were viewed as unworkable. Hence the CONFU process came to an ambiguous, unresolved ending.

The year 1998 also marked the adjudication of a major case concerning image copyright. *Bridgeman Art Library v. Corel Corp*, now commonly known as the Bridgeman case, was a decision by the United States District Court for the Southern District of New York, which ruled that exact photographic copies of public domain images could not be protected by copyright in the United States because the copies lack originality. Even if accurate reproductions require a great deal of skill, experience and effort to produce, the key element for “copyrightability” under U.S. law is that copyrighted material must show sufficient and discernable originality.

Following the CONFU dead end and the Bridgeman decision, the VRA decided to take independent steps to provide its members with appropriate guidance regarding copyright and fair use issues specific to image collection and utilization. Beginning in 1998, the Intellectual Property Rights Committee began work on formulating a document called the “Image Collection Guidelines” (originally known as the “Standards of Good Practice”), subtitled “the Acquisition and Use of Images in Non-profit Educational Visual Resources Collections.” This document addressed issues relating to both analog and digital images, as many of us still remained heavily vested in slides even with the relentless advance of the digital era.

With the publication of the completed Image Collection Guidelines as a text-based document in 2001, the IPR Committee undertook to develop a parallel tool intended to take advantage of web technology. The so-called Copy Photography Computator was an early iteration of an interactive decision-making query program, guiding the user through successive related risk-assessment steps.

A similar, but much more fully developed and nuanced structure, was used in IPR’s next major undertaking, the Digital Image Rights Computator, or DIRC. The DIRC query program addressed both image rights issues and various possible use scenarios. The DIRC prototype was introduced in 2006 at the CAA, ARLIS, and VRA conferences; the final version was implemented the following year in 2007. Incidentally, all of these VRA

projects are available for your use on the VRA web site under the IPR section of “Resources.”

At much the same time, the Center for Social Media at American University in Washington, D.C., under the guidance of Peter Jazsi, of the Washington College of Law at American University, began promoting the formulation of fair use guidelines by various user communities. Peter Jazsi was already well known to the VRA, having been the keynote speaker at our 23<sup>rd</sup> annual conference in Miami, in 2005, where he warned us about “The Vanishing Middle in Copyright Policy Discourse.”

The mission of the Center for Social Media, supported by a number of major foundations and the National Endowment for the Arts, is to promote truly public media, with particular attention to documentary film and video in the rapidly-evolving networked digital environment. As part of this mission, the Center for Social Media has encouraged and supported the development of fair use guidelines such as the:

Documentary Filmmakers’ Statement of Best Practices in Fair use;  
Code of Best Practices in Fair use for Online Video;  
Code of Best Practices in Fair use for Scholarly Research in Communication;  
Code of Best Practices in Fair use for Academic and Research Libraries (Association of Research Libraries).

The Center for Social Media has also provided a common point of dissemination so that each new document in this growing body of guidance generates a complementary synergy with the others.

For more on the recent history of these fair use guideline statements, I would now like to call upon the current Co-Chair of the VRA Intellectual Property Rights Committee, Cara Hirsch.

Cara Hirsch is the Deputy General Counsel for the ARTstor Digital Library. In this role, she works closely with ARTstor’s General Counsel to refine ARTstor’s intellectual property and other legal strategies for the organization. She is also responsible for drafting and negotiating a wide range of content, licensing and third party vendor agreements, and supervising the legal due diligence on the ARTstor collections.

From 2004-2008, Ms. Hirsch was an associate at the law firm of Weil, Gotshal & Manges LLP, where she specialized in both intellectual property and complex commercial litigation. At Weil, Ms. Hirsch worked on a variety of matters including drafting a position paper and congressional testimony on behalf of a major trade organization in connection with a proposed legislative change to copyright law; litigating breach of fiduciary duty cases and copyright and trademark infringement disputes; and negotiating and drafting a variety of intellectual property agreements. Ms. Hirsch also provided *pro bono* representation to artists and musicians through Volunteer Lawyers for the Arts and New York Lawyers for the Public Interest.

Ms. Hirsch received her J.D. from Fordham University School of Law, where she was on Dean's List and served as the Writing and Research Editor for the Fordham International Law Journal.

Cara Hirsch:

Thanks so much, Allan.

I'm going to keep my comments brief so we have ample time for Q & A at the end. But first, I wanted to go a little more in depth about the history of the development of all of these new fair use guidelines.

