

ASSOCIATION OF ART MUSEUM DIRECTORS

**GUIDELINES FOR THE USE OF
COPYRIGHTED MATERIALS AND WORKS OF ART BY ART MUSEUMS**

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ASSOCIATION OF ART MUSEUM DIRECTORS

GUIDELINES FOR THE USE OF COPYRIGHTED MATERIALS AND WORKS OF ART BY ART MUSEUMS

I. Introduction.

The possession, ownership and use of copyrighted materials and works of art¹ in art museums² involves virtually all aspects of museum operations, from the display of works of art to the dissemination of archival material³, from the creation of exhibition catalogues to the use of online collections. In all of these aspects and others, museums must be mindful of the rights of the creators of, and holders of copyright in, materials and works of art. At the same time, in order to accomplish their mission of acquiring, preserving, studying and interpreting works of art that are held for the benefit of the public, art museums rely on the ability and the right to use copyrighted materials and works of art in appropriate circumstances and under conditions that are well recognized, both legally and ethically. Museums not only use copyrighted materials and works of art, they also create such materials and even commission such works. They should - and the Association of Art Museum Directors (“AAMD”) believes do - understand and expect their copyrighted materials and works of art to be subject to the same fair use by third parties.

For many years, museums operated within a reasonably well-recognized system of legal principles, ethical guidelines and norms that guided them in their use of copyrighted materials

¹ For purposes of these Guidelines, “copyrighted materials” and “materials” mean printed, manuscript or digital material such as books, articles, artists’ notes or archival material that are subject to copyright in the United States. “Works” and “works of art” mean works of the visual arts in any media—including paintings, works on paper, video, digital, sculpture and other three-dimensional media—that are subject to copyright in the United States. These Guidelines do not address materials and works of art that are not subject to copyright in the United States, commonly known as public domain works.

² References in these Guidelines to “museums,” “art museums” or “member museums” are generally intended to refer to museums whose directors are members of the Association of Art Museum Directors (the “AAMD”). While these Guidelines are written for members of the AAMD, if museums whose directors are not members find these Guidelines to be useful, they are encouraged to adopt them.

³ While each type of copyrighted materials may have specific issues under copyright law, archives can be particularly complicated and while generally included in the definition, present special issues to be discussed in a forthcoming Section of these Guidelines.

and works of art. The explosion of electronic media, the application of digital technology, the dissemination of information through the internet, and a more nuanced understanding of fair use, informed by court decisions, have all changed and expanded the ways in which museums think about their collections and their activities. The art world is no stranger to the dynamic forces of digital information sharing and the new ways organizations communicate with the general public, scholars, researchers and others. These phenomena have evolved rapidly in just the last decade and are likely to continue at the same pace, if not an accelerated pace, in the future.

With an ever-evolving technological world and legal landscape, art museums need and want guidance with respect to how they can fulfill their missions while respecting the rights of authors, artists and copyright holders. Any such guidance should acknowledge the right to use copyrighted materials and works of art without undue restriction or limitation, so long as such uses are legally and ethically sound.

The AAMD believes that there is a need to inform the field about appropriate and normative practices in the use of copyrighted materials and works of art and the application of fair use in the context of various museum activities.⁴ Because the same general principles of fair use apply regardless of the nature of the museum activity, providing the guiding legal principles and precedents that dictate the fair use analysis and applying those principles to a series of examples specific to art museums makes sense. While these Guidelines are designed to inform and assist member museums generally, each museum should develop its own written policy and procedures relating to the use of copyrighted materials and works of art.

These Guidelines are designed to guide and educate the members of the AAMD, the museums of which they are directors and other museums that choose to follow them. They do

⁴ The AAMD commends the College Art Association for its work in creating the *Code of Best Practices in Fair Use for the Visual Arts* which has substantially advanced the knowledge of and discussion about fair use and informed these Guidelines.

not cover every aspect of fair use or copyright and, except where specifically discussed, they do not address other legal considerations impacting the use of copyrighted materials or works of art such as trademarks and rights of privacy and publicity. Furthermore, in making a decision about how and when to use copyrighted materials and works of art, member museums must be sensitive not only to the laws governing activities in their home jurisdictions, but also, especially with the proliferation of internet activities, other jurisdictions in which they may be found to operate. These Guidelines assume the application of United States copyright law, which may differ in significant ways from laws in other jurisdictions. The AAMD cannot provide guidance for every situation and every jurisdiction. Museums should seek legal advice as necessary.

II. Fair Use.

The AAMD reaffirms the right of art museums in the United States to make fair use of copyrighted materials and works of art in the fulfillment of their missions. This right is critical to the accomplishment of activities that are performed by art museums for the public benefit. In fact, the right to use copyrighted materials and works of art fairly is one that inures to the benefit of the public that is educated and informed by art museums using such materials and such works.⁵

The right of fair use is deeply embedded in American law and is codified in Section 107 of the Copyright Act of 1976 (the “Copyright Act”). Congress has provided a set of four factors to be considered when evaluating whether a use of copyrighted material or a work of art is “fair.” In the introduction to the four factors, Section 107 provides that “fair use of a copyrighted work...for purposes such as criticism, comment...teaching, scholarship, or research, is not an

⁵ The Copyright Act of 1976 (§108(f)(4)) refers to “the right of fair use as provided by section 107.” Fair use has been characterized in many ways, *e.g.*, a privilege, an affirmative defense, a noninfringing use. The AAMD views fair use by museums in support of their missions as a right.

infringement of copyright.” Because the analysis is one of weighing factors, bright lines in the area of fair use are rare and judgment and the evaluation of the use of the material are critical to arriving at an appropriate decision. The four factors to be considered are:

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

These factors are discussed in greater detail in Fair Use and the Four Factors, Annex A to these Guidelines (“Annex A”). Courts have over time enunciated considerations for each factor and the importance of each factor in a fair use analysis. For example, the first and fourth factors are considered extremely important in a fair use analysis, the third factor less so and the second factor interrelated in many ways with the first factor. As a result, a museum must consider the use of copyrighted material or a work of art in the context of the factors before determining that a use is protected.

The fair use analysis does not require that every factor be found in a museum’s favor to support a museum’s use of copyrighted materials or works of art. In fact, many cases still find fair use even when at least one of the factors weighs in favor of the copyright holder. In those cases, fair use is nevertheless upheld because the strength of the other factors (in particular, the first factor) in favor of the user outweigh those found in favor of the copyright holder.

The more that a museum evaluates, informs and educates a particular public, audience or recipient about copyrighted material or a work of art, the more extensive (in the extent and amount of copyrighted material or in the size and quality of reproduction of a work of art) the

fair use can be. As one court⁶ noted, “The more transformative the new work, the less important the other factors, including commercialism, become.” Or, as another court said, “In some instances, it is readily apparent that [the defendant’s] image display enhances the reader’s understanding of the biographical text.”⁷ On the other hand, mere retransmission of a copyrighted image in a different medium is not likely to be considered transformative. As one court explained, “. . . where the use is for the same intrinsic purpose as [the copyright holder’s], such use seriously weakens a claimed fair use.”⁸ Nor is fair use designed simply to excuse users from seeking permission when other non-infringing material is available and equally suited to the user’s needs. As another court recently noted, “The fair-use privilege under § 107 is not designed to protect lazy appropriators. Its goal instead is to facilitate a class of uses that would not be possible if users always had to negotiate with copyright proprietors. (Many copyright owners would block all parodies, for example, and the administrative costs of finding and obtaining consent from copyright holders would frustrate many academic uses.)”⁹

While there are cases that have analyzed the fair use doctrine in the context of copyrighted materials or works of art, no cases as of the date of these Guidelines have involved the use by a museum. As a result, there is limited specific guidance on this issue, but there are precedents that inform a museum on how to evaluate the use of copyrighted materials and works of art in the context of fair use. Some of those precedents are discussed in Annex A.

Any fair use analysis is fact and context-specific, and requires a careful balancing of the four factors in the context of a specific use. When making such a decision, museums should contemporaneously document their analysis and their decision to use copyrighted materials or

⁶ *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003) (“*Kelly*”).

⁷ See *Bill Graham Archives v. Dorling Kindersley Ltd.* 448 F.3d 605 (2nd Cir. 2006) (“*Graham*”).

⁸ *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110 (9th Cir. 2000) (“*Worldwide*”).

⁹ *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756 (7th Cir. 2014).

works of art. The documentation need not be extensive, even a simple summary of the use of the material or work and why the museum believes the use is fair use will provide important support for the museum's position if challenged.

III. Special Considerations.

Set forth below are some special considerations that are not strictly part of the legal test for fair use, but are related. They will not apply in all instances, but should form part of the analysis when museums are using copyrighted materials and works of art.

A. Attribution.

While not a component of the fair use analysis, museums should, whenever possible, attribute copyrighted materials or works of art when they are used. Normally this means attributing the material or work to the author(s) or artist. If there is a separate copyright holder or agent of the copyright holder known to the museum (or the holder of copyright, if any, of an image of an underlying work of art), the museum should also consider acknowledging that holder in a fashion consistent with the medium and usage within the field or the custom and practice applicable to the type of use. While attributions directly accompanying the use of copyrighted materials and works of art are encouraged, doing so may not always be feasible given the nature of the use (*e.g.*, Twitter's character limitation), the material being used or the various mediums of use (print versus digital publications, for example). There may also be times when attribution is not appropriate,¹⁰ but the analysis should begin with a presumption that attribution is the norm.

