

**Before the U.S. Copyright Office,
Library of Congress**

In the Matter of)
Copyright Protection for)
Certain Visual Works) Docket No. 2015-01

**Comments of
University Libraries, University of Massachusetts, Amherst**

**Submitted by
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INTRODUCTION

We write in response to the Notice of Inquiry on Copyright Protection for Certain Visual Works, Docket No. 2015-01, 80 Fed. Reg. 23054,¹ Questions 4 and 5:

4. What are the most significant challenges or frustrations for those who wish to make legal use of photographs, graphic art works, and/or illustrations?

5. What other issues or challenges should the Office be aware of regarding photographs, graphic artworks, and/or illustrations under the Copyright Act?

We write to share the perspectives of those who teach with images and of the librarians who support those uses. We briefly review the array of teaching uses of images, and library support of those uses. We then examine impediments to these uses, contrast that with tools and doctrines that have proven notably beneficent to teaching, and conclude by extracting some principles for supporting teaching with images.

BACKGROUND

We are librarians at the University of Massachusetts, Amherst.

Gerald Schafer is the Director of Libraries, with an MA in librarianship and a bachelor's degree in English. He directs all libraries at the University of Massachusetts Amherst and is active in numerous professional organizations at the national level.

Laura Quilter is the Copyright and Information Policy Librarian, with a law degree in addition to her MSLIS. Her work is focused on providing copyright education and support at UMass Amherst.

Brian Shelburne is the Head of the Image Collection Library (<http://library.umass.edu/image-collection-library>), with an MA in Classical and

¹ Proceedings and comments available at <http://copyright.gov/policy/visualworks/>.

Near Eastern Archaeology in addition to his MLS. His work is building and providing image resources for the university community and promoting awareness of visual literacy at UMass Amherst. He is a former Executive Board member of the Visual Resources Association (VRA).

Annie Sollinger is the Digital Image Metadata Librarian, MSIS and bachelor's degree in Art History. Her work is researching and cataloging images of artwork for teaching. She is a photographer and visual artist.

Our opinions here represent our experience in supporting educational uses of images. We write to share the perspectives of those who teach with images, and the librarians who support those uses.

USE OF IMAGES IN TEACHING

The ease of use of digital images has led to their widespread use in teaching at all levels. In certain fields such as art, architecture, art history, and media studies visual works are absolutely critical, and it is impossible to present the material effectively without them. But images are a critical tool in virtually every other discipline as well: From the sciences to business to literature, images serve as an important pedagogical tool in all disciplines, and at all educational levels, from preschool through college and graduate studies. Continuing education, child and adult language programs, and vocational programs are also examples of educational programs relying on visual works.

The uses of images in teaching are varied and pervasive throughout education. Teachers incorporate images into presentations, lectures, and study materials. Imagine a lecture on anatomy or rock formations without photographs and illustrations. Images allow instructors to support different styles of learning in their students, and provide content in multiple formats to reinforce and connect with students. For instance, an instructor discussing setting as a character in a novel might verbally describe a passage in text describing the moors of *Wuthering Heights*, show various artistic illustrations of the scenes, and some actual photographs of the moors. To build on that point, the instructor might then show

some manipulated images placing the characters in different settings, or minimizing the setting.

Participatory education shifts the focus from lecture as a performance to engaging the student in creating as a form of learning, demanding extensive use of images. Students create texts, graphics, or videos to explore a subject, demonstrating their research and their grasp of the subject through their presentation of it. Choosing the right image to convey a concept, or collaging images from different sources to make a point or capture the viewer's interest, are critical means of understanding a subject. Images are studied by students outside of class, copied by students learning to create images themselves, and incorporated by students into critical works in numerous media such as text, video, and presentations.

Educators today obtain images from a wide range of sources. Instructors and students routinely create their own original images or source them directly from photographers and creators who make their own works available on websites and in Internet-accessible databases such as Flickr. Educators obtain images from the Internet in general, using search engines to identify particular works, or images on a particular subject. And of course, educators and librarians continue to source images from the more traditional resources such as print publications, image vendors, licensed databases, and the commercial world (advertisements).