Going back to the 1800s, fair use has been recognized by courts. One of the things that courts have consistently looked at in determining whether one could rely on fair use is custom and practice within a community where there was clear evidence of this. The VRA is already out in the forefront of these issues in developing DIRC (the Digital Image Rights Computator) and Copy Photography Computator, which documented the VR communities' consistent image-based community practices going back for 150 years. In recent years many other communities have also tried to put pen to paper to create documents that lay out their own customs and practices in the form of codes of best practice.

This morning's session on legal issue surrounding the use of video in educational, scholarly and archival contexts, included discussion by one of the first drafters of the first set of best practice guidelines, Gordon Quinn, a member of the documentary film community. The documentary film community differs from our community in that they did not previously have a consistent set of best practices or standards that could be referred upon when relying on fair use. Over the course of time, this led to a lot of problems. In order to show and distribute their films, documentary filmmakers were typically required to have errors and omissions insurance. However, historically, when documentary filmmakers wanted to rely on fair use in their films, they were frequently denied that insurance. This really hampered the ability for documentary filmmaking to thrive and it only got worse over the years.

One particularly dramatic example of how this impacted the community involves a filmmaker named Jonathan Caouette who created a great film called *Tarnation*. It was widely known as a very low budget film. His total cost in making the film was \$218. This total includes production costs, editing clips, gathering all material, etc. Because he couldn't rely on fair use, though, he was forced to clear rights to all of the content in the film. The amount of money he spent on copyright clearances for that film was \$200,000.

To address these issues, several years ago, the documentary film community, along with several very prominent legal scholars, sat down and put together a set of best practices, the Documentary Filmmakers' Statement of Best Practices in Fair Use<sup>1</sup>. This was the first of the codes of best practices for relying on fair use. Once the statement was issued it was widely acclaimed. One of the amazing things that resulted was that the insurers

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<sup>1</sup> <http://www.centerforsocialmedia.org/fair-use/best-practices/documentary/documentary-filmmakers-statement-best-practices-fair-use>

who issued errors and omission insurance decided that documentary filmmakers who wanted to rely on fair use could now get errors and omissions insurance so long as they followed the guidelines in the code of best practice. So, the code has been very powerful.

Since then, there have been a number of communities, including our own VRA community, that have drafted sets of best practice guidelines for relying on fair use. Hopefully, these will have a similar impact in solving each community's issues and the grey areas surrounding their reliance on fair use.

Aside from the VRA's own best practices statement, which we will discuss today, there are a couple of other best practice guidelines I would like to mention, that may be of particular use to our community. The first one is the Code of Best Practice for Fair use of Online Video<sup>2</sup>. The second is the statement on Fair Use for Scholarly Use for Research in Communication, which deals with fair use for academic and research libraries<sup>3</sup>. These are both available through American University's Center for Social Media's website. I encourage you to visit their site since there are many other helpful resources there, as well.

I'd now like to turn over the microphone to Allan, to introduce the next speaker.

Allan Kohl:

Thank you Cara. And now for the inside story on the formulation of the VRA's own fair use guideline statement, I'd like to call on Gretchen Wagner. Our predecessor as Co-chair of the IP Rights committee, Gretchen is General Counsel, Secretary and Vice-President of Administration for the ARTstor Digital Library, responsible for all legal matters at ARTstor. Before joining ARTstor, Ms. Wagner was the Assistant General Counsel to The Andrew W. Mellon Foundation, where she drafted and negotiated numerous agreements with educational institutions, museums, and US and foreign governmental entities involving the licensing and distribution of intellectual property. She also worked on a wide range of non-profit tax and contractual matters. Before working at the Mellon Foundation, Ms. Wagner worked as an associate at a large law firm, Davis Polk & Wardwell, where, among other things, she provided significant *pro bono* representation on immigration and criminal matters for indigent clients.

She received a J.D. from Columbia Law School, where she was an editor of the Columbia Law Review, a Harlan Fiske Stone scholar, and was recognized for her contributions to public service. She received her B.A. from Yale.

Gretchen Wagner:

I was just thinking back to when Allan described the development of the Copy Photography Computator and Digital Image Rights Computator a few minutes ago, and it

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<sup>2</sup> See: <http://www.centerforsocialmedia.org/fair-use/related-materials/codes/code-best-practices-fair-use-online-video>

<sup>3</sup> See: <http://www.centerforsocialmedia.org/fair-use/related-materials/codes/code-best-practices-fair-use-scholarly-research-communication>



struck me that these are themselves fair use statements. So, the VRA had the foresight to see the value of these fair use statements early on.

Today, I want to talk about the latest fair use statement developed by the VRA.

