

# PUTTING FAIR USE ON DISPLAY: ENDING THE PERMISSIONS CULTURE IN THE MUSEUM COMMUNITY

ROSEMARY CHANDLER<sup>†</sup>

## ABSTRACT

*Digital technologies present museums with tremendous opportunities to increase public access to the arts. But the longstanding “permissions culture” entrenched in the museum community—in which licenses are obtained for the use of copyrighted materials regardless of whether such uses are “fair,” such that licenses are not legally required—likely will make the cost of many potential digital projects prohibitively expensive. Ending the permissions culture is therefore critically important to museums as they seek to connect with diverse audiences in the Digital Age. In this issue brief, I argue that such a development will require clear and context-specific information about fair use that enables museum professionals to better understand the appropriate boundaries of fair use, and that a community-based code of best practices—like the College Art Association’s recently released Code of Best Practices for Fair Use in the Visual Arts—is likely the best means to achieve this.*

## INTRODUCTION

Digital technologies make it possible for museums to connect with diverse audiences in new and unprecedented ways.<sup>1</sup> Today art enthusiasts and novices alike can digitally walk through an exhibition without ever leaving their home;<sup>2</sup> step into a museum and learn about unfamiliar works using smartphone applications and interactive displays;

---

<sup>†</sup>J.D. Candidate at Duke University School of Law, 2017; Boston College, B.A. Art History, 2013. I would like to extend my gratitude to Professor James Boyle, Lawrence Berger, and the editors of the *Duke Law and Technology Review* for their thoughtful comments and support throughout the research and writing process.

<sup>1</sup> See, e.g., Isabel Ross, *Education Focused, Technology Driven: A New Kind of Museum*, MUSEUM OF MODERN ART (July 13, 2016), [https://moma.org/explore/inside\\_out/2016/07/13/education-focused-technology-driven-a-new-kind-of-museum/](https://moma.org/explore/inside_out/2016/07/13/education-focused-technology-driven-a-new-kind-of-museum/); Les Shu, *Van Gogh v. Candy Crush: How Museums Are Fighting Tech with Tech to Win Your Eyes*, DIG. TRENDS (May 1, 2015 5:00 PM), <http://www.digitaltrends.com/cool-tech/how-museums-are-using-technology/>.

<sup>2</sup> *Id.*

and curate their own digital collections of a museum's works.<sup>3</sup> Such possibilities, if they are to be turned into realities, will doubtless require the reproduction of an enormous quantity of copyrighted images and other materials. But if museums continue their current licensing practices into the future, the cost of doing so likely will make many of these endeavors prohibitively expensive.<sup>4</sup>

For years, a “permissions culture” has pervaded the visual arts community.<sup>5</sup> Reproductions of copyrighted materials have been licensed almost reflexively, without serious consideration as to whether obtaining a license to reproduce a work was legally necessary or not.<sup>6</sup> If these compulsory licensing practices continue, they will substantially inflate the costs of digital projects—and in turn, the quantity and quality of digital projects will likely decline as resources allocated to their development are expended on unnecessary licenses.<sup>7</sup> Ending the permissions culture is therefore critically important to museums as they seek to connect with diverse audiences in the Digital Age.

This issue brief proceeds as follows. In Part I, I explain that fair use doctrine—which permits unauthorized, unlicensed reproduction of copyrighted materials under certain circumstances—is essential to fulfilling American copyright law's ultimate objective: the promotion of widespread access to knowledge and ideas. I then consider how the doctrine's flexibility is at once a virtue—making it adaptable to new ideas and technologies—and a vice—producing uncertainty about what constitutes a permissible fair use, and ultimately chilling its exercise in the museum community. In Part II, I advocate that many common museum activities incorporating copyrighted materials are fair, despite the fact that many of these materials are licensed. This incongruity is largely attributable to the uncertainty that surrounds fair use doctrine, and to the risk-averse practices of individual institutions that, collectively, have entrenched a permissions culture within the industry. In Part III, I argue that shifting the balance toward fair use would enable museums to better implement digital projects, and that this shift would require context-specific information about fair use that would enable museum professionals to better understand the appropriate boundaries of

---

<sup>3</sup> *Id.*

<sup>4</sup> PATRICIA AUFDERHEIDE & PETER JASZI, COPYRIGHT, PERMISSIONS, AND FAIR USE AMONG VISUAL ARTISTS AND THE ACADEMIC AND MUSEUM VISUAL ARTS COMMUNITIES: AN ISSUES REPORT 31 (2014).

<sup>5</sup> *Id.* at 24–25.

<sup>6</sup> This practice is referred to throughout as “compulsory licensing.”

<sup>7</sup> *See id.* at 55–56; *see also* Guy Pessach, *Museums, Digitization and Copyright Law: Taking Stock and Looking Ahead*, 1 J. INT'L. MEDIA & ENT. L. 253, 260–63.

fair use. I further argue that community-based codes of best practices—like the College Art Association’s recently released Code of Best Practices for Fair Use in the Visual Arts—are likely the best means of doing so. I then evaluate the CAA Code, and conclude that despite its imperfections, it is a significant step towards ending the permissions culture in the museum industry. Its ultimate success, however, hinges on a critical mass of museum professionals deciding to put its guidelines into practice.

#### I. PROMOTING THE PROGRESS OF SCIENCE AND THE USEFUL ARTS: A BRIEF OVERVIEW OF COPYRIGHT AND FAIR USE

United States copyright law was devised to fulfill a utilitarian purpose: “To promote the Progress of Science and useful Arts.”<sup>8</sup>

##### A. *Copyright is a Social Bargain with a Utilitarian Aim*

The United States Copyright Act of 1976 protects “original works of authorship [that are] fixed in any tangible medium of expression” through a grant of copyright ownership that provides its owner with certain exclusive rights.<sup>9</sup> This grant of copyright, however, is not an end in itself.<sup>10</sup> Rather, its ultimate aim is to stimulate progress in the arts and sciences for the enrichment of the public.<sup>11</sup>

Copyright is therefore understood as a social bargain between creators and the public.<sup>12</sup> It seeks to strike “[a] balance between the interests of [creators] in the control and exploitation of their [works] . . . and society’s competing interest in the free flow of ideas, information, and commerce.”<sup>13</sup> To achieve this balance, copyright law grants authors and inventors “a limited and temporary monopoly” over their creations, providing them with certain fundamental rights over their works for a designated period of time.<sup>14</sup> This limited monopoly is intended to serve as both an incentive and a reward for creating new works.<sup>15</sup> In exchange,

---

<sup>8</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>9</sup> 17 U.S.C. § 102(a) (2012).

