



UPDATED GUIDELINES FOR THE USE OF COPYRIGHTED MATERIALS AND WORKS OF ART BY ART MUSEUMS

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ASSOCIATION OF ART MUSEUM DIRECTORS

GUIDELINES FOR THE USE OF COPYRIGHTED MATERIALS AND WORKS OF ART BY ART MUSEUMS

I. INTRODUCTION.

The possession, ownership and use of copyrighted materials and works of art¹ in art museums² involve virtually all aspects of museum operations, from the display of works of art to the dissemination of archival material³, from the creation of exhibition catalogues to the use of online collections for a range of activities. In all of these aspects and others, museums must be mindful of the rights of the creators of, and holders of copyright in, materials and works of art. At the same time, in order to accomplish their mission of acquiring, preserving, studying and interpreting works of art that are held for the benefit of the public, art museums rely on fair use, the ability and the right to use copyrighted materials and works of art in appropriate circumstances and under conditions that are well recognized, both legally and ethically. Museums not only use copyrighted materials and works of art, they also create such materials and even commission such works. They should - and the Association of Art Museum Directors (“AAMD”) believes do - understand and expect their copyrighted materials and works of art to be subject to the same fair use by third parties.

¹ For purposes of these Guidelines, “copyrighted materials” and “materials” mean printed, manuscript or digital material such as books, articles, artists’ notes or archival material that are subject to copyright in the United States. “Works” and “works of art” mean works of the visual arts in any media, including paintings, works on paper, photographs, video, digital, sculpture and other three-dimensional media, that are subject to copyright in the United States. These Guidelines do not address materials and works of art that are not subject to copyright in the United States, commonly known as public domain works.

² References in these Guidelines to “museums,” “art museums” or “member museums” are generally intended to refer to museums whose directors are members of the Association of Art Museum Directors (the “AAMD”). While these Guidelines are written for members of the AAMD, if museums whose directors are not members find these Guidelines to be useful, they are encouraged to adopt them.

³ While each type of copyrighted materials may have specific issues under copyright law, archives can be particularly complicated and while generally included in the definition, present special issues discussed in Article IV, Section E, Archives.

For many years, museums operated within a reasonably well-recognized system of legal principles, ethical guidelines and norms that guided them in their use of copyrighted materials and works of art. The explosion of electronic media, the application of digital technology, the dissemination of information through the internet, and a more nuanced understanding of fair use, informed by court decisions, have all changed and expanded the ways in which museums think about their collections and their activities. The art world is no stranger to the dynamic forces of digital information sharing and the new ways organizations communicate with the general public, scholars, researchers and others. These phenomena have evolved rapidly in just the last decade and are likely to continue at the same pace, if not an accelerated pace, in the future, particularly with the rise of Artificial Intelligence (“AI”) and the copyright issues that it presents.

With an ever-evolving technological world and legal landscape, art museums need and want guidance with respect to how they can fulfill their missions while respecting the rights of authors, artists and copyright holders. Any such guidance should acknowledge the right to use copyrighted materials and works of art without undue restriction or limitation, so long as such uses are legally and ethically sound.

The AAMD believes that there is a need to inform the field about appropriate and normative practices in the use of copyrighted materials and works of art and the application of fair use in the context of various museum activities.⁴ Because the same general principles of fair use apply regardless of the nature of the museum activity, providing the guiding legal principles and precedents that dictate the fair use analysis and applying those principles to a series of examples specific to art museums makes sense. While these Guidelines are designed to inform and assist

⁴ The AAMD commends the College Art Association for its work in creating the *Code of Best Practices in Fair Use for the Visual Arts* which includes a section on Museum Uses and has substantially advanced the knowledge of and discussion about fair use and informed these Guidelines.

member museums generally, each museum should develop its own written policy and procedures relating to the use of copyrighted materials and works of art.

These Guidelines are designed to guide and educate the members of the AAMD, the museums of which they are directors and other museums that choose to follow them. They do not cover every aspect of fair use or copyright and, except where specifically discussed, they do not address other legal considerations impacting the use of copyrighted materials or works of art such as trademarks and rights of privacy and publicity. Furthermore, in making a decision about how and when to use copyrighted materials and works of art, member museums must be sensitive not only to the laws governing activities in their home jurisdictions, but also, especially with the proliferation of internet activities, to other jurisdictions in which they may be found to operate. These Guidelines assume the application of United States copyright law, which may differ in significant ways from laws in other countries. The AAMD cannot provide guidance for every situation and every jurisdiction. Museums should seek legal advice as necessary.

II. FAIR USE.

The AAMD reaffirms the right of art museums in the United States to make fair use of copyrighted materials and works of art in the fulfillment of their missions. This right is critical to the accomplishment of activities that are performed by art museums for the public benefit. In fact, the right to use copyrighted materials and works of art fairly is one that inures to the benefit of the public that is educated and informed by art museums using such materials and such works.⁵

The right of fair use is deeply embedded in American law and is codified in Section 107 of the Copyright Act of 1976 (the “Copyright Act”). Congress has provided a set of four factors to

⁵ The Copyright Act of 1976 (the “Copyright Act”) (§108(f)(4)) refers to “the right of fair use as provided by section 107.” Fair use has been characterized in many ways, *e.g.*, a privilege, an affirmative defense, a non-infringing use. The AAMD views fair use by museums in support of their missions as a right.

be considered when evaluating whether a use of copyrighted material or a work of art is “fair.” In the introduction to the four factors, Section 107 provides that “fair use of a copyrighted work...for purposes such as criticism, comment...teaching, scholarship, or research, is not an infringement of copyright.” Because the analysis is one of weighing factors, bright lines in the area of fair use are rare and judgment and the evaluation of the use of the material are critical to arriving at an appropriate decision. The four factors to be considered are:

- The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;⁶
- The nature of the copyrighted work;
- The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- The effect of the use upon the potential market for or value of the copyrighted work.

These factors are discussed in greater detail in Fair Use and the Four Factors, Annex A to these Guidelines (“Annex A”). Courts have over time enunciated considerations for each factor and the importance of each factor in a fair use analysis, including in two important museum and art-related cases decided since these Guidelines were first released.⁷ For example, the first and fourth factors are considered extremely important in a fair use analysis, the third factor less so and the second factor interrelated in many ways with the first factor.⁸ As a result, a museum must consider the use

⁶ This factor incorporates the “transformative” standard, by which the use is evaluated in terms of whether it adds new expression, meaning or message to the original or has a different character or purpose. This test was established by the Supreme Court in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (“*Campbell*”).

⁷ 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, §13.05[A][1][a] at 13-161 (2015) (quoting *Mathews Conveyer Co. v. Palmer-Bee Co.*, 135 F.2d 73, 85 (6th Cir. 1943)). *Marano v. Metropolitan Museum of Art*, 844 F. App’x 436 (2d Cir. 2021)(“*Marano*”); *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023) (“*Warhol*”). While these Guidelines focus on the art and museum-related fair use decisions, the scope of fair use continues to be litigated extensively. The University of California at Irvine’s (UCI) Intellectual Property, Arts, and Technology (IPAT) Clinic has tracked and summarized 170 fair use cases between 2019 and early 2023, <https://ipat.law.uci.edu/fairuse23/>. This database served as an invaluable resource in the preparation of this update to the Guidelines.

⁸ *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003) (“*Kelly*”); *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756 (7th Cir. 2014) (“*Kienitz*”).

of copyrighted material or a work of art in the context of all the factors before determining that a use is protected; *however, the fair use analysis does not require that every factor be found in a museum's favor to support a museum's use of copyrighted materials or works of art.*⁹ In fact, many cases still find fair use even when at least one of the factors weighs in favor of the copyright holder.¹⁰ In those cases, fair use is nevertheless upheld because the strength of the other factors (in particular, the first factor) in favor of the user outweighs those found in favor of the copyright holder.¹¹

The more that a museum evaluates, informs and educates a particular public, audience or recipient about copyrighted material or a work of art, the more extensive (in the extent and amount of copyrighted material or in the size and quality of reproduction of a work of art) the fair use can be. As one court¹² noted, “The more transformative the new work, the less important the other factors, including commercialism, become.” Or, as another court said, “In some instances, it is readily apparent that [the defendant’s] image display enhances the reader’s understanding of the biographical text.”¹³ On the other hand, mere retransmission of a copyrighted image in a different medium is not likely to be considered transformative because it serves only as a substitute for the original. As one court explained, “. . . where the use is for the same intrinsic purpose as [the copyright holder’s], such use seriously weakens a claimed fair use.”¹⁴ Nor is fair use designed simply to excuse users from seeking permission when other non-infringing material is available and equally suited to the user’s needs. As another court noted, “The fair-use privilege under § 107

⁹ 4 Nimmer, *supra* at §13.05[A][5][a] at 13-206.5 (2017) (quoting *Wright v. Warner Books, Inc.*, 953 F.2d 731, 740 (2d Cir. 1991)).

¹⁰ *Id.* at 741.

¹¹ *Id.* at 736-37.

¹² *Kelly*, 336 F.3d 811.

¹³ See *Bill Graham Archives v. Dorling Kindersley Ltd.* 448 F.3d 605 (2nd Cir. 2006) (“*Graham*”).

¹⁴ *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110 (9th Cir. 2000) (“*Worldwide*”). See also, *Warhol*, 598 U.S. 508 (2023).

is not designed to protect lazy appropriators. Its goal instead is to facilitate a class of uses that would not be possible if users always had to negotiate with copyright proprietors. (Many copyright owners would block all parodies, for example, and the administrative costs of finding and obtaining consent from copyright holders would frustrate many academic uses.)”¹⁵

While there are countless cases that have analyzed the fair use doctrine in the context of copyrighted materials or works of art, only recently has a court decided a case involving use by a museum. This decision, *Marano*, upheld fair use in the context of the Metropolitan Museum of Art’s use of a copyrighted photograph in an online exhibition catalogue. The decision provides specific guidance on this issue (see discussion Article IV, Section (B), and there are other precedents that inform a museum on how to evaluate the use of copyrighted materials and works of art in the context of fair use. Some of those precedents are discussed in Annex A.

III. SPECIAL CONSIDERATIONS.

Set forth below are some special considerations that are not strictly part of the legal test for fair use but are related. They will not apply in all instances, but should form part of the fair use analysis when museums are using copyrighted materials and works of art.

A. Attribution.

While not a component of the fair use analysis, museums should, whenever possible, attribute copyrighted materials or works of art when they are used. Normally this means attributing the material or work to the author(s) or artist. If there is a separate copyright holder or agent of the copyright holder (or the holder of copyright, if any, of an image of an underlying work of art) known to the museum, the museum should also consider acknowledging that holder in a fashion consistent with the medium and usage within the field or the custom and practice applicable to the

¹⁵ *Kienitz*, 766 F.3d 756 (7th Cir, 2014).

type of use. While attributions directly accompanying the use of copyrighted materials and works of art are encouraged, doing so may not always be feasible given the nature of the use (*e.g.*, character limitations on certain apps), the material being used or the various mediums of use (print versus digital publications, for example). There may also be times when attribution is not appropriate,¹⁶ but the analysis should begin with a presumption that attribution is the norm.¹⁷

B. Partial or Modified Images.

As a courtesy to artists, museums generally should use the entire image of a work of art, without cropping or other alteration or diminution. If less than the entire work is reproduced or modifications to the image of the work are made, they should be clearly identified as such (*i.e.*, detail, alteration, over-text, etc.) and if possible, a complete, unaltered reproduction of the work of art should appear in the same publication for reference purposes in such size and resolution as would independently meet the fair use factors. In some circumstances, the use of a detail may be more strongly supported as fair use than the entire work, if the transformative purpose of the use

¹⁶ In certain circumstances under the Visual Artists Rights Act (“VARA”), artists (and only artists regardless of whether or not they are the copyright holder) have the right not to have a work of art attributed to them (see the Copyright Act (§106(a))). This right is limited and generally only applies if there has been a distortion, mutilation or other modification of the work which would be prejudicial to the artist’s honor or reputation.

