



The impact of copyright permissions culture on the US visual arts community: The consequences of fear of fair use

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Abstract

As digital opportunities emerge in the visual arts—to produce multimedia art and digital scholarship, publish online, and hold online museum exhibitions—old copyright frustrations have worsened in a field where getting permissions is routine. A national survey of 2828 visual arts professionals, combined with 100 in-depth interviews of visual arts practitioners throughout the United States, explored how visual arts professionals use the US copyright doctrine of fair use. Results showed widespread lack of confidence and misconceptions about fair use; resulting exaggerated risk assessment; personal and social relations within the community that deter reliance on fair use; and consequent delays, deformations, and failure to execute mission.

Keywords

Artists, archives, copyright, digital humanities, fair use, museums, online censorship, publishing, scholarship, visual arts

Introduction

This study explores the impact of copyright permissions culture in the US visual arts community, using survey data and in-depth interviews. It looks at practices of fine artists,

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scholars, editors, teachers, and professionals working in all aspects of museum work. It asks: How do visual arts professionals' copyright understandings condition their creative production in a digital era? Specifically, what work do visual arts professionals delay, change, or leave undone, when they choose to seek licenses rather than employ fair use—their legal right to use copyrighted material without permission of the copyright holder? Given patterns discovered in research with other creative communities, the authors expected to find a tendency toward self-censorship associated with reluctance to employ fair use. They also expected to find customs among gatekeepers and in institutional practice that sustain a culture of default permission. This community was of particular interest for its visually oriented work; researchers believed that learning more about field-specific practices would provide not only reinforcement for an emerging pattern of interest to scholars and policy-makers but also information of utility to the field itself.

Quantitative survey data are used to document current patterns in practice and to investigate the relationship between copyright understanding and the employment of fair use. Qualitative data both from open-ended survey questions and interviews are used to further understand these relationships in specific circumstances and also to explore the justifications for current practice.

The digital transformation has highlighted long-standing problems that US-based visual arts professionals have in managing their work responsibilities in relation to expectations that all copyrighted materials will be used with permission. In the visual arts community,¹ others' copyrighted material is critical to much daily practice. Artists refer to other artists' work and the world around them, scholars reference text and images in their scholarship, teachers illustrate their insights in class and online with third-party material, museum curators showcase work both digitally and in spaces, and editors illustrate and quote from texts. Multimedia digital formats and online communication challenge the current practice, known as "permissions culture," the assumption that all copyrighted materials must be used only with permission (Bielstein, 2006; Whalen, 2009). This process touches almost everyone's decision making in a tightly knit and interdependent community, in which many act as both producers and gatekeepers of others' production.

Most visual arts professionals generate copyrights automatically (since copyright is default) as they create anything tangible, and they use others' work frequently to do so, according to the survey results. As the field has grown and faced the challenges of a digital era, the needs to access copyrighted material have increased. One response within the US visual arts community has been to centralize and streamline permissions. Specialized entities have emerged as permissions intermediaries. Two major organizations, the Artists Rights Society (ARS) and VAGA, now act as permissions middlemen. ARTstor provides a digital repository to which a variety of institutions belong, facilitating open access to visual content in some cases and providing a venue for negotiation in others (Bielstein, 2006).

Another approach has been to attempt to generate digitally accessible, copyright-free or copyright-light (including Creative Commons) materials. Many art museums, such as the J. Paul Getty Museum, Los Angeles County Museum of Art, National Gallery of Art, Walters Art Museum, Yale Art Gallery, and Yale Center for British Art, are establishing "open access policies," which make high-resolution images of public domain works of art downloadable for use without restriction and free of charge. The Digital Public Library of America and Google Art Project are useful to art professionals wanting to

mount innovative virtual exhibitions. Open electronic databases include the Society of Architectural Historians (SAHARA), Getty Research Portal, and ARTstor's Images for Academic Publishing. The Khan Academy's Smarthistory provides open access to art history.

None of these efforts, however, helps visual arts creators when they legitimately want to use copyrighted material without permission or payment, for reasons that may range from expression (for instance, saying something the copyright holder may not wish them to say) to referencing, illustrating, demonstrating, or comparing. For this, in the United States, they have fair use, a reliable right of free expression, and one that courts including the Supreme Court have celebrated as a tool to generate new culture. But deciding when to invoke fair use must also be made on a case-by-case basis, grounded not only in the core concepts of transformativeness and appropriateness but also in the mission of the specific community of practice (Aufderheide and Jaszi, 2011; Madison, 2004).

Copyright, fair use, and communities of practice

The clash between the growth of digital opportunity and permissions culture is well documented in the visual arts (Adamson, 2012; Zorich, 2012). Increasingly, scholars have documented the frustrations of attempting to work within a permissions regime, particularly in the field of scholarly publishing (McGill, 2006; Rubin, 2011; Sundt, 1999; Westermann and Ballon, 2006; Whalen, 2009) and museum curation (Buskirk, 2012). Museums are uncertain about the value of long-standing policies on licensing, as some respond to the opportunities in a digital environment to make work openly accessible and others do not (Kelly, 2013; Shincovich, 2004; Tanner, 2004). Archivists rail at the strictures of the Digital Millennium Copyright Act, which bans de-encryption, when they try to preserve digital expression (Edwards, 2013). Artists create art that itself comments on copyright (Illegal Art, 2014; Sinaiko, 2013). At the same time, digital opportunities open up, patrons demand them, and artists want to use them. However, this discussion has typically taken place within a set of assumptions that permissions are inevitably required and with minimal access to the copyright doctrine of fair use.

