

LIBRARY OF CONGRESS
Copyright Office

Promotion of Distance Education Through)
Digital Technologies)

Docket No. 98-12A

COMMENTS OF THE COLLEGE ART ASSOCIATION

By Robert A. Baron of the College Art Association's Committee on Intellectual Property
Kathleen R. Cohen, Member of College Art Association's Committee on Education
Jeffrey P. Cunard, Debevoise & Plimpton, College Art Association, Counsel

The College Art Association (CAA) is pleased to submit comments to the Copyright Office in response to the Notice requesting comments in Docket No. 98-12A. CAA is a professional organization that includes among its members those who are committed to the practice of art, teaching, and research of and about the visual arts and humanities. Over 13,000 artists, art historians, scholars, curators, collectors, educators, art publishers, and other visual arts professionals are individual members. Another 2,000 university art and art history departments, museums, libraries, and professional and commercial organizations hold institutional memberships.

CAA members are deeply interested in distance education and its potential applications and benefits and, for this reason, we welcome the opportunity to provide the Copyright Office with our views on the extent to which the Copyright Act should be reviewed and revised to foster distance education. These comments respond to several of the topics on which the Copyright Office is seeking the views of the public, including the nature of distance education, the successes and failures of licensing and the application of copyright law to distance education.

Today, many of the members of the CAA are exploring the means with which new digital tools can be used to enhance their abilities to communicate with students and the public. These applications include "virtual exhibitions," distance education projects and other educational activities in digital formats, such as live, recorded or simulated demonstrations, which may include the playing of relevant portions of audio-visual works. In each case, as considered appropriate, such applications may be "real-time," that is, that the activities may be interactive and, in several respects, be not dissimilar from real-time face-to-face teaching. In other cases, applications may be "on demand," in which case the display of program materials may be facilitated by a server and viewed locally (i.e., the student is physically proximate to a computer); in other paradigms, the program material may be downloaded and then played back or otherwise used at a distant location at another time. Given the wide variety of present and potential applications, the CAA and its membership have a major stake in any recommendations with respect to intellectual property legislation that affects the process of creating and disseminating such exhibits and courseware. The outcome of the process mandated by Section 403 of the Digital

Millennium Copyright Act enacted October 28, 1998 may determine whether it is feasible to continue the pursuit of these goals or whether they must be abandoned to wait for more favorable legal, technological or licensing conditions.

Before discussing our views on the nature of distance education and the specific recommendations we believe the Copyright Office should make, it is appropriate for the CAA to describe its views on the creation and use of intellectual property. The CAA membership wishes to continue contributing to the process of broadening the public's understanding and appreciation of our rich cultural, historical and artistic heritage. We take our mission from the Constitution of the United States itself, which confers on Congress the power to use copyright "to promote the progress of science and useful arts," which is generally held to mean that "the primary purpose of copyright legislation is to foster the creation and dissemination of intellectual works for the public welfare..." (Marybeth Peters, General Guide to the Copyright Act of 1976, Washington DC: Copyright Office, Library of Congress, 1977, 3:1). The constituency of the CAA is composed of both creators and users of intellectual property. We therefore believe that any revision of copyright legislation should maintain the traditional principle of balance between the rights of users and those of copyright holders.

Application of Copyright Law to Distance Education

To maintain the constitutional balance between the rights of users and creators in the context of enabling meaningful distance education, the CAA believes that the Copyright Office and Congress must review and reconsider three crucial components of the Copyright Act: 1) the extent to which Section 107(3) is and may be interpreted to limit the application of fair use in situations where the use of a work is educational, even though the entirety of the work may be used, 2) the extent to which the exemption in Section 110(1) is now limited to "face-to-face" teaching activities, and 3) the requirements in Section 110(1) and 110(2) that limit the location of instruction to classrooms or similar places devoted to instruction.

As to fair use, Section 107(3) of the Copyright Act instructs courts to consider the amount and substantiality of the portion of a work used in considering whether the use is fair. In many cases, courts would conclude that the fact that the entirety of the work is used, or that the "heart" of the work is disseminated, ought to cut against a finding of fair use. This interpretation may make sense for literary works and for works that take place in time, like cinema and drama; for such works, it may be appropriate to require that elements can and should be abstracted for comment lest the risk of being found liable for infringement be heightened.

Such an interpretation of Section 107(3), however, is misapplied and overly restrictive when applied to the use of visual arts in studying and teaching. For the visual arts, it is necessary to show the entirety of a work – for example, a slide image that depicts the entire painting or sculpture being discussed in a classroom. From the perspectives both of the student and of the artist who wants to make certain that the integrity of a work he or she created be maintained when used in teaching, it is an absolute requirement that, in addition to details, the entirety of a work be shown. The use, in teaching, of photographic and visual surrogates of the works themselves is the proportional equivalent of quoting only portions of literary works. Arguably, given the lower resolution of the images used in

reproductions for educational purposes, the omission of elements such as the texture and detail of the original might suggest that such reproductions do not, in fact, take the entirety of the original work and, therefore, that Section 107(3) should cut in favor of a finding of fair use for such uses.