¹⁷ Note that attribution to the original author of the content is different than copyright notice, which uses the © symbol, year of authorship and name of author; since 1989, with the enactment of the Berne Convention, the copyright symbol is no longer required to claim copyright, but it is routinely still used to provide notice of copyright ownership.

is best served by only reproducing a detail of the copyrighted work, under the first¹⁸ and third¹⁹ factors. In such a situation, only the detail would be used.

C. Documentation of Considerations.

Any fair use analysis is fact and context-specific and requires a careful balancing of the four factors in the context of a specific use. When a museum makes a determination to use copyrighted materials or works of art based on fair use, the museum should consider documenting its reasons for relying on fair use when the decision is made. A writing that is substantially contemporaneous with the decision can demonstrate the museum's good faith in making a decision, even if the decision is ultimately found not to be supported by fair use. The documentation need not be extensive, even a simple summary of the use of the material or work and why the museum believes the use is fair use will provide important support for the museum's position if challenged.²⁰

D. Website Terms of Use.

Museum websites often use copyrighted materials and works of art in a number of different ways, including online collections, guides to the collection, previews of exhibitions, blog posts, scholarly articles, webcasts, social media, and many other uses. A properly drafted "terms of use" or "terms and conditions" can serve a number of purposes, including placing the users of the website on notice of important restrictions often applicable to all (not just copyrighted) materials

¹⁸ The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.

¹⁹ The amount and substantiality of the portion used in relation to the copyrighted work as a whole.

²⁰ For example, Section 504(c)(2)(i) of the Copyright Act requires a court to remit statutory damages for a copyright violation if the infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use and if the infringer was: an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords. Whether a museum can avail itself of this defense in all circumstances is not a decided question, but the contemporaneous writing at least preserves the argument.

and works of art on the website. An additional level of protection, to evidence the user's acceptance of conditions of access and use, would be a click through agreement requiring the user to check a box prior to obtaining access to the website.

Common terms of use provide that:

- certain materials and works of art on the website are protected by copyright and may also be subject to other third-party rights, including trademarks and the rights of privacy and publicity;
- downloading for commercial purposes is prohibited;²¹
- in accordance with scholarly practice, users of materials or works of art (whether copyrighted or not) in publications, etc., should cite (i.e., provide attribution) to the author/artist and the source;
- the use of trademarks is limited or prohibited; and
- using copyrighted materials or works of art for fair use purposes is permitted - sometimes this is stated in terms of allowing uses that are non-commercial, scholarly, educational or research-related.

Terms of use or terms and conditions can also provide protection to the museum, including:

- disclaiming any warranties about the museum's rights in the copyrighted materials and works of art;
- limiting liability for downstream uses by users of the museum's website of copyrighted materials or works of art;
- providing choice of law and venue provisions for disputes between users of the museum's website and the museum;
- requiring indemnities to the museum from users of the museum's website for the user's unauthorized or infringing uses; and
- providing a mechanism for making a copyright complaint (notice and take down procedures), including procedures available under the Digital Millennium Copyright Act of 1998.

²¹ Some museums have not only prohibited downloading or generally prohibited downloading for commercial purposes in their terms of use but have sought to disable downloading. Doing so does not appear to be legally required, but may be an additional proactive step that, as a policy matter, museums may consider. Some museums do not seek to limit use of materials or works of art no longer in copyright.

Terms of use or terms and conditions should also be carefully reviewed in the context of the museum's policies with respect to the use of museum proprietary or protected information, use of content not subject to copyright, consequences of posting by users, and users' rights of privacy. Properly crafted terms of use or terms and conditions also demonstrate the museum's responsible approach to fair use and protection of copyrighted materials and works of art.

E. Contract Limitations.

Museums often obtain copyrighted materials and works of art, including images, from third-party sources through license or sales agreements that impose restrictions on use. Museums also acquire works of art or images of works of art from the artist or a gallery representing the artist or copyrighted materials from an author under contracts (*e.g.*, licenses) that contain use restrictions. These contractual restrictions can limit a museum's use of copyrighted materials or works of art regardless of whether or not a proposed use qualifies as fair use under copyright law. *Normally, fair use is not a defense to, and does not excuse a museum from abiding by, an enforceable contractual limitation.* For this reason, museums should consider inserting in contracts with third-party sources, artists and galleries provisions that expressly preserve fair use rights permitted by the Copyright Act without having to seek permission from the copyright holder.

F. Courtesy Clearance.

Notwithstanding the right to fair use, museums may voluntarily elect to seek copyright permission even when they would not legally be required to do so under a reasonable reading of fair use. Seeking such permission should not, as a matter of law,²² custom or practice, be construed as limiting a museum's right to make fair use of copyrighted materials or works of art, including

²² See *Graham*, where permission to reproduce the Grateful Dead poster was requested and denied, but the Court did not regard such denial as an impediment to fair use.

the copyrighted materials or works of art for which permission has been sought, even if permission is denied.²³ Maintaining time-honored relationships with authors, artists, and other creators and copyright holders is a vital aspect of art museum life. Museums should not be expected to choose between exercising their fair use rights and maintaining such relationships.

G. Practical Considerations.

An additional practical consideration is the copyright holder's approach to protecting and enforcing its copyrights. Copyright holders, including licensing agents acting on behalf of copyright holders, that routinely challenge even fair uses and aggressively pursue licenses and fees can present a cost and risk for the museum that should be taken into account when deciding whether or not (or how) to publish copyrighted material or a work of art.

IV. SPECIFIC EXAMPLES.

Set forth below are examples that address various museum activities and provide guidance in the fair use analysis. The AAMD cautions that each specific use needs to be evaluated on its own merits and the examples below are provided simply as a framework for that analysis. The AAMD may supplement and add to the examples set forth below, as appropriate, and may revise existing examples as more guidance becomes available through actual experience, the courts and/or Congress.

²³ At least one recent copyright case, *Monsarrat v. Newman*, 28 F. 4th 314 (1st Cir. 2022) has acknowledged that “there is some question whether an alleged infringer’s bad faith has much relevance to the fair use analysis”, citing *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006) and *Harper & Row Publishers, Inc. v. Nation Enterprises.*, 471 U.S. 539 (1985). The Court in *Monsarrat* ultimately concluded that even if bad faith precludes fair use, the conduct would have to be “something akin to egregious intentional copying for commercial gain.” Nevertheless, with the concept of “good faith” having been raised by some courts as part of the Factor 1 analysis, there is an open question of whether someone who asks for permission, is denied, and uses the image anyway in reliance on fair use could be found to have acted in bad faith and thus not satisfy Factor 1 regardless of whether the other sub-factors have been met (i.e., transformative and non-commercial).

Because there are very few bright lines, a fair use analysis by definition involves a potential for some risk, and each museum should evaluate for itself where on the risk continuum a specific activity falls and whether such use is, therefore, one that the museum finds appropriate under the circumstances. As indicated above, the results of this analysis should be documented and maintained in the museum's records. Furthermore, any risk should be understood in the context of the remedies available to a copyright holder. Some users believe that the only risk is having to discontinue the use or pay a license fee. This is not always the case, as there are considerable costs incurred in terms of staff time, resources, legal fees and adverse publicity if litigation results or even if it is merely threatened. If successful litigation is brought by the copyright holder, monetary damages, injunctive relief and even attorneys' fees are possible consequences.

A. Online Collections.

This Section provides guidance in the museum's use of online collections. Online collections can serve a variety of purposes, among them providing the public with a basic index of works of art in a museum's collection and serving as a valuable research tool for scholars. The amount of information contained in such online collections can range from simple tombstone information (*i.e.*, name of the artist, title of the work, date of the work) included for the basic purpose of identifying the work of art to rich contextual information about the work of art including, for example, its provenance, publication history, medium/materials, technique and historical significance. The use of collection images in a searchable online collection of images constitutes a transformative use and squarely falls within fair use according to such decisions as *Kelly*, which held that "thumbnail" images were fair use within the context of a commercial search engine for online images.²⁴ As one court explained in finding a search engine in and of itself

²⁴ See *Kelly*.

transformative, a search engine “transforms the image into a pointer directing a user to a source of information.”²⁵ In a searchable museum online collection that only contains minimal tombstone information and that serves almost exclusively as an index, relatively small images are more likely to be considered to qualify as transformative use. The rulings in *Kelly* and *Perfect 10* support at least “thumbnail”-sized images as fair use in the context of a museum’s online collection, but larger images may also constitute fair use because of the context of the online collection within and connected to other educational aspects of a museum’s website, as well as the non-commercial nature of a museum’s online collection.

As the nature of the information included in an online collection becomes more robust and contextual, the use also becomes more transformative, involving other, core fair uses directly relating to the image such as commentary and criticism, thereby justifying a larger size and higher quality resolution necessary to illustrate the content in the accompanying text. As explained in *Graham*, when a work created for one purpose (*e.g.*, a concert poster) is used for a different purpose (*e.g.*, the illustrated history of the Grateful Dead in *Graham*), the doctrine of fair use permits reproduction of the poster image in a size much smaller than the original image (in *Graham*, approximately the size of a baseball card or 1/8 of a page in the book), but sufficient for the transformative use. Similarly, in the context of an online collection, when a work of art is used with contextual information such that the online collection can be used by the general public as a guide to the museum’s collections as well as by scholars and researchers to facilitate research, analysis, and close-up examination, the additional transformative uses of the image provide an even stronger basis for fair use, and justify, under fair use principles, the use of larger and higher

²⁵ *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007) (“*Perfect 10*”).

resolution images necessary to illustrate the contextual, critical and educational commentary accompanying the image.

As the amount of information in the online collection as to a work of art expands along a continuum from basic index information to detailed and substantive information equivalent to scholarly essays, the transformative purpose serves to justify reproducing the image at a larger size and higher resolution. Thus, an online collection can be, and often is, a combination of formats and image sizes depending on the amount of information about each image. Some images may be accompanied by only tombstone information requiring a smaller and lower resolution image while others may be accompanied by more extensive information and, therefore, can be larger and higher resolution. Specifying one specific size and resolution is problematic because such prescriptions do not take into consideration the variety of factors that comprise the fair use analysis. Nevertheless, museums must appreciate that there is a delicate balance between a fair use of an image in an online collection and reproductions that are so large and high quality as to interfere with the copyright holder's exclusive rights.²⁶

Under the fair use standard's third factor,²⁷ the size/resolution of the image, or how much of the image to reproduce, should be related to the museum's intended transformative use. For example, if the museum's transformative purpose is to use the image as part of a searchable online collection, with minimal tombstone information, the AAMD recommends that the image size be sufficiently large to accommodate that purpose, but not larger than is required to accommodate such purpose.

²⁶ Higher resolution images, if used, should be less than publication quality. If the image is sufficiently high quality to enable third parties to download and use the image for a commercial or non-transformative purpose, a museum could be accused of contributory infringement.

²⁷ The amount and substantiality of the portion used in relation to the copyrighted work as a whole.