¹⁰ In certain circumstances under the Visual Artists Rights Act ("VARA"), artists (and only artists regardless of whether or not they are the copyright holder) have the right not to have a work of art attributed to them (see the Copyright Act of 1976 (§106(a))). This right is limited and generally only applies if there has been a distortion, mutilation or other modification of the work which would be prejudicial to the artist's honor or reputation.

B. Partial Images.

As a courtesy to artists, museums generally should use the entire image of a work of art, without cropping or other diminution. If less than the entire work is reproduced or modifications to the image of the work are made, they should be clearly identified as such (*i.e.*, detail, alteration, etc.) and if possible, a complete, unaltered reproduction of the work of art should appear in the same publication for reference purposes in such size and resolution as would independently meet the fair use factors. In some circumstances, the use of a detail may be more strongly supported as fair use than the entire work, if the transformative purpose of the use is best served by only reproducing a detail of the copyrighted work, under the first¹¹ and third¹² factors. In such a situation, only the detail would be used.

C. Documentation of Considerations.

When a museum makes a determination to use copyrighted materials or works of art based on fair use, the museum should consider documenting its reasons for relying on fair use when the decision is made. A writing that is substantially contemporaneous with the decision can demonstrate the museum's good faith in making a decision, even if the decision is ultimately found not to be supported by fair use.

D. Website Terms of Use.

A museum's website often uses copyrighted materials and works of art in a number of different ways, including online collections, guides to the collection, previews of exhibitions, blog posts, scholarly articles, webcasts and many others. A properly drafted "terms of use" or "terms and conditions" can serve a number of purposes, including placing the users of the website on notice of important restrictions often applicable to all (not just copyrighted) materials

¹¹ The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.

¹² The amount and substantiality of the portion used in relation to the copyrighted work as a whole.

and works of art on the website. An additional level of protection, to evidence acceptance of conditions of access and use, would be a click through agreement.

Common terms of use provide that:

- certain materials and works of art on the website are protected by copyright and may also be subject to other third party rights, including trademarks and the rights of privacy and publicity;
- downloading for commercial purposes is prohibited;¹³
- in accordance with scholarly practice, users of materials or works of art (whether copyrighted or not) in publications, etc., should cite the author/artist and the source;
- the use of trademarks is limited or prohibited; and
- using copyrighted materials or works of art for fair use purposes is permitted - sometimes this is stated in terms of allowing uses that are non-commercial, scholarly, educational or research-related.

Terms of use or terms and conditions can also provide protection to the museum, including:

- disclaiming any warranties about the museum's rights in the copyrighted materials and works of art;
- limiting liability for downstream uses by users of the museum's website of materials or works of art;
- providing choice of law and venue provisions for disputes between users of the museum's website and the museum;
- requiring indemnities to the museum from users of the museum's website for the user's unauthorized or infringing uses; and
- providing a mechanism for making a copyright complaint (notice and take down procedures), including procedures available under the Digital Millennium Copyright Act of 1998.

¹³ Some museums have not only prohibited downloading or prohibited downloading for commercial purposes in their terms of use, but have sought actually to disable downloading. Doing so does not appear to be legally required, but may be an additional proactive step that, as a policy matter, museums may consider.

Terms of use or terms and conditions should also be carefully reviewed in the context of the museum's policies with respect to the use of museum proprietary or protected information, use of content not subject to copyright, consequences of posting by users, and users' rights of privacy. Properly crafted terms of use or terms and conditions also demonstrate the museum's responsible approach to fair use and protection of copyrighted materials and works of art.

E. Contract Limitations.

Museums often obtain copyrighted materials and works of art, including images, from third-party sources through license agreements that impose restrictions on use. Museums also acquire works of art or images of works of art from the artist or a gallery representing the artist or copyrighted materials from an author under contracts (*e.g.*, licenses) that contain use restrictions. These restrictions can limit a museum's use of copyrighted materials or works of art regardless of whether or not a proposed use qualifies as fair use. Normally, fair use is not a defense to, and does not excuse a museum from abiding by, an enforceable contractual limitation. For this reason, museums should consider inserting contract provisions that expressly preserve fair use rights permitted by the Copyright Act without having to seek permission from the copyright holder.

F. Courtesy Clearance.

Notwithstanding the right to fair use, museums may voluntarily elect to seek copyright permission even when they would not legally be required to do so under a reasonable reading of fair use. Seeking such permission should not, as a matter of law,¹⁴ custom or practice, be construed as limiting a museum's right to make fair use of copyrighted materials or works of art, including the materials or works for which permission has been sought. Maintaining time-honored relationships with authors, artists, and other creators and copyright holders is a

¹⁴ See *Graham*.

vital aspect of art museum life. Museums should not be expected to choose between exercising their fair use rights and maintaining such relationships.

G. Practical Considerations.

An additional practical consideration is the copyright holder's approach to protecting and enforcing its copyrights. Copyright holders that routinely challenge even fair uses and aggressively pursue licenses and fees can present a cost and risk for the museum that should be taken into account when deciding whether or not (or how) to publish copyrighted material or a work of art.

IV. Specific Examples.

Set forth below are examples that address various museum activities and provide guidance in the fair use analysis. The AAMD cautions that each specific use needs to be evaluated on its own merits and the examples below are simply to provide a framework for that analysis. The AAMD intends to supplement and add to the examples set forth below, as appropriate, and may revise existing examples as more guidance becomes available through actual experience, the courts and/or Congress.

Because there are very few bright lines, a fair use analysis by definition involves a potential for some risk, and each museum should evaluate for itself where on the risk continuum a specific activity falls and whether such use is, therefore, one that the museum finds appropriate under the circumstances. As indicated above, the results of this analysis should be documented and maintained in the museum's records. Furthermore, any risk should be understood in the context of the remedies available to a copyright holder. Some users believe that the only risk is having to discontinue the use or pay a license fee. This is not always the case, as there are considerable costs incurred in terms of staff time, resources, legal fees and adverse publicity if litigation results or even if it is merely threatened. If successful litigation is brought by the

copyright holder, monetary damages, injunctive relief and even attorneys' fees are possible consequences.

A. Online Collections.

This Section¹⁵ provides guidance in the museum's use of online collections. Online collections can serve a variety of purposes, among them providing the public with a basic index of works of art in a museum's collection and serving as a valuable research tool for scholars. The amount of information contained in such online collections can range from simple tombstone information (*i.e.*, artist name, title of the work, date of the work) included for the basic purpose of identifying the work of art to rich contextual information about the work of art including, for example, its provenance, publication history, medium/materials, technique and historical significance. The use of collection images in a searchable online collection of images constitutes a transformative use and squarely falls within fair use according to such decisions as *Kelly*, which held that "thumbnail" images were fair use within the context of a commercial search engine for online images.¹⁶ As one court explained in finding a search engine in and of itself transformative, a search engine "transforms the image into a pointer directing a user to a source of information."¹⁷ In a searchable museum online collection that only contains minimal tombstone information and that serves almost exclusively as an index, relatively small images are more likely to be considered to qualify as transformative use. The rulings in *Kelly* and *Perfect 10* support at least "thumbnail"-sized images as fair use in the context of a museum's online collection, but larger images may also constitute fair use because of the context of the online collection within and connected to other educational aspects of a museum's website, as well as the non-commercial nature of a museum's online collection.

¹⁵ This Section was issued June 1, 2016.

¹⁶ See *Kelly*.

¹⁷ *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007) ("Perfect 10").

As the nature of the information included in an online collection becomes more robust and contextual, the use also becomes more transformative, involving other, core fair uses directly relating to the image such as commentary and criticism, thereby justifying a larger size and higher quality resolution necessary to illustrate the content in the accompanying text. As explained in *Graham*, when a work created for one purpose (*e.g.*, a concert poster) is used for a different purpose (*e.g.*, the illustrated history of the Grateful Dead in *Graham*), the doctrine of fair use permits reproduction of the poster image in a size much smaller than the original image (in *Graham*, approximately the size of a baseball card or 1/8 of a page in the book), but sufficient for the transformative use. Similarly, in the context of an online collection, when a work of art is used with contextual information such that the online collection can be used by the general public as a guide to the museum's collections as well as by scholars and researchers to facilitate research, analysis, and close-up examination, the additional transformative uses of the image provide an even stronger basis for fair use, and justify, under fair use principles, the use of larger and higher resolution images necessary to illustrate the contextual, critical and educational commentary accompanying the image.

