Art history publications are heavily reliant on images to illustrate their arguments, but a restrictive rights culture combined with the shrinking budgets of publishers has meant that it can be difficult to find and use the necessary images. By contrast, online cultures use images to freely express themselves in an open generative contrast. This paper analyses how the fair use doctrine of copyright law as a tool that can help bridge these two cultures and create a more open discourse in art history.

Headings:

Fair use (Copyright)

Digital images

Art in libraries

Scholarly publishing
BUILDING A FAIR USE FRAMEWORK FOR THE USE OF IMAGES IN ONLINE ART HISTORY COMMUNICATIONS

by
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Introduction

Art history writing is built upon the use of high quality images for illustration of their arguments. Unfortunately, with a shrinking public domain, a culture that operates under the assumption that something is only usable with granted permission, and shrinking publishing budgets to secure those permissions, the field is becoming archaic in its methods and abilities. Internet culture, in contrast, is vibrant and dynamic, borrowing and using from a variety of sources to create new material constantly, and its habits and standards could inform a freer scholarly culture regarding its use of images. This paper will analyze how art history can adopt use of the fair use doctrine of copyright policy for its use of images to create opener, more generative and dynamic online communications. This paper will review the state of art history and its current standards for usage of images. It will discuss how online culture uses images to create and develop different uses and juxtapositions than originally intended and within the spirit of the law. Finally, it will analyze how the doctrine of fair use can bridge this gap between these two cultures and allow more freedom for expression and thought in the domain of art history.

Bringing the scholarly culture closer to the online culture, through increased use of online journals and online tools of analysis and communication, would enable art history to be a nimbler and potentially livelier field, with a reduction of the costs and bottlenecks of traditional publishing. While many publishers and scholars would be worried by claims of copyright infringement, and rightfully so, the law provides an answer in the Fair Use doctrine which could provide a way of bridging the gap between
these two cultures and create a system to modernize art history’s research and communication methods.

Art history publications rely on images to illustrate and build their arguments. The culture of art history publications and its scholarly community is based largely in the print realm, and its use of images tends to the assumption that permission is required for the use of images, and if it is not granted, or the license that is asked is prohibitively high, then it will not be able to use the images. Furthermore, use of these images is then further constrained by restrictions set out by the licensing agreements. As new students and researchers are trained in the discipline of art history, they will bring more familiarity with digital tools of analysis, and perspectives influenced by growing up in a more permissive culture. Developing new tools and techniques for analysis of art images is hindered by a culture that fears reprisal in the face of legal uncertainty.

This in contrast to the standards of open internet culture of today, in almost any fashion, from fan sites, Tumblr, YouTube, and countless other sites. It is a vibrant, generative community that uses images freely to create new content and express themselves freely and openly, with little consideration for recriminations. It is not a culture that heeds too much attention to the legalities of its use of images, and it is often in the wrong, or could do better to bolster their own permission. Nevertheless, it is a culture that changes and mutates very rapidly, and much of these changes are in a creative and transformative spirit, in line with the doctrine of fair use.

Art history publications do not have the luxury to be quite as free with permissions as internet users with no scholarly duty to the creators rights holders, or historical mission to cite and provide references, but it could learn and gain from the
practices of internet culture, and the legal framework of fair use analysis could provide a justification that decreases the fears of publishers and academics and could help facilitate a freer culture for scholars, one that is vibrant and uses all of the tools that are available to an information age researcher.
Current Situation

The Culture of Art History

Art history requires images. Using these images has become more difficult as the public domain shrinks, fees have increased, and rights holders have become more intransigent. Congress has changed copyright law many times in the last century and has effectively frozen the public domain at 1923. (Hirtle, 2013) This is in contrast to the stated mission of art institutions to “inspire curiosity about, and enjoyment and understanding of, the visual arts,” (Getty, 2013). At the same time often creating barriers to the use of their material that would have proven antithetical to many of the artists they esteem. This is rendered further ridiculous because the revenue of institutions generated by images rights is not a primary stream; the selling of image rights is perfunctory to most institutions and secondary to the primary motivations of the institution.

