

UC Santa Cruz

Refract: An Open Access Visual Studies Journal

Title

Images, Copyright, and the Future of Digital Publishing in the Arts

Permalink

<https://escholarship.org/uc/item/50g5j00d>

Journal

Refract: An Open Access Visual Studies Journal, 5(2)

Author

Fortney, Katie

Publication Date

2023

DOI

10.5070/R75259838

Copyright Information

Copyright 2023 by the author(s). This work is made available under the terms of a Creative Commons Attribution License, available at <https://creativecommons.org/licenses/by/4.0/>

Peer reviewed

Images, Copyright, and the Future of Digital Publishing in the Arts

Katie Fortney

California Digital Library

Publishing in many arts disciplines is enriched by, and may rely on, the use of images. Authors have long found the hurdles and the fees for using these images to be daunting, and the move to digital publishing can make this problem worse. Open-access publishing can prove even more challenging. If scholarship in art history, art criticism, visual studies and other fields is going to thrive in a future where digital and open-access publishing are the norm, we need better options. Fortunately, we have already seen signs that a better future is possible, and communities have been creating resources to make it more likely. Raising the awareness of the individuals and organizations in the art scholarship publishing ecosystem about these resources is a crucial first step toward a shared vision for scholarly publishing in the arts: one that encourages academic freedom and broad engagement through openness and a better understanding of the law.

Authors and Fair Use

Under US law, reproducing an image that someone else created without getting permission sometimes qualifies as fair use and is not an infringement of copyright. Fair use has long served as a crucial mechanism for ensuring that the rights granted to copyright owners do not stifle free speech. As the Seventh Circuit once explained, fair use facilitates “criticism of copyrighted works by enabling the critic

to quote enough of the criticized work to make his criticisms intelligible. Copyright should not be a means by which criticism is stifled with the backing of the courts.”¹ Reproduction of a piece of visual art in order to facilitate critical writing about that piece of art is at the heart of fair use, the statute for which specifically calls out the paradigmatic purposes of “criticism, comment, news reporting, teaching, . . . scholarship, or research.”²

And yet, in interviews and surveys conducted among visual arts professionals in 2012 and 2013, this right was not being taken advantage of because of confusion about fair use and a perception that permission was required.³ This data gathering was the first phase of a College Art Association (CAA) project that sought to develop a code of best practices in fair use for the visual arts, and it was conducted by two law professors who were among the principal investigators for the project.⁴ Instead of relying on fair use, the project found, art scholars were often self-censoring or overpaying for permissions that were not required by law. As described in the project’s *Issues Report* to the CAA in 2014, respondents reported abandoning projects, avoiding certain topics, and warning graduate students away from subjects because of real or perceived copyright issues.⁵ It is difficult to estimate the damage that this culture of permissions has had on academic freedom and art scholarship. Choices like these, as a later recap of the survey results summarized, jeopardize scholars’ “ability to realize their own full potential, as well as that of the visual arts community as a whole.”⁶

As a later phase of the project, the CAA published the *Code of Best Practices in Fair Use in the Visual Arts* in 2015.⁷ The *Code* describes five common scenarios where it should be reasonable to rely on fair use, based on the consensus of focus groups of art professionals and review by external legal experts. The first of these scenarios is in the case of art scholarship: “In their analytic writing about art, scholars and other writers (and, by extension, their publishers) may invoke fair use to quote, excerpt, or reproduce copyrighted works.”⁸

The principle is qualified with a few limitations, including

- “The writer’s use of the work, whether in part or in whole, should be justified by the analytic objective, and the user should be prepared to articulate that justification,” and
- “The amount and kind of material used and (where images are concerned) the size and resolution of the published reproduction should not exceed that appropriate to the analytic objective.”⁹

These limitations and the others included in the *Code* are easily met by most academic writing, where an image is only reproduced so that readers can understand what the author is writing about. And while reliance on permission is

sometimes less about the law and more about maintaining relationships, it should be reassuring to art scholars that the *Code* was endorsed by the Association of Art Museum Curators and received statements of support from the American Alliance of Museums and the Association of Art Museum Directors. Despite all this, however, many scholars remain leery.

Scholars who work with images need to better understand and advocate for their rights in order to shift away from a culture of permissions. No one is better placed than they are to understand and explain how the use of particular images (or the inability to use them, or the steep cost of using them) affects the scholarship they do and the scholarship they could be doing if copyright concerns were not haunting their disciplines.

However, authors are not the only ones exercising control over fair use decisions. In making their work available to the public, authors partner with journals and presses to publish their work, and these organizations have their own policies regarding fair use.