Fair use is an exception to copyright monopoly that once was part of a range of ways that maintained a balance between rewards for existing creators and incentives for future creators (Kaplan, 2005; Patterson and Lindberg, 1991). As copyright monopoly has expanded through extended license terms, expanded scope, and making copyright default on any tangible expression, fair use has risen to pre-eminence among exceptions to copyright monopoly. In fact, the Supreme Court of the United States has twice recognized fair use as essential in maintaining copyright's constitutionality because without a viable exception of this order, copyright law would violate the First Amendment of the Constitution by letting governmental policy enable private censorship (Netanel, 2013).

While fair use applies only in countries where it is the law—the United States, Israel, and the Philippines—its application is of great interest beyond the United States. This is because, first, fair use may have some overlap with other national regimes' exceptions and limitations to copyright monopoly, and US practice may provide a model for using or reforming other exemption policies. This was the case in Canada, where "fair dealing" has been made remarkably flexible with the latest copyright reform (Katz, 2013). Others

have considered the possibilities of applying a fair use–like logic to the “right of quotation” in some Commonwealth countries (Flynn and Jaszi, 2009) and in some parts of Europe (Larsen and Nærland, 2010). Furthermore, in some international collaborations, in practice, gatekeepers accept copyright claims matching the terms of US fair use.

Fair use enables new expression where existing work is employed not for substitution but in appropriate amounts for a new use (Leval, 1990). It does not, by definition, impinge upon existing markets for the original work and, therefore, does not create a meaningful financial-interest conflict between monopoly rights holders and new users. Although fair use has sometimes been dragged into debates over piracy, illegal downloading, and crisis in business models, this demonstrates moral panic, not reasoned analysis (Patry, 2009).

As permissions culture becomes ever more unwieldy, some have attempted to clarify fair use in the visual arts. The US-based Association of Art Museum Directors (AAMD, 2011) established pixel-specific guidelines for fair use of digital thumbnails representing artworks, which unfortunately have aged with rapid technological changes. The Intellectual Property Rights Committee of the Visual Resources Association (VRA), a US association of art librarians and archivists, issued the VRA Statement of Fair Use of Images for Teaching, Research, and Study (Wagner and Hall, 2011), but it is specific to librarians and archivists.

The visual arts’ fair use frustration occurs within a larger conversation about copyright’s effect on creative practice. Some legal scholars, arguing both from principle and examples, have decried the consequences of a shrinking public domain, which limits the choices of future creators. Boyle (1996), Lessig (2001), and Netanel (2008) describe the expansion of copyright monopoly within a US policy designed to foster expression and the generation of culture. Mazzone (2011) describes consequences of copyright monopoly rights holders’ overreach in a range of practices. Cultural studies, policy, and historical scholars have also argued, using historical evidence, industry analysis, and anecdote, that unbalanced copyright, which privileges existing work, can constrain the creation of future work (Bollier, 2001, 2002; DiCola and McLeod, 2011; Gillespie, 2007; Vaidhyanathan, 2001). Cultural studies scholars have noted the link between unbalanced copyright and the growth of cultural practices that self-identify as illegal or piratical, such as fanfic and remix, although they in fact may not be (Burkart, 2014; Gray et al., 2007; Jenkins, 2006; Jenkins et al., 2013; McLeod, 2005; Sinnreich, 2010, 2013; Tushnet, 2010).

Missing until recently, however, is a systematic study on established creative communities’ practices in relation to their copyright knowledge. While scholars have analyzed both legal structure and points of conflict in the system, communities of practice have actually lived the experience of creating work under a copyright regime that has increasingly favored existing copyright holders. Close observation and analysis of community behavior can document whether there are systemic patterns that indicate suppression of cultural production and also what they are. Such field-specific information, if acted on, can change field practice and affect policy decisions.

This gap is being filled now. Since 2004, studies have been conducted, among others, with filmmakers, media literacy teachers, film and communication professors, as well as librarians (Ad Hoc Committee on Fair Use and Academic Freedom, 2010; Adler et al., 2010; Aufderheide, 2007; Aufderheide and Jaszi, 2004, 2007, 2011). These studies have

substantially solidified conclusions drawn by legal scholars and cultural studies scholars from legal theory, historical analysis, and anecdote. They have reinforced the conclusions, in both legal and cultural studies work, that creative expression is impaired by failure to use the exceptions of existing copyright law, especially fair use. While each community has its own practices, customs, and professional priorities, studies have shown consistently that where established communities of practice do not understand their fair use rights, their mission-related activity is constrained or deformed. These studies have mapped patterns of deformation of production process, delay, and avoidance of areas of work. Conversely, when members of communities of practice have been able to understand the standards and expectations of their community regarding fair use, they have been able to create more and better work (Abdenour, 2014; Falzone and Urban, 2010; Mazzone, 2011). Therefore, this study participates in a growing literature that explores the implications of restrictive copyright practice on creativity and looks at field-specific practices.