Without suggesting that such a size would in any way constitute an upper limit for such a use, an image that on a standard, integrated, personal computer screen is not larger than one-quarter of the screen and not more than 560 x 843 pixels could be argued to be well within the test of a reasonable use in light of current technology, the digital platform being used and the purpose being served. Of course, larger and higher resolution images, as well as details and features such as zooming, can be fully justified in the context of uses that are more transformative. For example, scholarly publications, articles about conservation that encourage magnification of areas being conserved, and educational tools on the website to encourage comparative analysis of brush strokes or techniques, all could and should allow a museum to enhance the size and resolution of the image as well as to publish details or permit zooming.

While the one-quarter screen and 560 x 843 pixels dimensions should be well within accepted norms of fair use for online collections, the application of the law of fair use to digital images as well as technology itself is constantly evolving.²⁸ The AAMD encourages museums to review periodically, and reconsider as appropriate, their policies on the display, use, and download of images of copyrighted works of art in online collections in light of what may be evolving normative sizes and resolutions.

B. Publications.

Publications are found in many different museum activities, but for this Section, the discussion is confined to exhibition catalogues, scholarly articles, blogs, educational materials, collection handbooks and museum brochures, whether in print or digital format. This grouping is intended to separate the analysis with respect to these publications that are primarily, if not

²⁸ An example of this evolution is the AAMD's *Policy on the Use of "Thumbnail" Digital Images in Museum Online Initiatives*, which many viewed as a "standard" but which, with evolutions in technology and a more precise understanding of fair use, is now obsolete and has been revoked by the AAMD.

exclusively, scholarly in nature and fall within fair use from those publications that have a significant promotional or marketing aspect (those being dealt with in Article IV, Section C of these Guidelines) and may fall outside fair use. The latter category may also include publications, such as highly illustrated, limited content, “coffee table” books produced for the commercial market that use artworks for the same intrinsic purpose as the original without transformation or sales and marketing materials produced in connection with auctions or other sales of works. The mere fact that a publication containing copyrighted material is sold does not necessarily make the use commercial or negate the fair use analysis, as discussed in Annex A under the First Factor. Rather, the publication’s sale is just one consideration that should be taken into consideration as part of the larger fair use analysis. If a publication is sold, museums should carefully consider such other fair use factors as the size and quality of the reproduction and avoid using copyrighted images on the cover or on marketing materials without permission.

Museum-specific guidance in connection with fair use of copyrighted materials or works of art in the context of online museum publications has recently been provided by the district court and affirmed by Second Circuit Court of Appeals in the case of *Marano v. The Metropolitan Museum of Art*, 844 F. App’x 438 (2d Cir. 2021). The Metropolitan Museum of Art (“Met”) included a photograph taken by Lawrence Marano of Eddie Van Halen performing at a concert in an online catalogue for an exhibition about the instruments of rock and roll. The photograph, included in a section on “Exhibition Objects”, was reproduced in a thumbnail size, along with images of 184 other objects from the Exhibition, and accompanied by historical and technical information about the guitar. Marano filed suit in 2019 alleging infringement. The district court for the Southern District of New York conducted a fair use analysis, weighed all four factors, and concluded that the Met’s use of the photo to present the “Frankenstein” guitar as an historical artifact was transformative and fundamentally different than the original expressive and creative

purpose of the photo to capture Van Halen on stage. *Marano v. Metropolitan Museum of Art*, 472 F. Supp. 3d 76 (S.D.N.Y. 2020).

In rendering the decision, the district court noted several additional factors that supported its fair use finding. First, the image was displayed alongside factual, historical and scholarly information. Second, the image was reproduced in a thumbnail size and it took multiple “clicks” to access the photo. Third, the photo constituted an “inconsequential portion” of the Met’s online catalogue. Fourth, with respect to whether the use is commercial or not, the court held that the relevant issue is not whether the Met charges a general admission fee to out-of-town visitors, but whether the specific use is commercial in nature. Given that there was no charge for viewing the online catalogue, no one paid to see the photo, and it was unlikely that the market for the photo’s original expressive purpose would be affected in any way by the Met’s use, the court found this fourth factor in favor of the Met. On appeal, the Second Circuit affirmed the district court’s decision in 2021. Perhaps going even further than the district court, the Second Circuit noted that the fact that the museum’s website was “both free and publicly available” and welcomed without charge millions of virtual visitors every year, meant that such purposes “are not commercial; to the contrary, they align the Met’s fair use of the Photo with ‘copyright’s very purpose, “[t]o promote the Progress of Science and useful Arts.’” As a caution, however, the Second Circuit acknowledged that the fair use analysis was fact and case-specific and a different use by a museum could have tipped the scales in a different direction.

In its decision in *Marano*, both the district court and Court of Appeals relied heavily on the decision in *Graham*, which addresses the use of images in a print publication that was found to be transformative. That decision certainly bolsters the argument that the use of a copyrighted image in a publication that provides explanation of and historical context for the copied work can constitute fair use even though, as was the case in *Graham*, the publication might not be classified

as exclusively “scholarly” and was created for a commercial market.²⁹ As a result, museums must consider the use of copyrighted materials and works of art within a broader analysis of fair use, evaluating the four factors as applied to each proposed publication on a continuum that once again starts with simply copying the material or the work for no intrinsic purpose other than reproducing the material or work of art without any, or at least any significant, transformation and ends with the kind of extensive, in-depth and contextual, scholarly analysis for which museums are well known; in particular, in exhibition catalogues and scholarly articles.³⁰

The AAMD is mindful that publications that have traditionally been in print are rapidly moving to digitization and distribution through the internet, either as a complement to or as a replacement for print publication. By eliminating distribution barriers, the internet creates unprecedented opportunities for museums to disseminate content, but it has also raised new challenges, many of which were discussed above in Article IV, Section A, Online Collections, with respect to online collections, *e.g.*, terms of use. Even with *Marano’s* strong support for museum reliance on fair use to reproduce copyrighted images in online publications, museums must be mindful that the distribution of any publication, whether in print or digital format, depending upon how extensive and targeted the distribution, can raise issues with respect to the protection of intellectual property in countries that do not recognize fair use or the equivalent of fair use (*e.g.*, fair dealing) with different standards or requirements. These Guidelines do not address those issues. They assume that U.S. copyright law governs. Finally, in all the uses

²⁹ Justice Gorsuch’s concurrence in *Warhol* reinforces this position when he stated that use of Warhol’s silkscreens in a “for-profit book commenting on 20th century art...might well point to fair use.” *Warhol*, 598 U.S. 508, 558 (2023)

³⁰ For additional guidance, the reader is referred to Article II, Fair Use and Annex A, Fair Use and the Four Factors as the factors, analysis and specific guidance discussed in that Article and Annex are all applicable to uses discussed in this Section. Furthermore, as appropriate, the special considerations set forth in Article III, Special Considerations, may also apply when works of art and copyrighted materials are involved in the uses discussed in this Section.

discussed in this Section, attribution and care in the use of partial or modified images should be the norm.

1. Exhibition Catalogues (Print and Digital).

Exhibition catalogues are usually publications that, while using copyrighted materials and images of works of art in the exhibition, place those copyrighted materials and images within or accompanied by text of an educational, scholarly, or even critical nature. In addition, the catalogue may contain images of works not in the exhibition but included in the catalog for comparative purposes. The use of copyrighted materials and images of works of art often, and importantly, "...enhances the reader's understanding of the . . . text. . . ." ³¹ As established in *Marano* and *Graham*, the use should be confined, in the extent of copyrighted materials and in the size and quality of images of works of art, to that necessary to illustrate the educational, scholarly or critical text and no more. Exhibition catalogues may also contain small scale images of works, sometimes used in exhibition checklists in the back of catalogues, which are more like online collections in that they serve the purpose of documenting basic information about every work included in the exhibition catalogue.

Caution is advised before relying on fair use to reproduce images exclusively or primarily used as cover pieces, frontispieces or on other pages with little or no text; in other words, as potentially approaching a substitute for the original image without a transformative context. Further, the fair use analysis should be evaluated in the context of the use of each image and not simply on the basis of the publication as a whole.³²

2. Scholarly Articles.

³¹ See *Marano* and *Graham*.

³² Yale University Press has issued an interesting set of guidelines in its *Fair Use of Art Images in Scholarly Art and Architecture Monographs*. Those guidelines suggest that, **generally**, images should be no more than one-quarter of the printed page in size. The guidelines go on to say that larger images may be appropriate under various circumstances.

The analysis with respect to scholarly articles is much the same as for exhibition catalogues, except one could argue that scholarly articles are even one step further along the continuum of transformative use. Scholarly articles are usually connected to research, and often used for the purposes of teaching. By definition these uses would qualify as “scholarship” as contemplated by Section 107 of the Copyright Act. As a result, when the amount of the copyrighted material and the size and quality of the image are only so much or so large and of such resolution as to accomplish the purpose of the scholarly article, such use of copyrighted material should be regarded as fair use.

3. Blogs.

Blogs are a unique creature of the internet that are created in a digital format and distributed electronically rather than in print form. Blogs can serve a multiplicity of purposes even within a single blog, and can contain scholarly analysis, criticism and news, as well as promotional materials. They can announce new acquisitions, upcoming exhibitions or other museum programs. As a general rule, they are written in a less formal style although they can provide important context for a museum’s exhibitions, activities and programs. As with other types of museum publications discussed in this Section, the extent to which copyrighted materials or works of art can be included in a museum blog depends on the purpose of the blog and the context.

When the blog is more akin to a scholarly article, the analysis is the same as that for such articles, except the issue becomes the size and quality of the image used in a web context. As a result, these scholarly types of blogs represent an intersection in the analyses between scholarly articles (see Article IV, Section B(2)) and online collections (see Article IV, Section A). The more content, description, and analysis in the blog, the easier to justify a larger, higher resolution image under fair use. Because blogs sometimes describe a work in specific detail with an analysis of the artist’s technique or approach, magnification tools may also be appropriate.

For those blogs that are more promotional in nature, with less content, analysis or news, for example, announcing future exhibitions or events, and that are using the image of a work of art for its intrinsic purpose as a work of art rather than for a transformative purpose, there is rarely a need for large or high resolution images. These types of blogs should be analyzed in the context of promotional activities by the museum, discussed in Article IV, Section C.

4. Educational Materials.

Given that many publications by museums are educational in nature, this subsection addresses those publications the primary focus of which is pedagogical. Examples might include use of digital images in connection with a lecture or symposium or a course taught on-site at the museum or online (*e.g.*, Massively Open Online Course, “MOOC”). Another example would be materials designed to educate children about art in an after-school program or as part of a gallery visit or special exhibitions venue. Educational materials are produced in connection with virtually every museum activity. These uses are not “for the same intrinsic purpose as” the copyright holder’s original purpose as discussed in *Worldwide* and fall within “teaching,” as contemplated by Section 107 of the Copyright Act. So long as the extent of the copying of copyrighted materials and the size and quality of the image are sufficient to accomplish the purpose and not more, then the use should be fair use.

5. Collection Handbooks.

Collection handbooks can run the gamut of publications. Some are highly illustrated “coffee table” books consisting of images of the collection covering almost an entire page and with only limited information that would be found in a basic online collection. Other handbooks are intended to guide the reader through the museum’s collection, often providing significant scholarly text (perhaps including copyrighted material) informing the reader about the work and, for example, the artist, the artist’s methods, and comparable works. *Museums should*

take care in relying on fair use to reproduce high quality resolution images for a handbook that resembles an illustrated coffee table book with minimal text. In contrast, for handbooks with commentary, scholarship and images directly related to the text, the more transformative is that use and the stronger the fair use argument, again consistent with size and quality to effectuate the purpose.