As the amount of information in the online collection as to a work of art expands along a continuum from basic index information to detailed and substantive information equivalent to scholarly essays, the transformative purpose serves to justify reproducing the image at a larger size and higher resolution. Thus an online collection can be, and often is, a combination of formats and image sizes depending on the amount of information about each image. Some images may be accompanied by only tombstone information requiring a smaller and lower resolution image while others may be accompanied by more extensive information and, therefore, can be larger and higher resolution. Specifying one specific size and resolution is problematic because such prescriptions do not take into consideration the variety of factors that

comprise the fair use analysis. Nevertheless, museums must appreciate that there is a delicate balance between a fair use of an image in an online collection and reproductions that are so large and high quality as to interfere with the copyright holder's exclusive rights.

Under the fair use standard's third factor,¹⁸ the size/resolution of the image, or how much of the image to reproduce, should be related to the museum's intended transformative use. For example, if the museum's transformative purpose is to use the images as part of a searchable online collection, with minimal tombstone information, the AAMD recommends that the image size be sufficiently large to accommodate that purpose, but not larger than is required to accommodate such purpose.

Without suggesting that such a size would in any way constitute an upper limit for such a use, an image that on a standard, integrated, personal computer screen is not larger than one-quarter of the screen and not more than 560 x 843 pixels could be argued to be well within the test of a reasonable use in light of current technology, the digital platform being used and the purpose being served. Of course, larger and higher resolution images, as well as details and features such as zooming, can be fully justified in the context of uses that are more transformative. For example, scholarly publications, articles about conservation that encourage magnification of areas being conserved, and educational tools on the website to encourage comparative analysis of brush strokes or techniques, all could and should allow a museum to enhance the size and resolution of the image as well as to publish details or permit zooming.

While the one-quarter screen and 560 x 843 pixels dimensions should be well within accepted norms of fair use for online collections, the application of the law of fair use to digital

¹⁸ The amount and substantiality of the portion used in relation to the copyrighted work as a whole.

images as well as technology itself is constantly evolving.¹⁹ The AAMD encourages museums to review periodically, and reconsider as appropriate, their policies on the use of images of copyrighted works of art in online collections in light of what may be evolving normative sizes and resolutions.

B. Publications.

Publications are found in many different museum activities, but for this Section,²⁰ the discussion is confined to exhibition catalogues, scholarly articles, blogs, educational materials, collection handbooks and museum brochures, whether in print or digital format. This grouping is intended to separate the analysis with respect to these publications that are primarily, if not exclusively, scholarly in nature and fall within fair use from those publications that have a significant promotional or marketing aspect (those being dealt with in later sections of these Guidelines) and may fall outside fair use. The latter category may also include publications, such as highly illustrated, limited content, “coffee table” books produced for the commercial market that use artworks for the same intrinsic purpose as the original without transformation or sales and marketing materials produced in connection with auctions or other sales of works. The mere fact that a publication is sold does not necessarily make the use commercial or negate the fair use analysis, as discussed in Annex A under the First Factor. Rather, the publication’s sale is just one consideration that should be taken into consideration as part of the larger fair use analysis.

The courts have not provided significant direct guidance in connection with fair use of copyrighted materials or works of art in the context of museum publications. There are certainly

¹⁹ An example of this evolution is the AAMD’s *Policy on the Use of “Thumbnail” Digital Images in Museum Online Initiatives*, which many viewed as a “standard” but which, with evolutions in technology and a more precise understanding of fair use, is now obsolete and has been revoked by the AAMD.

²⁰ This Section was issued June 1, 2016.

cases that allow one to make an informed analysis of what should constitute fair use within this museum publication field, but cases dealing specifically with use by museums of copyrighted materials and works of art in museum publications, as of the date of this Section, have yet to be decided. *Graham*, which addresses the use of images in a publication that was found to be transformative, does provide some guidance for museum publications and certainly bolsters the argument that the use of a copyrighted image in a publication that provides explanation of and historical context for the copied work can constitute fair use even though, as was the case in *Graham*, the publication might not be classified as exclusively “scholarly” and was created for a commercial market. Conversely, courts have not yet issued opinions determining that a museum’s use of copyrighted materials or works of art in publications is not fair use. As a result, museums must consider the use of copyrighted materials and works of art within a broader analysis of fair use, evaluating the four factors as applied to each proposed publication on a continuum that once again starts with simply copying the material or the work for no intrinsic purpose other than reproducing the material or work of art without any, or at least any significant, transformation and ends with the kind of extensive, in-depth and contextual, scholarly analysis for which museums are well known; in particular, in exhibition catalogues and scholarly articles.

For additional guidance, the reader is referred to Article II, Fair Use, above, as the factors, analysis and specific guidance discussed in that Article are all applicable to the publications discussed in this Section. Furthermore, as appropriate, the special considerations set forth in Article III, Special Considerations, above, may also be topics to be addressed, both with respect to publications as a whole and to individual images and text.

The AAMD is mindful that publications that have traditionally been in print are rapidly moving to digitization and distribution through the internet, either as a complement to or as a

replacement for print publication. By eliminating distribution barriers, the internet creates unprecedented opportunities for museums to disseminate content, but it has also raised new challenges, many of which were discussed above in Article IV, Section A, Online Collections, with respect to online collections, *e.g.*, terms of use. Also, the distribution of any publication, whether in print or digital format, depending upon how extensive and targeted the distribution, can raise issues with respect to the protection of intellectual property in countries that do not recognize fair use or recognize fair use with different standards or requirements. These Guidelines do not address those issues. They assume that U.S. copyright law governs. Finally, in all the uses discussed in this Section, attribution and care in the use of partial or modified images should be the norm.

1. Exhibition Catalogues.

Exhibition catalogues are usually publications that, while using copyrighted materials and images of works of art in the exhibition, place those copyrighted materials and images within or accompanied by text of an educational, scholarly, or even critical nature. In addition, the catalogue may contain images of works not in the exhibition, but included in the catalog for comparative purposes. The use of copyrighted materials and images of works of art often, and importantly, . . . “enhances the reader’s understanding of the . . . text. . . .”²¹ The use should be confined, in the extent of copyrighted materials and in the size and quality of images of works of art, to that necessary to illustrate the educational, scholarly or critical text and no more. Exhibition catalogues may also contain small scale images of works, sometimes used in exhibition checklists in the back of catalogues, which are more like online collections in that they serve the purpose of documenting basic information about every work included in the exhibition catalogue.

²¹ See *Graham*.

Care should be taken before relying on fair use to reproduce images exclusively or primarily as cover pieces, frontispieces or on other pages with little or no text; in other words, as potentially approaching a substitute for the original image without a transformative context. Further, the fair use analysis should be evaluated in the context of the use of each image and not simply on the basis of the publication as a whole.²²

2. Scholarly Articles.

The analysis with respect to scholarly articles is much the same as for exhibition catalogues, except one could argue that scholarly articles are even one step further along the continuum of transformative use. Scholarly articles are usually connected to research, and often used for the purposes of teaching. By definition, these uses would qualify as “scholarship” as contemplated by Section 107 of the Copyright Act. As a result, when the amount of the copyrighted material and the size and quality of the image are only so much or so large and of such resolution as to accomplish the purpose of the scholarly article, such use of copyrighted material should be regarded as fair use.

3. Blogs.

Blogs are a unique creature of the internet that are created in a digital format and distributed electronically rather than in print form. Blogs can serve a multiplicity of purposes even within a single blog, and can contain scholarly analysis, criticism and news, as well as promotional materials. They can announce new acquisitions, upcoming exhibitions or other museum programs. As a general rule, they are written in a less formal style although they can provide important context for a museum’s exhibitions, activities and programs. As with other

²² Yale University Press has issued an interesting set of guidelines in its *Fair Use of Art Images in Scholarly Art and Architecture Monographs*. Those guidelines suggest that, generally, images should be no more than one-quarter of the printed page in size. The guidelines go on to say that larger images may be appropriate under various circumstances.

types of museum publications discussed in this Section, the extent to which copyrighted materials or works of art can be included in a museum blog depends on the purpose of the blog and the context.

When the blog is more akin to a scholarly article, the analysis is the same as that for such articles, except the issue becomes the size and quality of the image used in a web context. As a result, these scholarly types of blogs represent an intersection in the analyses between scholarly articles (see Article IV, Section B(2)) and online collections (see Article IV, Section A). The more content, description, and analysis in the blog, the easier to justify a larger, higher resolution image under fair use. Because blogs sometimes describe a work in specific detail with an analysis of the artist's technique or approach, magnification tools may also be appropriate.

For those blogs that are more promotional in nature, with less content, analysis or news, for example, announcing future exhibitions or events, and that are using the image of a work of art for its intrinsic purpose as a work of art rather than for a transformative purpose, there is rarely a need for large or high resolution images. These types of blogs should be analyzed in the context of promotional activities by the museum, to be discussed in a future Section of these Guidelines.

4. Educational Materials.

Given that many publications by museums are educational in nature, this subsection addresses those publications whose primary focus is pedagogical. Examples might include use of digital images in connection with a lecture or symposium or a course taught on-site at the museum or online (*e.g.*, Massively Open Online Course, "MOOC"). Another example would be materials designed to educate children about art in an after-school program or as part of a gallery visit or special exhibitions venue. Educational materials are produced in connection

with virtually every museum activity. These uses are not “for the same intrinsic purpose as” the copyright holder’s as discussed in *Worldwide* and fall within “teaching,” as contemplated by Section 107 of the Copyright Act. So long as the extent of the copying of copyrighted materials and the size and quality of the image are sufficient to accomplish the purpose and not more, then the use should be fair use.