Methods and sources

Information for this study was garnered under conditions of anonymity with informed consent, in accordance with our agreement with the American University Institutional Review Board for the Protection of Human Subjects.

The authors worked with the US-based international organization College Art Association (CAA), whose members, according to its website, “by vocation or avocation are concerned about and/or committed to the practice of art, teaching, and research of and about the visual arts and humanities.” CAA sent a survey designed by the authors in the first quarter of 2013 to its current and past membership of 35,000 people. The nonprobability sample drew 2828 replies, with 2100 completing the survey (6% rate of return), using Survey Monkey. For access to the full set of data, please contact Patricia Aufderheide.

The survey included questions about choices to license, familiarity with copyright law and fair use, and experience with challenges to unlicensed use and with infringement of copyrighted material. Questions were focused on actual practice, not on opinions. The survey asked respondents to identify themselves professionally by national location, work using CAA’s categories, and by time in the field. We aggregated a lengthy list of jobs into four categories: artist, academic, museum professional, and editor. Artists who also taught were counted as artists. Survey respondents were typically experienced in their field, with 83% having more than 5 years and a substantial majority more than a decade. While 12% of respondents were not from the United States, no significant statistical differences emerged when nationality was used as a control variable.

The survey had design weaknesses, due to failure to pre-test extensively enough. They included failure to link the decision to seek permissions to the specific reason for seeking it. This limited some of the conclusions we could draw from the data.

The authors also conducted in-depth interviews with 100 people working in the professions of CAA members, contacted via personal networks of CAA members. Interviewees had typically been working in the field at least a decade and often longer. The open-ended, hour-long interviews began with an invitation to reflect on the last time a copyright question came up at work. Then, interviewers explored specific workplace situations where copyright questions had arisen and been addressed. Interviewees were asked to discuss

about projects that had been delayed or indefinitely shelved because of copyright concerns and about projects the interviewees might like to do if they could have clarity about copyright risks. Interviewees were also asked for suggestions for other possible subjects, in particular people with experience with copyright conflicts, challenges, or successful approaches to meeting mission within copyright. Finally, we did informational interviews with seven representatives of content holders, including estates and intermediary rights organizations, merely to provide institutional context.

Fair use in visual arts practice

Copyrighted work is important to all professional subcategories in this community, even among those generating the original work of the field, the artists. Overall, 70% said that they used copyrighted work of others in their own work, with expectably higher rates of use among the nonartist visual arts professionals. Almost all editors (95%) use copyrighted material of others; 81% of academics do; the figure is also very high for museum professionals (76%). Among artists, 37% employ copyrighted works of others—expectably lower than other groups since artists strive to produce original work and often create from raw materials that do not incorporate copyrighted work; nonetheless, this is still a very significant portion of the respondents, and this figure for artists was higher than anticipated.

Survey respondents and interviewees lack formal copyright education or training and are insecure about fair use. Of survey respondents, three-fourths had received no formal copyright education or training, either in their education or at their workplace. The experience was roughly similar across visual arts professional fields. In follow-up, open-ended answers, survey respondents who did not get formal education mention as sources of information their own institution's lawyers, "the Internet," advice from colleagues "on the job," listservs in which peers consult each other, gatekeepers' comments, or even, for one survey respondent, "rumor."

Nonetheless, the majority of respondents to the survey express confidence in their copyright understanding. Nearly two-thirds, 63%, rated their own copyright understanding as "excellent" or "good" and only 5% as poor. Greater self-perceived understanding is related to professional practice, which is well established as reinforcing permissions culture. Editors and art historians, whose daily work is integrally linked to referencing others' work, rate their knowledge higher than other visual arts professionals.

Visual arts professionals overall are more likely to seek permissions than not. Some 30% of those surveyed *invariably* obtain permissions for their use of others' copyrighted material, with numbers especially high (58%) for editors and especially low (7%) for artists. This figure rises when excluding those who do not use third-party work at all (and 65% of the artists say they do not). In this pool, 44% invariably secure permission (including many artists). Of the group that uses third-party work, overall 86% sometimes or always secure permission.

Interviews and the related literature suggest some explanations for the high percentage of people who always obtain permissions, even in an environment where doing so cripples mission, where copyright is frequently referenced, where professionals profess confidence in their copyright knowledge, and where fair use is much discussed. Much copyright

training, both formal and informal/interpersonal, typically does not discuss the full range of fair use and emphasizes risks (California Lawyers for the Arts [CLA], 2012). In interviews and in survey open-ended responses, however, visual arts professionals of all kinds evinced a range of mythologies about fair use—"it's fine if the use is educational"; "it can only be used for noncommercial work"; and a number of rules of thumb about word length, image resolution, and number of alterations to the work. In interviews, sources also reported their current copyright knowledge as catch-as-catch-can, highly situational, and not authoritative. One museum professional noted, "Information is circulated with complete confusion. Everybody knows, but everybody doesn't know." Another said, "People share information haphazardly." Interviewees shared confidentially records of listserv conversations where members traded expressions of anxiety, confusion, hyper-cautious behavior, and misinformation.