<sup>10</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

<sup>11</sup> Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107–11.

<sup>12</sup> COLL. ART ASSOC., CODE OF BEST PRACTICES IN FAIR USE FOR THE VISUAL ARTS 8 (2015) [hereinafter “CAA CODE”].

<sup>13</sup> *Sony*, 464 U.S. at 442.

<sup>14</sup> JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 66 (2008).

<sup>15</sup> *Sony*, 464 U.S. at 429.

the public benefits from access to new works, and ultimately from an enriched public domain at the end of these works' copyright terms.<sup>16</sup>

*B. Fair Use is Essential to Copyright's Utilitarian Aim*

To realize copyright's utilitarian aim, a number of limitations are placed on the exclusive rights of creators that allow others to make certain uses of their protected works without authorization.<sup>17</sup> These limitations are as important as the rights they define,<sup>18</sup> as giving creators absolute control over their works would "limit, rather than expand, public knowledge" in some circumstances.<sup>19</sup>

The doctrine of fair use, which permits unauthorized copying in some circumstances, is one such limitation. Fair use is codified in Section 107 of the Copyright Act, which provides:

[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>20</sup>

Fair use is an affirmative defense to copyright infringement.<sup>21</sup> As such, a party asserting fair use has the burden to prove that his use is fair.<sup>22</sup> Perhaps for this reason, fair use is sometimes characterized as "a narrow and grudging defense against an otherwise valid case for copyright infringement."<sup>23</sup> But as the statute provides, "the fair use of a copyrighted work [. . .] is not an infringement of copyright" at all.<sup>24</sup> The

---

<sup>16</sup> *Id.*

<sup>17</sup> See BOYLE, *supra* note 14, at 68–69 for an explanation of additional limitations on intellectual property rights.

<sup>18</sup> *Id.* at 69.

<sup>19</sup> Leval, *supra* note 11, at 1110.

<sup>20</sup> 17 U.S.C. § 107 (2012).

<sup>21</sup> Boyle, *supra* note 14, at 66.

<sup>22</sup> See *id.*

<sup>23</sup> *Id.*

<sup>24</sup> 17 U.S.C. § 107.

doctrine thus serves as a “crucial safety valve in the copyright system,”<sup>25</sup> allowing for the development of new technologies and new expressions of creativity that make use of existing copyrighted material that—without fair use—would otherwise be prohibited infringement.<sup>26</sup>

### *C. Fair Use is a Flexible Doctrine*

Fair use developed as an “equitable rule of reason” through the common law process.<sup>27</sup> When Congress codified the doctrine through the enactment of Section 107, it declined the opportunity to take a “rigid, bright line approach to fair use.”<sup>28</sup> Instead, it endorsed “the purpose and general scope of the judicial doctrine [of fair use]” with the intention that courts remain “free to adapt the doctrine to particular situations.”<sup>29</sup>

As such, there is neither a “generally applicable definition” of fair use, nor a set of “exact rules” to determine whether a use is fair.<sup>30</sup> Rather, Section 107 provides “a very broad statutory explanation of what fair use is,” and lists “some of the criteria applicable to it.”<sup>31</sup> In its preamble, Section 107 provides some examples of purposes that may be considered fair uses.<sup>32</sup> These examples, however, are “illustrative and not limitative,” and “provide only general guidance about the sorts of copying that courts and Congress most commonly ha[ve] found to be fair uses.”<sup>33</sup> A claim of fair use therefore requires individual consideration against the factors set out in the statute. The results must then be “weighed together, in light of the purposes of copyright.”<sup>34</sup>

The flexibility of fair use is one of its greatest strengths. Had Congress instead codified it as a “laundry list of exemptions,” it would have lacked adaptability, and would have quickly become “frozen and irrelevant in the face of innovation and social change.”<sup>35</sup> As it stands, fair use accommodates invention, creation, and free expression without

<sup>25</sup> PATRICIA AUFDERHEIDE & PETER JASZI, *RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT* 80 (2011).

<sup>26</sup> Anthony Falzone & Jennifer Urban, *Demystifying Fair Use: The Gift of the Center for Social Media Statements of Best Practices*, 57 J. COPYRIGHT SOC’Y U.S.A. 337, 338 (2010).

<sup>27</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 n.31 (1984) (citing H.R. REP. NO. 94-1476, at 65–66 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5679; S. REP. NO. 94-473, at 65–66 (1975)).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> 17 U.S.C. § 107 (2012).

<sup>33</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577–78 (1994).

<sup>34</sup> *Id.* at 578.

<sup>35</sup> Falzone & Urban, *supra* note 26, at 338.

requiring constant modification of the underlying framework of copyright law.<sup>36</sup>

*D. Fair use is an uncertain doctrine*

While the flexibility of fair use is an essential element of its continued vitality, it is also critiqued as one of the doctrine's greatest shortcomings.<sup>37</sup> Flexibility means uncertainty. Standing alone, fair use doctrine means "very little without an understanding of the customary practices and habits around the kind of use in question."<sup>38</sup> And even then, it can be unclear whether a new use of existing copyrighted material is likely to be considered fair.<sup>39</sup>

Recent scholarship has recognized distinctive patterns among fair use cases that may be helpful in evaluating whether a use is likely to be considered fair.<sup>40</sup> But these broad evaluations, as Jennifer Rothman explains, do not adequately reassure users in individual cases.<sup>41</sup> "There is a big difference between knowing that given categories of uses tend to be favored for fair use . . . and knowing how a particular case will turn out."<sup>42</sup> And in many instances, the case law points in different directions.<sup>43</sup> This unpredictability has produced a chilling effect on creativity and innovation across many industries, including museums and

---

<sup>36</sup> *Id.* In contrast, § 108 provides specific exceptions to intellectual property rights for libraries and archives in certain clearly defined situations. *See* 17 U.S.C. § 108 (2012). While this specificity provides helpful clarity, it has severely impaired § 108's ability to adapt to the demands of the digital age, resulting in widespread calls for its revision. *See generally* Melissa A. Brown, *Copyright Exceptions for Libraries in the Digital Age*, 74 C. & RES. LIBR. NEWS 199 (2013).

<sup>37</sup> *See generally* Lawrence Lessig, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 99 (2004) (ebook) (explaining that "the fuzzy lines of [fair use] law, tied to the extraordinary liability if lines are crossed, means that the effective fair use for many types of creators is slight").

<sup>38</sup> AUFDERHEIDE & JASZI, *supra* note 25, at 24.