For starters, I want to talk about the need for this statement. Many of you are intimately familiar with the uncertainty surrounding the application of the fair use doctrine, particularly following the rise of digital technologies and the Internet. At the same time, what some of you may not know so well is that this community, and the educational community at large within the U.S., has been relying on fair use for roughly a century in connection with using images for research, teaching, and study.

I attribute the uncertainty around fair use in this context to the conscientious and incredibly scrupulous nature of this community. Visual resources professionals want to abide by the law; they want to do the right thing. So, the aim in developing this fair use statement was to address this uncertainty around fair use in scenarios commonly faced by educational users of images, and to provide those users a good faith, documented basis for robustly relying on fair use in those situations.

Before we get to the meat of the document, I want to briefly review what this statement is and is not about. For starters, the VRA statement on fair use is about still images, not video. As Cara and Allan acknowledged earlier, there are other fair use statements that have been produced about video, and you should read them if you have questions about fair use in that context.

The VRA statement on fair use covers six use case scenarios relating to teaching, research, and study. Obviously, there are many other kinds of use case scenarios that we could have included in the statement. We chose to focus on the six most common situations faced by educational image users; five of these scenarios had been described in previous fair use statements, including the Digital Image Rights Computator and the Copy Photography Computator. One use case scenario had not been covered in previous fair use statements, but we felt that it was very important to address that last situation given the impact of current copyright clearance requirements on scholarship in that context.

The VRA statement on fair use is about US law. Fair use does not exist outside the United States. So this statement is intended to cover uses that are occurring primarily within the United States.

The VRA statement on fair use is not about contracts. I want to just stress that for a moment. According to many courts, contracts can trump copyright and fair use. So it is important to review your contracts to make sure, before you sign them, that they don't explicitly or implicitly override your fair use rights. In crafting the ARTstor Digital Library contract terms of use, we expressly said that nothing in that contract would trump fair use. But, there are other contracts where those rights are not protected. And you may

well want to negotiate the terms of those contracts to expressly protect your fair use rights.

The VRA statement on fair use is not about the public domain. If you have an image where the copyright has expired, you don't have to rely on fair use; use it for whatever purpose you want and you will not be violating copyright law.

The VRA statement on fair use does not define the outer boundaries of fair use. Teaching and research are preferred uses under the fair use statute, as noted in the preamble to the fair use statute, so you should not think of this statement as defining the limits of fair use. There are many, many different uses that are not described in the statement that are fair.

I want to spend a minute talking about the process of developing the statement. We were very fortunate, because we were able to build on the tremendous expertise and previous work conducted over many years by VRA leaders, including Christine Sundt, Allan Kohl, Macie Hall, Ben Kessler, and others who I affectionately call "the wise ones." Cara and Allan talked earlier about the documentary filmmakers statement being one of the first statements to come out on fair use. Actually, as I noted earlier, I would argue that VRA had some of the first statements on fair use with the Copy Photography Computator, the Digital Image Rights Computator, and the Image Collection Guidelines. In essence, these are statements on fair use. They are on the IPR resources page of the VRA website<sup>4</sup> and they are a tremendous source of guidance. We drew heavily from these documents, as well as the longstanding expertise of the many members of the IPR committee and others in developing the latest statement. We also drew on experiences described in previous conferences, from the common practices of this community that had been documented over time, and from the clearly documented reasons for relying on fair use in such situations. So, we drew on all of this information in the investigatory phase in understanding the community's longstanding practices in relying on fair use, and in formulating the use case scenarios that were addressed in the statement.

After the statement was drafted and vetted by the IPR committee, it was reviewed by a group of legal experts. The members of the Legal Advisory Committee were: Robert W. Clarida (previously Cowan, Liebowitz & Latman, now Reitler, Kailas, and Rosenblatt), Jeffrey P. Cunard (Debevoise & Plimpton), Jackie Ewenstein (Ewenstein & Young), Georgia K. Harper (Scholarly Communications Advisor, The University Libraries, University of Texas at Austin), Virginia Rutledge (PIPE Arts Group; Former Creative Commons General Counsel), and Jule Sigall (Associate General Counsel – Copyright, Microsoft; Formerly Associate Register for Policy and International Affairs at the Copyright Office). We were very fortunate to have such a stellar group of copyright scholars and practitioners serve as advisors to this project. These advisors reviewed the statement to ensure that it was consistent with the law, and it should be a source of comfort and reassurance to those relying on the statement that it has been "blessed" by such preeminent copyright lawyers and scholars.