6. Museum Brochures.

This category relates to the museum's publications in the context of exhibitions, permanent collection installations, mini handbooks of highlights of specific departments and similar functions. As a brochure, and perhaps more accurately described as a guide, to a specific exhibition or specific activity of the museum, the primary purpose usually is to guide the visitor through a particular exhibition, activity or area and to highlight specific works and see those works within the context of the exhibition, activity or area. As a result, the amount of text and explanation may be modest or can be very extensive. In making a fair use assessment, the degree matters in relation to the size and quality of the images used. The more the brochure is simply a means of navigating the exhibition or area, or showcasing the activity, the less the need for large and high-quality images; the more the museum brochure approaches an exhibition catalogue or study guide, the greater the justification for larger and higher quality images that complement and inform the text.

7. Other.

Capturing the full breadth of museum uses involving print and digital publications is simply not possible in guidelines. As evident from this Section, for each new or different type of publication, a museum should first conduct the fair use analysis for the publication as a whole as well as in connection with each use of the copyrighted materials or works of art by using the

four factors and other tools provided by these Guidelines. Once the analysis is completed, the museum is advised to prepare and maintain a contemporaneous record of the fair use analysis.

C. Promotional, Marketing and Advertising Materials.

This Section³³ addresses the use of works of art and copyrighted material in the context of promoting, marketing and advertising the museum’s collection, special exhibitions, events and activities in furtherance of the museum’s mission (collectively sometimes referred to as “promotional uses”).³⁴ Promotional uses serve the purpose of generating public interest in and informing the public about museum activities such as special exhibitions, public programs, lectures, performances, and other core activities, and encouraging the public to visit and participate. Promotional uses often include works of art and copyrighted materials and do so in a variety of ways and mediums, although social media has emerged as one of the primary vehicles for these activities. In addition to social media, for example, works of art and copyrighted materials can be found on invitations, flyers, brochures, mailers, inserts, banners and signs (inside the museum, on street lights and other poles, busses, shelters and trains), in advertisements in newspapers and magazines, and in announcements and postings on museum websites. Typically, these promotional uses convey information about an event, its location, date, time and other pertinent details.

If an express license (including, for example, a Creative Commons license) has not been granted by a copyright holder and a museum seeks to include a work of art (or other copyrighted material) in promotional materials, it must determine whether its use in this context qualifies as a fair use. As with all museum uses previously discussed in these Guidelines, making this

³³ This Section was issued February 1, 2017.

³⁴ As used in this Section, promotional uses are not fundraising uses. The use of works of art and copyrighted material in connection with activities, the principal purpose of which is fundraising, is addressed in Article IV, Section D, Fundraising.

determination requires an analysis of the four fair use factors.³⁵ Merely embedding copyrighted images in social media posts, such as Instagram, for informational purposes without sufficient context, has been found to fail the fair use test in several recent court decisions on the basis that such uses, often commercial, are not transformative³⁶. As the Court noted in *Brammer v. Violent Hues Productions, LLC*, 922 F.3d 255 (4th Cir. 2019), using a photograph to provide information “...does not necessarily create a new function or meaning that expands human thought; if this were so, virtually all illustrative uses of photography would qualify as transformative.”

In addition to the special considerations, promotional uses can also raise issues of other third-party rights, including trademarks and the rights of privacy and/or publicity such as when the works of art or copyrighted materials depict a celebrity whose name, voice, image and likeness are protected by a state’s right of publicity law. While using a celebrity image as it may appear in a work of art (e.g., portrait) or copyrighted materials in an educational or scholarly context generally is protected by the First Amendment, using celebrity images for commercial purposes, such as to endorse an activity or for fundraising, typically requires consent³⁷.

³⁵ For additional guidance, the reader is referred to Article II, Fair Use and Annex A, Fair Use and the Four Factors as the factors, analysis and specific guidance discussed in that Article and Annex are all applicable to uses discussed in this Section. Furthermore, as appropriate, the special considerations set forth in Article III, Special Considerations, may also apply when works of art and copyrighted materials are involved in the uses discussed in this Section.

³⁶ Some courts have granted a bit more leeway to news outlets that embed copyrighted images in their social media posts, even if the reporting is about the subject of the photo rather than for the purpose of commenting on the photograph itself; however, a string of recent cases in the district courts has demonstrated that courts are grappling with fair use in the context of news articles reporting on embedded social media posts, sometimes finding that use of copyrighted photographs in this context is rarely transformative and almost always commercial.

³⁷ Photographs of celebrities can raise both copyright and rights of publicity issues. While fair use might justify use of a copyrighted photograph in certain contexts, use of the image itself raises separate legal issues. For example, in *Warhol*, the estate of Prince did not pursue any publicity claims against the Warhol Foundation for using Prince’s image to create the series of silkscreens, so the courts only reviewed the copyright claim by Goldsmith. In another recent case, a photographer, Jeffrey Sedlik, brought suit against Kat von Drachenberg for reproducing his photograph of Miles Davis, the jazz artist, as a tattoo. *Sedlik v. von Drachenberg et al*, No. 2:21-cv-01102, C.D. Cal. 2024. The Davis estate did not raise publicity issues, but the photographer alleged copyright infringement and Kat von D claimed fair use. Interestingly, between the filing of the case and the trial, the Supreme Court decided the *Warhol* case. Based on that, the court rejected that Kat von D's tattoo was transformative but nevertheless sent the case to the jury which found that she did not infringe Sedlik’s portrait because the works were not substantially similar, thus avoiding the broader question of fair use in the tattoo

1. The First Factor – Purpose/Character.

No court has analyzed fair use under the Copyright Act in the context of a museum's promotional use, so reliance on fair use, even after a careful analysis of the four factors, necessarily presents risks for the museum. In considering the first factor, *i.e.*, the purpose and character of the use, the most important consideration is whether the use satisfies the transformative test. When museums incorporate works of art and copyrighted materials into promotional materials, they are using the works of art and copyrighted materials as a vehicle for communicating with the public about the museum's activities, providing information about the location, date and time of events, and generating enthusiasm for the museum. In the promotional context, works of art and copyrighted materials are transformed into vehicles to disseminate information, provide wayfinding, and encourage the public to visit and participate in museum activities. All these purposes further the museum's mission to reach the broadest possible public audience. In addition to providing important information, promotional materials may also combine images with other images, reduce or enlarge the size of the image, change the quality of the image, include a detail of a work of art, and otherwise alter the original work of art to further the promotional purpose. These variations, particularly when works of art and copyrighted materials are used along with contextual information, imbue the copy with a different purpose than the original artistic purpose, thereby "altering the first with new expression, meaning, or message."³⁸

context. The jury did, however, decide that Kat von D's use of the Davis image on social media to demonstrate her tattoo process did qualify as fair use. The discrepancies in the jury findings and the judge's decision to send certain issues of law to the jury are now being challenged on appeal to the Ninth Circuit.

³⁸ See *Campbell*.

If, however, a court were to find that there was no transformative use,³⁹ or if the transformative nature of the promotional use is deemed insufficient or weak, the second consideration under the first fair use factor, namely, whether the use is of a commercial nature or for nonprofit educational purposes, becomes more important, as the court in *North Jersey Media* found. The *Marano* decision was the first to discuss the meaning of “commercial” in the context of museum activities. In that case, the plaintiff argued that because the Met charges admission fees to non-residents of New York, it is a commercial enterprise and therefore, the display of his photograph of Van Halen in an on-line exhibition catalogue was a commercial use. In rejecting this argument, the district court found that “the relevant issue is not the Met’s business model but whether the use at issue is commercial in nature.” Noting that there was no charge to the public for viewing the online catalogue and “no one paid anything to see the use of the Photo”, the district court found the use to be non-commercial. The court ultimately placed little weight on the Met’s business model due to the highly transformative nature of the secondary use. In affirming, the Second Circuit agreed that regardless of the Met’s charges for out-of-state visitors, the museum’s website is both free and publicly available and serves to extend the Met’s cultural and academic

³⁹ Although museum promotional uses have not been addressed by the courts, promotional use of a copyrighted image in social media by a for-profit media source (Fox News) has been addressed by the district court in *North Jersey Media Group Inc. v. Pirro and Fox News Network*, 74 F. Supp. 3d 605 (SDNY 2015) (“*North Jersey Media*”). In that case, Fox News tweeted an iconic photograph of firefighters on the anniversary of 9/11 to promote an upcoming program along with the hashtag “never forget.” Fox contended that the use qualified as fair use because it was newsworthy and the inclusion of the hashtag constituted a transformative use. The district court rejected Fox’s argument that use of the image was newsworthy (and hence transformative) noting that the use did not convey any new information, insights or understandings and the photographer actively licensed the iconic photograph for editorial uses. Absent a transformative use, the court gave more weight to the second part of the first factor analysis to conclude that Fox used the image for the commercial purpose of advertising and promoting its for-profit program. While this decision may strike a cautionary note regarding museum promotional uses, particularly in connection with social media uses where the ability to include contextual information is limited--this case may be distinguishable from museum promotional uses, both in the context of whether the use is transformative (if the use includes information about an exhibition or program and is ancillary to an educational program) and in the context of whether the use is commercial.

reach by welcoming without charge millions of virtual visitors every year... “These purposes are not commercial.”⁴⁰

Graham also provides helpful guidance by clarifying the meaning of the term commercial. While acknowledging in *Graham* that the publication containing the copyrighted images was a “commercial venture,” the Second Circuit rejected the notion that the “crux of the profit/nonprofit distinction is ... whether the sole motive for the use is monetary gain.”⁴¹ Noting that nearly all of the illustrative uses listed in the preamble paragraph of the fair use section of the Copyright Act are generally conducted for profit, the Second Circuit, citing a Supreme Court case,⁴² articulated the test as “whether the user will profit from the exploitation of the copyrighted material without paying for that use.” Although the Court did not clarify how a user might “profit” from exploitation of a copyrighted work other than by monetary gain, when read in conjunction with *Marano*, an argument can be made that increasing physical and on-line museum attendance for core, mission-related programs (whether general admission, special exhibitions, lectures, programs, online activities, etc.) as the result of using a work of art or copyrighted materials is unlikely to be deemed to be “commercial” or to entail “profit from the exploitation of the copyrighted material” even if general or special admission fees are charged, and, in this context, monetary gain is clearly not the “sole motive” (or a motive at all) for the use.⁴³

⁴⁰ Plaintiff also complained in the district court pleadings that the Met used the photo in the brick and mortar museum as well as the online catalogue, however, no such allegation was included in the complaint, and the district court found that the decision would have been the same even if plaintiff had alleged misuse of the image in the physical exhibition.

⁴¹ See *Graham*. Also see *Warhol*, in which Justice Gorsuch noted in his concurrence that had the Foundation sought to use the image of Prince in a “for-profit book commenting on 20th century art, the purpose and character of that use might well point to fair use.”

⁴² *Harper & Row, Publishers, Inc., v. Nation Enterprises.*, 471 U.S. 539, 562 (1985).

⁴³ In responding to the plaintiff’s allegation that the Second Circuit’s broad view of fair use as applied in the museum context would essentially extinguish copyright protections for photographers when their images are displayed by museums, the Second Circuit noted that the fair-use analysis was “deeply case specific” and that a different use by a museum and other combination of factors could have tipped the scales in another direction.

Applying this reasoning to museum promotional activities allows one to distinguish promotional activities using a work of art or copyrighted material that may result in, for example, revenue from general admission or ticket sales for an exhibition or event from an activity in which the museum profits from a commercial exploitation without paying for the use. While a visitor paying an entrance fee to the museum or a special fee or charge to see an exhibition or participate in a special event, such as a lecture or symposium or class, may generate revenue for the museum, that “business model”, as noted in *Marano*, does not necessarily mean it is intended to, nor does it necessarily, generate a profit by the museum in the same sense as, for example, sales of commercial merchandise that depict works of art or copyrighted material. Nor should the fact that certain promotional activities involve an outgoing expenditure by the museum to promote those activities (e.g., purchasing an ad in a newspaper or magazine, offering a gift card as part of a promotional campaign), be deemed to involve exploitation of the copyrighted material for profit so long as the ultimate purpose of the activity is to further the museum’s nonprofit educational purposes.