<sup>39</sup> *See* Leval, *supra* note 11, at 1107 (explaining that "[d]ecisions [in fair use cases] are not governed by consistent principles, but seem rather to result from intuitive reactions to individual fact patterns.").

<sup>40</sup> *See generally, e.g.*, Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537 (2009); Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 *U. PA. L. REV.* 549 (2008); Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 *WM. & MARY L. REV.* 1525 (2004).

<sup>41</sup> Jennifer E. Rothman, *Copyright's Private Ordering and the "Next Great Copyright Act,"* 29 *Berkeley Tech. L.J.* 1595, 1602–03.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

the broader visual arts community.<sup>44</sup> As a result, the promise of fair use has in many ways gone unfulfilled.<sup>45</sup>

## II. MUSEUMS UNDER-EXERCISE THEIR FAIR USE RIGHTS TO THEIR OWN DETRIMENT

Museum professionals make frequent use of copyrighted materials. For instance, curators include images of works of art in materials produced for exhibitions, and museum educators use images when teaching school groups. Nevertheless, there is surprisingly little case law on copyright issues within the museum context.<sup>46</sup> The relevant case law, however, provides strong authority that copyrighted images and other materials may be used fairly for transformative, noncommercial purposes, such as the production of educational materials.<sup>47</sup>

### *A. Many Museum Uses are Fair*

In this section, I present an example of an increasingly typical museum use of copyrighted materials, and evaluate that example against the statutory fair use factors listed in Section 107 of the Copyright Act.<sup>48</sup> Imagine that a museum professional working at a nonprofit art museum plans to use images of copyrighted works of art in an educational application about a modern artist for a smartphone or other digital device.<sup>49</sup> The hypothetical application includes extensive original written and audio educational commentary about many of the artist's most famous works, thus transforming the images from mere renderings of the works of art into helpful visual aids in a multimedia educational essay. To allow visitors to closely view the works discussed, it includes images that exceed the small, low-resolution "thumbnail" size that was for many

---

<sup>44</sup> See Falzone & Urban, *supra* note 26, at 340.

<sup>45</sup> *Id.*

<sup>46</sup> AUFDERHEIDE & JASZI, *supra* note 5, at 20–23.

<sup>47</sup> *Id.* (referencing, among other cases, Prince v. Cariou, 714 F.3d 694 (2d Cir. 2013); Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605 (2d Cir. 2006); Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006)); *see also* Perfect 10 v. Amazon.com Inc., 508 F.3d 1146 (9th Cir. 2007); Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003); Nunez v. Caribbean Int'l News Corp., 235 F.3d 18 (1st Cir. 2000).

<sup>48</sup> 17 U.S.C. § 107 (2012).

<sup>49</sup> This hypothetical assumes that the museum already has high-resolution digital images of the necessary works, which is not always the case. Museum professionals without access to a high-resolution image may have to pay an artist, an artists' rights organization, or another museum to obtain one. This is an access fee. Unlike a licensing fee, an access fee is not rooted in copyright law. As such, payment of an access fee may be required regardless of whether an intended use is fair.

years considered the industry standard image size when relying on fair use.<sup>50</sup> The application is to be made available for free download from the museum's website.

This example is not intended to be limited to smartphone applications, or even just to uses of images of copyrighted works of art. Rather, it is intended to illustrate the types of concerns likely to arise when evaluating any use of copyrighted materials within the museum context for transformative, noncommercial purposes.<sup>51</sup>

### *1. The First Factor: The Purpose and Character of the Use*

Section 107 requires consideration of a number of factors that must be weighed together to determine whether a particular use is fair. The first factor considers “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.”<sup>52</sup> It looks at the profit or nonprofit character of the secondary use, as well as whether it is educational. Nonprofit and educational secondary uses tend to weigh in favor of a finding of fair use.<sup>53</sup> It also considers the degree to which the original is transformed through the secondary use. It asks whether the secondary use “adds something new” to the original, “with a further purpose or different character.”<sup>54</sup> While “not absolutely necessary” for a finding of fair use, “the more transformative the new work, the less will be the significance

---

<sup>50</sup> Am. Ass'n. of Museum Dirs., POLICY ON THE USE OF “THUMBNAIL” DIGITAL IMAGES IN MUSEUM ONLINE INITIATIVES 2 (2011), <https://perma.cc/R6JT-5MTU>. This policy was developed by the American Association of Museum Directors (AAMD) in 2011. *Id.* The AAMD revoked this policy in 2016 because it had become “obsolete.” Am. Ass'n. of Museum Dirs., *Policy on the Use of “Thumbnail” Digital Images in Museum Online Initiatives* (Jan. 25, 2016), <https://perma.cc/K22B-2QXD>. It was replaced with more flexible fair use guidelines that encourage museum professionals to use images that are appropriate in size for the particular use at issue. *See generally* Am. Ass'n. of Museum Dirs., GUIDELINES FOR THE USE OF COPYRIGHTED MATERIALS AND WORKS OF ART BY ART MUSEUMS (2016), <https://aamd.org/sites/default/files/document/Final%20Fair%20Use%20Guidelines%20060116.pdf> [hereinafter “AAMD FAIR USE GUIDELINES”].

<sup>51</sup> The analysis that follows could be applied more or less equally to the use of copyrighted works of art on educational webpages, in print or digital teaching materials, and other noncommercial museum uses with some sort of scholarly or educational purpose. *See* AAMD FAIR USE GUIDELINES, *supra* note 50, at 15–18 for additional examples of such uses, including exhibition catalogues and blog posts.

<sup>52</sup> 17 U.S.C. § 107(a).

<sup>53</sup> *See id.*

<sup>54</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

of other factors, like commercialism, that may weigh against [such] a finding.”<sup>55</sup>

Here, the nonprofit, educational purpose for which the application is created weighs in favor of a finding of fair use. Its transformative character also weighs in favor of such a finding; it includes significant textual information that contextualizes and comments on the images of the works it includes, “[adding] something new, with a further purpose or different character.”<sup>56</sup> As such, this factor weighs heavily in favor of a finding of fair use.

### 2. *The Second Factor: The Nature of the Copyrighted Work*

The second factor, “the nature of the copyrighted work,”<sup>57</sup> asks whether the original work is within “the core of intended copyright protection.”<sup>58</sup> Because copyright only protects creative expression (as opposed to mere facts or ideas), the more creative a work, the greater the scope of copyright protection it is provided.<sup>59</sup>

Here, the works of art themselves are “original[] creative expression,” and thus are afforded the fullest extent of copyright protection. This protection extends to the derivative digital images of the works at issue here.<sup>60</sup> But here, as in so many other cases, the second factor “does little more than confirm that the works at issue are protected by copyright and may only be used ‘fairly.’”<sup>61</sup> It weighs neither in favor nor against a finding of fair use.