Clearly, fair use as applied to the traditional and electronic visual media, for purposes of research, commentary and teaching, should permit showing and archiving reproductive, surrogate representations of originals. Moreover, a fair use finding in support of such uses is particularly appropriate (notwithstanding that the entirety of the work may be used) due to the transformative nature of the use. Unlike uses of literary works, a reproductive copy of a visual work is almost always transformed in way that makes it suitable for teaching and for a limited number of research and study applications, but makes it generally unsuitable for most commercial applications. This is so because, in a teaching and scholarly environment, for reasons of economy and efficiency, most educational users must accept lower quality reproductions than will the publishing and entertainment industries. These lower quality reproductions themselves tend to be derived from low quality analogue reproductions — book illustrations, mostly.

Copyright owners, for understandable reasons, have long feared an expansive reading of the fair use doctrine of the sort suggested above. Nonetheless, CAA believes that such concerns — driven in part by the possibility of subsequent unlawful economic exploitation of works of art — is unwarranted due to two factors: 1) the relatively poorer quality of the images used in educational settings, and 2) the lack of intense public interest in much of what is used to teach. (This last point, of course, is related to the absence of commercial licensing for many of these images, a point that is discussed in greater detail below.) In the experience of CAA members, although it is impossible to guarantee that abuses will not occur, serious cases of infringement are unlikely. Accordingly, it is unlikely that teaching surrogates (be they unmoving images or selected clips of audio or audio-visual works) will be substituted for the original in any way that adversely affects key income streams from licensing and sales owed to creators and copyright holders. In that regard, the fourth fair use factor should generally weigh in favor of a finding of fair use.

As suggested by the foregoing paragraphs, CAA members believe that fair use, at a minimum, should be available to protect the use of images in educational settings, whether the teacher is in the classroom or is teaching his or her students at a distance through electronic means. In fact, lawsuits alleging infringement of images photographically copied or scanned under a claim of fair use are relatively uncommon. Nonetheless, leaving the decisions to courts (that may or may not correctly balance the fair use factors) is unwise. Indeed, CAA believes that the Copyright Office should not conclude that the fair use doctrine adequately addresses all the copyright issues or that no specific statutory exemptions are necessary to assure the continued educational use of such materials.

There is a specific and known risk of having to confront litigation that would challenge potential claims of fair use of images and study materials in educational

contexts. Perhaps this risk is not high. Nonetheless, it is a risk. The risk of litigation has, in fact, created a widespread disabling disincentive to collect resources under claims of fair use. University counsels across the country, for fear of exposing their institutions to potential liability, have prohibited art and art history departments from relying on fair use as means of gathering and using resources for a variety of educational applications. The consequence of these decisions have fundamentally limited the quality and breadth of academic programs everywhere and have prevented many CAA members from embarking on digital projects. (In one instance known to one of the authors of these comments, for fear of being caught with what university attorneys felt may be viewed as illegal booty, the art department gave its entire slide collection to one of its professors.)

Departments are forced to abandon the right to build their collection by relying on fair use. In doing so, they perforce must limit their curricula to courses and syllabi that depend on available but frequently meager commercial offerings.

The Copyright Office also asks about the role of voluntary guidelines, about which CAA is, to be frank, skeptical. Certainly, the extant educational guidelines, including the CONFU guidelines on the use of digital images, that define the limits of fair use offer no relief to university art departments. In our experience, these guidelines seriously misunderstand the realities of the educational mission, the exigencies of the teaching environment, and impose a highly restrictive — repressive — interpretation on the application of the fair use doctrine.

Willful infringers and fair users each, to some extent, depend upon "market failure" to protect themselves from liability — the former, to protect themselves from being caught, and the latter to escape the potentiality of having to defend their takings. Contrary to some assertions, market failure is not a *raison d'être* for fair use and fair use is not simply a begrudging acknowledgement of market failure. To accept market failure as a protection against being challenged for a fair use is not a remedy to the educational issue outlined above, but rather a means of avoiding the difficult decisions.

The digital world — with technological options and new licensing paradigms — now has the capacity to minimize market failure in its own sphere. Nevertheless, what is needed is, at a minimum, a statutory clarification of education's claim to be a fair user — particularly in the circumstances described above.