Libraries have long supported educators and students alike. Acquiring and preserving images in various formats is only the most obvious method; librarians have pushed to convert older collections to more useful formats, and to render the collections discoverable and accessible. From the practices of “copystand photography” to today’s comprehensive digital asset management programs, librarians have labored to ensure that teachers can actually locate and use the images they need.²

² See Gretchen Wagner, “Finding a New Angle of Repose”, *EDUCAUSE Review*, Nov. / Dec. 2007, pp. 84-106, and Visual Resources Association, *Statement on the Fair Use of Images for Teaching, Research, and Study* (2011), for a clear explanation of the history of educators’ use of images.

It is important to note that use of images and other visual works in the classroom, particularly in the discipline of the arts, benefits all parties. Creators of visual images unquestionably benefit from educational use of their works. Indeed, creators are often eager to have their works studied and included in “the canon,” or used as exemplars of particular techniques or eras. The creators of the works being shown benefit through the increase in the awareness of their works. Over time it is through this process that creative works may become more embedded into our cultural fabric. Restrictions on the ability to obtain good representations of a work of art will certainly result in that work receiving less widespread exposure.

Technical and procedural hurdles can interrupt all the benefits that flow from educational use of images. Teachers assembling a broad array of materials into a single lecture, with dozens or hundreds more to build, may easily be dissuaded from use of a particular image—even if it is the perfect image to make a point. Librarians entrusted with developing collections to support these teachers face the same issues writ large. Licensing or technical mechanisms that seem perfectly reasonable in a commercial context can impose disproportionate burdens in the educational context. Attempts to capture or monetize all possible economic benefit can, in fact, destroy a significant economic value that can only exist when unhindered by the middleman costs imposed by metering.

The focus of the Notice of Inquiry appears to be primarily on commercial uses. While this is laudable for those images and creators who hope to exploit their works commercially, the Constitutional purpose of the copyright is to “promote the Progress of Science and useful Arts.”³ In light of this, we believe the focus ought to be on how best to support the creation of works, distribution, and use of works, and especially in settings such as education which directly “promote the Progress of Science and useful Arts.” While commercialization has historically been an important part of this mission, with the widespread availability of technologies for creation and distribution of images and other copyrighted works, noncommercial creativity has become ever more important to visual image creators and users alike. Importantly, this noncommercial creation and distribution dovetails closely with

³ United States Constitution, Art. I, Sec. 8, cl. 8.

educational uses, which are inherently noncommercial. We thus write to ensure that mechanisms developed to facilitate commercial exploitation do not have unintended adverse consequences on educational uses, and in hopes that by identifying principles that assist educators' uses of images, other productive uses may also be fostered.

In summary, we note in particular these facts that are unique or important to this inquiry:

- Images are tremendously important in teaching, both as subjects of teaching and as pedagogical tools.
- Pedagogical approaches are diverse and continually evolving. It is impossible to predict and provide detailed support in advance for all the creative approaches developed by teachers.
- Noncommercial creators and holders of copyright far outnumber commercial and professional creators and holders.
- Creators and creative industries alike benefit from exposure in the classroom.
- Even modest transaction costs in time or money, when imposed in certain contexts such as education, can quell important uses that bring value to creators, users, and society alike.

IMPEDIMENTS TO TEACHING USES

We write in response to Question 4, **“What are the most significant challenges or frustrations for those who wish to make legal use of photographs, graphic art works, and/or illustrations?”**

In particular, we note that several mechanisms developed to facilitate commercial exploitation have had unintended adverse consequences on educational uses, posing “challenges [and] frustrations” for educators and their students.

Difficulty #1: Digital rights management (DRM) / Technical protection measures (TPMs) that are tied to electronic images often pose barriers to otherwise

lawful uses, including classroom teaching and study. For instance, Apple's implementation of DVDCCA in Apple computers has long restricted the ability to capture screen shots from video works on DVDs. Copy protection schemes that disable the ability to copy and paste hinder creation of lecture slides, as well as other productive uses. Watermarks, of course, can obstruct or impair image quality. Pre-built image packages, such as CD-ROM packages or DVDs that accompany books, while less common than they were several years ago, may allow images to be viewed only in the context of that package. Educators cannot separate an image from the source and use it in a lecture. These barriers to legal use cause frustration for educators who seek to use images in their teaching.