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<sup>4</sup> [http://www.vraweb.org/organization/committees/ipr/ipr\\_resources.html](http://www.vraweb.org/organization/committees/ipr/ipr_resources.html)

Turning to the statement itself, I want to give you a brief overview of the introductory sections, before we talk about the different use case scenarios. I'm not going to spend time today on the four fair use statutory factors, as they are set forth in the statute and described in the statement. But it is worth noting that the first part of the VRA statement does give a brief overview of the fair use doctrine, and provides, in essence, a legal overview of why these uses of images are fair. This section does not provide references to the case law, but if you want to get a sense of the relevant case law, citations and links to the relevant cases are on the IPR resources page of the VRA website.

The introductory section – which provides an overview of why these uses are fair - is heavily focused on the first and fourth factors of the fair use statute. We spent a lot of time talking about the nature of the uses that are being made, and in particular that these educational uses are cited in the preamble to the fair use statute as being the types of uses that are likely to be fair. These kinds of uses are also at the heart of the First Amendment. When a scholar is displaying an image to critique that image or the work depicted in that image, for example, that kind of speech is at the core of the First Amendment, and is therefore more likely to be fair.

In addition, you will see that in other fair use statements, there is often a discussion about uses being transformative, which tend to support a finding of fair use. There is no question that the uses that we're making here are almost always transformative. When one is taking an image created for aesthetic purposes and making an educational use of it, and placing that image in a different context, that use is very likely to be transformative.

We did not spend a lot of time on the second or third factors of the fair use statute, because they tend to be less relevant in this context. We did note, however, that often you need to use the entire image to make your point, and that courts have repeatedly said that this should not weigh against a fair use finding in such instances.

We also then spent a fair amount of time on the last factor, which deals with the affect of the use that one is making on the copyright owner's market for that work. In particular, we discussed in that section our community's century-long tradition of relying on fair use, and the fact that, in many instances, copyright permissions simply cannot be obtained. For example, we have many orphan works represented in our image collections, especially in the context of photographic works or non-western art objects.

More importantly, it is often impossible to obtain permissions in a manner that is conducive to teaching. Copyright owners, though they may support educational use, are not accustomed to licensing images for those purposes. Engaging in conversations about licensing for educational use with copyright owners is often useful and there may be many reasons to do so, but in most instances this process is not efficient enough to facilitate teaching. As a result, the community has by necessity relied on fair use for many decades.

It is important to note, however, that the VRA fair use statement expressly carved out those images that are created by photographers or other vendors and licensed to the educational community. For those images, the community has generally not relied on fair use and the statement urges users to conform to those existing practices. These organizations and individuals provide a tremendous service to the community by providing high resolution images specifically created for educational needs. In the statement, we recognize the importance of these services.

The VRA statement on fair uses also includes a number of other suggestions about utilizing terms and conditions of use or about limiting the audience accessing these images. None of these suggestions are required under fair use. However, good faith is increasingly becoming an important part of the fair use analysis. And these measures may be one means – in addition to relying on the fair use statement itself – by which educational image users can demonstrate their good faith.

Now, I want to briefly summarize each of the six use-case scenarios outlined in the statement:

The first one is focused on preservation and the need to have access to images used for teaching and research over the long-term.

The second use case scenario is focused on teaching, both in person and online. It should be noted that, while users may be able to rely on the TEACH Act, in addition to fair use, the TEACH Act does not define the outer parameters of fair use. So, this scenario envisions a broad set of pedagogical uses of images that we felt should be fair.

The third use case scenario involves the use of images on course websites. Increasingly, as we heard this morning in the video use session [titled *Navigating the Use of Video in Educational, Scholarly, and Archival Contexts*], course web sites are not only becoming a part of the fabric of teaching, but our student and faculty expect to use them. They are, in many ways, innovative and interactive mechanisms for teaching and learning, and are now an important component of the pedagogical landscape. We felt very strongly that the use of images in these contexts is often highly transformative and should be fair.

The fourth use case scenario deals with adaptations. We see all kinds of adaptations of images in the educational context. A faculty member might alter the sense of perspective in an image to demonstrate the importance of perspective as a concept. Students in a design class might copy or alter brushstroke techniques or do mash-ups or other kinds of adaptations. We felt very strongly that these kinds of adaptations should be fair.

Here, academic context matters. If you are using an adaptation by putting it on a shower curtain and selling it, the fair use analysis is likely to be different. But, if you are offering it in the academic context for teaching, research or study, or in the context of an on-campus exhibit, that use should be fair.

Sharing images across campuses for teaching and research was the fifth use case scenario in the VRA statement on fair use. Images are often shared, as educational users from different institutions collaborate online, or as faculty work at multiple institutions. If each institution is relying on fair use to access the same work, then using one shared image file of that same work (rather than each institution scanning its own image of that same work), should be fair. So, we wanted to recognize here that collaborations are occurring in a variety of both formal and informal contexts and that those collaborations are still consistent with fair use.