### 3. *The Third Factor: The Amount and Substantiality of the Portion Used*

The third factor looks at “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.”<sup>62</sup> This factor calls for both a quantitative and a qualitative evaluation.<sup>63</sup> The

---

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> 17 U.S.C. § 107(b).

<sup>58</sup> *Campbell*, 510 U.S. at 586.

<sup>59</sup> *See* Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 346–50 (1991). In contrast, less creative works (e.g., a phone book ordering individuals alphabetically by last name) are afforded less protection under the copyright act, if they are afforded any protection at all. *See id.*

<sup>60</sup> 17 U.S.C. §106 (2012).

<sup>61</sup> Princeton Univ. Press v. Mich. Doc. Servs., Inc., 99 F.3d 1381, 1405 (6th Cir. 1996).

<sup>62</sup> 17 U.S.C. § 107(c).

<sup>63</sup> *Campbell*, 510 U.S. at 586.

more important the part or the greater the amount of the original reproduced, the less likely the secondary use is fair.<sup>64</sup>

Nevertheless, there is no categorical rule against copying a work in its entirety or its most important part.<sup>65</sup> As long as the secondary user copies only as much of the original as necessary, then this factor does not weigh against a finding of fair use.<sup>66</sup> This point is particularly relevant when considering copyrighted images. Images, unlike text, cannot be adequately quoted or summarized.<sup>67</sup> In recognition of this fact, courts have repeatedly held that copying entire images for transformative secondary uses is fair.<sup>68</sup>

Here, it is necessary to include images of the works in their entirety so that users can understand the application's commentary. As the application's commentary discusses the details of the works, it is appropriate that the images included are large enough that users are able to perceive those details. This factor therefore weighs neither in favor nor against a finding of fair use.

#### 4. *The Fourth Factor: The Market Effect on the Copyrighted Work*

The fourth fair use factor, “the effect of the use upon the potential market for or value of the copyrighted work,”<sup>69</sup> considers whether the secondary use serves as a competing substitute for the original, thereby denying the copyright owner significant profits if potential purchasers acquire the secondary work in lieu of the original.<sup>70</sup> It inquires not only about the extent of market harm caused by the particular secondary use at issue, but also about the effects of

---

<sup>64</sup> See *id.* at 587–89.

<sup>65</sup> See *id.* at 589.

<sup>66</sup> *Id.*

<sup>67</sup> See generally Stephen E. Weil, *Fair Use and the Visual Arts, or Please Leave Some Room for Robin Hood*, 62 OHIO ST. L.J. 835, 840 (2001).

<sup>68</sup> See, e.g., *Perfect 10 v. Amazon.com Inc.*, 508 F.3d 1146 (9th Cir. 2007) (holding that the use of entire copyrighted images was reasonable in light of the purpose of a search engine) and *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003) (same); see also *Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18 (1st Cir. 2000) (holding that the reproduction of entire photographs in a newspaper was a fair use when the news story concerned the content of the photographs themselves).

<sup>69</sup> 17 U.S.C. § 107(d) (2012).

<sup>70</sup> *Authors Guild v. Google, Inc.*, 804 F.3d 202, 233 (2d. Cir 2015).

“unrestricted and widespread conduct” of the same sort.<sup>71</sup> If a secondary use is noncommercial, it gives rise to a presumption that a use is fair.<sup>72</sup>

The fourth factor also considers the effect of the use on the potential market for derivative works.<sup>73</sup> In the context of our hypothetical, this includes the market for licensing digital images of the works of art. The extension of copyright protection over derivative works “reflects a clear and logical policy choice.”<sup>74</sup> Congress determined that a creator’s “right to control and profit from the dissemination of her work ought not to be evaded by conversion of the work into a different form.”<sup>75</sup> But the impact on the potential licensing market cannot be determinative. If a court concluded “in every case that potential licensing revenues were impermissibly impaired simply because the secondary users did not pay a fee for the right to engage in the use, the fourth fair use factor would *always* favor the copyright holder.”<sup>76</sup> Thus when assessing the harm to the market for derivative works, the relevant inquiry is whether the use is otherwise fair when compared against the other factors.

Here, allowing a museum professional to make fair use of images of the works of art in this context arguably benefits the market for the original works. An image of a sculpture reproduced on an iPad obviously does not serve as a substitute for the sculpture itself. Furthermore, an application like the one at issue here likely augments the visibility and reputation of the artist whose work it features, thereby stimulating demand for his original works of art.<sup>77</sup>

Allowing fair use in this instance would, however, deprive the copyright owner of a potential licensing fee for the use of the image. But because the application is otherwise a fair use, this should not be determinative.<sup>78</sup> Furthermore, even if reliance on fair use becomes widespread in this context, a substantial market for derivatives of the copyrighted work would remain in place. Those who wish to use the

---

<sup>71</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).

<sup>72</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 449–51 (1984).

<sup>73</sup> *Authors Guild*, 804 F.3d at 223.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* As such, an artist has a copyright interest in his painting as well as a coextensive interest in any images that represent that painting. *Id.*

<sup>76</sup> *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir. 2006).

<sup>77</sup> See Olav Velthuis, TALKING PRICES: SYMBOLIC MEANINGS OF PRICES ON THE MARKET FOR CONTEMPORARY ART 108–09 (2005) (discussing how institutional recognition from museums can stimulate demand for an artist’s works).

<sup>78</sup> See *id.*

images in ways that are clearly not fair—such as the unimaginative, commercial reproduction of the work in its entirety on shirts or coffee mugs—will continue to have to pay licensing fees for such non-transformative, commercial uses. The copyright owner will therefore continue to enjoy substantial revenue from a robust licensing market.

