

A PROPOSAL FOR EDUCATIONAL FAIR USE GUIDELINES FOR DIGITAL IMAGES

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1. INTRODUCTION:

1.1 PREAMBLE

Fair use is a legal principle that provides certain limitations on the exclusive rights of copyright holders. The purpose of these guidelines is to provide guidance on the application of fair use principles by educational institutions, educators, scholars and students who wish to digitize copyrighted visual images under fair use rather than by seeking authorization from the copyright owners for non-commercial purposes. The guidelines apply to fair use only in the context of copyright.

There is no simple test to determine what is fair use. [Section 107](#) of the Copyright Act^[3] sets forth the **four fair use factors** which should be considered in each instance, based on the particular facts of a given case, to determine whether a use is a "fair use": (1) the purpose and character of the use, including whether use is of a commercial nature or is for nonprofit educational purposes, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (4) the effect of the use upon the potential market for or value of the copyrighted work.

While only the courts can authoritatively determine whether a particular use is a fair use, these guidelines represent the endorsers' consensus of conditions under which fair use should generally apply and examples of when permission is required. Uses that exceed these guidelines may or may not be fair use. The endorsers also agree that the more one exceeds these guidelines, the greater the risk that fair use does not apply. The limitations and conditions set forth in these guidelines do not apply to works in the public domain -- such as U.S. government works or works on which the copyright has expired for which there are no copyright restrictions -- or to works for which the individual or institution has obtained permission for the particular use. Also, license agreements may govern the uses of some works and users should refer to the applicable license terms for guidance.

The participants who developed these guidelines met for an extended period of time and the result represents their collective understanding in this complex area. Because digital technology is in a dynamic phase, there may come a time when it is necessary

to revise these guidelines. Nothing in these guidelines should be construed to apply to the fair use privilege in any context outside of educational and scholarly uses of distance education. The guidelines do not cover non-educational or commercial digitization or use at any time, even by nonprofit educational institutions. The guidelines are not intended to cover fair use of copyrighted works in other educational contexts such as educational multimedia projects, electronic reserves or digital images which may be addressed in other fair use guidelines.

This Preamble is an integral part of these guidelines and should be included whenever the guidelines are reprinted or adopted by organizations and educational institutions. Users are encouraged to reproduce and distribute these guidelines freely without permission; no copyright protection of these guidelines is claimed by any person or entity.

1.2 Background: Rights in Visual Images.

As photographic and electronic technology has advanced, the making of high-quality reproductions of visual images has become easier, cheaper, and more widely accessible. However, the fact that images may be easily available does not automatically mean they can be reproduced and reused without permission. Confusion regarding intellectual property rights in visual images arises from the many ways that images are created and the many sources that may be related to any particular image. Clearing permission, when necessary, requires identifying the holder of the applicable rights. Determining all the holders of the rights connected with an image requires an understanding of the source of the image, the content portrayed, and the creation of the image, both for original visual images and for reproductions of images.

Visual images can be original works or reproductions of other works; in some cases, original works may incorporate reproductions of other works as well. Often, a digital image is several generations removed from the visual image it reproduces. For example, a digital image of a painting may have been scanned from a slide, which was copied from a published book that contained a printed reproduction of the work of art; this reproduction may have been made from a color transparency photographed directly from the original painting. There may be intellectual property rights in the original painting, and each additional stage of reproduction in this chain may involve another layer of rights.

A digital image can be an original visual image, a reproduction, a published reproduction, or a copy of a published reproduction. An original visual image is a work of art or an original work of authorship (or a part of a work), fixed in digital or analog form and expressed in a visual medium. Examples include graphic, sculptural, and architectural works, as well as stills from motion pictures or other audio-visual

works. A reproduction is a copy of an original visual image in digital or analog form. The most common forms of reproductions are photographic, including prints, 35mm slides, and color transparencies. The original visual image shown in a reproduction is often referred to as the "underlying work." Digital images can be reproductions of either original visual images or of other reproductions. A published reproduction is a reproduction of an original visual image appearing in a work distributed in copies and made available to the public by sale or other transfer of ownership, or by rental, lease, or lending. Examples include a plate in an exhibition catalog that reproduces a work of art, and a digital image appearing in a CD-ROM or online. A copy of a published reproduction is a subsequent copy made of a published reproduction of an original visual image, for example, a 35mm slide which is a copy of an image in a book.