The CAA believes, however, that specific statutory remedies that define in a broad manner the nature of the educational exemption is appropriate to facilitate the use of visual arts in the setting of distance education. One statutory approach might specify the types of uses, objects of use and means of transmission and reception that shall be considered to be within the just purview of the educational mission, and then state an exemption is available for such uses, objects and means. Nonetheless, given the rapid evolution of technology, it would be better to indicate that certain educational uses — namely, face-to-face and distance education created to support face-to-face and other real-time interactive instruction — deserve especially broad exemptions. To mount effective teaching activities, and to invest in the technology, infrastructure and human resources to support such activities, educational establishments, like other institutions, need some

degree of legal certainty. They need to know that their uses and their archiving of images and other resources to facilitate teaching (including distance education) and scholarship — particularly (but not exclusively) in those cases when licensed or other sources are not marketed or are not available at a reasonable price for educational purposes — are permitted by the Copyright Act. As to distance education specifically, they must know that such uses as are allowed include whatever content — materials, matter, and media — as have valid educational purpose in the context of a course of study and within the specific educational institution's community. They need to know that such materials may be presented in face-to-face, in real-time and by delayed (on-demand) presentations in and out of the classroom. Accordingly, such exemptions should apply not only to the rights of public performance and display, which are implicated by real-time interactivity, but also to the reproduction right, which is implicated when materials are downloaded and used subsequently by students.

Naturally, copyright owners are concerned with the possibility of unauthorized and subsequent dissemination of materials initially performed, displayed or downloaded in connection with distance education. CAA concurs that students using copyrighted educational materials ought to be made aware of the legal limitations that restrict their subsequent use of copyrighted materials presented to them in face-to-face, real-time and delayed transmission. They should have access to these materials for use in their research, creative endeavors and study, but should be well equipped to determine when there is a likelihood that they might be infringing on the rights of the creators and copyright holders. From a practical perspective, one of the best ways to teach this lesson is to inform students that they themselves are creators and have the same rights as do those who supply resources to them. As a general rule it is wiser to encourage the use of new technologies and methods by giving their creators maximum freedom, and to correct faults in conception and injustices as eventually made manifest by experience.

From the above it is clear that the bundle of rights needed to create a successful distance education program is allied to and inseparable from the rights exercised in the classroom. For the disciplines allied to the visual arts, not only is it necessary to place age-old standard didactic techniques of collecting and displaying images within an envelope of legality, but, at the same time, it is necessary to extend these rights into the techniques and products of digital education. Consequently, the CAA requests that the Copyright Office recommend to Congress that it amend the specific statutory exemption for face-to-face teaching currently found in Section 110(1). That exemption should be expanded as follows: to permit both the real-time, one-way and interactive, and delayed delivery of course materials and study tools (by downloading, for example) such as may be offered and prepared to coordinate with and to supplement both traditional face-to-face instruction, and real-time distance education. This statutory exemption must include the right to display static works in their entirety and to excerpt and display such narrative or time-based performances as educationally appropriate.

CAA believes that students and instructors should have the same rights of access to digital materials that they historically have had to analogue materials in classrooms and

in university research facilities. At the same time, however, CAA supports implementation of means to limit access to on-line digital course materials to bona fide students and other qualified members of the educational institution's community. For these purposes we support use of passwords or other security systems to prevent unrestricted access to copyrighted items. Potentially, we would support other means to inhibit unlawful uses such as watermarking and canceling images.

CAA appreciates that digital communications, whether closed or, like the Internet, open to any user, may be used as a vehicle on which to transmit distance education materials to any on-line computer, anywhere. Thus, although CAA strongly supports eliminating the restriction in Section 110(1) that limits performance to classrooms or similar places devoted to instruction, it also understands the need to include a tailored requirement that any delivery of such distance education materials that incorporate copyrighted works belonging to others should be subject to appropriate security measures, as indicated above. Downloaded materials of particular sensitivity to potential large-scale infringement may be protected by encoding that requires password access for each use and/or that renders the material identifiable but functionally unusable by a given date or after a specified interval.

Role of Licensing

CAA also would like to offer its views on the future role of licensing, another area of inquiry set out in the Copyright Office Notice. Some commercial vendors have made the argument that the new technologies and centralized permission agencies obviate the need to guarantee the uses described above, whether such “guarantee” is through the application of the fair use doctrine or through specific statutory exemptions. They argue that it is now possible to license (including by way of granting a site license) copyrighted materials for such uses. Libraries, in particular, license access to many tools used to conduct research for their patrons.

Again, for the visual arts, the text-to-image analogy is false. It is not possible to extrapolate from licensed text-based permission schemes in use in libraries and frequently used to assemble course readers to the visual materials needed to assemble courses in the visual arts. For one thing, the numbers of items needed are exponentially greater for the visual arts. While a course reader may involve seeking permission for 10 to 20 text items, each of the 30 to 45 art history lectures typically given in a single semester course can present anywhere from 30 to 60 (or more) images per class, making for a total of 900 to 2700 requests for permission per course — creating an administrative nightmare impossible to justify in any educational context.