#### 5. *Weighed Together in Light of the Purposes of Copyright*

The four statutory factors are not to “be treated in isolation, one from another.”<sup>79</sup> Rather, all four are “to be explored, and the results weighed together, in light of the purposes of copyright.”<sup>80</sup> As such, this analysis requires consideration of both “the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied.”<sup>81</sup>

Here, this calculation weighs strongly in favor of a finding of fair use. The copyright owner’s interest is admittedly damaged, but it is not devastated; and the public benefit is substantial. By eliminating unnecessary costs from the creation of digital projects like the one imagined here, it is more likely that these projects would be attempted, and that the results would provide the public with more insightful, more comprehensive, and more innovative approaches to a diverse range of art.<sup>82</sup> These gains would be particularly substantial for distant and traditionally underserved audiences, as digital projects would allow those unable to visit a museum to access its collections.<sup>83</sup> As such, the imagined application and other, similar uses clearly advance one of copyright’s most essential purposes—the “promotion of broad public availability of . . . [the] arts”—and are almost certainly fair.<sup>84</sup>

##### *a. Museum Professionals Under-Exercise Their Fair Use Rights*

While many uses of copyrighted materials in the museum context are fair, museum professionals are generally reluctant to assert this right. This reluctance stems partly from industry sensitivities. Museum professionals are concerned with maintaining good relationships with artists, their estates, and others who own the rights to

---

<sup>79</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

<sup>80</sup> *Id.*

<sup>81</sup> *Bill Graham*, 448 F.3d at 613 (quoting *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981)).

<sup>82</sup> See Lessig, *supra* note 37, at 113–15 (explaining that while technological advances have made it possible to create widespread access to scholarly and creative materials, efforts to do so are impeded by the high costs imposed by the current copyright regime).

<sup>83</sup> See G. WAYNE CLOUGH, *BEST OF BOTH WORLDS: MUSEUMS, LIBRARIES, AND ARCHIVES IN A DIGITAL AGE* 67–68 (2013) (ebook).

<sup>84</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984).

their works.<sup>85</sup> As such, museum professionals are disinclined to take actions that could damage those relationships, such as refusing demands for licensing fees.<sup>86</sup> Moreover, museum professionals revere artistic creativity, and may feel that paying licensing fees is a necessary display of that admiration.<sup>87</sup>

But as in other contexts, the reluctance to exercise fair use can be largely attributed to the uncertainty that surrounds the doctrine. Fearing the threat of litigation, museum professionals have developed practices over the last few decades that are primarily designed to avoid potential conflict with rights holders, rather than to evaluate particular uses and invoke fair use where appropriate.<sup>88</sup> Litigation would involve substantial time, money, and effort.<sup>89</sup> Moreover, the risks of losing would be significant.<sup>90</sup> It could result in a bill for monetary damages or attorneys' fees, or in a court-ordered injunction effectively erasing the museum professional's work from public view.<sup>91</sup> As such, risk-averse practices are understandably viewed as "cost-effective business decisions" within the museum industry.<sup>92</sup>

*b. The Under-Exercise of Fair Use Entrenches a "Permissions Culture"*

The risk-averse practices of individual institutions are especially problematic because, in the aggregate, they produce a vicious circle.<sup>93</sup> The more frequently museum professionals at a particular institution seek licenses "for anything and everything," the more their peers at other institutions come to assume that every secondary use requires a license, and start to license everything themselves.<sup>94</sup> As a result, a "permissions culture" has been thoroughly entrenched in the museum industry.<sup>95</sup> Most

---

<sup>85</sup> AUFDERHEIDE & JASZI, *supra* note 4, at 7–8.

<sup>86</sup> *See id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 24 (attributing this development largely to the expansion of copyright law that began with the 1976 reform of the Copyright Act).

<sup>89</sup> Falzone & Urban, *supra* note 26, at 339.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property Law*, 93 VA. L. REV. 1899, 1951 (2007).

<sup>93</sup> *See* Falzone & Urban, *supra* note 26, at 340–41.

<sup>94</sup> *See id.*

<sup>95</sup> AUFDERHEIDE & JASZI, *supra* note 4, at 23–26.

secondary uses of copyrighted material are licensed, without serious consideration as to whether licenses are legally necessary or not.<sup>96</sup>

Once ubiquitous within an industry, these near-automatic licensing practices acquire normative significance. They are interpreted as the standard of acceptable behavior within a community by community members and outsiders alike.<sup>97</sup> Any deviation is viewed with suspicion. In other industries, courts have interpreted nonconformity with customary licensing practices as a factor weighing against fair use, even when a use otherwise appears fair.<sup>98</sup> In addition, industry gatekeepers—such as publishers and insurers of secondary works—have been reluctant to release works that seek to rely on fair use, even where fair use is clearly appropriate.<sup>99</sup>

The establishment of a permissions culture within a community thus makes it considerably more difficult for its members to exercise fair use. Fair use, “like a muscle, can shrink with disuse.”<sup>100</sup> Without a critical mass of museum professionals willing to assert their right to make fair use, then effectively no one can.

*c. The Permissions Culture Impedes Museum Activity*

Risk-averse licensing practices have already produced three distinct losses in the museum context. First are the associated monetary and opportunity costs.<sup>101</sup> Significant amounts of employee and volunteer time are devoted to obtaining licenses for the use of copyrighted materials.<sup>102</sup> These licenses can be extremely expensive.<sup>103</sup> Depending on the copyright owner and the intended use of the material, licensing fees can range from a nominal sum to the tens of thousands of dollars.<sup>104</sup> Were all secondary uses first assessed for fairness—and were the decision then made that licenses should not be sought for uses that are clearly fair—museums could save themselves a considerable amount of human and financial resources.

---

<sup>96</sup> See *id.* at 24–25 (explaining that in the visual arts field “the permissions culture has grown until it has become the most common way to deal with managing third-party copyright issues”).

<sup>97</sup> See Rothman, *supra* note 92, at 1937–944.

<sup>98</sup> See *id.* at 1902–03 (arguing that the producers in *Ringgold v. Black Entertainment Television* would likely have succeeded in their fair use defense but for the court’s consideration of industry clearance practices).

<sup>99</sup> *Id.* at 1902–04.

<sup>100</sup> AUFDERHEIDE & JASZI, *supra* note 25, at xi.

<sup>101</sup> AUFDERHEIDE & JASZI, *supra* note 4, at 54–55.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 51–52.