5. Collection Handbooks.

Collection handbooks can run the gamut. Some are highly illustrated “coffee table” books consisting of images of the collection covering almost an entire page and with only limited information that would be found in a basic online collection. Other handbooks are intended to guide the reader through the museum’s collection, often providing significant scholarly text (perhaps including copyrighted material) informing the reader about the work and, for example, the artist, the artist’s methods, and comparable works. Museums should take care in relying on fair use to reproduce high quality resolution images for a handbook that resembles an illustrated coffee table book with minimal text. In contrast, for handbooks with commentary, scholarship and images directly related to the text, the more transformative is that use and the stronger the fair use argument, again consistent with size and quality to effectuate the purpose.

6. Museum Brochures.

This category relates to the museum’s publications in the context of exhibitions, permanent collection installations, mini-handbooks of highlights of specific departments and similar functions. As a brochure, and perhaps more accurately described as a guide, to a specific exhibition or specific activity of the museum, the primary purpose usually is to guide the visitor through a particular exhibition or activity and to highlight specific works and see those works within the context of the exhibition or activity. As a result, the amount of text and explanation may be modest or can be very extensive. In making a fair use assessment, the degree matters in

relation to the size and quality of the images used. The more the brochure is simply a means of navigating the exhibition, the less the need for large and high-quality images; the more the museum brochure approaches an exhibition catalogue, the greater the justification for larger and higher quality images that complement and inform the text.

7. Other.

Capturing the full breadth of museum uses involving print and digital publications is simply not possible in guidelines. As evident from this Section, for each new or different type of publication, a museum should first conduct the fair use analysis for the publication as a whole as well as in connection with each use of the copyrighted materials or works of art by using the four factors and other tools provided by these Guidelines. Once the analysis is completed, the museum is advised to prepare and maintain a contemporaneous record of the fair use analysis.

C. Promotional, Marketing and Advertising Materials.

This Section²³ addresses the use of works of art and copyrighted material in the context of promoting, marketing and advertising the museum's collection, special exhibitions, events and activities in furtherance of the museum's mission (collectively sometimes referred to as "promotional uses").²⁴ Promotional uses serve the purpose of generating public interest in and informing the public about museum activities such as special exhibitions, public programs, lectures, performances, and other core activities, and encouraging the public to visit and participate. Promotional uses often include works of art and copyrighted materials and do so in a variety of ways and mediums. For example, works of art and copyrighted materials can be found on invitations, flyers, brochures, mailers, inserts, banners and signs (inside the museum, on street

²³ This Section was issued February 1, 2017.

²⁴ As used in this Section, promotional uses are not fundraising. The use of works of art and copyrighted material in connection with activities, the principal purpose of which is fundraising, is addressed in Article IV, Section D, Fundraising.

lights and other poles, busses, shelters and trains), in advertisements in newspapers and magazines, and in announcements and postings on museum websites and social media. Typically, these promotional uses convey information about an event, its location, date, time and other pertinent details.

If an express license has not been granted by a copyright holder and a museum seeks to include a work of art (or other copyrighted material) in promotional materials, it must determine whether its use in this context qualifies as a fair use. As with all museum uses previously discussed in these Guidelines, making this determination requires an analysis of the four fair use factors. For additional guidance, the reader is referred to Article II, Fair Use and Annex A, Fair Use and the Four Factors as the factors, analysis and specific guidance discussed in that Article and Annex are all applicable to promotional uses discussed in this Section. Furthermore, as appropriate, the special considerations set forth in Article III, Special Considerations, may also apply when works of art and copyrighted materials are involved in promotional uses. In addition to the special considerations, promotional uses can also raise issues of other third party rights, including trademarks and the rights of privacy and/or publicity such as when the works of art or copyrighted materials depict a celebrity whose name, voice, image and likeness are protected by a state's right of publicity law.²⁵

1. The First Factor.

No court has analyzed fair use under the Copyright Act in the context of a museum's promotional use, so reliance on fair use, even after a careful analysis of the four factors, necessarily presents risks for the museum. In considering the first factor, *i.e.*, the purpose and

²⁵ In *Hoepker v. Kruger*, 200 F. Supp. 2d 340 (SDNY 2002), a case involving both copyright and privacy issues in the context of a museum exhibition, the court, applying New York law on privacy rights, not copyright law, recognized that promotional activities and advertisements undertaken by a museum to promote an exhibit for the purpose of increasing patronage satisfied the "ancillary" or "incidental" use exception and, like the exhibit itself, fell outside the reach of New York state privacy law.

character of the use, the most important consideration is whether the use satisfies the transformative test. When museums incorporate works of art and copyrighted materials into promotional materials, they are using the works of art and copyrighted materials as a vehicle for communicating with the public about the museum's activities, providing information about the location, date and time of events, and generating enthusiasm for the museum. In the promotional context, works of art and copyrighted materials are transformed into vehicles to disseminate information, provide wayfinding, and encourage the public to visit and participate in museum activities. All these purposes further the museum's mission to reach the broadest possible public audience. In addition to providing important information, promotional materials may also combine images with other images, reduce or enlarge the size of the image, change the quality of the image, include a detail of a work of art, and otherwise alter the original work of art to further the promotional purpose. These variations, particularly when works of art and copyrighted materials are used along with contextual information, imbue the original with a different purpose than the original artistic purpose, thereby "altering the first with new expression, meaning, or message."²⁶

²⁶ See *Campbell*.

If, however, a court were to find that there was no transformative use,²⁷ or if the transformative nature of the promotional use is deemed insufficient or weak, the second consideration under the first fair use factor, namely, whether the use is of a commercial nature or for nonprofit educational purposes, becomes more important, as the court in *North Jersey Media* found. No court has defined “commercial” in the context of museum activities, but *Graham* provides helpful guidance by clarifying the meaning of the term commercial. While acknowledging in *Graham* that the publication containing the copyrighted images was a “commercial venture,” the Second Circuit rejected the notion that the “crux of the profit/nonprofit distinction is ... whether the sole motive for the use is monetary gain.”²⁸ Noting that nearly all of the illustrative uses listed in the preamble paragraph of the fair use section of the Copyright Act are generally conducted for profit, the Second Circuit, citing a Supreme Court case,²⁹ articulated the test as “whether the user will profit from the exploitation of the copyrighted material without paying for that use.” Although the Court did not clarify how a user might “profit” from exploitation of a copyrighted work other than by monetary gain, increasing museum attendance at core, mission-related programs (whether general admission, special

²⁷ Although museum promotional uses have not been addressed by the courts, promotional use of a copyrighted image in social media by a for-profit media source (Fox News) has been addressed by the district court in *North Jersey Media Group Inc. v. Pirro and Fox News Network*, 74 F. Supp. 3d 605 (SDNY 2015) (“*North Jersey Media*”). In that case, Fox News tweeted an iconic photograph of firefighters on the anniversary of 9/11 to promote an upcoming program along with the hashtag “never forget.” Fox contended that the use qualified as fair use because it was newsworthy and the inclusion of the hashtag constituted a transformative use. The district court rejected Fox’s argument that use of the image was newsworthy (and hence transformative) noting that the use did not convey any new information, insights or understandings and the photographer actively licensed the iconic photograph for editorial uses. Absent a transformative use, the court gave more weight to the second part of the first factor analysis to conclude that Fox used the image for the commercial purpose of advertising and promoting its for-profit program. While this decision may strike a cautionary note regarding museum promotional uses, particularly in connection with social media uses such as Twitter--where the ability to include contextual information is limited--this case may be distinguishable from museum promotional uses, both in the context of whether the use is transformative (if the use includes information about an exhibition or program and is ancillary to an educational program) and in the context of whether the use is commercial, discussed below.

²⁸ See *Graham*.

²⁹ *Harper and Row, Publishers, Inc., v. Nation Enters.*, 471 U.S. 539, 562 (1985).

exhibitions, lectures, programs, etc.) as the result of using a work of art or copyrighted materials seems unlikely to be deemed to be “commercial” or to entail “profit from the exploitation of the copyrighted material” even if general or special admission fees are charged, and, in this context, monetary gain is clearly not the “sole motive” (or a motive at all) for the use.

Applying this reasoning to museum promotional activities allows one to distinguish promotional activities using a work of art or copyrighted material that may result in, for example, revenue from general admission or ticket sales for an exhibition or event from an activity in which the museum profits from a commercial exploitation without paying for the use. While a visitor paying an entrance fee to the museum or a special fee or charge to see an exhibition or participate in a special event, such as a lecture or symposium or class, may generate revenue for the museum, that does not mean it is intended to, nor does it necessarily, generate a profit by the museum in the same sense as, for example, sales of commercial merchandise that depict works of art or copyrighted material. Nor should the fact that certain promotional activities involve an outgoing expenditure by the museum to promote those activities (*e.g.*, purchasing an ad in a newspaper or magazine, offering a gift card as part of a promotional campaign), be deemed to involve exploitation of the copyrighted material for profit so long as the ultimate purpose of the activity is to further the museum’s nonprofit educational purposes.