Artists were no better informed than others, but they were much more likely to use others' work without permission in some circumstances. We believe this speaks to their position at the beginning of the chain of visual arts production, making them less vulnerable to the whims of estates, museums, archives, and other partners essential to others in the community. It also reflects a dismissive attitude toward external rules that surfaced in many interviews. "I don't want to inhibit my art by asking too many questions about what's possible," one said.

Permissions culture is enforced at many points. Gatekeepers include teachers, school administrators, librarians, editors of scholarly material, rights and permissions personnel at museums, patrons commissioning art, curators, and gallerists. These gatekeepers do not, of course, make their judgments solely on the legality of fair use. They also enforce permissions knowing that many artists' estates and image-brokering services such as ARS and VAGA could punish even legitimate fair users by denying access to other work in the future. "It's a small world, and life is long," said one interviewee. Furthermore, they sometimes do so as a sign of respect to artists.

In describing their decisions for permissions, subjects did not perceive monopoly rights as absolute or fair use as a taking. Most subjects, as noted, were copyright holders as well as users. But subjects did not associate fair use with unfair copying, even among artists. "There are artists who make entire careers on copying as artists, not forgers," one noted wryly in interview. Only one artist noted a problem, relating an incident of wholesale plagiarism but easily distinguishing plagiarism and wholesale copying from selective quotation for a new purpose. Subjects in all categories, including artists, noted the publicity value—even when commentary was negative—of recontextualized use of work. Generally, they did not believe that permissions, especially given transaction costs, were lucrative for their part of the field. In particular, museum and archives managers generally believed that granting permissions costs them more than their institutions recoup (they also noted that two or three large institutions probably did make money).

Rather, in deciding for permissions, they conflated issues of legal risk, social reputation, irritation, relationships, and respect. Lack of confidence in fair use was linked to exaggerated risk assessment. Interviewees often equated conservative, even self-censoring choices with acceptable security, even in the most cutting-edge digital projects. An educator involved in an online educational project, for example, said, "better safe than sorry."

Interviewees feared being sued by more well-resourced entities and worried for their reputations or positions. “There’s not enough money in publishing for people to take the risks, even if the threats are almost always empty,” said one scholar:

Scholars and even more their publishers are afraid of being sued even when what they want to do is clearly fair use because the lawsuit itself by a well-funded corporation or other entity would be so expensive that the publisher or scholar could go under by legal costs even if they won.

One museum professional, who is also a scholar, noting the institution’s rigid and extreme permissions policies, said, “I know that we are too risk-averse, because no one will probably sue us, but ...” Another museum professional said, “I don’t want to be the test case. I don’t want [my institution] to be sued.”

Even artists, the population in this group most likely to operate outside permissions culture when employing others’ copyrighted material, often describe their choices as risky. Some draw from popular culture to make paintings, time-based work, and sculptures that reference their world. Some choose to reframe, echo, or build upon the work of other artists. Some are experimenting with digital applications that generate content in new ways. While they often expressed the felt need to use without licensing, they also did so in ways that registered, variously, bravado, anxiety, and calculation. One said, “A lot of times artists play it fast and loose until they play it poorly.” “By design fair use is a grey area, and I knew I had a fair use defense but I decided to get permissions whenever possible,” explained an artist. Some cultivate an attitude of transgression; thus, artists engaged in social critique see their copyright choices not as an exercise of legal rights but as a transgressive dare to the larger society.

This fear of risk is in stark contrast with actual legal trouble experienced. Among 2828 survey respondents, only one person reported a legal challenge over copyright, which was quickly settled out of court. Respondents did, however, report plenty of irritation. When asked whether they had ever been challenged in use of third-party works, almost 10% of survey respondents said yes. Challenges mentioned included their own self-doubt, queries by colleagues, and established customs of the permissions culture. Thus, for some respondents, “challenge” often meant either self-censorship or the frustrations, delays, and distortions resulting from something other than a challenge from a rights holder.

For others, it included hostile contact by estates or other rights holders, such as museums or image brokers. Rarely did individual respondents report counter-challenging the rights holders, although some institutional representatives did. Some had been contacted by ARS or VAGA, after which they typically reported to have negotiated or paid the asking price. Scholars had received complaints about use of images in their articles from rights holders who had searched databases such as JSTOR. Others had received e-mails from museums and had negotiated image licensing terms. Graduate students had been unable to upload dissertations with all relevant illustrations to ProQuest.

For those who had faced challenges online, the most common problem was automatically generated online takedown or Content ID notices (two kinds of removals on YouTube). Almost universally, the respondents had acquiesced to the takedown or Content ID match, rather than even trying to claim fair use with a counter-takedown, as YouTube permits—albeit with imperfect results.

Endemic concern about legal risk is thus radically out of step with any experience of direct challenge, most of which appears to have been sent by bots or rights holders with a default position of demanding permissions in all cases. The lived experience of legal action or anything close to it appears to be vanishingly small. By contrast, the belief that copyright is fraught with threatening situations appears pervasive. The fear that rights holders will complain, however, appears more common and highly effective in the absence of any language to defend one's choice not to license. Most common is internal censorship and gatekeeping within the production process.