<sup>104</sup> *Id.*

Second are the occasions when the time and effort is expended to track down a rights holder, only for permission to be denied because a rights holder dislikes the message of a particular project, or for the licensing fees to be prohibitively high and the copyright owner unwilling to negotiate.<sup>105</sup> Hesitant to rely on fair use, museum professionals often decide to excise the unauthorized materials, and to release their work in an incomplete or materially different format than what was preferred.<sup>106</sup>

And lastly are the occasions when projects are not even attempted because of knowledge about the difficulty or expense of obtaining licenses from certain copyright owners.<sup>107</sup> These concerns result in an alarming amount of self-censorship within the visual arts field.<sup>108</sup> More than a third of museum professionals admit to having avoided or abandoned a project because of the actual or perceived inability to obtain licenses for copyrighted materials.<sup>109</sup> As a result, there are significant voids in scholarship in areas where licensing is prohibitively expensive or otherwise difficult.<sup>110</sup>

Concerns about the permissions culture have taken on new urgency in light of digital projects' potential to stimulate widespread interest in the arts.<sup>111</sup> It is now possible to create virtual counterparts to traditional exhibitions that enable remote visitors to virtually experience the curatorial narrative.<sup>112</sup> Works of art and archival materials otherwise unavailable can now be made accessible through online databases, which greatly expands the utility of these materials for scholars, artists, and the public at large.<sup>113</sup> Digitization also preserves these materials for future generations.<sup>114</sup>

If existing licensing practices extend into the digital era, however, it will almost certainly impede museums from implementing these possibilities.<sup>115</sup> Digital-based projects typically require an enormous number of images and archival materials.<sup>116</sup> If these materials

---

<sup>105</sup> *Id.* at 52–53.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 53.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 52.

<sup>110</sup> *Id.*

<sup>111</sup> *See generally* Clough, *supra* note 83.

<sup>112</sup> *See* sources cited *supra* note 1.

<sup>113</sup> *Id.*

<sup>114</sup> AUFDERHEIDE & JASZI, *supra* note 4, at 5.

<sup>115</sup> Pessach, *supra* note 7, at 262.

<sup>116</sup> Digitizing a museum's modern art collection, for instance, would require as many images as the collection had paintings. It would increase exponentially if a museum desired to digitize related archival materials.

are still under copyright, then these projects will likely be unfeasible for those unwilling to exercise their fair use rights. As Patricia Aufderheide and Peter Jaszi write, these losses “affect not only today’s future professionals, [but also] those worldwide who cannot obtain digital access to inspiration that could influence and shape their artistic and career choices.”<sup>117</sup> This lack of access is a loss that is felt not only in the present. It is also “the erasure of a possible future.”<sup>118</sup>

### III. SHIFTING THE BALANCE TOWARD FAIR USE

Given the toll that the permissions culture takes on scholarship and innovation in the museum context, it is in the collective best interest of museum professionals—and ultimately the general public—to bring compulsory licensing practices to an end.<sup>119</sup> Shifting the balance toward fair use would enable museums to undertake more projects to increase public access to the arts, and to do so at a higher speed and lower cost.<sup>120</sup> This cultural shift, however, is not likely to occur unless the largest inhibitor to the effective exercise of fair use—uncertainty—is significantly reduced.<sup>121</sup>

#### *A. A Context-Specific Test Case is Unlikely to Emerge*

The present record of fair use litigation in museums and the visual arts is sparse.<sup>122</sup> Since fair use is a context-specific doctrine, this contributes to the uncertainty that surrounds its application.<sup>123</sup> A “test case” that produced clear rules for the application of fair use in museums would undoubtedly resolve much of this uncertainty, and would enable museum professionals to exercise their fair use rights with greater confidence.<sup>124</sup>

But as Aufderheide and Jaszi conclude, such a scenario is “simply wishful thinking.”<sup>125</sup> It is unlikely that a rights holder would litigate an uncertain fair use question, as even if a rights holder were ultimately successful, a close case could reveal the utility of fair use and undermine his future interests.<sup>126</sup> Moreover, fair-use decision-making is highly fact sensitive. It is thus improbable that a single case would yield

---

<sup>117</sup> AUFDERHEIDE & JASZI, *supra* note 4, at 12.

<sup>118</sup> *Id.*

<sup>119</sup> *See supra* note 82 and accompanying text.

<sup>120</sup> *See* AUFDERHEIDE & JASZI, *supra* note 4, at 5–6 (describing the costs associated with compulsory licensing practices).

<sup>121</sup> *See* AUFDERHEIDE & JASZI RECLAIMING FAIR USE, *supra* note 25, at 99.

<sup>122</sup> AUFDERHEIDE & JASZI, *supra* note 4, at 23.

<sup>123</sup> *Id.*

<sup>124</sup> *See* AUFDERHEIDE & JASZI, *supra* note 25, at 99.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

a decision that could serve as a useful guide for all future museum activities.<sup>127</sup> There is also an underlying collective action problem at work.<sup>128</sup> A test case would undoubtedly benefit museums as a whole.<sup>129</sup> But no single institution would likely receive such a large benefit that it would be worth incurring the potential costs of litigation on its own.<sup>130</sup> As such, conflicts with rights holders will likely continue to be resolved through less costly private compromises between individual rights holders and museums, and no test case will emerge.

*B. The College Art Association's Code of Community-Based Best Practices May Provide Improved Fair Use Certainty*

Greater certainty can also be achieved through the development of codes of “best practices” for fair use. Such codes—which already have been adopted in other creative and academic communities—translate fair use principles into more understandable terms tied to the activities of its members.<sup>131</sup> Because the costs of production are dispersed throughout the entire community, these codes are able to overcome the collective action problem that otherwise prevents the resolution of fair use uncertainty.<sup>132</sup>

The College Art Association released the Code of Best Practices for Fair Use in the Visual Arts in February 2015.<sup>133</sup> It parallels similar codes developed in other creative communities.<sup>134</sup> It pertains to the practices of museum professionals, as well as other members of the visual arts profession, including art historians, artists, educators, and

---

<sup>127</sup> *Id.*

<sup>128</sup> See MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 44 (20th ed. 2002) (explaining that “in a large group in which no single individual’s contribution makes a perceptible difference to the group as a whole, or the burden or benefit of any single member of the group, it is certain that a collective good will not be provided unless there is coercion or some outside inducements that will lead the members of the large group to act in their common interest”).

<sup>129</sup> *See id.*

<sup>130</sup> *See id.*

<sup>131</sup> The documentary filmmaking community’s code of best practices is the earliest and perhaps best known example. ASSOC. OF INDEPENDENT VIDEO & FILMMAKERS ET AL., DOCUMENTARY FILMMAKERS STATEMENT OF BEST PRACTICES IN FAIR USE (2005), [http://archive.cmsimpact.org/sites/default/files/fair\\_use\\_final.pdf](http://archive.cmsimpact.org/sites/default/files/fair_use_final.pdf). An archive of best practices in other communities is available online through the Center for Media & Social Impact’s website. *Codes of Best Practices*, CTR. FOR SOC. MEDIA & SOC. IMPACT, <http://cmsimpact.org/codes-of-best-practices/> (last visited Oct. 26, 2016).