Publisher Policies regarding Fair Use

The “Policies” page for this journal, *Refract*, states, “Before submitting an article to the journal, please be sure that all necessary permissions have been cleared in any third party material.”¹⁰ Note the word *necessary*; if the law does not require permission, then neither does the journal (nor does its publisher, eScholarship¹¹). But publisher policies vary.

On the one hand, there are presses like those at Yale and MIT, both of which publish monographs in art,¹² and both of which support fair use. The Yale University Press Guidelines for Authors of Art Books include a section titled “Guidelines for Fair Use of Art Images in Scholarly Art and Architecture Monographs.”¹³ According to those guidelines, “Yale University Press supports the fair use of art images in scholarly monographs.” The guidelines walk through each of the four factors of fair use and explain that the press has a general rule of thumb for quarter-page size when images are included in a book as a fair use. If there is a disagreement between the author and the press about whether a use qualifies as fair use, the press gets to make the final decision. But overall, the guidelines reflect a nuanced and flexible approach and portray a publisher interested in working productively with authors to exercise fair use rights in a reasonable way.

The page for Current Authors on the MIT Press website says that in 2017 MIT Press “adopted a progressive policy in order to encourage the fair use of

published materials in scholarly publications.”¹⁴ The accompanying Permissions Guidelines explain what fair use is, reference the CAA Code, and give some examples, including use of images.¹⁵ The guidelines urge authors to think carefully and act responsibly, but also allow them to use their judgment, and state that “MITP does not require authors to obtain permission where they reasonably determine in good faith that fair use applies.”

The University of Chicago Press permissions guidelines, on the other hand, caution authors away from fair use of images: “It is more difficult to claim fair use for copyrighted works of visual art reproduced in their entirety, and you are encouraged to err on the side of caution in such cases.”¹⁶ The section on works of art is even starker: “Unless the work was published in the US prior to 1926, you will need to seek copyright permission to reproduce works of art whose creator died less than 70 years ago.”¹⁷ The University of Minnesota Press has similar instructions: “Artwork, including paintings, drawings, and comics, require permission.”¹⁸ “Photographs other than the author’s own,” they claim, “require permission. Exceptions are screen captures and promotional publicity stills for films, which are considered fair use under the justification that they are small parts of a much larger whole.”

Why would one university press be more cautious than another? Well, no one wants a lawsuit, or the threat of one, and some presses may have reached a different conclusion about the balance of risks than others. Even when the law is on your side, copyright complaints can be stressful, time-consuming, and costly. The previously mentioned guidelines for the University of Chicago Press give another insight: “Lenders may blacklist an author or a Press for using images in their collection without having obtained a Use Permission from them.” This brings us to another of the parties in the ecosystem of art scholarship publishing: those who hold the physical works of art and control access to images.

Museum and Archive Policies

To make fair use of an image you have to have a copy of that image. To publish it—especially in print—you have to have a good quality copy.¹⁹ In some cases, the only way to get that copy is to request it from the gallery, library, archives, or museum (“GLAM” institution) that has the original physical item you want to write about, and to agree to the terms of their particular contract. The terms of these contracts vary even more than publisher policies.

Some GLAM institutions will not provide an image to an author unless that author first gets permission for their use from the work’s artist or the artist’s

estate. In some cases this requirement may come from a restriction imposed on them by the donor or seller of the work in the acquisition agreement, and the institution has no choice. More typically, the GLAM institution is trying to limit its risk based on its understanding of the artist's rights under copyright law, not contract. As discussed above, however, the law often allows the use of a work without permission in the context of criticism of that work. When GLAM institutions require copyright holder permission before giving an art scholar a copy of a work, they are not only deciding not to take advantage of the fair use rights the institution has under the law; they are also preventing authors from using *their* rights to rely on fair use in their scholarship.

GLAM institutions with this practice can do better, and the *Guidelines for the Use of Copyrighted Materials and Works of Art by Art Museums* point the way.²⁰ Similar to the CAA's *Code of Best Practices*, these *Guidelines* published by the Association of Art Museum Directors acknowledge that "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."²¹ GLAM institutions wishing to limit their liability when providing images for fair use to third parties they cannot control, like outside authors, can look to the section on Website Terms of Use²² for conditions to add to the contracts they use. For example, they can require authors to indemnify the institution for uses that exceed fair use or otherwise violate the rights of others.

