



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 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. 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 and works of art on the website. For example, 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 rights of privacy and publicity;
- downloading for commercial purposes is prohibited;¹³

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.

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.

- 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, including procedures available under the Digital Millennium Copyright Act of 1998.

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.

D. 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.

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

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.

¹⁴ See *Graham*.

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

¹⁵ This Section was issued June 1, 2016.

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.

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

¹⁶ See *Kelly*.

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

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

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

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 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,

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.

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, albeit a minor one, 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 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.

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

²¹ See *Graham*.

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.

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 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.

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
- **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).”¹⁷
 - 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*.¹⁸
 - 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 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.¹⁹

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 See *Kienitz*.

¹⁸ See *Campbell*, emphasis added.

¹⁹ See *Kelly* and *Google*.