2. The Second Factor – Nature of Use.

Under the second fair use factor, *i.e.*, the nature of the copyrighted work, courts have identified various elements of a work of art or copyrighted material that argue against fair use under this factor, in particular whether the work of art or copyrighted material used is highly artistic and expressive and whether the work or material has already been published. Works of art in general, as well as many copyrighted materials, are highly artistic and expressive so that their promotional use may argue against fair use under the second factor. In addition, the museum

should determine whether its use will be the first publication, another element arguing against fair use.

3. The Third Factor – Amount Used.

Under the third factor, *i.e.*, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, both a quantitative and qualitative analysis are required. With respect to the quantity reproduced, most promotional uses reproduce the entire work of art rather than only a portion or detail. At one time, reproduction of the entire work might have weighed against fair use. With decisions in such cases as *Kelly* (thumbnails in a searchable digital database), *Graham* (reproduction of poster in historical context), and *Marano* (thumbnail reproduction of photograph in online exhibition catalogue), courts have found that the third factor supports fair use so long as the use of the entire image is also deemed transformative under the first factor and the size/resolution of the image is appropriate for its transformative purpose. The test, according to *Marano*, is whether the display of a photo in its entirety “...is reasonable in light of the purpose and character of the use.” In the context of promotional uses, most uses of works of art or copyrighted materials will entail some adjustment in the size, resolution and other qualities of the image, tailored to the promotional use and dependent on the medium. These variations render the image much less likely to be seen as a mere substitute for the original or a commercial quality reproduction of the original. Thus, images on street banners (though large in size) will only be seen from a distance; images on buses would be seen in passing, without an opportunity for detail or contemplation,⁴⁴ images in newspapers and magazines, and on social media, can be tailored to meet the fair use guidelines for publication of lower resolution and smaller size images

⁴⁴ Although most discussions of the size of reproductions in fair use decisions involve reduced size reproductions as in *Graham* and *Marano*, the critical issue under the third factor is whether the size is necessary and appropriate to accomplish the transformative purpose. In the context of museum promotional uses, a large size, *e.g.*, on the side of a bus, is often necessary and appropriate.

addressed in *Kelly* and *Perfect 10* and discussed elsewhere in these Guidelines.⁴⁵ These common variations from the original work of art or copyrighted materials can be argued to be qualitatively different than the original work and tailored to the transformative purpose of informing the public about an exhibition or other program. They are also arguably much more effective than promotional materials that omit use of the image. These reasons all support a conclusion that satisfies the requirements of the third factor.

4. The Fourth Factor – Market Effect.

Lastly, under the fourth factor, *i.e.*, the effect of the use upon the potential market for or value of the copyrighted work, even if the museum’s promotional use is not commercial, this factor is unlikely to favor the museum particularly if the copyright owner routinely licenses images for these types of uses. As in the *North Jersey Media* example, a court could find that a museum’s use would interfere with the copyright holder’s market and find against fair use with respect to the fourth factor. In contrast, however, *Graham* and *Marano* focused on the “traditional market” for the original and found that unless the secondary use “usurps” the market for the original work, and serves as a substitute for the original, this factor does not necessarily favor the copyright holder. The Second Circuit made it clear in *Graham* that a “transformative market” does not qualify as a “traditional market”, so unless the market for the photo’s original purpose (*i.e.*, expressive in the case of *Marano*) would be affected by the Met’s transformative use of depicting the guitar in a historical context, the fourth factor weighs in favor of fair use. In some cases (but not in the promotional context), the copyright holder’s practice of not licensing her work for purposes similar to those of the alleged infringer has been found to weigh in favor of fair use under this factor.⁴⁶

⁴⁵ See Article IV, Section A, Online Collections.

⁴⁶ *Blanch v. Koons*, 467 F. 3d 244, (2d Cir. 2006).

While there may well be specific circumstances or approaches to the use of images for promotional purposes that should be consistent with fair use (*e.g.*, a promotional ad, in print or social media, regarding an exhibition, that both provides meaningful content about the exhibition and the work in question and that uses a low resolution image of the work), with several factors either weighing against fair use or inconclusive, particularly the question of whether the use is transformative, and given the absence of judicial precedent applying fair use to these specific types of promotional uses, reliance on fair use in the areas addressed in this Section may pose more risk than the other uses addressed in previous Sections of the Guidelines.

D. Fundraising.

This Section addresses the use of works of art and copyrighted material in the context of museum fundraising. The vast majority of museums in the United States are non-profit institutions that need public support in order to accomplish their missions. Museums receive public support through a variety of means, including solicitations of donations of works of art, cash and other items of value.⁴⁷ As a result, fundraising is an integral and essential component of a museum's existence.

For purposes of this Section, the AAMD defines fundraising as activities in which the museum is requesting or soliciting financial support or an item of value that the museum can use to raise cash (*e.g.*, donations of cars, boats, items for auctions like vacation home rentals, furniture, rugs, etc.). Fundraising for purposes of this Section does not include solicitations of works of art or other tangible objects for the collections nor does it include an admission fee to the museum or an exhibition or other fees or consideration for or incidental to attendance at an event or

⁴⁷ Obtaining public support is of course both an element of and enhanced by most museums' status as organizations exempt from Federal income tax under Section 501(c)(3) of the Internal Revenue Code.

participation in an activity.⁴⁸ Fundraising activities may consist of direct solicitations or they may include invitations to dinners, concerts, auctions, or other special events arranged by the museum, with or without a fee or other charge to attend, the principal purpose of which is fundraising.

There are many uses of works of art and other copyrighted material in the context of fundraising. For example, customized solicitations directed toward current or prospective donors may feature a specific work of art in the context of seeking a donation. Capital campaigns are often conducted using a wide variety of techniques, tools and platforms that may include works of art, all of which are designed for the purpose of seeking financial support. Membership drives or renewal solicitations that often include the opportunity to attend exhibitions and events free of charge may use works of art and other copyrighted material as part of the request.

5. The First (Purpose/Character) and Fourth (Market Effect) Factors.

In analyzing whether the use of works of art or other copyrighted material in connection with fundraising may be considered a fair use, assessing whether fundraising is *per se* a commercial use under the first factor⁴⁹ of the fair use analysis is important. On one hand, any activity that directly involves or leads to a transaction resulting in the receipt of money, or other items of value that may be converted to cash, such as a fundraising solicitation, can be seen as commercial.⁵⁰ On the other hand, activities that benefit the museum's nonprofit programs, including promotion and marketing and solicitations of charitable donations to help a museum

⁴⁸ Some of these activities are addressed in the preceding Section, Promotional, Marketing and Advertising Materials (Article IV, Section C).

⁴⁹ For an analysis of the four factors involved in any fair use analysis, see Annex A, Fair Use and the Four Factors, to the Guidelines.

⁵⁰ At least two courts have provided guidance on the meaning of "commercial" in a museum or similar context. In *Graham*, the court applied a more measured test to define commercial than just a financial transaction. The court articulated the test as "whether the user will profit from the exploitation of the copyrighted material without paying for that use." See the discussion of *Graham* under Article IV, Section C, Promotional, Marketing and Advertising Materials. In *Marano*, the Second Circuit defined commercial by what it was not, noting that the Met's display of the Van Halen photo on a free and publicly available website that welcomes millions of virtual visitors each year without charge is not a commercial purpose. See the discussion of *Marano* under Article IV, Section B, Publications.

carry out its non-profit purposes⁵¹, are arguably distinguishable from more traditional commercial transactions such as sales of merchandise (*e.g.*, posters, mugs, t-shirts, or other items depicting copyrighted works of art). Such sales are universally recognized by museums as a commercial activity requiring a license from the copyright holder. Determining whether these distinctions are legally significant in the context of the first fair use factor as applied to fundraising is difficult, however, because there is no current judicial precedent that examines whether museum fundraising constitutes a commercial activity.

Whether or not fundraising is considered a commercial activity for purposes of the fair use analysis, the use may still satisfy the first factor of the fair use analysis provided that it is strongly transformative (an aspect of the first factor that should be present regardless of whether the use is commercial or noncommercial). In the context of museum fundraising activities, when a copyrighted image of a work of art is used on an invitation or in a program for a paid special event the purpose of which is fundraising,⁵² the work is typically used as a design element, *e.g.*, for aesthetic or expressive purposes. Sometimes, but not always, the image may be accompanied by contextual information; however, the primary purpose of using the image, *i.e.*, fundraising, in and of itself, is difficult to justify as transformative in nature. Absent a strong transformative use argument, whether or not a court views a museum's use of a copyrighted image in the context of fundraising as a commercial use, that use may fail the first prong of the fair use analysis and potentially the fourth prong (effect on the potential market) by interfering with the copyright owner's market, particularly if the owner engages in licensing activity for these types of uses.

⁵¹ Importantly, *Marano* recognizes that the mere fact that museums are non-profit institutions does not, by itself, mean that all their activities are non-commercial.

⁵² These types of special events should be distinguished from those in direct fulfillment of the museum's exempt purpose, such as lectures or exhibitions. Invitations or other promotional materials for such educational events are discussed in Article IV, Section C, Promotional, Marketing and Advertising Materials.

6. The Second (Nature of Use) and Third (Amount Used) Factors.

As discussed earlier in these Guidelines, fair use does not require that the use meet all four of the factors, but if the first and fourth factors are difficult to satisfy in the fundraising context, and the work is highly creative (factor two) and reproduced in its entirety by the museum in connection with fundraising activities (factor three), a copyright holder might successfully argue that none of the four fair use factors are satisfied in connection with the museum's fundraising use.

While there may be arguments against fair use of works of art and other copyrighted material in connection with activities whose primary goal is fundraising, this does not mean that a fundraising component precludes an otherwise well supported fair use. For example, a museum brochure that includes images of copyrighted works along with scholarly essays or general museum information as well as a membership solicitation or invitation to a fundraising event may be sufficiently transformative and non-commercial to justify reliance on fair use.

The absence of legal precedent or guidance, combined with the argument that fundraising activities are commercial in nature without a strong transformative element, does suggest that significant caution in this area is appropriate.

E. Archives and Other Special Collections.

This Section addresses the copyright implications of using copyrighted material and works of art that are part of an archive or other special collection held by a museum.⁵³ For purposes of this Section, "special collections" or "archives" mean an archival record of a third party or parties such as artists, dealers, curators, galleries and others acquired by the museum by purchase,

⁵³ In addition to copyright considerations, archives and special collections can raise challenging legal issues pertaining to donor restrictions, rights of privacy, publicity, defamation, and the First Amendment. Before making such collections available to the public online, the museum would be advised to conduct a good faith review of individual items, if possible, to remove or restrict materials that might violate personal rights of individuals and expose the museum to potential liability independent of copyright claims.

donation or bequest (as distinguished from the museum’s own archives of records and documents pertinent to the activities and history of the museum⁵⁴). Archives and other special collections typically consist of large quantities of many different types of property and ephemera, both tangible and intangible, including works on paper (*e.g.*, letters, postcards, photographs, sketches), interviews and oral histories, three-dimensional works such as models, analog electronic audio and video tape, digital media such as disks, hard drives, digital information stored in the cloud, and text messages (individually, “archival item(s)”). Archival items can be published or unpublished, and can have differing copyright periods. Particular archives also can comprise multiple authors within a single group, for example, letters from and to third parties.