The rights in images in each of these layers may be held by different rightsholders; obtaining rights to one does not automatically grant rights to use another, and therefore all must be considered when analyzing the rights connected with an image. Rights to use images will vary depending not only on the identities of the layers of rightsholders, but also on other factors such as the terms of any bequest or applicable license.

1.3 Applicability of These Guidelines.

These guidelines apply to the creation of digital images and their use for educational purposes. The guidelines cover (1) pre-existing analog image collections and (2) newly acquired analog visual images. These guidelines do not apply to images acquired in digital form, or to images in the public domain, or to works for which the user has obtained the relevant and necessary rights for the particular use.

Only lawfully acquired copyrighted analog images (including original visual images, reproductions, published reproductions, and copies of published reproductions) may be digitized pursuant to these guidelines. These guidelines apply only to educational institutions, educators, scholars, students, and image collection curators engaging in instructional, research, or scholarly activities at educational institutions for educational purposes.

1.4 Definitions.

Educational institutions are defined as nonprofit organizations whose primary purpose is supporting the nonprofit instructional, research, and scholarly activities of educators, scholars, and students. Examples of educational institutions include K-12 schools, colleges, and universities; libraries, museums, hospitals, and other nonprofit institutions also are considered educational institutions under this definition when they

engage in nonprofit instructional, research, or scholarly activities for educational purposes.

Educational purposes are defined as non-commercial instruction or curriculum-based teaching by educators to students at nonprofit educational institutions, and research and scholarly activities, defined as planned non-commercial study or investigation directed toward making a contribution to a field of knowledge and non-commercial presentation of research findings at peer conferences, workshops, or seminars.

Educators are faculty, teachers, instructors, curators, librarians, archivists, or professional staff who engage in instructional, research, or scholarly activities for educational purposes as their assigned responsibilities at educational institutions; independent scholars also are considered educators under this definition when they offer courses at educational institutions. *Students* are participants in instructional, research, or scholarly activities for educational purposes at educational institutions.

A *digital image* is a visual work stored in binary code (bits and bytes). Examples include bitmapped images (encoded as a series of bits and bytes each representing a particular pixel or part of the image) and vector graphics (encoded as equations and/or algorithms representing lines and curves).

An *analog image collection* is an assemblage of analog visual images systematically maintained by an educational institution for educational purposes in the form of slides, photographs, or other stand-alone visual media. A pre-existing analog image collection is one in existence as of [December 31, 1996]. A newly acquired analog visual image is one added to an institution's collection after [December 31, 1996].

A *visual online catalog* is a database consisting of thumbnail images of an institution's lawfully acquired image collection, together with any descriptive text including, for example, provenance and rights information that is searchable by a number of fields, such as source.

A *thumbnail image*, as used in a visual online catalog or image browsing display to enable visual identification of records in an educational institution's image collection, is a small scale, typically low resolution, digital reproduction which has no intrinsic commercial or reproductive value.

2. IMAGE DIGITIZATION AND USE BY EDUCATIONAL INSTITUTIONS:

This Section covers digitization by educational institutions of newly acquired analog visual images and Section 6 covers digitization of pre-existing analog image collections. Refer to the applicable section depending on whether you are digitizing newly acquired or pre-existing analog visual works.

2.1 Digitizing by Institutions: Newly Acquired Analog Visual Images.

An educational institution may digitize newly, lawfully, acquired analog visual images to support the permitted educational uses under these guidelines unless such images are readily available in usable digital form for purchase or license at a fair price. Images that are readily available in usable digital form for purchase or license at a fair price should not be digitized for addition to an institutional image collection without permission.

2.2 Creating Thumbnail Images.

An educational institution may create thumbnail images of lawfully acquired images for inclusion in a visual catalog for use at the institution. These thumbnail images may be combined with descriptive text in a visual catalog that is searchable by a number of fields, such as the source.

2.3 Access, Display, and Distribution on an Institution's Secure Electronic Network.

Subject to the time limitations in Section 2.4, an educational institution may display and provide access to images digitized under these guidelines through its own secure electronic network. When displaying digital images on such networks, an educational institution should implement technological controls and institutional policies to protect the rights of copyright owners, and use best efforts to make users aware of those rights. In addition, the educational institution must provide notice stating that digital images on its secure electronic network shall not be downloaded, copied, retained, printed, shared, modified, or otherwise used, except as provided for in the permitted educational uses under these guidelines.