As noted earlier, there is one carve out here from these guidelines that has to do with respect to vendor images that are licensed to individual educational institutions. If you were sharing one of those images with your colleague at another institution, you could very well be impacting the livelihood of someone at Archivision or Scholars Resource, for example. So, we expressly noted that the sharing of those licensed images was not covered by this fair use statement.

The last use case scenario addressed in the VRA statement on fair use is slightly different from the previous five scenarios. This use case scenario had not been covered in the Digital Image Rights Computator or in the Copy Photography Computator. With this case scenario, we focused on the use of images in dissertations and theses.

Traditionally, the community had relied on fair use to include images in dissertations and theses. As part of their academic requirements, students submitted these papers to their academic libraries, where theses and dissertations were stored and accessed on an ongoing basis. Reliance on fair use to incorporate images into those theses and dissertations went unchallenged.

With the development of online databases that stored and disseminated these theses and dissertations, however, the database publishers have required - as a risk mitigation measure - that students clear copyright for all images in those dissertations and theses. At the same time, some educational institutions are requiring that students submit those dissertations or theses to these online publishers as an academic requirement. The result is that the student is caught between having an academic requirement of having to post his or her dissertation or thesis in an online database in order to graduate, and the publishers' contractual requirements that students clear all third party copyrights in their papers, meaning that one cannot rely on fair use if one wants to graduate.

As a result, there is evidence of students redacting images from their dissertations or theses. Obviously, this makes no sense; if one is trying to make an argument about a particular image or an aspect of an image and cannot include that image, then obviously this will impact the import of that argument, and the ability of others to analyze or critique that argument. We have also heard about delayed time-to-degree requirements and even instances in which students were choosing their field of focus based on perceived copyright clearance requirements.

Given the importance of the First Amendment issues at stake in this context, we felt that these uses should be fair, and that, as a community, we should be asserting fair use more robustly in this situation.

So, those are the six use case scenarios. The Statement has been very well received and has generated a lot of interest since its publication. I have participated in several panels and other sessions in which I've described the fair use statement, including participation in a fair use panel for the National Association of College and University Attorneys, in which over six hundred participants attended via webinar. So, I would encourage you to share this with your counsel, with your colleagues, and with your faculty.

Allan Kohl:

I would like to mention that one of the focus sessions at the College Art Association meeting in February 2012 dealt with the crisis in academic publishing due to scholarship being impeded by these perceptions regarding rights. As Gretchen mentioned, in some cases, students are constraining their research and publication over perceptions about the difficulty in obtaining clearance. Clearly, pushing back is necessary.

Along those lines, one of the convergences between the VRA and that of the Fair Use Guidelines statement by the Association of College and Research Libraries was this issue of dissertation and thesis publication. I would like to bring to your attention the fact that on February 26 this year, the College Association Board of Directors voted unanimously to endorse both the VRA and the Association of College and Research Libraries' fair use guidelines. The academic scholarly community is clearly in our court on this issue.

What we would like now to receive your questions.

Jenni Rodda (New York University):

I have one really short question, which will probably elicit a long answer: How do we push back?

Gretchen Wagner:

We'll I'm going to ask you a questions first, how do we push back against whom? Are you talking about publishers? Because, in some ways, I think it is important to reach out to artists and photographers; in most instances, they are supportive of educational use and are not seeking to charge for such uses. But I do think it's important to educate publishers on the real risks associated with relying on fair use in publishing dissertations and theses where images are incorporated in reliance on fair use.

Jenni Rodda:

My question regarding pushing back has to do with dissertations and theses. At my academic institution, it is a requirement for graduation that students submit their dissertations to ProQuest, one of the big aggregators of dissertations. In order to have your dissertation published through ProQuest, you have to choose one of four separate licenses, each of which requires you to have some copyright clearance for every image that appears in your dissertation. If we're going to push back against ProQuest or UMI or

one of the other big dissertation publishers in a way that is protective for everyone, how do we do that?

Gretchen Wagner:

Great question. I think we need to have with meetings with them to show them the impact of their contractual requirements on scholarship, which ultimately impacts their bottom line financially. We might also collaborate with them to try to obtain insurance that would cover the fair use of images in dissertations and theses, as was the case for documentary filmmakers.

Audience Member:

I'm a photographer and I make my photographs available for educational, non-commercial use from my website. Though I've never denied any publication request, I do reserve that right, particularly for photographs depicting religious buildings or objects, which need to be handled with sensitivity. Given the carve-out for vendor supplied images, do you have any suggestions about structuring access to photography on my website or about protecting against misuse of my photography?