The Digital Millennium Copyright Act's (17 USC 1201) conversion of TPMs into legally enforceable requirements not only complicates the already difficult problem of finding a way to use content to teach, it raises the specter of criminal liability simply for teaching. The triennial rulemaking to exempt such uses from criminal liability is burdensome and effectively excludes the vast majority of potential users from effective participation. This leaves teachers out of the loop, represented only by a handful of professional associations or public interest organizations capable of addressing copyright concerns. The exceptions thus granted have, while increasingly protective of pedagogical approaches,⁴ have been so parsimonious in approach, and so generous in length of explanation, that even favored users approach with caution and confusion. Most instructors choose to either abandon their lesson plans out of fear, or to simply ignore the technicalities and operate in good faith, leaving them legally vulnerable.

Difficulty #2: Burdensome and overly elaborate statutory mechanisms, such as those detailed in 17 USC 110(2) (the "TEACH Act"), render ordinary pedagogical strategies unworkable. To avail oneself of this statute's safe harbor, an instructor

⁴ Not until the 2006 rulemaking were educators' needs recognized, and then they were limited only to media studies professors circumventing technical protection measures on DVDs. That exemption expanded in 2010 and 2012, but the exception is still exceedingly technical and limited. One commentator on an educational webinar aimed at librarians and educators advised that it was so confusing and technical that it wasn't worth it. (NISO webinar on videostreaming, June 12, 2013.)

must meet a lengthy checklist of factors, some of which are not readily within the faculty member's control.⁵ Because of the difficulty of applying the TEACH Act, it is widely viewed by educators as more trouble than it is worth,⁶ as with the DMCA anticircumvention provisions, instructors must either compromise their pedagogy, or operate in a state of legal limbo and uncertainty.

Difficulty #3: Commercial-Oriented Licensing Practices. In a perfect world, licensing enables a provider and a user to come together on terms of mutual agreement. Unfortunately, in the real world, very few rightsholders adequately anticipate the needs of teachers in either the provision of content or the provision of licenses. Providers that target commercial markets rarely establish mechanisms to provide for reasonable licensing in educational and scholarly markets.⁷ Where licensing is developed for educators, too often it is based on commercial models that are simply inappropriate in pricing or terms. For instance, commercial providers of databases routinely include indemnification clauses in their agreements, which are often illegal for state institutions to sign.

Unfortunately, organizations that serve as rights clearinghouses and represent large numbers of artists are often similarly ill-equipped to serve educators. The Artists Rights Society (ARS) is one of the most prominent examples of these. The ARS licensing request form offers no options for an educational use of the

⁵ For instance, the TEACH Act checklist developed by Kenneth Crews, formerly of the Columbia University Copyright Advisory Office, broke the statute's requirements into sixteen separate requirements, shared among the instructor, the institutional IT department, and the institution as a whole.

⁶ As the American Library Association has written, "...[I]n order to enjoy its advantages, colleges, universities, and other qualified educational institutions will need to meet the law's rigorous requirements. Educators will not be able to comply by either accidental circumstances or well-meaning intention." <http://www.ala.org/advocacy/copyright/teachact> See also ALA's FAQ: "Is it worth the effort?", "Distance Education and the TEACH Act", at <http://www.ala.org/advocacy/copyright/teachact/faq> (last visited July 20, 2015). Similarly, the College Art Association found that most professionals are overly cautious in employing fair use. "Copyright, Permissions, and Fair Use Among Visual Artists and the Academic and Museum Visual Arts Communities: An Issues Report", Feb. 2014, available at <http://www.collegeart.org/pdf/FairUseIssuesReport.pdf>.

⁷ See Susan M. Bielstein, *Permissions: A Survival Guide* (Chicago: University of Chicago Press, 2006) for a discussion of the distortions wrought by commercial pricing for licensed images in academic publishing.

work. The ARS website is likewise aimed at prospective commercial users, specifically stating that scanning from a book is wrong and illegal—and never acknowledging fair use. Educators or students who desire to use images in the classroom education may be discouraged by the information on the website.