The focus of this Section is the fair use issues to be considered by a museum when it decides to: (1) digitize an **entire** archive or special collection and (2) make available online **all or a substantial portion** of an archive or other special collection.⁵⁵ Reviewing the circumstances under which archives or special collections are often transferred to museums provides an important first step in the fair use analysis. Artists, dealers, galleries and others who elect to transfer archival materials and special collections to public museums generally do so with the express understanding and intention that the materials will be made available to scholars, researchers and the general public for educational purposes. Donors to museums of these materials usually (and should) expect that scholars will scour the materials and use them in whole or in part for publications, dissertations, exhibitions, and other means of dissemination in furtherance of a scholarly purpose. If donors are concerned about copyright or other legal considerations, the transfer documents typically will contain limitations or restrictions. Purely as a practical matter, therefore, a museum

⁵⁴ Although this Section does not address the museum’s own archives, many of the analyses discussed in this Section are equally applicable to those archives.

⁵⁵ Reliance on fair use to reproduce and publish individual or selected archival items in their entirety or brief excerpts for scholarly and educational purposes should be considered under the relevant chapters in Article IV, Section B, Publications.

that receives an archive or special collection is not unreasonable in assuming that the donor will not object to the wholesale digitization and release of the archival items in furtherance of the educational mission of the museum.⁵⁶ The following fair use analysis should, therefore, be viewed in this context, while keeping in mind that the donor of the archive may not be the owner of some or even any of the intellectual property rights in some or all of the material comprising the archive. Thus, the donor's expectations may not have any bearing on the purely legal issue of whether the digitization and publication of archival material is "fair use" or otherwise complies with the copyright law.⁵⁷

Traditionally, archives and special collections have been made available for on-site and painstaking page-by-page review conducted in reading rooms and often by appointment only. To vastly expand access to these valuable scholarly resources, museums are eager to digitize full archives and special collections and make them available digitally to the public. As with other issues addressed in these Guidelines, the courts have not yet rendered an opinion on the wholesale digitization of an archive or special collection for purposes of making the contents available to the public in their entirety in furtherance of a museum's mission. Nevertheless, other precedent is

⁵⁶ Although the assumption is not unreasonable, depending on the specific facts of each donation, transfer or sale of archival materials or special collections to the museum, it still may be prudent for a museum to seek a license or other consent at the time of the transfer to the museum to future digitization and publication of the collection.

⁵⁷ Just as donor expectations may not have any bearing on the legal issue of fair use, the expectations of grant-making entities that require unrestricted access to digitized materials as a condition of providing funding for digitization do not affect the fair use analysis. Some prominent funders of archival digitization projects increasingly are requiring, as a condition of the grant, that the resulting digital content be made available to the public without restriction and some prescribe use of a Creative Commons license, such as CC0 or CC-NC. Arguably, more museums would be able to accept these grant funds if they could comfortably rely on fair use in digitizing their archives and special collections and making them publicly accessible for non-commercial use. Museums still must be cautious, as accepting these conditions can put museums at legal risk not only for possible breach of the terms of the grant but also for potential copyright claims if fair use arguments are rejected. Additional financial risk may arise if grantors require museums to indemnify the grantors for third party claims of infringement. *Grantor expectations or requirements have no bearing on fair use, so museums should exercise caution in accepting grant funds with such requirements absent confidence that they will be able to obtain permissions necessary to comply with the grant or rely on fair use.*

useful in considering the fair use implications of making these important tools of research publicly accessible.

Archives and other special collections present a unique challenge when considering fair use because traditional copyright fair use analysis is conducted item by item rather than for a collection as a whole. In the context of archives and other special collections, undertaking such an analysis can present insurmountable problems for museums that may lack the staff and resources needed to evaluate each archival item. Even where staff and resources are available, the nature of archival items is often different than typical artistic material where authors tend to include their signatures, dates of creation or other information that would facilitate a copyright determination. Many archival items lack such identifying information and cannot be identified with a specific author or artist or time frame. They often include documentary or transactional materials, consisting primarily of personal or professional records that document routine activities or the creative process rather than finished works of aesthetic or artistic expression. As a result, archives often contain materials commonly known as “orphan works,” *i.e.*, the copyright owner cannot be identified or cannot be located. The challenges to conducting an archival item-by-item copyright assessment becomes particularly problematic if a museum is expected to determine the copyright status of each archival item before digitizing and making these collections available. For this reason, a museum’s ability to rely on fair use to digitize these collections and make them broadly accessible, although not without risk, would represent a significant public benefit in furtherance of the museum’s educational mission.

In conducting the fair use analysis for archival and special collections, two separate but related questions must be addressed: First, is the mere creation of a digital copy of an entire archive or special collection a violation of the copyright holders’ rights and second, is the publication (*i.e.*,

making the entire digital archive or special collection publicly available online) a fair use?⁵⁸ With regard to the first question, there are two independent grounds for the conclusion that such digitization is not a copyright violation. First, the *Google*⁵⁹ decision supports the position that wholesale digital copying can be a fair use under certain circumstances. In the *Google* books case, the plaintiff authors contended that the mere act of scanning the books, creating digital copies and storing them on Google’s servers constituted copyright infringement. In rejecting that argument, the court, looking at digitization of the entire book, not in the abstract, but rather analyzing the activity in the context of the broader fair use analysis, said “not only is the copying of the totality of the original reasonably appropriate to Google’s transformative purpose (*i.e.*, to create a searchable electronic database), it is literally necessary to achieve that purpose.”⁶⁰ In these and other cases, courts have found repeatedly that digital copying of an entire work or works **in**

⁵⁸ Preceding the fair use analysis, of course, the museum should first review the acquisition document(s) under which the museum acquired the archive or special collection to determine whether copyright was acquired and if contractual restrictions apply. Because the transferor or seller of these types of special collections, which often include materials created by third parties, usually does not own all the rights in the special collection, the transfer document commonly includes a “quit claim” transfer of only such rights as the donor/seller may have. In these circumstances, the museum should not assume that it has acquired copyright in all the contents of the archive or special collection.

⁵⁹ *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2nd Cir. 2015) (“*Google*”)

⁶⁰ See *Google*. The limits of *Google*, however, are being tested in the case of *Hachette v. Internet Archive*, in which four publishers sued Internet Archive for copyright infringement claiming that the Archives’ practice of scanning and distributing entire copies of copyrighted books for the purpose of “controlled digital lending” (CDL) infringed the publishers’ copyrights. The publishers argued that there was nothing transformative about the CDL program because it simply repackaged or republished the entire work; in essence, the Archive was effectively distributing “bootlegged” e-books. The Archive disagreed, claiming that CDL is non-commercial, transformative and justified by copyright’s purposes. The District Court for the Southern District agreed with the publishers, categorically rejecting that the CDL program was a fair use. On September 4, 2024, the Second Circuit Court of Appeals affirmed the district court and found against fair use,

furtherance of a different purpose than the original constitutes a fair use.⁶¹ In the case of museum copying for storage, conservation, preservation or research, without publication, the individual works are transformed by their inclusion in the whole archive or special collection and the copying thereof is for those different purposes, *i.e.*, there is a transformative act.

Additionally, if the museum's purpose in digitizing an entire archive or other special collection, without publication, is for easier storage, conservation, preservation or to facilitate research, the act of making a complete digital copy would be consistent with the limitations on exclusive rights provided in Section 108 of the Copyright Act for reproductions by libraries and archives. Although Section 108 is not explicitly applicable to museums,⁶² the basis for the special exception for libraries and archives is to enable copying for such uses as conservation, preservation and storage. As such, a strong argument can be made (under fair use or under Section 108) that a museum may create a digital copy of an entire archive or special collection for purposes of storage, preservation and conservation, as well as to facilitate research.

⁶¹ The rise of artificial intelligence ("AI") as a tool for ingesting massive quantities of content, both copyrighted and public domain, to generate information in a different form, presents a new test for the limits of fair use. Although the extent of museum use of AI is not well documented at this time, it is conceivable that AI could be used in connection with archival and special collections to render them more accessible and user-friendly. Such uses are not without copyright risk, however. In a recently filed case, the New York Times brought a copyright infringement lawsuit against Microsoft and OpenAI (the creators of ChatGPT) contending that millions of copyrighted articles published by the NYT were used to train automated chatbots, and such uses are interfering with the market for the NYT. Although early in the litigation, it is anticipated that the defendants will rely on fair use to claim, perhaps like the Google Books case, that the resulting content from AI serves a different purpose than the original news stories and is thus transformative. Another issue presented by use of AI is whether the resulting output is itself eligible for copyright protection. The Copyright Office has long maintained that works made by machine rather than by human hand are ineligible for copyright protection. As such, the Copyright Office declined to register "A Recent Entrance to Paradise", a work of AI art produced by Stephen Thaler, on the basis that it was "autonomously created." by a machine. Thaler filed suit and the District Court for the District of Columbia agreed with the Copyright Office, citing a line of cases declining to recognize copyright in works created without human involvement (e.g., monkey selfie). Thaler has appealed the decision to the D.C. Circuit Court of Appeals, arguing that his art qualifies as a creative work of authorship and that the Copyright Office is mistaken in its position that works of authorship require natural persons. This case, as well as the NYT litigation, bear watching as they will likely set parameters for the copyright implications for museums as they wade into the AI waters.

⁶² Section 108 does not, by its terms, apply to museums although there have been numerous efforts to expand Section 108 to include museums. In addition, many museums maintain libraries and archives and may well be covered by Section 108 for the activities of their libraries, which could include the management of archival material, as well as the museum's own archives.

The second question – whether a museum may publish the entire digital copy of the archive or special collection online to enable scholars and the public to access and use the archive or special collection – presents the more difficult fair use issue and is analyzed below under the Four Factors.

7. The First Factor – Purpose/Character.

Assuming the creation of a digital copy of an entire archive or special collection is not itself infringing provided that it is undertaken in furtherance of a different, transformative purpose, what additional uses of the digital copy would also constitute a transformative purpose under the first factor? The court in *Google* addressed this directly stating that: “the creation of a full-text searchable database is a quintessentially transformative use...[as] the result of the word search is different in purpose, character, expression, meaning, and message from the page from which it is drawn.”⁶³ Other decisions⁶⁴ further support the position that the creation of a searchable, digital archive itself is transformative. (See discussion of online databases in Article IV, Section B, Publications.) In *Kelly*, the Court found that Defendant Arriba’s use of the images served a different function than Kelly’s use by improving access to information on the internet versus artistic expression. Because Arriba’s use did not supersede Kelly’s use, but created a different purpose for the images, Arriba’s use was deemed transformative.⁶⁵ In relying on *Kelly*, the court in *Perfect 10* reinforced the notion that “a search engine transforms the image into a pointer

⁶³ See *Google*.

⁶⁴ See *Kelly* and *Perfect 10*.