Many items can be purchased from image vendors. Moreover, some useful site licensing schemes are beginning to appear. Nevertheless, much of the specialized materials needed for course presentation are not available from commercial sources, and never will be. The reasons are simple. First, vendors and licensors only know what to offer after scholars and teachers have established a work's significance; chronologically, scholarship comes first, commerce, second. Second, some works are used so rarely that it is not economically worthwhile for a vendor to license and prepare these images for use. Third, in the visual humanities there are relatively few established sets of images that wholly meet

the requirements of standard courses. Many courses tend to be personal constructs of their instructors and as such reflect evolving opinions supported by newly selected objects.

At this point, only very few vendors are beginning to offer digital versions of their image catalogues. In addition, no centralized image resource bureaus yet exist that cover even the range of traditional images needed in courses offered by CAA members (and it is unlikely that any will ever exist). Accordingly, the ability to locate and license all needed images in digital format is and probably always will be next to impossible.

Institutions that have attempted to license images used in teaching have experienced, among other things, extreme difficulties in identifying, locating and contacting copyright owners, have received lax or no response from those whom they have contacted, and sometimes are asked to pay unreasonably high prices for the images they request. The lengthy time needed to clear images for use imposes hardships on faculty trying to prepare timely courses and upon departments unable to afford the wasted administrative costs involved.

Consequently, as high quality digital images do become available, educational institutions will certainly purchase and license them when appropriate, but teaching must not be limited only to those objects that someone has decided are commercially viable. Curiously, it is often less expensive to acquire or license an image packaged for teaching, than to access it through a claim of fair use. Yet, to stifle the proper application of fair use or to refrain from validating these activities through statutory exemptions in the electronic environment would be to strangle the life out of the creativity and inventiveness that has become the hallmark of the contribution that American universities have made to American and international intellectual culture and science.

Concluding Observations

In response to the knowledge explosion of the 20th and 21st centuries and to the decline of manufacturing as a source of national wealth, American educational institutions are being called upon to prepare increasing numbers of students to work at intellectual pursuits and in the information marketplace. To achieve these goals, education needs free access to the tools required to fulfill that charge. America's intellectual strength has been nurtured by the free public library system and the promise of broad access to educational materials. This success in the world of analogue access has been made possible by exploiting the principles of "fair use" and the "first sale doctrine." Neither principle should be stifled or stymied by the application of a crabbed application of the copyright law or by the proliferation of new licensing paradigms that rely on encryption or other access control mechanisms that would have the effect of undercutting the fair use doctrine. Indeed, these two principles, when combined with inventive uses of materials in the public domain, in the past, as now, have been fundamental to the production of American intellectual properties — products recognized, respected and acquired throughout the world.

As we move into the digital age, it is crucial that the benefits of freedom of access to research and study aids be extended to the new realities of teaching. The rights students now have to consult and access library and course materials, and the rights teachers now have to expose students to such materials, should be echoed in the protocols applied to distance education. Similarly, the restrictions now placed on users to prevent

misuse of copyrighted materials they access should be borne by the recipients of distance education programs.

Creating intellectual property is like farming: you can only reap what you sow. And the university is one of the soil beds into which these seeds must be cast. The current desire among some providers of intellectual properties to maximize profits at the cost of future growth in the final analysis will prove to be self destructive and contrary to American interests. For a robust and fertile market we must distinguish between formative uses of, and consumer markets for intellectual properties; we must encourage giving educators continued access to digital materials, and must not impose restrictions that inhibit students from learning how to use the products of the past and present to create the products of America's future. We must cling to and act on our belief that education is an investment for the future.

The CAA joins other educational groups and organizations in urging that the Copyright Office recommend that Congress maintain the current, constitutionally-mandated balance between the rights of intellectual property owners and users. It is crucial that the Copyright Office and Congress take such steps as are necessary to ensure that such balance is maintained in the digital dimension — through the use and application of digital media and the benefits of real-time and delayed delivery of such media in distance education.

In short, the CAA believes that the traditional classroom and the traditional relationship the student has with the learning process should serve as the paradigm for the exploitation of new educational media and processes. The basis for this belief is rooted in the primacy of real-time, instructor-based interactive teaching, whether it takes place face-to-face or through any number of potential transmission methods and received in any number of potential locations. Such contact between student and teacher must serve as a prerequisite for obtaining and exercising rights that sanction the use of both real-time and archived or delayed methodologies for teaching and learning, coupled with proper and appropriate regards and safeguards for the rights of the owners of copyrighted materials.