2.3.1 Visual online catalog:

An educational institution may display a visual online catalog, which includes the thumbnail images created as part of the institution's digitization process, on the institution's secure electronic network, and may provide access to such catalog by educators, scholars, and students affiliated with the educational institution.

2.3.2 Course compilations of digital images:

An educational institution may display an educator's compilation of digital images (see also Section 3.1.2) on the institution's secure electronic network for classroom use, after-class review, or directed study, provided that there are technological limitations (such as a password or PIN) restricting access only to students enrolled in the course. The institution may display such images on its secure electronic network only during the semester or term in which that academic course is given.

2.3.3 Access, display, and distribution beyond the institution's secure electronic network:

Electronic access to, or display or distribution of, images digitized under these guidelines, including the thumbnail images in the institution's visual online catalog, is not permitted beyond the institution's own electronic network, even for educational purposes. However, those portions of the visual online catalog which do not contain images digitized under these guidelines, such as public domain images and text, may be accessed, displayed, distributed beyond the institution's own secure electronic network.

2.4 Time Limitations for Use of Images Digitized by Institutions from Newly Acquired Analog Visual Images.

An educational institution may use and retain in digital image collections images which are digitized from newly acquired analog visual images under these guidelines, as long as the retention and use comply with the following conditions:

2.4.1 Images digitized from a known source

and not readily available in usable digital form for purchase or license at a fair price may be used for one academic term and may be retained in digital form while permission is being sought. Permission is required for uses beyond the initial use; if permission is not received, any use is outside the scope of these guidelines and subject to the four-factor fair use analysis (see Section 1.1).

2.4.2 Where the rightsholder of an image is unknown

a digitized image may be used for up to 3 years from first use, provided that a reasonable inquiry (see Section 5.2) is conducted by the institution seeking permission to digitize, retain, and reuse the digitized image. If, after 3 years, the educational institution is unable to identify sufficient information to seek permission, any further use of the image is outside the scope of these guidelines and subject to the four-factor fair use analysis (see Section 1.1).

3. USE BY EDUCATORS, SCHOLARS, AND STUDENTS:

Subject to the time limitations in Section 2.4, images digitized under these guidelines may be used by educators, scholars, and students as follows:

3.1 Educator Use of Images Digitized Under These Guidelines.

3.1.1 An educator may display digital images for educational purposes,

including face-to-face teaching of curriculum-based courses, and research and scholarly activities at a non-profit educational institution.

3.1.2 An educator may compile digital images for display on the institution's secure electronic network

(see also [Section 2.3.2](#)) to students enrolled in a course given by that educator for classroom use, after-class review, or directed study, during the semester or term in which the educator's related course is given.

3.2 Use of Images for Peer Conferences.

Educators, scholars, and students may use or display digital images in connection with lectures or presentations in their fields, including uses at non-commercial professional development seminars, workshops, and conferences where educators meet to discuss issues relevant to their disciplines or present works they created for educational purposes in the course of research, study, or teaching.

3.3 Use of Images for Publications.

These guidelines do not cover reproducing and publishing images in publications, including scholarly publications in print or digital form, for which permission is generally required. Before publishing any images under fair use, even for scholarly and critical purposes, scholars and scholarly publishers should conduct the four-factor fair use analysis ([see Section 1.1](#)).

3.4 Student Use of Images Digitized Under These Guidelines.

Students may:

- - Use digital images in an academic course assignment such as a term paper or thesis, or in fulfillment of degree requirements.

- - Publicly display their academic work incorporating digital images in courses for which they are registered and during formal critiques at a nonprofit educational institution.
- - Retain their academic work in their personal portfolios for later uses such as graduate school and employment applications.

Other student uses are outside the scope of these guidelines and are subject to the four-factor fair use analysis (see Section 1.1).

4. IMAGE DIGITIZATION BY EDUCATORS, SCHOLARS, AND STUDENTS FOR SPONTANEOUS USE:

Educators, scholars, and students may digitize lawfully acquired images to support the permitted educational uses under these guidelines if the inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission. Images digitized for spontaneous use do not automatically become part of the institution's image collection. Permission must be sought for any reuse of such digitized images or their addition to the institution's image collection.