At the same time, the nature of scholarly communication in academia is shifting. More work is being done online, more work is being disseminated through non-mainstream or sanctioned channels, and the culture of the internet presents a speed and standard of communication that the world of permissions has not accustomed itself.

Art history is a field that has not adapted the use of online communications as rapidly as the sciences. This is partially because the field needs high quality visual images to conduct research and construct arguments. The interpretation of a piece needs to be substantiated by high quality evidence from the images of the work. (Ballon, 2006) It is also because the current generation of scholars are traditionalists and therefore
strongly attached to printed matter. “Some still view the printed book as standing at the pinnacle of the scholarly publishing hierarchy.” (McGill, 2006, 30) This reluctance to break from monographs ensures that the future of the field will slowly be whittled down by forces it cannot control, like publisher decisions and academic library purchasing.

This is all further reinforced by the art history’s tendency to favor print media, and monographs in particular, for considerations of an academic’s professional future. As publishers reduce costs, one of the first places this occurs is in a field that offers little return, such as art history monographs. Art history, after seeing the amount of monographs increase precipitously in the 1990’s, has seen this amount decline, and it has continued to see the amount of Ph.D.’s conferred continue at a static rate. (McGill, 2006) The market of university presses is not likely to return to this as a growth area, so pursuing online avenues would fight the field’s stagnation.

If art history is to survive as a field that is not hamstrung by the requirements of licensors and estates, then it will have to attempt to move the terms of fair use and acceptable usage, renegotiate licensing agreements and persuade rights holders that increased use and visibility is mutually beneficial. Problems of permissions and licensing will persist, but a wider berth for the accepted use in scholarly work and research would create benefits for scholars, the public, and the rights holders. The cost of acquiring reproduction rights and the restrictiveness of the rights holders has increased dramatically over the last two decades.

Open access journals support the dissemination and widespread availability of research material to a greater audience. Implemented more commonly in the sciences, it has been adopted much more slowly in the humanities, and in art history in particular. Art
history journals are not as expensive, the research is not government funded, and monographs are still the major form of scholarship. (Evans, 2011) The problem has seemed much less urgent and has not approached art history scholars as suddenly as it has in the sciences. There are many roadblocks to its increased adoption in this field. As there is a still a gap between the level of quality of image reproduction in print and digital, both in terms of source images and display. There is still a reluctance to embrace a model that does not embody the traditional aspects of the field, and to accept what is many ways still an inferior and less-satisfying product. But as the publishing houses are squeezed by both the increasing costs of licensing fees and publication and pressure from institutions to be revenue neutral or self-sufficient, creating a culture and system of publishing that can become vibrant and healthy again.

**Online culture**

Images are created, used, and reappropriated online in ways that are completely alien to scholarly work. There is virtually no effort involved in removing an image from its original context or place on the web and adding it to an unrelated page, giving it new context and meaning. There is no requirement for attribution, so attribution is often neglected. This is done often because of laziness, and often as a means of obscuring the origins, providing further levels of decontextualization and removal from the point of origin.

This is further complicated with the almost effortlessness way with which one can duplicate images online, and the high level of quality that is possible with that duplication. Reproduction of works of art is not a new phenomenon, and with lithography
and photography, reproductions have increased tremendously in quality, and with digital reproductions, these are now made with greater accuracy and speed, creating anxiety in rights holders on their ability to protect and manage their rights.

There are many communities that use images online. Fan communities use write new works of fiction and create new pieces of art based on media sources, and these communities thrive on sharing and exchanging these new works. It is often is encouraged and cultivated by the creators of the works, using these groups of dedicated fans to nurture and create an audience for the media, bringing in more fans with them. While the works created are often a technical violation of copyright, the fans’ work is tolerated. (Hellekson, 2009) They operate as a gift economy, with no exchange of money, and the communal appreciation and stream of new content keeps these communities active and engaged.