<sup>132</sup> *See supra* note 128 and accompanying text.

<sup>133</sup> CAA CODE, *supra* note 12, at 1.

<sup>134</sup> *See id.* at 4.

scholarly publishers.<sup>135</sup> It describes common activities within the museum and visual arts community where its members agree that the exercise of fair use is appropriate.<sup>136</sup> It then defines the boundaries of fair use in those situations, providing users of copyrighted materials with useful principles on which to rely when invoking fair use.<sup>137</sup>

*1. An Overview of the Relevant CAA Code Principles*

Three of the five principles are especially relevant to the activities of museum professionals: (1) general museum uses, (2) online access in memory institutions, and (3) analytic writing.<sup>138</sup> These principles provide that museum professionals may exercise fair use when engaging in many routine industry activities. The first principle—general museum uses—provides that museum professionals may invoke fair use when using copyrighted materials in activities that advance their core missions.<sup>139</sup> This principle would allow a museum professional, for instance, to make fair use of an image of a work of art used in an educational application for a smart phone.<sup>140</sup> It applies to all copyrighted materials—including images, text, and video—and provides that these materials may be reproduced fairly in both print and digital media.<sup>141</sup>

It is subject to four categories of limitations. First, it is subject to a purpose and character limitation. The use “should be justified by the curatorial objective, and the user should be prepared to articulate that justification.”<sup>142</sup> Second, it is subject to amount and substantiality limitations. The amount of the copyrighted work used “should be appropriate to the analytic or educational purpose.”<sup>143</sup> If a downloadable image is made available online, it “should be suitable in size for full-screen projection or display on a personal computer or mobile device, but generally not larger.”<sup>144</sup> Third, it is subject to oversight and security limitations. Images should not be made available for download “unless a

---

<sup>135</sup> *Id.* at 5.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 7-8. The other two principles, which are less likely to be implicated by the activities of most museum professionals, are making art and teaching about art in a classroom setting. *Id.*

<sup>139</sup> *Id.* Broadly speaking, “[t]he mission of all art museums is to serve the public through art and education.” Am. Ass’n. of Museum Dirs., ART MUSEUMS, PRIVATE COLLECTORS, & THE PUBLIC BENEFIT (2007), <https://aamd.org/sites/default/files/document/PrivateCollectors3.pdf>.

<sup>140</sup> For an explanation of the fairness of such a use, see *supra* Part 0.0.

<sup>141</sup> CAA CODE, *supra* note 12 at 7-8.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

special justification is present,” and all materials “should be associated with all appropriate and reasonably available metadata.”<sup>145</sup> Fourth, it is subject to limitations stemming from various sensitivities in the visual arts communities. Images “should be “accompanied by attribution of the original work as is customary in the field, to the extent possible,” and all materials should be reproduced at a “level of fidelity . . . appropriate to the analytic or educational purpose.”<sup>146</sup> Lastly, the reproduction of any material “should honor institutional policies designed to protect non-copyright interests of third parties, including the privacy of individuals and the cultural sensitivities of communities.”<sup>147</sup>

The second principle—online access in memory institutions—provides that museum professionals may invoke fair use to make copyrighted materials available online, as well as to make “digital preservation copies” for the museum’s own purposes.<sup>148</sup> This principle applies to “art-related documentation” materials that are not subject to use restrictions imposed by donation agreements.<sup>149</sup> It includes such materials as sketches, manuscripts, and book collections of artists and collectors.<sup>150</sup>

This principle is subject to essentially the same limitations as general museum uses.<sup>151</sup> But there is greater emphasis on user oversight: the limitations provide that a website should inform users that all materials are provided only for personal and scholarly use, and that it should disclaim any liability for downstream uses of these materials.<sup>152</sup> Additionally, it provides that these websites should advertise “a point of contact for further information and correspondence.”<sup>153</sup> These additional limitations are likely attributable to the relative ease with which digital materials can be copied and reproduced.

The third principle—analytic writing—provides that museum and visual arts professionals may invoke fair use when reproducing copyrighted materials in analytic writing about art.<sup>154</sup> This principle applies both when the copyrighted materials are the “specific subjects of analysis,” as well as when the materials “are used to illustrate larger

---

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 8.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 5–6.

points about artistic trends and tendencies.”<sup>155</sup> It applies to writings made available in either print or digital formats.<sup>156</sup>

This principle is subject to limitations that closely parallel the limitations associated with the previous two principles.<sup>157</sup> There is increased emphasis, however, that the analytic objective of these writings “should predominate over that of merely representing the work or works used.”<sup>158</sup> The limitations also caution that digital uses should be considered especially carefully because of the “heightened risk that reproductions may function as substitutes for the originals.”<sup>159</sup>

## *2. The Likely Impact of the CAA Code on Fair Use in the Museum Industry*

The development of community-based codes of best practices can be tremendously beneficial for users of copyrighted materials. Through their limited focus on principles of fair use relevant to a particular community, these codes can make the doctrine more accessible and less abstract than more general discussions of fair use.<sup>160</sup> As a result, community members are able to exercise their fair use rights with greater confidence.

Codes of best practices, however, are not without their concerns. First, these codes are often formulated without input from all relevant stakeholders.<sup>161</sup> They usually reflect a consensus among users of copyrighted materials within a particular community, with little to no input from rights holders with countervailing interests.<sup>162</sup> The CAA Code is no exception. It was created through discussions between artists, museum professionals, and other users of copyrighted materials within the visual arts community.<sup>163</sup> Representatives from rights managements groups—whose core business is to license images of works of art—were notably absent.<sup>164</sup>

Generally speaking, rights holders are presumably excluded from these discussions because of the actual or perceived difficulty of

---

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> Falzone & Urban, *supra* note 26, at 343.

<sup>161</sup> *Id.* at 348; Rothman, *supra* note 41, at 1620.

<sup>162</sup> *Id.*

<sup>163</sup> CAA CODE, *supra* note 12, at 2.

<sup>164</sup> *Id.*

achieving a consensus between rights holders and secondary users.<sup>165</sup> But when agreement to common principles is not even attempted, it raises serious concerns about whether these statements appropriately define the boundaries of fair use.<sup>166</sup> One-sided codes risk partiality. Formulated without serious opposition from those with countervailing interests, they are more likely to reflect interpretations of the law that advance their authors' preferred allocation of rights, rather than a moderate and widely agreed upon interpretation of copyright law. In turn, more friction is likely to result between rights holders and secondary users when the principles these codes put forward are ultimately put in action. Although the CAA Code accurately reflects fair use case law, its invocation nevertheless hazards exactly this sort of resistance from rights holders. Rights holders—who depend on licensing fees for income—can be expected to push back to avoid the short-term revenue loss that the more frequent invocation of fair use is likely to cause.