Difficulty #4: Overreaching and inaccurate copyright-related claims. Closely related to overreaching licensing is the practice termed “copyfraud” by scholar Jason Mazzone:⁸ the practice of wrongfully claiming copyright over content that is in the public domain or not owned by the claimant. The problem of inaccurate and overreaching copyright-related claims is not a trivial one. A teacher who wishes her students to study a Renaissance portrait, or use a medieval artwork to illustrate a point, may be perfectly within her rights to do so, but intimidated by overreaching copyright claims on works. Museums, which were long counseled to engage in such practices, have been actively reforming with initiatives such as the Met’s Images for Academic Publishing (IAP) and Open Access for Scholarly Content (OASC) programs,⁹ and The Getty’s Open Content Program.¹⁰ Nevertheless, it is still common for distributors and publishers of copyrighted works to misrepresent the scope of their rights, to the detriment of educational uses.

Ambiguously broad copyright claims, simply asserting copyright on an entire work such as a book or text incorporating third-party images, work similar harms. The Association of Research Libraries, in a 2011 publication, documented a number of examples of such misrepresentations.¹¹ Poor labeling practices are responsible for many of these problems, but the rush to commercialize can exacerbate them, as in the notorious case of *Agence France Presse v. Morel*, in

⁸ Jason Mazzone, “Copyfraud”, 81 *N.Y.U. L. Rev.* 1026 (2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=787244; expanded upon in *Copyfraud and Other Abuses of Intellectual Property Law* (2011), Stanford Law Books.

⁹ The Metropolitan Museum of Art, “Image resources”, <http://www.metmuseum.org/research/image-resources> (last visited July 22, 2015).

¹⁰ The J. Paul Getty Trust, “Open Content Program”, <http://www.getty.edu/about/opencontent.html> (last visited July 19, 2015).

¹¹ Association of Research Libraries (Brandon Butler, author), “Copyfraud and Classroom Performance Rights: Two Common Bogus Copyright Claims”, 276 *Research Library Issues* 21 (2011) (available at <http://publications.arl.org/rli276>).

which photographer Daniel Morel found his works swept up into commercial licensing operations without his permission, or attribution.¹²

From a librarian's perspective, copyfraud is not just a misuse of law, it's something altogether worse—the sin of bad metadata.¹³ Wrongfully attributed or marked images pose difficulties in discovery, but compound the problem, leading errors to be perpetuated as follow-on users go through a chain of wrong sources. A teacher who simply wishes to show an image in a lecture needs to be able to find the most authoritative source, a task next to impossible prior to the advent of image-based search engines.

TOOLS THAT FACILITATE TEACHING USES

In contrast to the legal and technical impediments we describe above, we also respond to Question 5, **“What other issues or challenges should the Office be aware of regarding photographs, graphic artworks, and/or illustrations under the Copyright Act?”**, and describe those legal principles and tools that facilitate teaching, and undergird numerous instructional uses.

Image Search Engines: The plethora of image search engines heralded by the Internet has been an unparalleled boon to all who would use images, including teachers and students. Preparing a lecture or study assignment in any field would be virtually impossible without Google Images, Yahoo! Image Search, Ditto.com, Picsearch, GIPHY, etc. Identifying the source or most authoritative version of an image is likewise made feasible for teachers and ordinary consumers by image search engines.

These search engines have been made possible by open metadata. In contrast to DRM, which restricts access by users and indexers alike, open metadata facilitates identification, establishment of priority, discovery of resources, and appropriate use. Creative Commons licenses (discussed below) are, among other

¹² *Agence France Presse v. Morel*, 2011 WL 147718 (S.D.N.Y. Jan. 14, 2013).

¹³ Every librarian knows that it is far better to leave a book on a table than to put it back on the shelf *in the wrong place*.

things, a type of metadata labeling the source and identity of works as well as describing permitted uses.