Communities online also use images in intensely curated collections. Individuals or groups of bloggers create websites with a personal worldview that represents itself through the images other media selections on their website. The juxtapositions and combinations of all of these media create a new presentation and format for these works, often involving a high degree of selection and creativity in maintaining these sites.

These communities operate without licensing the works. Requiring licensing for what is a hobby would stifle and limit how people would be able to express themselves, and likely lead to many people no longer pursuing their passions. This would also require a large shift of the cultural norms and practices of the web. These interactions are built on an assumption of sharing and reuse of these images, and it is unlikely that this practice will be reversed. Some rights holders of images do send cease and desist letters, but they
work poorly to preempt use, and the nature of online culture is to adapt or permute, rather than to quit and move on.

**What libraries and museums have done now**

Many museums and libraries are already opening up their image collections to use online for scholarly publications and the world at large. These images are often limited to works in the public domain and that the institutions are sure to be free of copyright problems, but it is a sign of the growing recognition that supporting widespread use of images has benefits for both users, the works of art, and the institution itself.

The Los Angeles County Museum of Art just announced that they are releasing thousands of images in the public domain under a creative commons license. “As Michael Govan often says, it’s because our mission is to care for and share those works of art with the broadest possible public.” (Heibel, 2013) It is the wholesale adoption of what had been a small experiment and has so far seen use with no abuse of the public domain images they have released.

The National Gallery of Art provides images that are in the public domain for any use, commercial or non-commercial. This is because it sees this policy as being “a natural extension of its mission to serve the United States of America by preserving, collecting, exhibiting and fostering the understanding of works of art at the highest possible museum and scholarly standards.” (National Gallery of Art, 2012) Institutions that exist for the benefit and edification of the public see the gains in allowing cultural heritage to foster new creations and spur new use of materials as new domains and tools are created.

The Metropolitan Museum of Art has collaborated with ARTstor to provide images online for scholarly publication. These images are restricted to purely scholarly
uses, and purely to works in the public domain. (Metropolitan Museum of Art, 2012) The Met still claims copyright over these images, and has a short, albeit lenient, list of restrictions. Providing scholarly images for free is positive, but it does not encourage broad and new uses for these materials. It has carved a small segment for non-commercial use from its larger pool of licensing.

These are all good signs and movements in the right direction. These museums are leaders in the field, and will hopefully inspire other archives and museums to follow suit in providing images for general use, both scholarly and non-scholarly. The provision of images for scholarly publication is only one side of the equation. We also need publications that are more widely available, and we need images that are available for much wider use. Scholarly publications are of limited accessibility to the public at large, often requiring being a member of an institution to access journals or to have an extensive library.

Museums and libraries exist to extend knowledge to and educate the public, but have been constrained by perceived legal barriers and cultural biases. Art history and its attendant institutions are bound by traditions, as evidenced by the field’s slow adoption of digital publications and its reliance on printed monographs as relevant to promotion and tenure. These two tendencies both have historical and rational reasoning. There are signs that the field is beginning to adapt to modern standards of the web and new communications, and they can be aided in this way by adopting a new face towards the existing permissions culture.
Copyright

Copyright was created with the intention of supporting and nurturing creativity. It rewarded the creator with an exclusive right to profit from a creation, and then, after a set number of years, it joined the public domain, where anyone is free to use any or all of it for any purpose. This right is created and granted by congress, and it was originally intended to provide the creator with a reward and goal to promote creation of new works, and then to turn this work over to the public to serve new ends and to inspire and create further new works.