Allan Kohl:

The question, and an important one for those with artwork and for content providers, is how do you make the decisions between whether a use is in the arena of a legal decision, whether the moral rights of content creators are affected, and about the appropriate nature of a particular use in a particular context.

Gretchen Wagner:

I know many copyright owners struggle with exactly this question. One way they've handled this is to develop licenses, like creative commons licenses. But one way of doing this is to say something like, "I allow you to make these kinds of uses of these images. If you want to make other kinds of uses, I expect you to contact me." Requesters could fill out the form on your website listing the allowed kinds of uses, and the uses for which additional permission are required. This is one way of trying to help facilitate broad use for educational purposes, which it sounds like you are supportive of, but which would outline the terms under which you'd like your images to be used.

Audience member [continuing]:

I'm happy to license my photography for academic purposes. However, I become concerned that my interests, and the interests of other content producers, won't be taken into consideration when pushing back against publishers. When claiming a use as being educational, are the interests of content producers being adequately considered?

Gretchen Wagner:

All rights have to be balanced with competing rights, and all rights have limitations. But to the extent that you are talking about being able to license your images to the educational community, we do have a carve-out within the fair use statement for these kinds of images. The carve out is for those individuals who are actively licensing their images for education purposes and who see that it is a means of trying to make their

living. We don't want to destroy the services that you and others are providing or your intellectual livelihood. On the other hand, the vast majority of rights holders are not doing what you are doing. In those instances where we have tried to obtain permissions, we still haven't been able to obtain permission for educational use. I was engaged in a permissions effort early on at ARTstor and, despite repeated attempts to obtain permissions, I just didn't hear back from many rights owners. In other instances, rights holders have gotten back to us and permitted us to use their images, but the process was long and time consuming and involved many individual conversations. It wasn't a process that would work for the needs of faculty. So, we need to have room for fair use in those contexts.

Sarah Falls (New York School of Interior Design):

Last year at ARLIS, we did a panel on e-books publishing regarding the crisis in arts publishing in the academic community. This is a layer to fair use that is similar to the theses and dissertation issue, but also different. The number of e-books available for art libraries is really low and it is a challenge to sustain a developed collection. I really have to pick and choose among available titles.

As we all know in art libraries, it is crucial that image and text be together. At ARLIS, we also had a paper given about image redaction and the amount of redacted images the speaker was finding in vendor provided databases for full text journals. Anecdotally, one of our faculty members told me that her publication would not be available electronically because the publisher refused to pay for the electronic rights, which cost much more than print rights.

Is this anything that VRA is dealing with? It is different from dissertations and a little different from academic publishing, but there is a vast amount of content out there published by faculty members. These faculty members aren't making money off these publications, but are publishing for tenure. Ostensibly the venue, like Scholars Resource or ProQuest, would make money. So, how can we tow that line? How can we push back so that our faculty can publish electronically, so that the images are not redacted from academic publishing, and that we have a good selection of e-books to offer to our students?

Gretchen Wagner:

I have two comments. First, this question is not only about copyright but about contracts. And contracts for the online use of images are often problematic, such as terms providing durational limits on the licenses.

The second point I would note is that there are efforts underfoot to address these issues, particularly in the fair use context. So, I hope that more guidance will be forthcoming shortly, and I hope that I and others can share more with you about this soon.

Written audience question read aloud by Allan Kohl:



Under the preservation scenarios, the first of the 6, we find the following situation: a university owns a laser disc of a full-length film. Can we convert this to DVD and then put the entire film on course website for a limited period of time, such as a semester?

Allan Kohl:

If this question were brought to me, and it has been brought to me at MCAD, my first line of response would be to ask if the same title is available in an authorized form that can you buy on a DVD. That wouldn't really be an instance of fair use because we are then replacing a legitimate commercial transaction.

As to the second part of the question about putting the entire film onto a course website for a limited time, most have taken the path that since a course website is limited to enrolled students and is password protected, that it is a safe environment for this sort of material. But, I'll defer to my colleagues if there is another answer.

[Gretchen Wagner and Cara Hirsch agree with Allan Kohl.]

Next written question read by Allan Kohl:

Can online sites providing images for educational uses publish images of works that are still in copyright like those of Picasso and Warhol?

Allan Kohl to Gretchen Wagner: Since you've negotiated with those estates, I'll let you answer this.