Chilling effects

The creative consequences of a fearful approach to fair use are starkly evident in survey data. Fully a third of survey respondents (34%) report (Q13) avoiding or abandoning a project due to actual or perceived inability to obtain permission to use third-party works. The most likely professionals to say that they could not execute their work as a result of copyright problems were editors (57%), of whom a majority avoided or abandoned a project for copyright reasons. Of scholars, 39% have avoided or abandoned work. In all, 35% of museum professionals have done so too. Although artists surveyed are least likely among the visual arts communities of practice to use copyrighted material or to seek permission if they do, fully a fifth (21%) of those surveyed testified to abandoning or avoiding a project for copyright reasons.

These numbers, while a sobering statement about mission not met, however, only tell us that something was lost. In asserting a chilling effect on creativity from copyright confusion, it is important to know what kind of creative work is actually at risk. Recall that until the recent case studies of creative communities, analysis of copyright problems of communities, as discussed, had only generated anecdotes and hypotheses. The ensuing discussion specifies, for visual arts professionals, what is lacking, changed, or foregone. It is universally work core to the mission of each subfield.

Subjects are, of course, much more likely to report work abandoned—a moment in their personal history in which something was actually attempted and frustrated—than work avoided. The latter is sometimes simply avoided reflexively, without even a conscious thought process. Following is a summary of the kinds of work identified as abandoned or changed. The kind of creative work affected is specific to each professional subgroup.

Art scholarship, publishing, and teaching. Art scholarship suffers delays and costs because of a widespread belief that permission is required for all illustrations, although some editors at academic presses said this was not their practice. “[Default permissions-getting] slows research and publication down,” one scholar noted. Another scholar said that copyright questions overshadowed the work process as a whole: “In my own writing, I’m worrying all the time.” Individual scholars pay rights holders hundreds, thousands, and even tens of thousands of dollars to publish a small-print-run monograph. Period surveys often prove to be prohibitively expensive, with costs of US\$20,000 and beyond for permissions, but single-artist monographs can be just as high. One editor had received an estimate from a rights agency for images to illustrate a major 20th-century survey, requiring between 300 and 400 reproductions. The cost per image was quoted at US\$375 (for permissions and a

high-resolution image file). Even assuming a discount could be negotiated, and assuming that some images could be obtained at no cost from galleries, the permissions cost for such a book easily could approach US\$100,000. Today, the editor noted, when a trade art book's typical print run rarely exceeds 4000–5000 books, trade sales could support only a fraction of that amount, perhaps US\$20,000 or less.

Even where museum policies favor open access use of images, information about the specific application of those policies can be hard to get. Getting permissions adds months and even years to production time, accounting in one scholar's estimate for a third of the research time. This delay threatens academic careers, scholars said. "In tenure decisions, time from degree to publication is very important," said a senior scholar.

Topics are chosen, avoided, or changed to accommodate permissions. Professors steer graduate students toward earlier centuries where public domain work is available. One said, "You have to warn them: 'Is your research topic going to be too expensive to publish adequately?'" Monographs and case studies are chosen over historical overviews and comparisons. Exhibition catalogs exclude relevant images. Art journals publish articles with blank spaces where reproductions should be. Articles are not published and catalog copy altered because the artist or artist's estate does not agree with the scholar's perspective and so will not authorize reproductions. One book was published with last minute revisions and deletions of all images because of a dispute with an estate. Rights holders impose aesthetic restrictions that reflect an artist's importance within the argument, for example, reproductions at a certain size or exclusive to a page. Scholars sometimes substitute their own drawings for reproductions of work they discuss or use less appropriate—but more obtainable—images. Student theses are archived digitally without relevant, and sometimes crucial, images.

"I think of copyright as a cudgel, and I have been repeatedly forestalled and censored because I have not been able to obtain copyright permission," said one art scholar whose work was not approved by the artist's estate and therefore not published. "For those of us who work against the grain of market-driven arts economy, their one recourse for controlling us is copyright." Another said:

In many cases I have encountered artists' estates and sometimes artists who refuse rights to publish (even when clearly fair use) unless they like the interpretation in the text. This is censorship and very deleterious to scholarship and a free public discourse on images.

An author argued, "The academy is a place of contestation. Unless you can make a case publicly and have other scholars engage it, the academy as a structure isn't working. These copyright situations keep us from doing our work." One editor called the consequences of the permissions culture "criminal," and another said, "You lose academic freedom because of copyright problems."

Teaching is also affected. Professors sometimes cannot share or even use private collections in an online teaching environment, cannot get access to images from current artwork, avoid collaboration outside face-to-face environments, and avoid creating appropriate digital curriculum.

Digital-native scholarship faces uncertain timetables and budgets. An online multimedia project, for instance, was delayed 18 months so that popular music referenced in some

of the work could be cleared. Both institutions and scholars hesitate to take on digital projects. A scholar asked about doing digital exhibitions said, “I don’t want that headache.”