5. IMPORTANT REMINDERS AND FAIR USE LIMITATIONS UNDER THESE GUIDELINES:

5.1 Creation of Digital Image Collections.

When digitizing copyrighted images, as permitted under these guidelines, an educational institution should simultaneously conduct the process of seeking permission to retain and use the images. Where the rightsholder is unknown, the institution should pursue, and is encouraged to keep records of, its reasonable inquiry (see Section 5.2). Rightsholders and others who are contacted are encouraged to respond promptly to inquiries.

5.2 Reasonable Inquiry.

A reasonable inquiry by an institution for the purpose of clearing rights to digitize and use digital images includes, but is not limited to, conducting each of the following steps:

1. checking any information within the control of the educational institution, including slide catalogs and logs, regarding the source of the image;
2. asking relevant faculty, departmental staff, and librarians, including visual resource collections administrators, for any information regarding the source of the image;
3. consulting standard reference publications and databases for information regarding the source of the image; and
4. consulting rights reproduction collectives and/or major professional associations representing image creators in the appropriate medium.

5.3 Attribution and Acknowledgment.

Educators, scholars, and students should credit the sources and display the copyright notice(s) with any copyright ownership information shown in the original source, for all images digitized by educators, scholars, and students, including those digitized under fair use. Crediting the source means adequately identifying the source of the work, giving a full bibliographic description where available (including the creator/author, title, publisher, and place and date of publication) or citing the electronic address if the work is from a network source. Educators, scholars, and students should retain any copyright notice or other proprietary rights notice placed by the copyright owner or image archive or collection on the digital image, unless they know that the work has entered the public domain or that the copyright ownership has changed. In those cases when source credits and copyright ownership information cannot be displayed on the screen with the image for educational reasons (e.g., during examinations), this information should still be linked to the image.

5.4 Licenses and Contracts.

Institutions should determine whether specific images are subject to a license or contract; a license or contract may limit the uses of those images.

5.5 Portions from Single Sources Such as Published Compilations or Motion Pictures.

When digitizing and using individual images from a single source such as a published compilation (including but not limited to books, slide sets, and digital image collections), or individual frames from motion pictures or other audiovisual works, institutions and individuals should be aware that fair use limits the number and substantiality of the images that may be used from a single source. In addition, a separate copyright in a compilation may exist. Further, fair use requires consideration of the effect of the use on the potential market for or value of the copyrighted work.

The greater the number and substantiality of images taken from a single source, the greater the risk that the use will not be fair use.

5.6 Portions of Individual Images.

Although the use of entire works is usually not permitted under fair use, it is generally appropriate to use images in their entirety in order to respect the integrity of the original visual image, as long as the limitations on use under these guidelines are in place. For purposes of electronic display, however, portions of an image may be used to highlight certain details of the work for educational purposes as long as the full image is displayed with or linked to the portion.

5.7 Integrity of Images: Alterations.

In order to maintain the integrity of copyrighted works, educators, scholars, and students are advised to exercise care when making any alterations in a work under fair use for educational purposes such as criticism, comment, teaching, scholarship, and research. Furthermore, educators, scholars, and students should note the nature of any changes they make to original visual images when producing their own digital images.

5.8 Caution in Downloading Images from Other Electronic Sources.

Educators, scholars, and students are advised to exercise caution in using digital images downloaded from other sources, such as the Internet. Such digital environments contain a mix of works protected by copyright and works in the public domain, and some copyrighted works may have been posted to the Internet without authorization of the copyright holder.

6. TRANSITION PERIOD FOR PRE-EXISTING ANALOG IMAGE COLLECTIONS:

6.1 Context.

Pre-existing visual resource collections in educational institutions (referred to in these guidelines as "pre-existing analog image collections") often consist of tens of thousands of images which have been acquired from a wide variety of sources over a period of many years. Many pre-existing collections lack adequate source information for older images, and standards for accession practices are still evolving. In addition, publishers and vendors may no longer be in business, and information about specific images may no longer be available. For many images there may also be several layers of rightsholders: the rights in an original visual image are separate from rights in a

reproduction of that image and may be held by different rightsholders. All these factors complicate the process of locating rightsholders, and seeking permissions for pre-existing collections will be painstaking and time consuming.