Second, codes of best practices do not always significantly clarify principles of fair use. In an effort to avoid being overly restrictive, they frequently do little more than restate the statutory fair use factors.<sup>167</sup> This is true of several of the CAA Code's principles. For example, its purpose and character limitation in the context of general museum uses provides that a use "should be justified by the curatorial objective, and the user should be prepared to articulate that justification."<sup>168</sup> This limitation merely contextualizes the question underlying the first statutory factor, without resolving what sort of curatorial objective justifies making fair use of copyrighted material. Such limitations do not unduly narrow the appropriate boundaries of fair use. But neither do they offer museum professionals with significant guidance in applying fair use. These vague limitations could be improved through the inclusion of illustrative examples. This could be done either through a formal revision, or through the creation of an online forum that offers further guidance to members of the visual arts community on appropriately implementing the Code's principles.<sup>169</sup>

Third, codes of best practices sometimes impose additional, non-legal burdens that stem from a community's ethical norms rather than the

---

<sup>165</sup> Rothman, *supra* note 41, at 1620; *see also* AUFDERHEIDE & JASZI, *supra* note 25, at 131–32.

<sup>166</sup> Rothman, *supra* note 41, at 1620.

<sup>167</sup> *Id.*

<sup>168</sup> CAA CODE, *supra* note 12, at 2.

<sup>169</sup> Other stakeholders can also take action to clarify the Code's principles. The AAMD recently released its own guidelines in an effort to further clarify the doctrine's applicability to museum uses. *See generally* AAMD FAIR USE GUIDELINES, *supra* note 50.

actual law.<sup>170</sup> The CAA Code admittedly incorporates “widely and strongly held community values” that are “not tied to language of the Copyright Act.”<sup>171</sup>

Most of the resulting limitations are not particularly burdensome. For example, in the context of general museum uses, the Code provides that “images provided to the public should be accompanied by attribution of the original work as is customary in the field, to the extent possible.”<sup>172</sup> This limitation, reflecting the importance of acknowledging artistic creativity within the visual arts community, is easily satisfied. In addition, the Code explicitly states that the use of images in this context “should honor institutional policies designed to protect noncopyright interests of third parties,” such as “the privacy of individuals and the cultural sensitivities of communities.”<sup>173</sup> While the right to privacy is a legal concern, cultural sensitivities are not. Such limitations could reassure museum professionals when invoking fair use that their behavior complies not only with the law, but also with the norms of the visual arts community. Overall, this could make museum professionals more inclined to adopt the Code’s principles than if such considerations were omitted.

But some of the CAA Code’s limitations are more concerning. Specifically, the oversight and security limitations in the general museum context provide that digital images “should be associated with all appropriate and reasonably available metadata,” and that “downloading should not be facilitated unless a special justification is present.”<sup>174</sup> Compliance with these requirements—neither of which are strictly required under Section 107—could complicate, or at least appear to complicate, the creation of digital applications, webpages, and other technologies that include copyrighted materials. This could unnecessarily deter museum professionals from undertaking such projects.

But in its recent decision, *Authors Guild v. Google, Inc.*, the Second Circuit considered Plaintiff’s argument that the digitization of copyrighted books to make them searchable on Google Books may facilitate their pirating, thereby harming the value of their copyright.<sup>175</sup> The court evaluated the adequacy of the security measures that Google had put in place, and, finding them satisfactory, concluded that pirating

---

<sup>170</sup> Rothman, *supra* note 41, at 1620.

<sup>171</sup> CAA CODE, *supra* note 12, at 10.

<sup>172</sup> *Id.* at 5–6.

<sup>173</sup> *Id.* at 8.

<sup>174</sup> *Id.* at 5–6.

<sup>175</sup> *Authors Guild v. Google, Inc.*, 804 F.3d 202, 227–28 (2d. Cir 2015).

was unlikely and dismissed the argument.<sup>176</sup> That does not necessarily indicate that an opposite conclusion would have precluded a finding of fair use. Nevertheless, the court stated that it “might well furnish a substantial rebuttal to the secondary user’s claim of fair use.”<sup>177</sup> Thus while compliance with the Code’s oversight and security limitation may be somewhat burdensome, it is likely a sound precaution to avoid unintentionally overstepping the boundaries of fair use.

The CAA Code is admittedly imperfect. But its flaws are not fatal. Moreover, many of them could be readily corrected through revision or other retroactive steps to make its principles more usable for museum professionals and other members of the visual arts community. But even if corrective measures are not taken, the CAA Code is still likely to produce positive change within the museum and visual arts community: if nothing else, its publication signals the start of an important conversation, of a widespread recognition of the stagnation that the permissions culture has produced, and of a movement towards something better.<sup>178</sup>

#### CONCLUSION

The hidden costs of the permissions culture have been tolerated in the museum community for far too long. With interest in implementing digital technologies increasing, its slow sucking of museum resources can no longer be ignored. Continued into the future, the permissions culture will make many digital projects unaffordable—impacting not only museum professionals, but also the public that they seek to serve.

The publication of the CAA Code is an important step in bringing the permissions culture to an end in the museum community. But it is just one step. Ultimately, its eradication is up to museum professionals themselves, who must reassess their licensing practices and

---

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 227.

<sup>178</sup> See Jennifer E. Rothman, *Best Intentions: Reconsidering Best Statements Practices in the Context of Fair Use and Copyright Law*, 57 J. COPYRIGHT SOC’Y U.S.A. 371, 375 (2010). Rothman attributes the success of the code of community-based best practices in the documentary filmmaking community not to the release of the code itself, but instead to the interest that it sparked within the community to combat the permissions culture. See *id.* The AAMD’s recent release of its own guidelines on fair use in the museum setting suggests that the CAA Code may trigger a similar effect in the museum community. See generally AAMD Fair Use Guidelines, *supra* note 50.

act to establish fair use as the new normal.<sup>179</sup> The CAA Code has set the stage for them to do so. But the real endeavor of expanding access to the arts to everyone, everywhere—which relies on fair use as but one of many tools—remains to be done.

---

<sup>179</sup> AUFDERHEIDE & JASZI, *supra* note 25, at 133–34 (explaining that “[c]hanging practice is not something that happens because a document is created; it happens when enough people use that tool to change their behavior”).