Use of Public Domain Images

So far I have been talking a lot about fair use. This seems like a good time to pause and point out that some art is actually in the public domain. For those images, authors do not need to rely on fair use because the work is not protected by copyright at all. In the United States, works generally fall out of copyright and enter the public domain ninety-five years after they were published, or seventy years after the death of the creator if never published.²³ That means anyone can use them for any purpose.

Therefore, if a work of art is in the public domain, the copy is good enough to use for your publication, and the image was obtained lawfully and without signing anything restricting your right to use it, you do not need anyone's permission. Neither the artist's estate, the GLAM institution that holds the original, nor whoever made the scan has any legal right to control that image. Anyone who has such a copy could give you a copy or post it online for everyone,

like the Art Institute of Chicago,²⁴ LACMA,²⁵ or the Rijksmuseum²⁶ do. But lots will not.

Some GLAM institutions claim, or seem to imply, that they own copyright in the images of public domain works that they provide. Presumably they are referring to their photograph or scan, not the original work. However, while a photograph of a three-dimensional object is copyrightable, in the United States, a faithful reproduction of a painting or other two-dimensional artwork is not.²⁷ Similarly, there is no *new* copyright in a scan or photographic reproduction of a two-dimensional work that is still in copyright; there is only the copyright of the artist.

Many GLAM institutions either do not realize this, do not believe the law applies in their jurisdiction, or just do not care, and so they assert ownership in a copyright that does not exist. A caption under a photo of a public domain painting that says “(c) MFA Boston” or “(c) Huntington Art Collections” is a false statement. If you need an image from some GLAM institutions, they will require you to perpetuate this falsehood to your readers, in a caption in your work, as a condition of giving you a copy of the image you can use for publication.

It does not have to be this way. More and more museums are taking the opposite tack, making the public domain items in their collections not only available to view online but available under a policy that encourages distribution and reuse. Prominent US institutions like the Smithsonian,²⁸ the Met,²⁹ and the Getty³⁰ have made news with their open content programs, but museums and archives all around the world are increasingly likely to have such a policy. The Open GLAM survey tracks these GLAM institutions openly sharing data and collections in a publicly viewable spreadsheet, and there are now over fourteen hundred of them.³¹ The 2022 update includes links to open collections or open content policies at the Wien Museum in Austria,³² the Museo Nacional de Bellas Artes in Argentina,³³ and many, many more.

Looking to the Future

Ten or twenty years ago some of the things I cite above—open content policies at major museums, supportive fair use guidelines from publishers and museum directors—might have sounded like naively optimistic things to wish for. The book *Permissions: A Survival Guide* captured the state of publishing books with art images in 2006.³⁴ It was written by Susan M. Bielstein, executive editor at the University of Chicago Press, and describes not only issues faced by authors she had worked with at the Press but also her own ordeals in acquiring images for her

own book. Her discussion focuses on print publication; in an early chapter she describes digital publishing of art books as “not likely to happen anytime soon,” and parts of an environment that would support such a thing as “simply not viable.”³⁵

Some seemingly impossible things have become reality, but we are not exactly living in an image-publishing utopia. As described above, many GLAM institutions still claim copyrights they do not have in reproductions of works in their collections. The contracts from some institutions will not only require you to print a false copyright statement; they will also limit the number of copies of your book or article that uses an image, which seems completely out of touch with the way publishing works in a digital age. And some GLAM institutions still charge fees for scholarly uses—legal, fair uses—that scholars cannot afford.

What’s an author to do? For one, make sure you understand the law that controls the use of images. The codes and guidelines described above are short, approachable for nonlawyers, and full of good information. Second, advocate for yourself. If a publisher or a GLAM institution says something that sounds unreasonable based on your understanding of the law or of the economics of academic publishing, tell them so. Show them counterexamples. It may not change their mind for your publication, but maybe if they hear from enough people, they will start to pause and think.

Finally, be transparent to your peers and other readers. Read Bielstein’s book for great examples of this. Her image captions include the credit lines she has been required to use, but she comments on them.³⁶ She says how much she had to pay for each, and to whom, alongside each image and in a summary at the end of the book. In my favorite example of this frankness, there is a blank box with a note: “The Bacon Estate asked to read the relevant text for this image and subsequently refused copyright permission to publish it.”³⁷

Fortunately, badgering by art scholars is not the only motivation for GLAM institutions to adopt better practices. Some have revamped their image policies and fee structures, finding that the revenue they were generating did not cover the administrative costs of maintaining their permissions program,³⁸ or that charging lower fees actually resulted in more income because authors would request more images.³⁹ Christine Kuan, former chief curator of Artsy, has hypothesized that GLAM institutions with restrictive policies might find that their approach can cost them in other ways: “less brand recognition, less public visibility, less educational impact, fewer onsite visitors, fewer scholarly publications (e.g., scholars may choose images that are more easily accessible or free), and less engagement with people who do not have physical access to art museums, art libraries, and other resources.”⁴⁰