Shifting rules and terms have further muddled what was already murky. Despite many revisions in the past century, it has not managed to keep pace with technological innovations. The revisions have also extended the term of copyright from an initial max term of 28 years (Copyright Act of 1790) to a term of the lifetime of the creator plus 70 years. (17 USC § 302) Copyright was created as a right that balances the creators’ ability to benefit and profit from their own works with a short term to incite them to create further works, as well as a source of communal benefit, as these works are slowly moved into the public domain, where others can use these works as inspiration for new creations. With the numerous extensions, copyright has moved to serve current rights holders, at the expense of the public interest.

Copyright is often asserted on images by bodies do not have that right, whether or not the image is in the public domain, and whether or not the body actually has the right to enforce copyright. There are many reasons that people do this. A misunderstanding of
the terms of copyright or the edges of the public domain, a threat of litigation to
discourage use or encourage rights’ fees, or attempting to preserve the legacy of an artist
through policing what is said about them can all be reasons to make this claim. This is
very dangerous and has led to a whittling of rights for users of this work through a
combination of obfuscation of usage rights and of a fear of reprimand.

Extended terms of copyright hold the public domain in a state of suspended
animation. What was once in the public domain has been seized back. (Golan v. Holder,
2012) New rules for what is considered copyright and how copyright is granted mean that
different rules and standards apply for works created in different eras, depending on the
date of creation, method of copyright, whether it was documented, whether it was
published.

The Fair Use doctrine is a provision of copyright that is specifically written into
the US code (17 USC § 107) and allows for portions of a work under copyright to be used
without express permission from the rights holder. It is a very powerful tool and one that
could broadly extend the ability to use images for research and commentary. This tool
was written into the 1976 law not as a new exception to the law but as a codification of
preceding standards as determined by case law. (Marcus v. Rowley, 1983) This exception
exists because there are often times where the public interest and the exclusions granted
by the law are not in alignment, and the government believes that there are legitimate
uses for copyrighted works that are not infringement.

**Four Factor Analysis**

Fair use is a right that is granted by law as an exception to protect the use of a
copyrighted work when it is to be used for purposes such as “criticism, comment, news
reporting, teaching (including multiple copies for classroom use), scholarship, research.” (17 USC § 107) Art history uses would seem to fall under almost all of these categories. This would seem to provide carte blanche to use and borrow images for almost any piece of scholarly communication. The test of strength of a fair use argument is the four factor analysis, where four rules also described in that section of the US code.

This analysis is a guideline, not a strict set of rules. Each case must be thought through individually, and while precedent informs new decisions, it does not provide a foolproof basis for an argument for either side of a case, either for or against. The four factors do not have equal import, nor does any single one reign over the others. Each element in a case is measured on its individual merits and in conjunction with the others. Having a strong argument that indicates that it has been thoroughly thought out and well reasoned will bolster any potential case and allow decisions to be made with more certainty that what one is doing is right.

**Purpose and character**

This factor measures the circumstances of a work’s use. This factor would point to favor greater use of images. The factor tilts towards non-profit, educational use of works, and is further tipped if the use is for commentary, criticism, or research. All of these elements lean towards supporting scholars’ uses of images in a fair use analysis. In Bill Graham Archives v. Dorling Kindersley Ltd. (2006), copying multiple images in full was found to be fair use, as their use was transformative, or used in a new way entirely separated from their originally intended use. In art historical terms, images are used to illuminate and illustrate arguments; the images are central to the arguments, but serve as supplemental material to the core of work. In this way there use is transformative, and
used for a new purpose, to serve commentary. The combination of these two arguments tilts factor towards the side of fair use.

**Nature of the copied work**

This factor favors the creator the initial work if the work is unpublished or of a creative nature, and the user of the created work if it is more factual or published. When discussing image rights, this can become messy. A photograph of an image that is already in the public domain is more likely to be allowed, as this would likely qualify as work that is of the “sweat of the brow,” *(Feist Publications, Inc., v. Rural Telephone Service Co., 1991)* and this is often regarding the effort involved in copying it. If it is a two-dimensional rendering of a photograph or a painting, it is much less likely to qualify as a photograph of three-dimensional object, such as a sculpture or a building, as that has been considered to require more creative effort to conceptually frame and realize. This factor, depending on context and images used, would lean towards the copyright holder.