⁶⁵ See *Kelly*.

directing a user to a source of information...a search engine provides social benefit by incorporating an original work into a new work, namely, an electronic reference tool.⁶⁶

The addition of a search function to accompany a digital archive, which serves as the electronic equivalent of a finding aid, is essential to rendering the archive usable for research and scholarship purposes. If the search function produces brief excerpts (“snippets”) that incorporate the search terms (as in *Google*) and/or low resolution images of visual artistic content included in the archive (as in *Kelly* and *Perfect 10*), the search capability provides “social benefit” by facilitating a deeper exploration of the materials, establishing new connections among archival items, and enhancing the ability to conduct original research.⁶⁷ In that respect, the digitization of the entire archive or special collection and the creation of a search function supports the transformative nature of the archive by creating a new purpose (*i.e.*, as a research tool) that is different than the underlying authors’ original purposes in creating the individual items for informative, documentary, transactional or aesthetic purposes. If, in addition to being transformative, the means to search the digital archive is also made available to the public free of charge, the non-commercial nature of the use would also satisfy the other part of the analysis under

⁶⁶ See *Perfect 10*. Not all search engines are protected by fair use, however. In 2019, the Ninth Circuit Court of Appeals cautioned that “the label ‘search engine’” is not a talismanic term that serves as an off-switch as to fair use. See *VHT, Inc. v. Zillow Group Inc.*, 918 F. 3d 723 (9th Cir. 2019), in which the Court of Appeals found that Zillow’s “Digs” search engine for images was not protected by fair use for a number of reasons, including that it displayed full size images, not thumbnails, the search results did not direct users to the original source of the photos, and images were displayed on pages with links to third-party merchants. Zillow’s use of the images was also distinguishable from acceptable uses such as Google Books because Zillow’s use did nothing to further the use of copyrighted works for socially valuable purposes as those enumerated in Section 107 of the Copyright Act (*i.e.*, criticism, comment, news reporting, etc.). While the museum search engines described in these Guidelines are distinguishable from Zillow’s, it is important to design a search engine that avoids the pitfalls of this decision.

⁶⁷ A fair use case in the 9th Circuit, *Monge v. Maya Magazines, Inc.*, 688 F. 3d 1164 (9th Cir. 2012) raised a distinction between a truly transformative use and the same use but for a different purpose. The Court noted that a separate purpose by itself that leaves the inherent character of the content unchanged does not necessarily create new aesthetics or a new work that adds new expression, meaning or message. *Although it can be argued that this decision is at odds with Kelly and Perfect 10, in which the inherent character of the images were not changed to create a searchable database, to the extent that a museum can enhance and supplement its digital databases of archival materials with additional information including scholarly analysis and links from individual archival items to pertinent and related content, whether on the museum’s website or those of third parties, the museum will have strengthened its argument for transformative use.*

the first factor. The creation of a complete digital copy of an archive or special collection that is searchable, and that, as in *Google*, produces only limited excerpts or snippets in response to a search (and that, with respect to visual images from the archive as opposed to texts, reproduces lower resolution copies that are only of a quality necessary to fulfill the transformative purpose of the search function), is likely to satisfy the first fair use factor (and to qualify as fair use) under *Google*, *Kelly*, *Perfect 10* and related cases.

What is unresolved by these decisions, however, is whether the amount of the digital archive made available to the public can go beyond the production of excerpts or snippets of relevant portions of the archive to encompass publication of full text and images of the entire archive or special collection. To answer this question, distinguishing the facts in *Google* from the facts associated with publication of an entire archive or special collection is important. Google’s ‘library’ was not an archive that included interrelated materials but instead was comprised of a vast collection of individual and independent works of authorship already published. Making the full text of all the works in the library available to the public was not necessary to further Google’s purpose of providing a searchable database and would have interfered with the market for books already published and available elsewhere.⁶⁸

In contrast, publishing only snippets from individual items in an archive or other special collection would not advance and might actually defeat the museum’s “different purpose” of facilitating the public’s ability to understand the relationship and interconnectedness of the individual archival items. Publishing the entire archive or other special collection provides historical and aesthetic context and creates a synergy that effectively transforms and infuses each

⁶⁸ The recently filed cases by the New York Times against Microsoft and OpenAI over wholesale use of NYT’s archive to train ChatGPT, and the case brought by News Corp’s Dow Jones and the New York Post against AI startup Perplexity for “massive” copyright infringement, may shed some light on the extent to which fair use allows full archives to be made available in a different format under fair use.

individual archival item with new expression, meaning or message through its relation to and interconnectivity with other archival items in the archive or other special collection. A simple example is the publication of a letter by an artist to someone and the response. The publication of both letters provides new meaning to each. See, *e.g.*, *Graham*, in which the Second Circuit determined that it was fair use to publish a group of seven related concert posters in their entirety (in reduced size) for the purpose of a biography of the Grateful Dead when the posters were created originally as individual artistic vehicles to advertise concerts. Although the *Graham* decision is distinguishable from the publication of an entire archive, it nevertheless supports the argument that publication of groups of materials created for one purpose can be fair use if the new purpose is sufficiently different and the amount and size of the material copied is consistent with the purpose.

Without conceding that the publication of an interrelated archive or special collection is not transformative in and of itself, the transformative nature of the publication of the entire archive or other special collection could be enhanced by providing additional content and research functions. For example, providing links from archival items to other archival items or to portions of the museum's website or to third party sources that contain relevant, comparative or supplemental information would enhance and extend the educational purpose of publication of individual archival items and provide additional support for treating the archive or other special collection as a holistic research and educational online resource.

8. The Second Factor – Nature of Use.

In evaluating the second factor, the nature of the work, the first challenge is to identify the “work.” Although this chapter argues that the “work” is the archive or special collection as a whole, because there is no precedent for analyzing a compilation such as an archive or special collection under fair use as a whole, review of this factor is best undertaken by evaluating individual archival items. Those can include many different forms, media and types of materials.

Some may be largely factual (*e.g.*, business records) and others may be highly creative (*e.g.*, sketches) and both can exist within the same archive or other special collection. The materials may have been created originally for a wide range of possible purposes – documentary, informative, transactional or aesthetic. Although some archival items may be published, often a majority of archival items in an archive or other special collection is unpublished. Generally, fair use is more difficult to establish when the underlying archival item is unpublished. As one court noted, “[t]he fact that a work is unpublished is a critical element of its ‘nature.’ Our prior discussion establishes that the scope of fair use is narrower with respect to unpublished works.”⁶⁹ Another court explained that “we think that the tenor of the [Supreme] Court’s entire discussion of unpublished works conveys the idea that such works normally enjoy complete protection against copying any protected expression. Narrower ‘scope’ seems to refer to the diminished likelihood that copying will be fair use when the copyrighted material is unpublished.”⁷⁰ Because of the predominance of unpublished materials in a typical archive or other special collection, the analysis under the second factor may be at best inconclusive and at worst negative strictly on legal grounds with respect to the publication of previously unpublished archival items, either on its own or as part of publication of the archive or other special collection as a whole.⁷¹ To be clear, the fact that copyrighted material has been unpublished does not preclude fair use. On the contrary, Section 107 of the Copyright Act provides that: “The fact that a work is unpublished shall not itself bar a finding of fair use if such is made upon consideration of all of the above factors.”⁷² Even if a court could find that the second factor tips against fair use in this context, the transformative nature of

⁶⁹ *Harper & Row Publishers, Inc. v. Nation Enterprises.*, 471 U.S. 539, 564 (1985).

⁷⁰ *Salinger v. Random House*, 811 F.2d 90 (2d Cir. 1987).

⁷¹ Although the second factor is more difficult to satisfy with regard to unpublished materials than published materials, the latter may present particular challenges with regard to the fourth factor, particularly, for example, if the archive contains a manuscript of an essay, poem, novella or book that has been published and is available for sale in the commercial market. See discussion of the Fourth Factor.

⁷² Copyright Act (§ 107).

the use under the first factor, which courts still regard as the most important factor, would arguably outweigh the presence of unpublished materials.

9. The Third Factor – Amount Used.

Under the third factor, the amount and substantiality of the portion used, this Section of the Guidelines considers the fair use implications of digitizing and making available the entire archive or other special collection (except for individual archival items that may be removed for reasons such as donor restrictions, privacy, publicity, defamation, etc.). If the publication of a whole archive or other special collection, both print and visual images, is arguably transformative, the question under the third factor is whether it is necessary, in order to achieve that transformative purpose, that the whole of the texts and/or the images within the archives or other special collection be published. In the case of images, for reasons explained in other sections of these guidelines, publishing a lower resolution version may be all that is necessary to satisfy the third factor. With regard to textual materials, the third factor may be satisfied if the best and most effective way to achieve the educational, transformative purposes of publication requires posting the full texts of most, if not all, of the archival material.

10. The Fourth Factor – Market Effect.

With respect to the fourth factor, the effect of the use on the potential market or value of the copyrighted work, examining this factor both with respect to the archive or other special collection as a whole and with regard to its individual components may be necessary. When considered as a whole, many archives and other special collections do not have a substantial commercial market value, although they certainly possess a substantial research and scholarship value. By their nature, archival items received from artists, authors or their estates, for example, tend not to be finished works of art (or writing) that have a commercial market value but rather consist of a body of more ephemeral, contingent works that have historical, critical and analytical

value reflecting on the artist's or author's process of creativity.⁷³ For those archives or other special collections that, as a whole, lack a substantial commercial value, a museum's digitization and posting of the archive or collection, as a whole, is unlikely to violate the fourth fair use factor by interfering with the copyright owner's market. Nevertheless, that may not be the end of the inquiry. Even if an entire archive or special collection lacks a substantial commercial value, application of the fourth factor may produce a different outcome if there is an active or potential commercial licensing market for an individual archival item or group of archival items within the archive or special collection. A museum's posting of the entire archive or special collection could usurp or undermine a valuable licensing market for components of the archive or special collection in a manner that might violate the fourth fair use factor, at least insofar as such individual items are concerned. As a result, a court could find that the fourth factor argues against fair use, certainly as to a specific archival item that is already published and currently commercially available for licensing⁷⁴.

11. Conclusion.

There is a strong argument that the creation of a digital copy of an entire archive or other special collection for storage, conservation, preservation and research purposes (including publication of snippets in response to searches by the public) is fully supported by fair use (see *Google*) and/or Section 108 of the Copyright Act. There is also a defensible argument that publication of all or virtually all of an archive or other special collection for the purpose of providing public access is transformative and noncommercial (if limited for scholarly use and made available for free) and thus will pass muster under the first fair use factor. In addition, the

⁷³ Of course, there are archives and special collections that do have a substantial market value (*e.g.*, an archive of historic photographs from a prominent magazine; archives of an artist that contain drawings, studies, preparatory sketches, etc.), and, indeed, institutions often pay large sums for important archives.

⁷⁴ See discussion of Supreme Court's decision in *Warhol* in Section G.

inclusion of a finding aid to accompany the archive or other special collection, which serves as a standard search tool for archives and other special collections, can enhance the transformative nature of the use. If the material has previously been published, or is factual in nature (second factor), and if images are only of a size and resolution that is necessary to support the transformative, educational, goals of publication (third factor), then the publication of the whole archive may, in addition to satisfying the first factor, comply with the second and third fair use factors. If the first three factors favor fair use, then even if the fourth factor (*i.e.*, impact on the market for the original) disfavors the museum's use, a court could still easily find fair use, but in most, if not all, cases, even the fourth factor may favor fair use if the material published does not have an existing commercial market.

In the absence of judicial precedent specifically on point with respect to a museum's wholesale publication of an archive or other special collection, recommending with a very high degree of confidence that a museum may publish an entire archive or other special collection without risking possible infringement claims is difficult. A museum that is unwilling to assume the risk of uncertainty in this area and prefers to take a conservative approach that does not rely on fair use may adopt the same procedures as have been in place prior to digitization, *i.e.*, require a researcher to visit the archives in person and obtain permission from a copyright holder prior to obtaining an entire copy of any of the materials and/or publishing them. If the museum has created a digitized version of the archive, it could be searched by such scholars at the museum, on its servers, rather than being published on the internet. Another option would be for the museum, as in *Google*, to create a digital copy of the archival items stored on the museum's server and allow the public to search that digital copy with search terms that will yield snippets and references to the original works in the archive. Relying on *Kelly* and *Perfect 10*, the museum could also post lower resolution images of visual archival material online, directly or in response to a search term

by a third-party user. Additionally, if the museum decides to make the entire archive or other special collection available online, the museum would be well advised to adopt applicable safeguards set forth in Article III, Special Considerations, of the Guidelines and might also consider the additional precaution of disabling download features to restrict wholesale copying and publication of the entire archive or other special collection.