When Bielstein was denied permission by the Bacon Estate in the example above, it was because she was using the image to illustrate the statement “about as pretty as a Francis Bacon painting,” which they apparently found unflattering. Intrigued by the blank box, I hopped online, used a search engine to locate a copy of the image, and had a good laugh. The future of digital publishing for art scholarship is bright. Whether that future will include images remains to be seen, but looking at the vibrant HTML and PDF pages of publications like *Refract*, I hope so.

* * *

Katie Fortney provides the University of California campus libraries and their communities with educational resources and policy guidance on copyright and rights-management issues, particularly those related to the California Digital Library’s scholarly research and publishing services via [eScholarship](#) and special collections access platforms like [Calisphere](#) and [OAC](#). She supports the UC Open Access Policies through her work as part of the [Office of Scholarly Communication](#), and maintains the [UC Copyright website](#) as part of her role on the [Standing Subcommittee for Copyright Policy](#) of the Systemwide Library and Scholarly Information Advisory Committee ([SLASIAC](#)).

Notes

¹ Chicago Board of Education v. Substance, Inc., 354 F. 3d 624 at 628 (7th Cir. 2003), https://scholar.google.com/scholar_case?case=29158225004000339.

² 17 U.S.C. §107, <https://copyright.gov/title17/92chap1.html#107>.

³ Christopher Howard, “CAA Publishes Fair Use *Issues Report*,” *CAA News Today*, January 29, 2014, <http://www.collegeart.org/news/2014/01/29/caa-publishes-fair-use-issues-report/>.

⁴ Christopher Howard, “Update on CAA’s Copyright and Fair-Use Project,” *CAA News Today*, October 7, 2013, <http://www.collegeart.org/news/2013/10/07/update-on-caas-copyright-and-fair-use-project/>.

⁵ Patricia Aufderheide et al., *Copyright, Permissions, and Fair Use among Visual Artists and the Academic and Museum Visual Arts Communities Issues Report*, College Art Association, 2014, 8, <http://www.collegeart.org/pdf/FairUseIssuesReport.pdf>.

⁶ *Code of Best Practices in Fair Use in the Visual Arts*, College Art Association, 2015, 6, <https://www.collegeart.org/programs/caa-fair-use/best-practices>.

⁷ Ibid.

⁸ Ibid., 9.

⁹ Ibid.

¹⁰ “Policies,” *Refract*, <https://escholarship.org/uc/refract/policies>. Accessed August 22, 2022.

¹¹ “Can Our Authors Include Images They Didn’t Create in the Articles We Publish,” eScholarship Help Center, <https://help.escholarship.org/support/solutions/articles/9000212223-can-our-authors-include-images-they-didn-t-create-in-the-articles-we-publish->. Accessed August 22, 2022.

¹² “Art (Books),” Yale University Press, <https://yalebooks.yale.edu/search-results/?category=ART>; “Art (Books),” MIT Press, <https://mitpress.mit.edu/search-result-list/?category=ART>. Accessed August 22, 2022.

¹³ *Yale University Press Manuscript Preparation Guidelines (Art and Architecture Books)*, https://yalebooks.yale.edu/sites/default/files/files/Art%20Books%20Author%20Guidelines%2001_12_21.docx. Accessed August 22, 2022.

¹⁴ “Current Authors,” MIT Press, <https://mitpress.mit.edu/for-authors/>. Accessed August 22, 2022.

¹⁵ “MIT Press Permissions Guidelines,” MIT Press, https://dhjhkxawhe8q4.cloudfront.net/mit-press/wp-content/uploads/2022/05/04175957/MITP-Permissions-Guidelines_1-20-17.pdf. Accessed August 21, 2022.

¹⁶ “Fair Use,” Author’s Permission Guidelines, University of Chicago Press, <https://press.uchicago.edu/resource/permissions.html#fairuse>. Accessed August 22, 2022.

¹⁷ “When Permission Is Needed,” Author’s Permission Guidelines, University of Chicago Press, <https://press.uchicago.edu/resource/permissions.html#art>. Accessed August 22, 2022.

¹⁸ “Permissions,” University of Minnesota Press Manuscript Preparation Guide and Production Overview, 3rd ed., University of Minnesota Press, 2014, <https://www.upress.umn.edu/information/author-resources-1/manuscript-guidelines>.