Gretchen Wagner:

This question is about fair use of images that are under copyright, like Picasso and Warhol, which is expressly covered under the fair use statement, and I'd urge you to read it. With online sites, one thing to consider, and this is spelled out in the statement, is having terms or conditions of use or other means by which you are limiting use to a clearly academic audience. Terms and conditions of use are not necessarily required under fair use, but they are very helpful in demonstrating that you are intending to use this material or to make it available for these strictly educational purposes. That can go a long way in helping support an assertion of fair use.

One challenging piece of all of this is that open websites distribute worldwide, but fair use does not exist outside the United States. When you are distributing online in an open manner, a question arises as to which country's law applies. This is a fairly complex question, and the answers are not always simple. So, I would just urge you or your counsel to consider that in thinking about open website use of images. There may be ways, through terms of use, in which you can more clearly gear the website towards educational audiences in the United States.

Dr. Kathleen Cohen (California State University):

I am in charge of a large website that many of you know, World Images<sup>5</sup>, that contains images from all over the world. I have taken down the images of works by Picasso, the

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<sup>5</sup> <http://worldimages.sjsu.edu>

works by Matisse, and the works by Warhol among others, covered by European and American artist's organizations, because I know Picasso's and Matisse's works are under European law and Warhol's are under US law. I would like to make the images available to everyone, but I guess I must continue to take them down and not show them on the site even though people want to see them. With other contemporary and modern artists, I put the images online, list the artist's name as the copyright holder, and include the name of the photographer. I tell artists that if they want to give contact information, that I'll be happy to list that information beside the image. If they want me to take it down, I'll take it down. That seems to be working because young artists want to get their work out.

Christine Sundt (University of Oregon, Emerita):

The challenge of not being able to extend fair use beyond the borders of the US is something that I'm very interested in right now. In this morning's presentation by Quinn [titled *Navigating the Use of Video in Educational, Scholarly, and Archival Contexts*], he mentioned the Universal Declaration of Human Rights, Article 27 and I'm wondering if we have explored this universal aspect of cultural heritage, the aspects of user rights and also creator rights, as a way of working around the fair use limitation.

Written audience questions read by Allan Kohl:

Are images in on-campus and in online exhibitions curated by either faculty, staff, or students covered by use case scenario number four dealing with adaptations?

Allan Kohl:

My first thought would be that if the documentation shows multiple works, then it is clearly in a critical context. In a critical context, there is a transformative quality in a sense of the juxtaposition of one work against another to create a new level of meaning. The display of individual works is one that I would be less comfortable with especially in a completely unrestricted environment, but I know that a lot of campuses like to do this in order to promote a particular exhibition. I'm not sure how to address that situation any more than I'm clear how to address the use of derivative works in online student portfolios.

Gretchen Wagner:

I tend to think that this would be covered under the third and fourth scenarios, but it's important to note that the scenarios outlined in the VRA statement are, in essence, a broad set of principals. Within them, there are going to be a variety of circumstances that may vary somewhat from the use case scenario described in the document. So, one of the ways in which you should use this document is to look at it for general guidance, and then talk to others in your institution about whether your particular situation falls closely enough within one of these scenarios so that you can proceed. If it does not fall within one of these scenarios, it may still be fair use, and in those cases, your decision is really going to depend upon your own institution's perceptions of risk and existing practices, because there are no hard and fast lines in this area.

Written audience question read by Allan Kohl:

This is about practice regarding what I would presume to be students in undergraduate situations: Are students doing works other than dissertations or theses protected by use scenario number 6, especially in regard to databases.

Allan Kohl:

For undergraduate work, this is more often a voluntary matter though sometimes there is a course requirement to publish a paper with images and in a variety of contexts, including the open web. So, again, I'm not sure how to respond to this one.

Gretchen Wagner:

It is not clearly covered under use case scenario six, which is really about dissertations. But, I would say that the same transformative principals, of taking an image and putting it in the educational context and using it to convey points in a transformative way, would point strongly toward fair use.

Written audience question read by Allan Kohl:

Here is a scenario that we're going to have happen more and more as academia shifts to the use of adjunct faculty: If your VR collection creates digital images for faculty, when faculty leave your institution and ask for copies of these digital images to use in their new campuses, is this allowed under fair use?

Allan Kohl:

My initial response to this would be that just as institutions have fair use rights, so do individuals including individual faculty. This seems to me to point towards one of the scenarios in the guidelines, that of sharing images across and between campuses as long as the fair use assessment done originally for that image is closely observed. Perhaps someone has another opinion on that.

Gretchen Wagner:

In part, I would say that it depends on where those images came from. If there are contractual terms associated with the image, you may not be able to take it to a new institution, so keep that in mind. Sometimes institutions are hesitant about sharing images that were created with their resources, so that may be a factor as well. And if these are vendor images, then they would not be covered under this Statement, as described earlier. You may want to consult with others on your campus and develop a policy that would cover these kinds of situations.