**Amount and substantiality**

This factor’s two parts are both important. The amount of the work used can affect whether it is of fair use, both in the amount of the work that is copied and the amount of space that it is dedicated to it in the new publication. With art history, it is crucial to have high-quality reproductions, with clear examples of what is being discussed.

The other measure is whether the heart of the work is used. As determined in Harper & Row v. Nation Enterprises (1985), using a short but extremely significant segment of a work cannot be considered fair use if that portion represents the
quintessence of the work. When working with images, this factor relies on whether the use is of the minimal size and quality necessary to be useful to the purpose of the work but lack the visual impact to supersede the original. In

For these purposes, it can be hard to assess before the authoring of the work that it is following these prescribed guidelines. This factor depends on whether the copyrighted work being used provides supplement or the entire purpose of the use. As they are being used to provide evidence, this would most likely be found fair use.

**Effect upon work’s value**

The market effect of using images for art history publications can be a difficult one to weigh. A market exists for image reproduction rights, and this proposal would act to inhibit it. But the market that does exist acts as an inhibitor of the creation and dissemination of scholarly research, limiting what is done and how it is used. This disconnect between what the market currently allows and the restrictions it places on scholarship are a clear indication on why the argument for fair use should be followed.

There is an intrinsic value to having works known and recognized, especially if the work is relatively unheralded. While a rights holder may see protecting their rights as the paramount feature, and will pursue protecting its rights over all other interests, the benefits accrued to the work will be realized in other ways: increased exposure will draw more eyes and attention to it; increased attention and wider dissemination among scholarly users may bring increased use among commercial users; and the goodwill of supporting academic endeavors.

For many of the works discussed, there is a fundamental value in the physical representation of the original, and reproductions of this work do not supplant this primary
purpose. The effect of increased knowledge and criticism provides a boost to the work that will be realized at a later time.

**Overall analysis**

Fair use exists to further the creative goals of copyright. To that end, “the ultimate test of fair use ... is whether the copyright law’s goal of Promoting the Progress of Science and useful Arts would be better served by allowing the use than by preventing it.” (Bill Graham Archives v. Dorling Kindersley Ltd., 2006) The four fair-use factors are not merely counted against each other but weighed to see if the conclusion from analyzing them leads one to support this conclusion.

In this case, I argue that the first and fourth factors strongly weigh in the favor of fair use, and that the second and third are less straightforward, but range from a soft edge for rights holders to a soft edge for fair use. All of the factors, on balance, support the fair use of images in art historical images.
Conclusion

Scholarly publications in the domain of art history have been stagnant and unreactive to latent trends in academia. Many scholars, researchers, librarians and others with a strong interest in this field have written thoughtful analyses of the issues facing this field, and have come up with many well-considered proposals. At the same time, there is a limited room for action that will arrest the acquiescence of accepting the overstated terms dictated by presumptive rights holders.

Fair use is a powerful tool and an important one when faced with shrinking permissive uses. The restrictions that permission rights have placed on the field have had drastic consequences, and discourages those in the field from developing new digital tools and from creating expansive, in-depth research that would rely heavily on images, due to prohibitive cost of permissions and printing, and the likelihood that an essential image would be denied use, rendering the whole work void. (Ballon, 2006) The effective deployment of fair use strengthens the ability to use works that constructively increase our domain of knowledge, and lead to a stronger and greater commons of discussion and exchange where we people are able to freely draw from the world around them without fear of reprisal.

Developing a new fair use framework for the use of images in art historical digital publications would create a safe harbor for researchers to work unfettered by the worry that the images they need will be unavailable to them. A new standard will allow for the
law and standards of academia to maintain the standards of how modern culture and
technology interact and produce work, liberalizing the domain and bringing the field of
art history more fully into the twenty-first century.


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