2. The Second Factor.

Under the second fair use factor, *i.e.*, the nature of the copyrighted work, courts have identified various elements of a work of art or copyrighted material that argue against fair use under this factor, in particular whether the work of art or copyrighted material used is highly artistic and expressive and whether the work or material has already been published. Works of art in general, as well as many copyrighted material, are highly artistic and expressive so that their promotional use may argue against fair use under the second factor. In addition, the museum should determine whether its use will be the first publication, another element arguing against fair use.

3. The Third Factor.

Under the third factor, *i.e.*, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, both a quantitative and qualitative analysis are required. With respect to the quantity reproduced, most promotional uses reproduce the entire work of art rather than only a portion or detail. At one time, reproduction of the entire work might have weighed against fair use. With decisions in such cases as *Kelly* (thumbnails in a searchable digital database), and *Graham* (reproduction of poster in historical context), courts have found that the third factor supports fair use so long as the use of the entire image is also deemed transformative under the first factor and the size/resolution of the image is appropriate for its transformative purpose. In the context of promotional uses, most uses of works of art or copyrighted materials will entail some adjustment in the size, resolution and other qualities of the image, tailored to the promotional use and dependent on the medium. These variations render the image much less likely to be seen as a mere substitute for the original or a commercial quality reproduction of the original. Thus, images on street banners (though large in size) will only be seen from a distance;

images on buses would be seen in passing, without an opportunity for detail or contemplation,³⁰ images in newspapers and magazines, and on social media, can be tailored to meet the fair use guidelines for publication of lower resolution images addressed in *Kelly* and *Perfect 10* and discussed elsewhere in these Guidelines.³¹ These common variations from the original work of art or copyrighted materials can be argued to be qualitatively different than the original work and tailored to the transformative purpose of informing the public about an exhibition or other program much more effectively than promotional materials that omit use of the image, in a manner that satisfies the requirements of the third factor.

4. The Fourth Factor.

Lastly, under the fourth factor, *i.e.*, the effect of the use upon the potential market for or value of the copyrighted work, even if the museum's promotional use is not commercial, this factor is unlikely to favor the museum particularly if the copyright owner routinely licenses images for these types of uses. As in the *North Jersey Media* example, a court could find that a museum's use would interfere with the copyright holder's market and find against fair use with respect to the fourth factor. In some cases (but not in the promotional context), the copyright holder's practice of not licensing her work for purposes similar to those of the alleged infringer has been found to weigh in favor of fair use under this factor. See *Blanch v. Koons*.³²

While there may well be specific circumstances or approaches to the use of images for promotional purposes that should be consistent with fair use (*e.g.*, a promotional ad, in print or social media, regarding an exhibition, that both provides meaningful content about the exhibition and the work in question and that uses a low resolution image of the work), with several factors

³⁰ Although most discussions of the size of reproductions in fair use decisions involve reduced size reproductions as in *Graham*, the critical issue under the third factor is whether the size is necessary and appropriate to accomplish the transformative purpose. In the context of museum promotional uses, a large size is often necessary and appropriate.

³¹ See Article IV, Section A, Online Collections.

³² *Blanch v. Koons*, 467 F. 3d 244, (2d Cir. 2006).

either weighing against fair use or inconclusive, particularly the question of whether the use is transformative, and given the absence of judicial precedent applying fair use to these specific types of promotional uses, reliance on fair use in the areas addressed in this Section may pose more risk than the other uses addressed in previous Sections of the Guidelines.

D. Fundraising.

This Section³³ addresses the use of works of art and copyrighted material in the context of museum fundraising. The vast majority of museums in the United States are non-profit institutions that need public support in order to accomplish their missions. Museums receive public support through a variety of means, including solicitations of donations of works of art, cash and other items of value.³⁴ As a result, fundraising is an integral and essential component of a museum's existence.

For purposes of this Section, the AAMD defines fundraising as activities in which the museum is requesting or soliciting financial support or an item of value that the museum can use to raise cash (*e.g.*, donations of cars, boats, items for auctions like vacation home rentals, furniture, rugs, etc.). Fundraising for purposes of this Section does not include solicitations of works of art or other tangible objects for the collections nor does it include an admission fee to the museum or an exhibition or other fees or consideration for or incidental to attendance at an event or participation in an activity.³⁵ Fundraising activities may consist of direct solicitations or they may include invitations to dinners, concerts, auctions, or other special events arranged by the museum, with or without a fee or other charge to attend, the principal purpose of which is fundraising.

³³ This Section was issued February 1, 2017.

³⁴ Obtaining public support is of course both an element of and enhanced by most museums' status as organizations exempt from Federal income tax under Section 501(c)(3) of the Internal Revenue Code.

³⁵ Some of these activities are addressed in the preceding Section, Promotional, Marketing and Advertising Materials (Article IV, Section C).

There are many uses of works of art and other copyrighted material in the context of fundraising. For example, customized solicitations directed toward current or prospective donors may feature a specific work of art in the context of seeking a donation. Capital campaigns are often conducted using a wide variety of techniques, tools and platforms that may include works of art, all of which are designed for the purpose of seeking financial support. Membership drives or renewal solicitations that often include the opportunity to attend exhibitions and events free of charge may use works of art and other copyrighted material as part of the request.

In analyzing whether the use of works of art or other copyrighted material in connection with fundraising may be considered a fair use, assessing whether fundraising is *per se* a commercial use under the first factor³⁶ of the fair use analysis is important. On one hand, any activity that directly involves or leads to a transaction resulting in the receipt of money, or other items of value that may be converted to cash, such as a fundraising solicitation, can be seen as commercial.³⁷ On the other hand, activities that benefit the museum's nonprofit programs, including promotion and marketing and solicitations of charitable donations to help a museum carry out its non-profit purposes, are arguably distinguishable from more traditional commercial transactions such as sales of merchandise (e.g., posters, mugs, t-shirts, or other items depicting copyrighted works of art). Such sales are universally recognized by museums as a commercial activity requiring a license from the copyright holder. Determining whether these distinctions are legally significant in the context of the first fair use factor as applied to fundraising is

³⁶ For an analysis of the four factors involved in any fair use analysis, see Annex A, Fair Use and the Four Factors, to the Guidelines.

³⁷ At least one court has applied a more measured test to define commercial than just a financial transaction. In *Graham*, the court articulated the test as “whether the user will profit from the exploitation of the copyrighted material without paying for that use.” See the discussion of *Graham* under Article IV, Section C, Promotional, Marketing and Advertising Materials.

difficult, however, because there is no current judicial precedent that examines whether museum fundraising constitutes a commercial activity.

Whether or not fundraising is considered a commercial activity for purposes of the fair use analysis, the use may still satisfy the first factor of the fair use analysis provided that it is strongly transformative (an aspect of the first factor that should be present regardless of whether the use is commercial or noncommercial). In the context of museum fundraising activities, when a copyrighted image of a work of art is used on an invitation or in a program for a paid special event the purpose of which is fundraising,³⁸ the work is typically used for illustrative and expressive purposes. Sometimes, but not always, the image may be accompanied by contextual information; however, the primary purpose of using the image, *i.e.*, fundraising, in and of itself, is difficult to justify as transformative in nature. Absent a strong transformative use argument, whether or not a court views a museum's use of a copyrighted image in the context of fundraising as a commercial use, that use may fail the first prong of the fair use analysis and potentially the fourth prong (effect on the potential market) by interfering with the copyright owner's market.

As discussed earlier in these Guidelines, fair use does not require that the use meet all four of the factors, but if the first and fourth factors are difficult to satisfy in the fundraising context, and the work is highly creative (factor two) and reproduced in its entirety by the museum in connection with fundraising activities (factor three), a copyright holder might successfully argue that none of the four fair use factors is satisfied in connection with the museum's fundraising use.

³⁸ These types of special events should be distinguished from those in direct fulfillment of the museum's exempt purpose, such as lectures or exhibitions. Invitations or other promotional materials for such educational events are discussed in Article IV, Section C, Promotional, Marketing and Advertising Materials.

While there may be arguments against fair use of works of art and other copyrighted material in connection with activities whose primary goal is fundraising, this does not mean that a fundraising component precludes an otherwise well supported fair use. For example, a museum brochure that includes images of copyrighted works along with scholarly essays or general museum information as well as a membership solicitation or invitation to a fundraising event may be sufficiently transformative and non-commercial to justify reliance on fair use.

The absence of legal precedent or guidance, combined with the argument that fundraising activities are commercial in nature without a strong transformative element, does suggest that significant caution in this area is appropriate.