Access to digital culture and affordances is also crippled by permissions culture. For instance, in one case, entire articles in a journal had to be rewritten because they referenced popular commercial culture, and the relevant media companies did not grant permission for digital distribution. Digitization of back issues of a journal proceeded with blank spots where images should be, because of permissions problems. In another case, a press is undertaking the arduous process of re-clearing all images for the 30-year run of a journal in order to post previous issues online. An editor in digital publishing said, “I self-censor all the time because I don’t want to deal with the headache of getting the image out there.”

Museums and archives. Both content and cost are affected. Because of rights problems, “we just avoid certain artists,” noted one curator. Another noted that there are fewer group shows than previously because of licensing problems. “Depending on how much time or money I have, I choose images that are different than I would in a perfect world—both because of money or refusal of permission,” noted a curator. One institution (to the curator’s exasperation) sought clearance for all the original materials in collages that were composed of popular culture objects, resulting in extensive staff effort and delay. After an artist refused to lend to a show organized by a curator with whose perspective the artist disagreed, the curator borrowed examples of the artist’s work from other museums. But the artist also refused to allow any images of his work to appear in the accompanying catalog.

Museums have chosen not to publish certain catalogs at all because of rights problems. For example, an exhibition catalog involving appropriation practice was simply canceled. Educational programs are limited; the potential for museum-based online education is extensive but goes partly unrealized because institutions comply with exacting policies on permissions, even for this purpose. Thus, one museum’s project to create an extended visual portrayal of the history of art was severely compromised with respect to work dating after 1922, solely for copyright reasons. Similarly, museums miss out on the opportunity to capitalize on the potential for digital distribution of collection and exhibition-related educational materials to schools.

Digital innovations are delayed or changed. Many, for instance, would like to create images online of the exhibitions. One museum professional explained, “ARS and the estates said, ‘We can identify the works in these exhibition views and you need to pay rights.’ We were outraged.” But they acceded. One museum professional described the development of an app that repackages information already available on the museum’s website, explaining that it is being challenged by ARS on copyright grounds. Smaller institutions have scrapped plans for online collections. One interviewee described a project to showcase multimedia-based art digitally that is trapped in beta because of copyright problems, and another bemoaned the privileging of “the select few” who can make it to the physical museum.

In institutional research archives, vast swathes of material have been digitized, but institutions are stymied in their efforts to make them available; what is available is overwhelmingly skewed to the public domain. In one case of a stalled database that had been designed to make scholarship more accessible, said a museum professional, “our philanthropic mission is being prevented.” An experienced archivist and scholar said, “We are

misleading the world; we are not giving the complete picture of the resources. This is a censored view of the material.”

Artists. Despite their generally more relaxed approach to permissions, artists often spoke of projects stalled or avoided. In one case, an artist producing a digital collage wanted to excerpt and recontextualize work from a book but felt obliged to obtain permission from its publisher. Once denied, the artist then sought inferior substitutes. Another artist chose to incorporate quotations from a public domain translation of a classic text into a multimedia artwork, rather than the preferred contemporary version. Some artists said they slant their choices toward public domain or copyright-light options when they want to incorporate a reference to the cultural environment. “I took out a copyrighted work in the final version, and replaced it with another work that wasn’t nearly as relevant or good, frankly, for copyright reasons,” said one artist. This problem is ever more acute with digital art practices, which sometimes involve pulling feeds of information, creating juxtapositions based on algorithms, and using the perfection of the digital copy as a statement. Artists also do not take advantage of the affordances of digital for circulation because of copyright concerns. Posting their work online created anxiety for many artists, sometimes resulting in a decision not to display. Artists in all media were both curious and wary about digital opportunities. One said, “If you had more confidence in what one’s [use] rights are, you wouldn’t have to cower so much when confronted with these opportunities.”

In open-ended survey answers, several artists described abandoning multimedia works incorporating music because permission could not be obtained. Some found that completed work incorporating copyright material could not be distributed or even shown. A respondent completed a film composed solely of photojournalistic images; the costs for permissions were prohibitively high, and even so, only available for limited periods, prohibiting distribution. Another artist made a set of images incorporating enlarged, re-photographed images of published dust jacket photographs of authors and took the work off a website out of copyright concern.

Work avoided. A more challenging area of research into copyright’s effect on creative practice is work avoided. Sometimes this is work people would like to do but cannot. More importantly, it is sometimes work that they do not consider. The subjects may not even know they are foreclosing opportunity.

There were hints of this problem in both survey and interviews. For instance, of the fifth of artists who said they had abandoned or avoided a project, most of them (71%) were not regular users of others’ copyrighted material such as appropriation or collage artists. Perhaps they had occasionally steered away from an unlicensed use. Or this figure of 71% might suggest that some artists are choosing to avoid entire kinds of creative work in the digital realm because it might entangle them in decisions they fear. Follow-up survey questions and interviews reinforced the latter interpretation.

Interviews and open-ended answers offered further. A curator told of having offhandedly raised an idea for a path-breaking Modernism exhibition while standing in a colleague’s doorway and then, mid-sentence, abandoning it for copyright concerns. A survey respondent wrote, “I will write only about objects for which images are freely available or I won’t illustrate what I write.” A studio art professor said:

My students say, “I was going to do this with an image, but that would be infringement.” Despite these students being well versed in appropriation art history like Warhol, they have also heard enough about lawsuits that they censor themselves.