However, there are significant educational benefits to be gained if pre-existing analog image collections can be digitized uniformly and systematically. Digitization will allow educators to employ new technologies using the varied and numerous images necessary in their current curricula. At the same time, rightsholders and educational institutions have concerns that images in some collections may have been acquired without permission or may be subject to restricted uses. In either case, there may be rightsholders whose rights and interests are affected by digitization and other uses.

The approach agreed upon by the representatives who developed these guidelines is to permit educational institutions to digitize lawfully acquired images as a collection and to begin using such images for educational purposes. At the same time, educational institutions should begin to identify the rightsholders and seek permission to retain and use the digitized images for future educational purposes. Continued use depends on the institutions' making a reasonable inquiry (see Section 5.2) to clear the rights in the digitized image. This approach seeks to strike a reasonable balance and workable solution for copyright holders and users who otherwise may not agree on precisely what constitutes fair use in the digital era.

6.2 Digitizing by Institutions: Images in Pre-Existing Analog Image Collections.

6.2.1

Educational institutions may digitize images from pre-existing analog image collections during a reasonable transition period of 7 years (the approximate useful life of a slide) from [December 31, 1996]. In addition, educators, scholars, and students may begin to use those digitized images during the transition period to support the educational uses under these guidelines. When digitizing images during the transition period, institutions should simultaneously begin seeking the permission to digitize, retain, and reuse all such digitized images.

6.2.2

Digitization from pre-existing analog image collections is subject to limitations on portions from single sources such as published compilations or motion pictures (see Section 5.5). Section 6 of these guidelines should not be interpreted to permit the systematic digitization of images from an educational institution's collections of books, films, or periodicals as part of any methodical process of digitizing images from the institution's pre-existing analog image collection during the transition period.

6.2.3

If, after a reasonable inquiry (see Section 5.2), an educational institution is unable to identify sufficient information to seek appropriate permission during the transition period, continued retention and use is outside the scope of these guidelines and subject to the four-factor fair use analysis (see Section 1.1). Similarly, digitization and use of such collections after the expiration of the transition period is outside the scope of these guidelines and subject to the four-factor fair use analysis (see Section 1.1).

APPENDIX A: ORGANIZATIONS ENDORSING THESE GUIDELINES:

[To be added after endorsements are received.]

APPENDIX B:

ORGANIZATIONS PARTICIPATING IN DEVELOPMENT OF THESE GUIDELINES:

(Note that participation in the process of drafting these guidelines does not assume the endorsement of any of the participating organizations.)

American Association of Community Colleges
American Association of Museums
American Council of Learned Societies
American Society of Media Photographers
American Society of Picture Professionals
Art Libraries Society of North America
Association of American Publishers
Association of American Universities
Association of Art Museum Directors
Association of Research Libraries
Coalition for Consumers' Picture Rights
College Art Association
Consortium of College and University Media Centers
Corbis Corporation
Creative Incentive Coalition
The J. Paul Getty Trust
Instructional Telecommunications Council
Library of Congress/National Digital Library Project
Medical Library Association

National Council of Teachers of Mathematics
National Endowment for the Arts
National Endowment for the Humanities
National Initiative for a Networked Cultural Heritage
National Science Teachers Association
Picture Agency Council of America
Special Libraries Association
U.S. Copyright Office
Visual Resources Association

References

1. The Guidelines shall not be read to supersede other preexisting educational use guidelines that deal with the 1976 Copyright Act.
2. See [Section 106](#) of the Copyright Act.
3. The Copyright Act of 1976, as amended, is codified at 17 U.S.C. et seq.
4. The names of the various participants in this dialog appear at the end of these guidelines and indicate the variety of interest groups involved, both from the standpoint of the users of copyrighted works and also from the standpoint of the copyright holder.

Discussion draft compiled by participants in the CONFU-Digital Image discussion group at meetings on 2/28, 4/9, 4/17, 4/22, 5/2, 5/16, 5/29, 6/3, 6/12, 6/21, 6/26, 7/16, 8/7, 9/4, 10/9, and 10/29/96, and incorporating additional editorial clarifications.

The working draft of these guidelines is held with [Cameron Kitchin](#) of the American Association of Museums (202/218-7661).