Audience member: Very often you can't.

Allan Kohl:

I might say that at my own institution there is a very lengthy faculty manual that outlines policies, not just for this situation, but also for work such as syllabi and lecture notes and that sort of thing. The faculty senate actually pushed against administration on that point several years ago because so many faculty are adjuncts who teach at other institutions and want to be able to take this material to their next stop along the academic ladder. To say that a syllabus belonged to the institution and not to the instructor who created it wasn't

really strengthening the adjunct faculty member's ability to move on in their careers. So, the compromise that was worked out under guidance from counsel and approved by the board of trustees was a sort of both/and: course content could be used by the institution under permanent implicit licensure, but belongs to the faculty who created it because it turned out that the faculty contract stated that they were paid only to teach a class, not to create course content.

Written audience question read by Gretchen Wagner:

We have another question here from Linda Reynolds at Williams College regarding undergraduate honors theses and electronic versions accessible in college archives and the question is: If a thesis contains images that are not yet in the public domain, it is suggested that students split the document and put images that are not in the public domain into a version that will not be accessible electronically. Is this necessary?

Gretchen Wagner:

I would say that this is exactly the kind of requirement that has impacted scholarship in a very significant way and to a very negative effect. You can't make an effective argument about an image if the image is sequestered and people don't have access to the image. Others can't evaluate or critique your work. These are precisely the types of requirements, whether they are posed by publishers or by institutions that are trying to limit risk that we need to push back against. We need to have a better solution.

Allan Kohl: Are there any additional questions?

Audience member:

Hello. I work at a small college. I am wondering if studio arts faculty members could assign their students to collect images from anywhere and everywhere and put the images in a place, either online (open WWW) or online within the course software on campus (closed to off campus; alternatively closed to anyone not in their class). They would then use this collection for class discussion. □

Does this collection have to be on a closed network within the college or can it be on the open web? Does it have to be up for only a limited time, or could it evolve as a "curated" collection over time and many sequential classes? If a student were to graduate could they download the collection and create a portfolio of their discussion material to take away with them? Is there any way that graduates could remain "live" in the discussion of the class, as an "art community", after they are not in class anymore?

Gretchen Wagner:

So this question is about course websites and uses in connection with a course. We wanted to emphasize, with the VRA statement, that use of images in course websites to facilitate teaching and education is generally consistent with fair use. I would point you to the suggestions made about restricting access or trying to find ways to make it very clear that this website is intended for educational use because those efforts can help demonstrate your good faith in limiting use of those images to those that are educational in nature.

Christine Sundt (University of Oregon, Emerita):

I think it is an excellent question. I would conduct workshops with artists, with students in journalism, with multi-media classes, with multimedia classes, etc, and what I would try to stress with them is the idea of balance between creation and use. I would throw the question back to the students: “How would you feel if somebody took your work?” and let them be the ones to help decide what they wanted to take and how they wanted to use it. I would really try to educate them about the necessity for a sense of balance in giving and taking that involves fair use.

Gretchen Wagner:

That is a really good point and courts approach this issue the same way. In fact, I heard a speaker at a previous session, Steve McDonald from Rhode Island School of Design, say “Pigs get fed at the trough.” The analogy doesn't work entirely because the pigs get slaughtered, but the idea is that pigs get *fed* at the trough and hogs get *slaughtered*. You want to be the pig, but you don't want to be the hog. You want to find uses that are aimed at educational use. You can ask what are the uses really intended for. If the intention is just to throw it up on the web and say, “We don't care and we're just going to do what we want to do,” then that's not going to be perceived so well by courts or by others. You don't want to be perceived as the hog in that situation.

Allan Kohl:

I'd like to send you forth with an exhortation: on most of our campuses -- and it is true of mine certainly -- people look to the VR person for copyright information and suggestions and advice. We heard earlier that Gretchen participated in a webinar for the National Association of Colleges and Universities Attorneys and many hundreds of people participated. They are hungry for this kind of information. Many of them, not to cast aspersions unduly, are interested in employment law and whether someone will sue you if you trip over a crack in the sidewalk. They may have not thought a great deal about the implications of copyright policy. They are looking for guidance. They are looking for real life use scenarios that you can document for them. This is an area where we can provide guidance with the broader perspectives that go beyond the particular applications of this semester or tomorrow's class meeting. So, let those be our parting words for you. Go forth and promote these guidelines and recall that everything in life, including copyright and fair use, is meant to strike an equitable balance and our job is to help ourselves—and to help others—find that balance.