An artist described avoiding digital multimedia because the artist “found the specter of corporate blocks, mostly in the music industry, very intimidating.”

When subjects expressed frustration, they also sometimes suggested significant absences. A scholar noted, “Aggressive rights holders prevent the existence of field specialists, or make the existence of such specialists very tenuous, as that scholar’s entire existence is tied to the appeasement of that estate.” A museum professional, who is also a scholar, said, “Your [perceived] copyright problems interfere with your scholarly thinking, and in my view that is the worst part of this whole thing.”

This necessarily fragmentary and allusive evidence suggests pervasive self-censorship at a time of rapid expansion of possibilities.

Conclusion

Visual arts professionals are variously unaware of, confused, or misinformed about their copyright options to use unlicensed materials. Confusion is compounded by behavior of gatekeepers and intimidation by rights holders, in a world of intimate and long-lasting relationships. Results include exaggerated risk, failure to execute a wide variety of work in the way they regard as best, censorship, and self-censorship. Creative use of digital technologies is particularly affected.

How will visual arts practice change with greater clarity around the risks of employing fair use? In 2015, the CAA released a code of best practices in fair use for visual arts professionals on the model of codes that have enabled more mission-centric practice in other fields. Will visual arts professionals more vigorously explore how the visual arts can take advantage of digital affordances to achieve professional goals? They certainly will continue to have the network of personal relationships that currently encourage a permissions culture, but they will also have information that allows them to make well-grounded decisions, where possible. Future surveys can use this study as a baseline to assess the value of field-wide consensus on creative action.

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1. Nomenclature favored by the national association serving the visual arts field, The College Art Association, a US organization.

References

- Association of Art Museum Directors (a) (2011) AAMD Policy on the use of “thumbnail” digital images in museum online initiatives. Available at: <https://aamd.org/sites/default/files/document/Thumbnail%20Images%20Policy.pdf> (accessed 10 July 2014).
- Abdenour J (2014) Documenting fair use: has the statement of best practices loosened the fair use reins for documentary filmmakers? *Communication Law and Policy* 19(3): 367–398.
- Adamson G (2012) Art and copyright. *Art in America* 100(6): 77–79.
- Ad Hoc Committee on Fair Use and Academic Freedom (2010) *Clipping Our Own Wings*. Washington, DC: International Communication Association.
- Adler P, Butler B, Aufderheide P and Jaszi P (2010) *Fair Use Challenges in Academic and Research Libraries*. Washington, DC: Center for Media and Social Impact.
- Aufderheide P (2007) How documentary filmmakers overcame their fear of quoting and learned to employ fair use: a tale of scholarship in action. *International Journal of Communication* 1(1): 26–36.
- Aufderheide P and Jaszi P (2004) *Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers*. Washington, DC: Center for Social Media, American University.
- Aufderheide P and Jaszi P (2007) *The Good, the Bad and the Confusing: User-Generated Video Creators on Copyright*. Washington, DC: Center for Social Media, School of Communication, American University.
- Aufderheide P and Jaszi P (2011) *Reclaiming Fair Use: How to Put Balance Back in Copyright*. Chicago, IL: The University of Chicago Press.
- Bielstein SM (2006) *Permissions, a Survival Guide: Blunt Talk about Art as Intellectual Property*. Chicago, IL: The University of Chicago Press.
- Bollier D (2001) *Public Assets, Private Profits: Reclaiming the American Commons in an Age of Market Enclosure*. Washington, DC: New America Foundation.
- Bollier D (2002) *Silent Theft: The Private Plunder of Our Common Wealth*. New York: Routledge.
- Boyle J (1996) *Shamans, Software, and Spleens: Law and the Construction of the Information Society*. Cambridge, MA: Harvard University Press.
- Burkart P (2014) *Pirate Politics: New Information Policy Contests*. Cambridge, MA: The MIT Press.
- Buskirk M (2012) *Creative Enterprise: Contemporary Art between Museum and Marketplace*. New York: Continuum.
- California Lawyers for the Arts (CLA) (2012) *Copyright Workshop for Artists of All Disciplines*. Available at: <http://www.calawyersforthearts.org/calendar?eventId=441158&EventViewMode=EventDetails> (accessed 10 April 2014).
- DiCola P and McLeod K (2011) *Creative License: The Law and Culture of Digital Sampling*. Durham, NC: Duke University Press.
- Edwards B (2013) The copyright rule we need to repeal if we want to preserve our cultural heritage. *Atlantic*. Available at: <http://www.theatlantic.com/technology/print/2013/03/the-copyright->