E. Archives and Other Special Collections.

This Section addresses the copyright implications of using copyrighted material and works of art that are part of an archive or other special collection held by a museum³⁹. For purposes of this Section, “special collections” or “archives” mean an archival record of a third party or parties such as artists, dealers, curators, galleries and others acquired by the museum by purchase, donation or bequest (as distinguished from the museum’s own archives of records and documents pertinent to the activities and history of the museum⁴⁰). Archives and other special collections typically consist of large quantities of many different types of property and ephemera, both tangible and intangible, including works on paper (*e.g.*, letters, postcards, photographs, sketches), interviews and oral histories, three-dimensional works such as models, analog electronic audio and video tape, digital media such as disks, hard drives, digital information

³⁹ In addition to copyright considerations, archives and special collections can raise challenging legal issues pertaining to donor restrictions, rights of privacy, publicity, defamation, and the First Amendment. Before making such collections available to the public online, the museum would be advised to conduct a good faith review of individual items, if possible, to remove or restrict materials that might violate personal rights of individuals and expose the museum to potential liability independent of copyright claims.

⁴⁰ Although this Section does not address the museum’s own archives, many of the analyses discussed in this Section are equally applicable to those archives.

stored in the cloud, and text messages (individually, “archival item(s)”). Archival items can be published or unpublished, and can have differing copyright periods. Particular archives also can comprise multiple authors within a single group, for example, letters from and to third parties.

The focus of this Section is the fair use issues to be considered by a museum when it decides to: (1) digitize an **entire** archive or special collection and (2) make available online **all or a substantial portion** of an archive or other special collection.⁴¹ Reviewing the circumstances under which archives or special collections are often transferred to museums provides an important first step in the fair use analysis. Artists, dealers, galleries and others who elect to transfer archival materials and special collections to public museums generally do so with the express understanding and intention that the materials will be made available to scholars, researchers and the general public for educational purposes. Donors to museums of these materials usually (and should) expect that scholars will scour the materials and use them in whole or in part for publications, dissertations, exhibitions, and other means of dissemination in furtherance of a scholarly purpose. If donors are concerned about copyright or other legal considerations, the transfer documents typically will contain limitations or restrictions. Purely as a practical matter, therefore, a museum that receives an archive or special collection is not unreasonable in assuming that the donor will not object to the wholesale digitization and release of the archival items in furtherance of the educational mission of the museum.⁴² The following fair use analysis should, therefore, be viewed in this context, but keeping in mind that the donor of the archive may not be the owner of some or even any of the intellectual property rights in

⁴¹ Reliance on fair use to reproduce and publish individual or selected archival items in their entirety or brief excerpts for scholarly and educational purposes should be considered under the relevant chapters in Article IV, Section B, Publications.

⁴² Although the assumption is not unreasonable, depending on the specific facts of each donation, transfer or sale of archival materials or special collections to the museum, it still may be prudent for a museum to seek a license or other consent at the time of the transfer to the museum to future digitization and publication of the collection.

some or all of the material comprising the archive. Thus, the donor's expectations may not have any bearing on the purely legal issue of whether the digitization and publication of archival material is "fair use" or otherwise complies with the copyright law.⁴³

Traditionally, archives and special collections have been made available for on-site and painstaking page-by-page review conducted in reading rooms and often by appointment only. To vastly expand access to these valuable scholarly resources, museums are eager to digitize full archives and special collections and make them available digitally to the public. As with other issues addressed in these Guidelines, the courts have not yet rendered an opinion on the wholesale digitization of an archive or special collection for purposes of making the contents available to the public in their entirety in furtherance of a museum's mission. Nevertheless, other precedent is useful in considering the fair use implications of making these important tools of research publicly accessible.

Archives and other special collections present a unique challenge when considering fair use because traditional copyright and fair use analysis is conducted item by item rather than for a collection as a whole. In the context of archives and other special collections, undertaking such an analysis can present insurmountable problems for museums that may lack the staff and resources needed to evaluate each archival item. Even where staff and resources are available, the nature of archival items is often different than typical artistic material where authors tend to

⁴³ Just as donor expectations may not have any bearing on the legal issue of fair use, the expectations of grant-making entities that require unrestricted access to digitized materials as a condition of providing funding for digitization do not affect the fair use analysis. Some prominent funders of archival digitization projects increasingly are requiring, as a condition of the grant, that the resulting digital content be made available to the public without restriction and some prescribe use of a Creative Commons license, such as CC0 or CC-NC. It is arguable that more museums would be able to accept these grant funds if they could comfortably rely on fair use to digitize their archives and special collections and make them publicly accessible for non-commercial use. Museums still must be cautious, as accepting these conditions can put museums at legal risk not only for possible breach of the terms of the grant but also for potential copyright claims if fair use arguments are rejected. Additional financial risk may arise if grantors require museums to indemnify the grantors for third party claims of infringement. Museums should keep in mind that grantor expectations or requirements have no bearing on fair use, so museums should exercise caution in accepting grant funds with such requirements absent confidence that they will be able to obtain permissions necessary to comply with the grant or rely on fair use.

include their signatures, dates of creation or other information that would facilitate a copyright determination. Many archival items lack such identifying information and cannot be identified with a specific author or artist. They often include documentary or transactional materials, consisting primarily of personal or professional records that document routine activities or the creative process rather than finished works of aesthetic or artistic expression. As a result, archives often contain materials commonly known as “orphan works,” *i.e.*, the copyright owner cannot be identified or cannot be located. The challenges to conducting an archival item-by-item copyright assessment becomes particularly problematic if a museum is expected to determine the copyright status of each archival item before digitizing and making these collections available. For this reason, a museum’s ability to rely on fair use to digitize these collections and make them broadly accessible, although not without risk, would represent a significant public benefit in furtherance of the museum’s educational mission.

In conducting the fair use analysis for archival and special collections, two separate but related questions must be addressed: First, is the mere creation of a digital copy of an entire archive or special collection a violation of the copyright holders’ rights and second, is the publication (*i.e.*, making the entire digital archive or special collection publicly available online) a fair use?⁴⁴ With regard to the first question, there are two independent grounds for the conclusion that such digitization is not a copyright violation. First, the *Google* decision supports the position that wholesale copying can be a fair use under certain circumstances. In the *Google* books case, the plaintiff authors contended that the mere act of scanning the books, creating

⁴⁴ Preceding the fair use analysis, of course, the museum should first review the acquisition document(s) under which the museum acquired the archive or special collection to determine whether copyright was acquired and if contractual restrictions apply. Because the transferor or seller of these types of special collections, which often include materials created by third parties, usually does not own all the rights in the special collection, the transfer document commonly includes a “quit claim” transfer of only such rights as the donor/seller may have. In these circumstances, the museum should not assume that it has acquired copyright in all the contents of the archive or special collection.

digital copies and storing them on Google’s servers constituted copyright infringement. In rejecting that argument, the court, looking at digitization of the entire book, not in the abstract, but rather analyzing the activity in the context of the broader fair use analysis, said “not only is the copying of the totality of the original reasonably appropriate to Google’s transformative purpose (*i.e.*, to create a searchable electronic database), it is literally necessary to achieve that purpose.”⁴⁵ In these and other cases, courts have found repeatedly that digital copying of an entire work or works **in furtherance of a different purpose** than the original constitutes a fair use. In the case of museum copying for storage, conservation, preservation or research, without publication, the individual works are transformed by their inclusion in the whole archive or special collection and the copying thereof is for those different purposes, *i.e.*, there is a transformative act.

Additionally, if the museum’s purpose in digitizing an entire archive or other special collection, without publication, is for easier storage, conservation, preservation or to facilitate research, the act of making a complete digital copy would be consistent with the limitations on exclusive rights provided in Section 108 of the Copyright Act for reproductions by libraries and archives. Although Section 108 is not explicitly applicable to museums,⁴⁶ the basis for the special exception for libraries and archives is to enable copying for such uses as conservation, preservation and storage. As such, a strong argument can be made (under fair use or under Section 108) that a museum may create a digital copy of an entire archive or special collection for purposes of storage, preservation and conservation, as well as to facilitate research.

⁴⁵ See *Google*.

⁴⁶ Section 108 does not, by its terms, apply to museums although there have been numerous efforts to expand Section 108 to include museums. In addition, many museums maintain libraries and archives and may well be covered by Section 108 for the activities of their libraries, which could include the management of archival material, as well as the museum’s own archives.

The second question – whether a museum may publish the entire digital copy of the archive or special collection online to enable scholars and the public to access and use the archive or special collection – presents the more difficult fair use issue and is analyzed below under the Four Factors.

1. The First Factor.

Assuming the creation of a digital copy of an entire archive or special collection is not itself infringing provided that it is undertaken in furtherance of a different, transformative purpose, what additional uses of the digital copy would also constitute a transformative purpose under the first factor? The court in *Google* addressed this directly stating that: “the creation of a full-text searchable database is a quintessentially transformative use...[as] the result of the word search is different in purpose, character, expression, meaning, and message from the page from which it is drawn.”⁴⁷ Other decisions⁴⁸ further support the position that the creation of a searchable, digital archive itself is transformative. (See discussion of online databases in Article IV, Section B, Publications.) In *Kelly*, the Court found that Arriba’s use of the images served a different function than Kelly’s use by improving access to information on the internet versus artistic expression. Because Arriba’s use did not supersede Kelly’s use, but created a different purpose for the images, Arriba’s use was deemed transformative.⁴⁹ In relying on *Kelly*, the court in *Perfect 10* reinforced the notion that “a search engine transforms the image into a pointer directing a user to a source of information...a search engine provides social benefit by incorporating an original work into a new work, namely, an electronic reference tool.”⁵⁰

⁴⁷ See *Google*.