¹⁹ See, e.g., “Art Preparation Guidelines,” University of Chicago Press, <https://press.uchicago.edu/resource/artdigest.html>.

²⁰ *Guidelines for the Use of Copyrighted Materials and Works of Art by Art Museums*, Association of Art Museum Directors, 2017,

<https://aamd.org/sites/default/files/document/Guidelines%20for%20the%20Use%20of%20Copyrighted%20Materials.pdf>.

²¹ Ibid., Principle IV.B.2.

²² Ibid., Principle III.D. For sample language, see “Terms of Use,” Los Angeles County Museum of Art, <https://www.lacma.org/about/contact-us/terms-use>; “Permissions Policies at the UC Berkeley Library,” Berkeley Library, <https://www.lib.berkeley.edu/about/permissions-policies>. Accessed August 20, 2022.

²³ These are rules of thumb. For more details, see “Copyright at Cornell Libraries: Copyright Term and the Public Domain,” Cornell University Library, <https://guides.library.cornell.edu/copyright/publicdomain>. Accessed August 22, 2022.

²⁴ “Open Access Images,” Image Licensing, Art Institute of Chicago, <https://www.artic.edu/image-licensing>.

²⁵ “Terms of Use,” Los Angeles County Museum of Art, <https://www.lacma.org/about/contact-us/terms-use>. Accessed August 22, 2022.

²⁶ “Image Requests,” Rijksmuseum, <https://www.rijksmuseum.nl/en/research/image-requests>. Accessed August 22, 2022.

²⁷ *Compendium of U.S. Copyright Office Practices*, 3rd ed. (United States Copyright Office, 2021), Section 909.3(A): “A photograph that is merely a ‘slavish copy’ of a painting, drawing, or other public domain or copyrighted work is not eligible for registration. . . . merely scanning and digitizing existing works does not contain a sufficient amount of creativity to warrant copyright protection” (<https://www.copyright.gov/comp3/>).

²⁸ “Open Access FAQ,” Smithsonian Institution, <https://www.si.edu/openaccess/faq>. Accessed August 22, 2022.

²⁹ “Open Access at the Met,” Metropolitan Museum of Art, <https://www.metmuseum.org/about-the-met/policies-and-documents/open-access>. Accessed August 22, 2022.

³⁰ “Open Content Program,” Getty, <https://www.getty.edu/projects/open-content-program/>. Accessed October 24, 2022.

³¹ Douglas McCarthy, “Four Years of the Open GLAM Survey,” blog, <https://dougasmccarthy.com/2022/03/four-years-of-the-open-glam-survey/>. Accessed October 24, 2022. Some of the institutions listed in the survey do claim a separate copyright in their photos or scans of the objects in their collections, but they are at least providing them free of charge, and encouraging for noncommercial scholarly purposes.

³² “About the Online Collection of the Wien Museum,” Wien Museum, <https://sammlung.wienmuseum.at/en/about-us/>. Accessed October 24, 2022.

³³ “Category: Files provided by the Museo Nacional de Bellas Artes,” Wikipedia, https://commons.wikimedia.org/wiki/Category:Files_provided_by_the_Museo_Nacional_de_Bellas_Artes. Accessed August 22, 2022.

³⁴ Susan M. Bielstein, *Permissions, a Survival Guide: Blunt Talk about Art as Intellectual Property* (Chicago: University of Chicago Press, 2006), <https://doi.org/10.7208/chicago/9780226046396.001.0001>

³⁵ *Ibid.*, 8.

³⁶ See, e.g. *ibid.*, 48, fig. 7: “This painting is in the public domain. Nevertheless, the museum asserts copyright to the reproduction image loaned for this book, through private contract.”; “Why has ARS affixed a 2006 copyright registration mark to a work painted in 1982 and published several times before now?” (*ibid.*, 24, fig. 2).

³⁷ *Ibid.*, 7, fig. 1.

³⁸ John French, “OA at Yale University,” about Yale University Art Gallery, in *Rights and Reproductions: The Handbook for Cultural Institutions*, 2nd ed., ed. Anne M. Young (Washington, D.C.: Rowman & Littlefield, 2019).

³⁹ Anne M. Young, “Reconsidering Reproduction Fees,” about the Indianapolis Museum of Art at Newfields, in Young, *Rights and Reproductions*, 172.

⁴⁰ Anne M. Young, James Shulman, and Christine Kuan, “The Importance of Partnering with Third-Party Distributors,” in Young, *Rights and Reproductions*, 136.