- rule-we-need-to-repeal-if-we-want-to-preserve-our-cultural-heritage/274049/ (accessed 10 April 2014).
- Falzone A and Urban J (2010) Demystifying fair use: the gift of the Center for Social Media Statements of best practices. *Journal of the Copyright Society of the USA* 57(3): 337–350.
- Flynn S and Jaszi P (2009) *Untold Stories in South Africa: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers*. Washington, DC: Program on Intellectual Property and the Public Interest, Washington College of Law, American University.
- Gillespie T (2007) *Wired Shut: Copyright and the Shape of Digital Culture*. Cambridge, MA and London: The MIT Press.
- Gray J, Sandvoss C and Harrington CL (2007) *Fandom: Identities and Communities in a Mediated World*. New York: New York University Press.
- Illegal Art (2014) Freedom of expression in the corporate age, 1998–2014. Available at: <http://www.illegal-art.net> (accessed 24 October 2014).
- Jenkins H (2006) *Convergence Culture: Where Old and New Media Collide*. New York: New York University Press.
- Jenkins H, Ford S and Green J (2013) *Spreadable Media: Creating Value and Meaning in a Networked Culture* (Postmillennial Pop). New York and London: New York University Press.
- Kaplan B (2005) *An Unhurried View of Copyright, Republished (and with Contributions from Friends)*. Newark, NJ: LexisNexis Matthew Bender.
- Katz A (2013) Fair use 2.0: the rebirth of fair dealing in Canada. In: Geist MA (ed.) *The Copyright Pentology: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law*. Ottawa, ON, Canada: Ottawa University Press, pp. 93–156.
- Kelly K (2013) Images of works of art in museum collections: the experience of open access. Available at: http://msc.mellon.org/researchreports/Open%20Access%20Report%2004%2025%2013-Final.pdf/at_download/file (accessed 10 April 2014).
- Larsen LO and Nærland TU (2010) Documentary in a culture of clearance: a study of knowledge of and attitudes toward copyright and fair use among Norwegian documentary makers. *Popular Communication* 8(1): 46–60.
- Lessig L (2001) *The Faith of the Commons in a Connected World*. New York: Random House.
- Leval PN (1990) Toward a fair use standard. *Harvard Law Review* 103: 1105–1136.
- McGill L (2006) The State of scholarly publishing in the history of art and architecture. Available at: <http://cnx.org/content/col10377/latest/> (accessed 10 April 2014).
- McLeod K (2005) *Freedom of Expression: Overzealous Copyright Bozos and Other Enemies of Creativity*. 1st ed. New York; London; Toronto, ON, Canada; Sydney, NSW, Australia; Auckland, New Zealand: Doubleday.
- Madison MJ (2004) A pattern-oriented approach to fair use. *William and Mary Law Review* 45: 1525.
- Mazzone J (2011) *Copyfraud and Other Abuses of Intellectual Property Law*. Stanford, CA: Stanford Law Books.
- Netanel N (2008) *Copyright's Paradox*. Oxford and New York: Oxford University Press.
- Netanel N (2013) First Amendment constraints on copyright after *Golan v. Holder*. *UCLA Law Review* 60: 1082–1127.
- Patry W (2009) *Moral Panics and the Copyright Wars*. New York: Oxford University Press.
- Patterson LR and Lindberg SW (1991) *The Nature of Copyright: A Law of Users' Rights*. Athens, GA: University of Georgia Press.
- Rubin P (2011) Defining the crisis in art history. *Visual Resources* 27(4): 308–314.
- Shincovich A (2004) Copyright issues and the creation of a digital resource: artists' Books Collection at the Frick Fine Arts Library, University of Pittsburgh. *Art Documentation: Bulletin of the Art Libraries Society of North America* 23(2): 8–13.

- Sinaiko E (2013) *Gloss**. New York: Marquand Books.
- Sinnreich A (2010) *Mashed up: Music, Technology, and the Rise of Configurable Culture*. Amherst, MA: University of Massachusetts Press.
- Sinnreich A (2013) *The Piracy Crusade: How the Music Industry's War on Sharing Destroys Markets and Erodes Civil Liberties*. Amherst, MA: University of Massachusetts Press.
- Sundt CL (1999) Testing the limits: the CONFU digital images and multimedia guidelines and their consequences for libraries and educators. *Journal of American Society for Information Science* 50(14): 1328–1336.
- Tanner S (2004) *Reproduction Charging Models & Rights Policy for Digital Images in American Art Museums: A Mellon Foundation Study*. London: KDCS Digital Consultancy. Available at: http://www.kdcs.kcl.ac.uk/fileadmin/documents/USMuseum_SimonTanner.pdf
- Tushnet R (2010) Hybrid vigor: mashups, cyborgs, and other necessary monsters. *I/S: A Journal of Law and Policy for the Information Society* 6: 1–12.
- Vaidhyathan S (2001) *Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity*. New York: New York University Press.
- Wagner G and Hall AT (2011) Visual Resources Association: statement on the fair use of images for teaching, research and study. *VRA Bulletin* 38(1): 15–25.
- Westermann M and Ballon H (2006) *Art History and Its Publications in the Electronic Age*. Houston, TX: Rice University Press.
- Whalen M (2009) What's wrong with this picture? An examination of art historians' attitudes about electronic publishing opportunities and the consequences of their continuing love affair with print. *Art Documentation: Bulletin of the Art Libraries Society of North America* 28(2): 13–22.
- Zorich D (2012) *Transitioning to a Digital World: Art History, Its Research Centers and Digital Scholarship*. KPRESS. Available at: <http://www.kressfoundation.org/news/Article.aspx?id=35338> (accessed 10 April 2014).

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