⁴⁸ See *Kelly* and *Perfect 10*.

⁴⁹ See *Kelly*.

⁵⁰ See *Perfect 10*.

The addition of a search function to accompany a digital archive, which serves as the electronic equivalent of a finding aid, is essential to rendering the archive usable for research and scholarship purposes. If the search function produces brief excerpts (“snippets”) that incorporate the search terms (as in *Google*) and/or low resolution images of visual artistic content included in the archive (as in *Kelly* and *Perfect 10*), the search capability provides “social benefit” by facilitating a deeper exploration of the materials, establishing new connections among archival items, and enhancing the ability to conduct original research.⁵¹ In that respect, the digitization of the entire archive or special collection and the creation of a search function supports the transformative nature of the archive by creating a new purpose (i.e., as a research tool) that is different than the underlying authors’ original purposes in creating the individual items for informative, documentary, transactional or aesthetic purposes. If, in addition to being transformative, the digital archive is also made available to the public free of charge, the non-commercial nature of the use would also satisfy the other part of the analysis under the first factor. The creation of a complete digital copy of an archive or special collection that is searchable, and that, as in *Google*, produces only limited excerpts or snippets in response to a search (and that, with respect to visual images from the archive as opposed to texts, reproduces lower resolution copies that are only of a quality necessary to fulfill the transformative purpose of the search function), is likely to satisfy the first fair use factor (and to qualify as fair use) under *Google*, *Kelly*, *Perfect 10* and related cases.

⁵¹ A more recent fair use case in the 9th Circuit, *Maya v. Monge*, 688 F. 3d 1164 (9th Cir. 2012) raised a distinction between a truly transformative use and the same use but for a different purpose. The Court noted that a separate purpose by itself that leaves the inherent character of the content unchanged does not necessarily create new aesthetics or a new work that adds new expression, meaning or message. Although it can be argued that this decision is at odds with *Kelly* and *Perfect 10*, in which the inherent character of the images were not changed to create a searchable database, to the extent that a museum can enhance and supplement its digital databases of archival materials with additional information including scholarly analysis and links from individual archival items to pertinent and related content, whether on the museum’s website or those of third parties, the museum will have strengthened its argument for transformative use.

What is unresolved by these decisions, however, is whether the amount of the digital archive made available to the public can go beyond the production of excerpts or snippets of relevant portions of the archive to encompass publication of full text and images of the entire archive or special collection. To answer this question, distinguishing the facts in *Google* from the facts associated with publication of an entire archive or special collection is important. Google’s ‘library’ was not an archive that included interrelated materials but instead was comprised of a vast collection of individual and independent works of authorship. Making the full text of all the works in the library available to the public was not necessary to further Google’s purpose of providing a searchable database. In contrast, publishing only snippets from individual items in an archive or other special collection would not advance and might actually defeat the museum’s “different purpose” of facilitating the public’s ability to understand the relationship and interconnectedness of the individual archival items. Publishing the entire archive or other special collection provides historical and aesthetic context and creates a synergy that effectively transforms and infuses each individual archival item with new expression, meaning or message through its relation to and interconnectivity with other archival items in the archive or other special collection. A simple example is the publication of a letter by an artist to someone and the response. The publication of both letters provides new meaning to each. See, e.g., *Graham Archives*,⁵² in which the Second Circuit determined that it was fair use to publish a group of seven related concert posters in their entirety (in reduced size) for the purpose of a biography of the Grateful Dead when the posters were created originally as individual artistic vehicles to advertise concerts. Although the *Graham* decision is distinguishable from the publication of an entire archive, it nevertheless supports the argument that publication of groups of materials

⁵² *Graham Archives v. Dorling Kindersley Limited*, 448 F.3d 605 (2d. Cir 2006).

created for one purpose can be fair use if the new purpose is sufficiently different and the amount and size of the material copied is consistent with the purpose.

Without conceding that the publication of an interrelated archive or special collection is not transformative in and of itself, the transformative nature of the publication of the entire archive or other special collection could be enhanced by providing additional content and research functions. For example, providing links from archival items to other archival items or to portions of the museum's website or to third party sources that contain relevant, comparative or supplemental information would enhance and extend the educational purpose of publication of individual archival items and provide additional support for treating the archive or other special collection as a holistic research and educational online resource.

2. The Second Factor.

In evaluating the second factor, the nature of the work, the first challenge is to identify the "work." Although this chapter argues that the "work" is the archive or special collection as a whole, because there is no precedent for analyzing a compilation such as an archive or special collection under fair use as a whole, review of this factor is best undertaken by evaluating individual archival items. Those can include many different forms, media and types of materials. Some may be largely factual (*e.g.*, business records) and others may be highly creative (*e.g.*, sketches) and both can exist within the same archive or other special collection. The materials may have been created originally for a wide range of possible purposes – documentary, informative, transactional or aesthetic. Although some archival items may be published, often a majority of archival items in an archive or other special collection are unpublished. Generally, fair use is more difficult to establish when the underlying archival item is unpublished. As one court noted, "[t]he fact that a work is unpublished is a critical element of its 'nature.' Our prior discussion establishes that the scope of fair use is narrower with respect to unpublished

works.”⁵³ Another court explained that “we think that the tenor of the [Supreme] Court’s entire discussion of unpublished works conveys the idea that such works normally enjoy complete protection against copying any protected expression. Narrower ‘scope’ seems to refer to the diminished likelihood that copying will be fair use when the copyrighted material is unpublished.”⁵⁴ Because of the predominance of unpublished materials in a typical archive or other special collection, the analysis under the second factor may be at best inconclusive and at worst negative strictly on legal grounds with respect to the publication of previously unpublished archival items, either on its own or as part of publication of the archive or other special collection as a whole.⁵⁵

3. The Third Factor.

Under the third factor, the amount and substantiality of the portion used, this Section of the Guidelines considers the fair use implications of digitizing and making available the entire archive or other special collection (except for individual archival items that may be removed for reasons such as donor restrictions, privacy, publicity, defamation, etc.). If the publication of a whole archive or other special collection, both print and visual images, is arguably transformative, the question under the third factor is whether it is necessary, to achieve that transformative purpose, that the whole of the texts and/or the images within the archives or other special collection be published. In the case of images, for reasons explained in other sections of these guidelines, publishing a lower resolution version may be all that is necessary to satisfy the third factor. With regard to textual materials, the third factor may be satisfied if the best and

⁵³ *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 564 (1985).

⁵⁴ *Salinger v. Random House*, 811 F.2d 90 (2d Cir. 1987).

⁵⁵ Although the second factor is more difficult to satisfy with regard to unpublished materials than published materials, the latter may present particular challenges with regard to the fourth factor, particularly, for example, if the archive contains a manuscript of an essay, poem, novella or book that has been published and is available for sale in the commercial market. See discussion of the Fourth Factor.

most effective way to achieve the educational, transformative purposes of publication requires posting the full texts of most, if not all, of the archival material.

4. The Fourth Factor.

With respect to the fourth factor, the effect of the use on the potential market or value of the copyrighted work, examining this factor both with respect to the archive or other special collection as a whole and with regard to its individual components may be necessary. When considered as a whole, many archives and other special collections do not have a substantial commercial market value, although they certainly possess a substantial research and scholarship value. By their nature, archival items received from artists, authors or their estates, for example, tend not to be finished works of art (or writing) that have a commercial market value but rather consist of a body of more ephemeral, contingent works that have historical, critical and analytical value reflecting on the artist's or author's process of creativity.⁵⁶ For those archives or other special collections that, as a whole, lack a substantial commercial value, a museum's digitization and posting of the archive or collection, as a whole, is unlikely to violate the fourth fair use factor by interfering with the copyright owner's market. Nevertheless, that may not be the end of the inquiry. Even if an entire archive or special collection lacks a substantial commercial value, application of the fourth factor may produce a different outcome if there is an active or potential commercial licensing market for an individual archival item or group of archival items within the archive or special collection. A museum's posting of the entire archive or special collection could usurp or undermine a valuable licensing market for components of the archive or special collection in a manner that might violate the fourth fair use factor, at least insofar as such individual items are concerned. As a result, a court could find that the fourth factor argues

⁵⁶ Of course there are archives and special collections that do have a substantial market value (*e.g.*, an archive of historic photographs from a prominent magazine; archives of an artist that contain drawings, studies, preparatory sketches, etc.), and, indeed, institutions often pay large sums for important archives.

against fair use, certainly as to a specific archival item that is already published and currently commercially available.