Search engines also rely on the doctrine of fair use, and key fair use decisions recognizing image searching in particular, and indexing for search in general, as highly transformative fair uses.¹⁴ These decisions are supported by case law from a variety of circuits, all of which recognize as fair use the transformative use of works for discovery and reference.¹⁵ These cases demonstrate that indexing and rendering discoverable images is precisely the sort of use that the fair use doctrine was developed to protect. Openly available consumer-oriented databases such as Google Images are not the only products that rely on fair use; high-end subscription databases such as Artstor also rely on fair use in developing their content.¹⁶

Creative Commons and Open Licensing: Educators have without question been one of the most significant beneficiaries of the Creative Commons (CC) suite of licenses. CC licensing is highly advantageous in teaching, not just because its “some rights reserved” approach eases the reproduction and distribution of works, but also because most licenses require attribution—a notable absence in copyright law¹⁷ and a primary concern for many educators, scholars, and nonprofessional creators. The implementation of CC licensing into large databases of user-generated content, such as Flickr, allows teachers to search for images of any location or subject matter, and find individually created, uploaded, and openly licensed photographs. CC licensing has also enabled access through open content projects such as Wikipedia, which, as the number one reference tool on the Internet, is itself a notable index of images.

¹⁴ *Kelly v. ArribaSoft*, 336 F.3d 811 (9th Cir. 2003) and *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

¹⁵ *See, e.g., A.V. v. iParadigm*, 562 F.3d 630 (4th Cir. 2009); *Authors Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).

¹⁶ *See* Gretchen Wagner, “Finding a New Angle of Repose”, *EDUCAUSE Review*, Nov. / Dec. 2007, pp. 84-106, for a discussion of ARTSTOR’s reliance on fair use in developing its database.

¹⁷ Notwithstanding the very limited applications of 17 USC 106A and 17 USC 1202.

The utility of this creator-driven, decentralized model of licensing stands in stark contrast to the unwieldy, incomplete, inaccurate, and commercially-centered approaches offered by rights clearance organizations. These organizations of course are helpful in some circumstances, such as facilitating commercial uses.¹⁸ But they have generally failed to serve the needs of educators.

They have also failed to meet the needs of creators themselves. As previously described, professional creators benefit greatly from having their works taught and “canonized”, and who thus benefit greatly from noncommercial uses such as teaching. The failure of commercial licensing to properly accommodate educational uses thus harms professional creators. But a quick look at a site such as Flickr also shows a world of images that is rife with non-professional contributors who have no interest in participating in commercial licensing at all, and for them, user-driven open licensing initiatives such as Creative Commons offer the perfect solution to establish, with a minimum of effort, attribution and their desired terms of use. Assessments of the viability of any licensing scheme must take into account the fact that photographers now number in the billions—the vast majority of whom are non-professional—and photographic works may now number in the trillions.¹⁹ Attempts to meter that flow are not only unwelcome to the vast majority of rightsholders, but would pose a threat to legal uses in education.

Consumer Education and “Codes of Best Practices”: Consumer-oriented guides to copyright law, when developed by neutral third-parties and scholars, can inspire confidence and fuller utilization of legal rights—“promoting the Progress of Science.” Several such guides exist for images, including guidelines produced by

¹⁸ But see Jonathan Band and Brandon Butler, “Some Cautionary Tales About Collective Licensing,” 21 *Mich. St. Int’l L. Rev.* 687 (2013), reviewing the ways in which these organizations have often dis-served the very creators they were established to benefit.

¹⁹ As of 2011, Facebook hosted 100 billion photos, and Flickr hosted 6 billion—that’s “billion” with a B. In March 2013, Flickr had 3.5 million images uploaded daily. That’s another 1.25 billion annually. Adrienne Jeffries, “The Man Behind Flickr on Making the Service ‘Awesome Again’”, *The Verge*, March 20, 2013, available at <http://www.theverge.com/2013/3/20/4121574/flickr-chief-markus-spiering-talks-photos-and-marissa-mayer> .

the Visual Resources Association²⁰ and the College Art Association²¹, as well as treatments within a number of resources produced of more general nature (such as the Society for Cinema and Media Studies²²). These guides provide nuanced, fact-sensitive guidance, and because of their very nature as statements of professional practice, are able to be responsive to changes in law and business practice. When a creator enforces her rights in due course, user-community-driven best practices shift in response; consumer education projects are in this sense a market-based tool enabling efficient allocation of resources by both rights-enforcing creators and users of creative works.