5. Conclusion.

There is a strong argument that the creation of a digital copy of an entire archive or other special collection for storage, conservation, preservation and research purposes (including publication of snippets in response to searches by the public) is fully supported by fair use (see *Google*) and/or Section 108 of the Copyright Act. There is also a defensible argument that publication of all or virtually all of an archive or other special collection for the purpose of providing public access is transformative and noncommercial (if limited for scholarly use and made available for free) and thus will pass muster under the first fair use factor. If the material has previously been published, or is factual in nature, and if images are only of a size and resolution that is necessary to support the transformative, educational goals of publication, then the publication of the whole archive may, in addition to satisfying the first factor, comply with the second and third fair use factors. If the first three factors favor fair use, then even if the fourth factor (*i.e.*, impact on the market for the original) disfavors the museum's use, a court could still easily find fair use, but in most, if not all, cases, even the fourth factor may favor fair use if the material published does not have an existing commercial market.

In the absence of judicial precedent specifically on point with respect to a museum's wholesale publication of an archive or other special collection, recommending with a very high degree of confidence that a museum may publish an entire archive or other special collection without risking possible infringement claims is difficult. A museum that is unwilling to assume the risk of uncertainty in this area and prefers to take a conservative approach that does not rely on fair use may adopt the same procedures as have been in place prior to digitization, *i.e.*, require a researcher to visit the archives in person and obtain permission from a copyright holder prior to

obtaining an entire copy of any of the materials and/or publishing them. If the museum has created a digitized version of the archive, it could be searched by such scholars at the museum, on its servers, rather than being published on the internet. Another option would be for the museum, as in *Google*, to create a digital copy of the archival items stored on the museum's server and allow the public to search that digital copy with search terms that will yield snippets and references to the original works in the archive. Relying on *Kelly* and *Perfect 10*, the museum could also post lower resolution images of visual archival material online, directly or in response to a search term by a third party user. Additionally, if the museum decides to make the entire archive or other special collection available online, the museum would be advised to adopt applicable safeguards set forth in Article III, Special Considerations, of the Guidelines and might also consider the additional precaution of disabling download features to restrict wholesale copying and publication of the entire archive or other special collection.

ANNEX A
FAIR USE AND THE FOUR FACTORS

Set forth below is a brief analysis of the four factors to be considered when evaluating whether the use of copyrighted materials and works or art is fair use under Section 107 of the United States Copyright Act of 1976. In evaluating any particular use, the museum should consider seeking qualified legal advice.

1. First Factor: The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.

- **Analysis:** The case law has addressed this factor by evaluating the extent to which the particular use adds new value to the underlying work (insights, aesthetics, criticism, education or understandings) such that the use will be deemed transformative in nature, rather than a mere copy of the original.¹
 - At least one court² has established the significance and transformative nature of purely illustrative uses of copyrighted work when used as part of a larger work that is different than the original purpose of the work.
 - Courts have consistently reiterated that among “the best recognized justifications for copying from another’s work is to provide comment on it or criticism of it.”³
- **Level of significance:** This first factor often establishes the context for the court’s overall fair-use analysis. As set forth in *Kelly*, “The more transformative the new work, *the less important the other factors*, including commercialism [*i.e.*, commercial use of the copyrighted material], become.”⁴ This does not mean that transformation negates the other factors nor can it, as one court commented, act to protect “lazy appropriators.”⁵

¹ *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2nd Cir. 2015) (“*Google*”); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (“*Campbell*”); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); and *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003) (“*Kelly*”).

² *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2nd Cir. 2006) (“*Graham*”).

³ See *Google*.

⁴ See *Kelly*, emphasis added.

⁵ *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756 (7th Cir. 2014) (“*Kienitz*”). *Kienitz* also questioned whether “transformative” is actually one of the four factors.

- Although it will be considered in a court’s evaluation of the purpose and character of the work, the commercial or nonprofit nature of the use is not the deciding element in a case.⁶
- Probably most uses by museums will meet the test of noncommercial and nonprofit activity, although there are certainly activities of museums that could be construed as commercial. Even those activities can fall squarely within the definition of fair use and the commercial nature of activity alone should not preclude a fair use analysis. “Given that even the statutory examples of fair use are generally conducted for profit, courts often ‘do not make much of this point’.”⁷

2. Second Factor: The nature of the copyrighted work.

- **Analysis:** This factor takes into account the type of work (factual/historical vs. creative/fictional) and whether the work has been previously published.
 - Courts have held that creative works “. . . are closer to the core of intended copyright protection than are most fact-based works,”⁸ therefore making fair use more difficult to establish when creative works are copied.
 - Whether the creative work that is copied has been previously published will also be taken into account (as a factor in favor of fair use).
 - Although both published and unpublished works alike are subject to fair use, courts have sometimes been less ready to recognize fair use when evaluating works that have not been previously published.⁹
- **Level of significance:** This particular factor “. . .has rarely played a significant role in the determination of a fair use dispute.”¹⁰

⁶ See *Campbell*.

⁷ *Warner Bros. Entertainment Inc. v. RDR Books*, 575 F. Supp. 513 (SDNY 2008) quoting in part *Castle Rock Entertainment, Inc. v. Carol Publishing Group*, 150 F.3d 132 (2nd Cir. 1998).

⁸ See *Kelly* quoting *A&M Records v Napster, Inc.*, 239 F. 3d 1004 (citing *Campbell*).

⁹ See *Kelly*.

¹⁰ See *Google*.

3. **Third Factor: The amount and substantiality of the portion used in relation to the copyrighted work as a whole.**

- **Analysis:** Case law applies a “reasonableness” standard to the evaluation of the amount and substantiality of the portion of the work used in the reproduction.
 - As the court held in *Campbell*, the extent of permissible copying depends on the purpose of the use, and the question to be asked is whether the amount and substantiality of the portion used “are *reasonable in relation to the purpose of the copying.*”¹¹ Another court in discussing the issue noted that so long as users copy only as much as is necessary for their intended uses, this factor will not weigh against them.¹²
 - Case law reflects the fact that the closer in size and appearance to the original the new use is, the greater is the risk that the copy is simply a substitute for the original.¹³
 - A number of cases have held that copying copyrighted works *in their entirety* is appropriate, and constitutes fair use, “when the copying was reasonably appropriate to achieve the copier’s transformative purpose *and was done in such a manner that it did not offer a competing substitute for the original.*”¹⁴ Therefore, the extent to which the amount of the original work reproduced is reasonable, in relation to the transformative purpose of the new use, will influence a court’s decision as to whether the new use represents a substitute for the original that could harm the copyright holder’s potential market (discussed below under the Fourth Factor).
- **Level of significance:** This factor is mostly important due to its interaction with:
 - the first factor, because the transformative nature and purpose of the use is taken into account when evaluating the “reasonableness” of the portion used; and
 - the fourth factor, because the size of the reproduction and the amount of work copied will influence a court’s analysis of the extent to which the new use harms the market for the copyrighted work.

¹¹ See *Campbell*, emphasis added.

¹² See *Kelly*.

¹³ See *Graham* and *Kelly*.

¹⁴ See *Google*, emphasis added.

4. **Fourth Factor: The effect of the use upon the potential market for or value of the copyrighted work.**

- **Analysis:** “This last factor requires courts to consider ‘not only the extent of market harm caused by the particular actions of the alleged infringer, but also ‘whether unrestricted and widespread conduct of the sort engaged in by [the alleged infringer] . . . would result in a substantially adverse impact on the potential market for the original’.”¹⁵ Courts have been clear that when evaluating market harm, the relevant harm is not whether there has been any loss of licensing revenue or sales, but rather the harm resulting from a new use that offers a competing consumer a substitute for the original work, “...so as to deprive the rights holder of *significant* revenues because of the likelihood that potential purchasers may opt to acquire the copy in preference to the original.”¹⁶ In some cases, the courts have found that the copyright holder’s practice of not licensing the work for uses similar to those employed by the alleged infringer weigh in favor of fair use.¹⁷
- **Level of significance:** This last factor has played a substantial role in the courts’ analysis of fair use, because it measures the *harm that the new use can have on the copyright for the original work*. One court has suggested that the measurement of this factor is “. . . whether the contested use is a complement to the protected work (allowed) rather than a substitute for it (prohibited).”¹⁸
 - The transformative nature of the work will again be considered, as it will figure in the court’s analysis of what harm, if any, is being caused to the original market. As one court stated, the adverse impact on the market of the original is *less certain* when the use of the copyrighted work is transformative, as such work is *less likely to serve as a substitute for the original work*.¹⁹
 - Furthermore, the third factor (portion and substantiality of portion used) will also figure in the court’s analysis of this final factor.
 - Even a reproduction or copy of an entire work will not necessarily be considered harmful to the market of the underlying work, particularly if the copies are substantially smaller in size than the original. Courts have been persuaded that the small size and lesser quality of the copied images were not harmful to the copyright

¹⁵ See *Kelly*, quoting in part *Campbell*, quoting Nimmer & D. Nimmer, *Nimmer on Copyright* (1993). In *Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014), the court discussed that the lack of a readily available license not only does not weigh against fair use, it weighs in favor of fair use.

¹⁶ See *Google*, emphasis added.

¹⁷ *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006).

¹⁸ See *Kienitz*.

¹⁹ See *Campbell*, emphasis added.

owners' markets, as the copies were not adequate substitutes for the original works such that they could harm the copyright owners' ability to sell or license full-sized versions of the images.²⁰

²⁰ See *Kelly and Google*.