Flexible and User-Protective Legal Doctrines: The tools above all operate under the legal regime of copyright, and we would be remiss if we did not note the key legal doctrines that support teaching uses of images.

Copyrightability – Recognition of lack of copyrightability is a core protection for teaching uses of images. For instance, the District Court decision in *Bridgeman Art Library v. Corel Corp.*, which recognized that “exact reproductions of public domain works of art” were not themselves copyrightable,²³ has been influential in courts, and very useful in libraries’ development of image databases to support teaching. Similarly, we are confident that the Copyright Office’s recent reiteration that copyright adheres only to works of human creativity will best facilitate the educational uses of non-human-authored photography, such as the infamous “Monkey Selfie.”²⁴ The contested territory between the factual and

²⁰ Visual Resources Association, *Statement on the Fair Use of Images for Teaching, Research, and Study* (2011), available at http://vraweb.org/wp-content/uploads/2011/01/VRA_FairUse_Statement_Pages_Links.pdf.

²¹ College Art Association, *Code of Best Practices in Fair Use for the Visual Arts* (2015), available at <http://www.collegeart.org/pdf/fair-use/best-practices-fair-use-visual-arts.pdf>.

²² The Society for Cinema and Media Studies’ *Statement of Best Practices for Fair Use in Teaching for Film and Media Educators*, available at <http://c.ymcdn.com/sites/www.cmstudies.org/resource/resmgr/docs/scmsbestpracticesforfairuse.pdf>

²³ 36 F. Supp. 2d 191, 195 (S.D.N.Y. 1999), discussing prior opinion at 25 F. Supp. 2d at 427.

²⁴ See generally Section 313.2, “Works That Lack Human Authorship”, *Compendium of the U.S. Copyright Office Practices*, Third Edition (2014).

creative content in a chart or graphic is an area in which instructors absolutely rely upon copyrightability to communicate information to students.

De Minimis – This legal doctrine is too often given *de minimis* attention relative to its more popular cousin, fair use. But unquestionably, the *de minimis* doctrine enables a plethora of educational uses that would simply not be possible if each had to be litigated, micro-licensed, or in some other way negotiated. For instance, an instructor might flash a series of images of human faces in quick succession to a classroom using iClickers to choose between traits such as “trustworthy” or “scientific”. Rapid-fire selections can elicit unconscious associations, and thus demonstrate to the class the presence of racial or gender bias. This use could certainly be defended as a fair use, but the *de minimis* doctrine would likely also protect such a brief use.

Fair Use – The flexible and open-ended fair use guidelines are without question the teacher’s best friend. Combining both an exemplary list of types of favored uses (“for purposes such as criticism, comment, news reporting, teaching [including multiple copies for classroom use], scholarship, or research”) with a relatively brief list of factors to be considered, the fair use doctrine has proven capable of adapting to more than 150 years’ of innovation in the creative arts, the business practices around them, the technologies enabling their creation and dissemination, and productive uses such as teaching. While courts have recognized that teaching and study are favored purposes within fair use—indeed, uses central to the Constitutional purposes of copyright—recent scholarship has also demonstrated that teaching uses are themselves often clearly transformative,²⁵ further supporting the analysis of teaching uses as fair use.

Statutory Exceptions and Safe Harbors – Safe harbors that clearly exempt or protect certain uses have an important role in law, minimizing uncertainty and

²⁵ Brandon Butler, “Transformation Teaching and Educational Fair Use After *Georgia State*”, *Conn. L.Rev.*, forthcoming (Feb. 23, 2015, draft available at SSRN at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2568936).

expensive litigation.²⁶ It is important, however, to restrain predictive and controlling impulses, and allow the market, and courts, to interpret statutes. Contrary to current trends in copyright statutory drafting, brevity and clarity help creators and users alike to navigate the law, and avoid expensive litigation. Section 120 provides a good template: Section a states simply that

“The copyright in an architectural work that has been constructed does not include the right to prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is located in or ordinarily visible from a public place.”²⁷

This is simple and clear for photographers and scholars of architecture alike.

Sections 110(1) and (2) offer an illustrative comparison of the two approaches, and the respective utility of each approach. Section 110(1) is reasonably brief and clear cut, noting that

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made;

²⁶ See Eric Goldman, “Want to End the Litigation Epidemic? Create Lawsuit-Free Zones”, *Forbes*, April 10, 2013, and the follow-up: “How the DMCA’s Online Copyright Safe Harbor Failed,” *Technology & Marketing Law Blog*, June 1, 2014.

²⁷ 17 U.S.C. 120(a).

By contrast, Section 110(2) is unfortunately prolix (too long to quote here), and is so weighted down by numerous technical requirements and specifications that it is virtually useless to its intended beneficiaries. Unfortunately, not only do teachers and students suffer, but the creators of the images whose works might have been studied or exposed also suffer.

PRINCIPLES AND CONCLUSIONS

The problem the Copyright Office has set itself is not an easy one: Balancing the needs of different constituencies of rightsholders—those rightsholders interested in commercial exploitation of their images, versus the majority of copyright holders who have little or no interest in commercial exploitation—is challenging enough. But the Copyright Office must also take into account those users and uses which copyright law has always accommodated and from which creators have benefited, including the educational uses we have discussed here.

We hope that describing the uses of images in education has proven illustrative, and that our discussion of technologies and law that have impeded or aided educational use has been helpful. From our comments we have distilled some key observations and principles:

Principles for supporting teaching and learning:

- Positive statements in broad, flexible language of beneficial and favored uses such as teaching and learning, serve both users and rightsholders, and enable courts and users alike to apply broad principles to new fact scenarios, such as new pedagogical strategies.
- Technical mandates and highly specific, prescribed procedures rarely age well, and provide little flexibility. Teachers are continuously adapting pedagogy and content to new tools and information, and overly specifying controls or exemptions ultimately hinders teaching and other productive uses.

- Consumer education, paired with exemplary case studies and best practices, enables use with confidence by second-comer creators such as teachers. Market forces enable rightsholders to focus policing and litigation efforts on high-value uses, enabling the vast majority of common educational uses, while allowing rightsholders to police the boundaries as they deem most appropriate.
- The majority of creative works and creators operate, as do educators, in a noncommercial world, and statutes, regulations, and technologies should be designed with these creators and users in mind first.
- Educational uses, like many other public uses, flourish primarily in a free-riding state; attempts to “capture” the economic value of such uses risk killing them under middle-man costs and procedural hurdles.
- Empowering individual creators with open and voluntary information resources such as search engines and open metadata catalogs benefits educators by supporting the vast majority of rightsholders who choose to share their content openly. Targeted support for development of voluntary registries and open metadata tools to supplement existing resources and systems would benefit rightsholders and users alike.
- False and overreaching claims negatively affect both rightsholders and users. Among users, false and overreaching claims disproportionately harm those users, such as educators, least able to investigate or challenge such claims.
- The doctrine of fair use enables the creation of tools to extract metadata and build resources that support rightsholders and users alike, and are critically important to enabling educational uses of copyrighted works.

From the three tools that support instructional use and study—image search engines, Creative Commons and open licensing, and consumer education “best practice” guides—we note that each of these are driven by different communities meeting their own needs: user communities, author / creator communities, and commercial entities developing information resources. Each group takes advantage

of the tools available to it—users taking advantage of licensing to get what they really want (credit and use), fair use supporting secondary and new uses, user communities supporting each other through education. This decentralized approach to the development of tools and resources has facilitated greater access to channels of distribution for creators, and greater access to images by teachers and students, than ever before.

Regulatory and technological tools aimed at supporting the creation and use of images through copyright law must carefully weigh these shifts in the production and use of images, while striving to protect and foster our shared interest in teaching and learning.

Respectfully submitted,

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