F. On-Site Uses (Physical and Virtual).

This section discusses both the on-site display of original works of art owned by museums or on loan to the museum in a gallery or exhibition display or surrounding physical space as well as the on-site display of reproductions of works of art and copyrighted materials in devices. This section does not address live performances of copyrighted material. For purposes of this Section, devices include mechanisms for display of reproductions of works of art and copyrighted materials in and around the museum's facilities by means of kiosks, "video" displays, touch-screens, audio devices, tablets, digital apps and other similar tools. While the most common use of works of art, whether from the museum's collection or borrowed, is display of an original work in a gallery ("gallery display") or in connection with an exhibition ("exhibition display"), museums also often reproduce or display or publicly perform works of art and other copyrighted materials, including audiovisual material and music, on-site in and by means of devices located in permanent galleries and exhibition spaces as well as other areas within and around the museum's facilities. Materials included in these on-site devices may include works of art, text, video, audio, music, archival materials, and other types of intellectual property that enhance and expand the reach of the works of art, artifacts and related materials on display at the museum or in the museum's permanent collections but not on view. Content displayed on these devices is sometimes, but not necessarily always, made available online or downloadable, although museums are routinely offering visitors

apps and other forms of technology (e.g., QR codes) to access, capture and save content provided on-site on smartphones and other devices to extend the museum experience.

On-site public display by a museum of an original work of art or a “copy lawfully made” is expressly authorized in the Copyright Act in Section 109(c). The right to such display is conferred on the owner of the original work and the lawfully made copy (for purposes of this Section, the museum), or any person authorized by such owner, without the authority of the copyright owner. Such right extends to the public display of the work and authorized copies to viewers present at the place where the copy is located. The display right⁷⁵ is the lifeblood for museums and finding examples in which copyright owners have challenged a museum’s right to display works of art owned by the museum or on loan to the museum is extremely rare.⁷⁶ In light of the Supreme Court’s recent decision in *Warhol* the display and use rights of works of appropriation art may present unique challenges for museums. Because the *Warhol* case represents the first time the Supreme Court has addressed fair use in the context of the visual arts, the decision and possible implications merit a full discussion, set forth below in Section G.

⁷⁵ The display right applies only to the original work and to “copies lawfully made;” it does not apply to all copies. Further, the “display” right does not apply to the “public performance” of audiovisual works, so even if the museum owns a work of film, video, digital or other types of such works, the work cannot be “displayed” or “publicly performed” in the galleries without a license, unless fair use applies.

⁷⁶ One scenario in which a museum’s right to display an original work might be challenged involves the display of appropriation art. If a museum owns or borrows a work of appropriation art and the owner of the rights to the underlying “appropriated” work claims that the new work is “not lawfully made,” the owner of the underlying rights might challenge the museum’s display right under Section 109(c). Faced with such a challenge, the museum should consider whether it can continue to display the disputed work of art in reliance on fair use. This would require the four factor analysis for two independent questions: whether the creation of the work of “appropriation art” itself qualified as a fair use (in which case the museum’s display is protected because the work was “lawfully made”), and whether, even if the work of “appropriation art” does not satisfy fair use, the museum’s display of that work constitutes “fair use” (for example as criticism or commentary or any other use supported by the fair use factors). If the museum is concerned that the work’s appropriation or the Museum’s display may not qualify as fair use, a museum might elect to remove the work temporarily until the dispute is resolved between the artists or by the courts and the museum’s right to display confirmed. In deciding a course of action, the museum should also consider other factors that may be present, including curatorial integrity, loan and acquisition agreement provisions, the risk of setting precedent, and relationships with lenders and artists. Unfortunately, the Supreme Court’s decision in *Warhol* did not clarify this issue because it did not explicitly address whether the original Orange Prince work by Warhol was “lawfully made.” See discussion below in Section G.

When a museum seeks to display or publicly perform copies of works of art or other copyrighted materials through devices or otherwise, without a license from the copyright holder, a traditional fair use analysis is required. In the context of gallery or exhibition display, copies of works of art and copyrighted materials may be used on devices in the museum to supplement and provide additional context for the gallery or exhibition display itself by providing historical details, supplemental information about the works on display or explanation of relationships between works on display or other works, and for other scholarly and educational purposes. As with other standard museum uses discussed in these Guidelines, the fair use analysis for inclusion of copies of works of art or other copyrighted materials on such devices requires examination of the four factors and, in particular, assessment of whether use of copies of works of art and copyrighted materials in the on-site device context is transformative.

12. The First Factor – Purpose/Character.

As with the previous sections of these Guidelines that address fair use in the context of on line collections, educational materials, exhibition catalogues and publications, museum brochures, blogs, and scholarly articles, the content produced for on-site display in a device typically consists of a compilation of copyrighted materials consisting of images, text, audio, video, music and/or other content related to the permanent collection or an exhibition. These materials are created to enhance the visitor experience by allowing the visitor to delve more deeply into works included in the gallery or exhibition display and in the museum’s permanent collection generally and to explore paths of inquiry and analysis based on the individual interests of the visitor. Materials created for on-site display often connect disparate pieces of information or invite the visitor to connect them and thereby infuse the elements with new meaning and connection. As with other types of materials discussed in previous sections of these Guidelines, these compilations of materials, often copyrighted, meet the transformative test of the first prong of the fair use analysis

as articulated in such cases as *Graham*. When these supplemental materials are presented on-site in devices to the public for non-commercial, educational purposes, the remaining prong of the first fair use factor is also satisfied.

13. The Second Factor – Nature of Use.

With regard to the second fair use factor, the nature of the works of art or copyrighted materials likely to be incorporated into presentations for display on site in devices in whole or in part are often protected by copyright not owned by the museum. To the extent that the works or materials included in presentations for on-site display in devices are creative, this factor would weigh against a finding of fair use.

14. The Third Factor – Amount Used.

The third factor considers the amount and substantiality of the portion used in relation to the copyrighted work as a whole. For materials created for display on-site in devices, the incorporation of entire works of art or copyrighted materials both quantitatively and qualitatively might render it difficult to satisfy this factor, particularly if such use could be viewed as superseding the original without transforming it. For example, the use of an entire television program from the 1950s to illustrate the design theme of an exhibition could be questionable. As with the other uses discussed in these Guidelines, the fair use argument will be strongest when the materials produced for on-site display in devices include brief excerpts, snippets, reproductions in smaller sizes and lower resolution and details of works of art rather than entire works (if the reproduction of the whole work is not necessary to achieve the transformative purpose of the use).

Music is a common feature of on-site display in devices and can present thorny fair use issues in part due to the complex web of licensing for public performances through entities such as ASCAP, BMI and SESAC. Although exceptions to the licensing schemes might apply to on-site public performance of recorded musical works in connection with an exhibition or other

display of works of art or a non-commercial program, reliance on fair use will typically require use of only brief snippets coupled with an explanation of the significance of the music to the exhibition, display or program. Conversely, use of entire or substantial portions of such musical works merely as background or entertainment would be difficult to justify as transformative.

15. The Fourth Factor – Market Effect.

For the final fair use factor, the effect of the use upon the potential market for or value of the copyrighted work; the more transformative the use the less the courts are influenced by the possible effect on the market for the original. For on-site uses discussed in this section, when the materials are made available in a limited physical location that is accessible only to the museum visitor, specific (as opposed to general admission or special exhibition) fees are not charged to access the content, materials are not made available for download, distributed online or otherwise outside the museum’s physical space,⁷⁷ and only selected portions are reproduced, the risk of such use interfering with any individual copyright owner’s market is remote. Similar arguments can be made if visitors are able to access apps while physically on-site through their devices that provide supplemental materials to enhance the visitor experience. Even if the apps enable visitors to view the content after they leave the physical space, so long as the purpose is to extend the educational visitor experience, fees are not charged, the content is not available for further copying or distribution, and other safeguards are adopted, the risk of interfering with the copyright owner’s market remains remote, although the issue may be less clear than a purely on-site use.

Based on the four-part fair use analysis discussed above and taking into account the limitations noted, a strong argument can be made that the display of works of art and copyrighted

⁷⁷ If materials are available for download, distributed online or otherwise outside the museum’s physical space, reference is made to Article IV, Sections A, Online Collections and B, Publications.

materials on devices located in and around the museum's galleries and buildings to supplement and enhance the permanent gallery or exhibition experience would qualify as fair use.

G. Appropriation Art

Many art museums own and display works of appropriation art on-site and include them in various media in furtherance of the museum's purposes. The genre of appropriation art consists of the practice by artists of incorporating pre-existing copyrighted objects or images in their art with varying degrees of modification of the underlying object or image. Works by Andy Warhol are considered some of the most iconic examples of appropriation art, in which he incorporated images of Campbell's soup cans and portraits of famous celebrities such as Marilyn Monroe and Prince. Roy Lichtenstein, Richard Prince, Jeff Koons, Louise Lawler and Deborah Kass are other examples of artists who have elevated appropriation art and tested the boundaries of copyright law.

Appropriation art raises complex copyright issues because of the tension it creates between the statutory right of an artist to create and control derivative works and the rights of others who "appropriate" aspects, designs, images, and other elements of the original work to create new works in reliance on fair use. A certain amount of borrowing from pre-existing works serves the public purpose set forth in the Constitution to promote the "Progress of . . . useful Arts". This notion of borrowing for certain purposes deemed in the public interest (such as news, commentary, etc.) is also the legal basis for fair use in the Copyright Act. It is the wavy line between permissible borrowing and impermissible misappropriation that often leads to confusion.

A few lower courts have examined the fair use doctrine in the context of appropriation art, but not until the *Warhol* case did the Supreme Court for the first time apply the fair use test to the visual arts. Given that many museums own, borrow, display on-site and reproduce works of appropriation art for a range of museum purposes as discussed in these Guidelines, the *Warhol* case and its possible implications for art museums is worth a more extended discussion.

Before the *Warhol* decision, the leading cases of appropriation art involved Richard Prince⁷⁸ and Shepard Fairey⁷⁹. Courts examined the fine line between infringing derivative works and non-infringing transformative works and sought to determine whether the new works satisfied the *Campbell* test of adding new meaning, message and context rather than serving as a mere substitute for the original. The wide gulf between the district court finding in *Cariou* that all the works were infringing and the Court of Appeals decision that 25 of 30 works were transformative, left many unanswered questions about the meaning and application of transformative to appropriation art⁸⁰.

The opportunity to clarify the parameters of fair use in this context arose when the Andy Warhol Foundation sued the photographer, Lynn Goldsmith, over her claims that Warhol infringed her copyright in a 1981 photograph of the artist Prince. The *Warhol* case raised the question of whether the licensing by the Warhol Foundation of the Orange Prince to Vanity Fair upon Prince's death for a special edition of the magazine was fair use. The story begins with Lynn Goldsmith's 1981 photograph of Prince which she was commissioned to create for Newsweek. In 1984, with

⁷⁸ *Cariou v. Prince*, 714 F. 3d 694 (2d Cir. 2013) (*Cariou*). In the *Cariou* case, photographer Patrick Cariou sued the artist Richard Prince in 2008 over a series of works created by Prince based on Cariou's photographs of Rastafarians published in the book "Canal Zone." Prince minimally altered the photographs to add some colors, enlarge, blur and create composites and sold them through the Gagosian Gallery as "appropriation art." Cariou prevailed at the district court, which found the Prince works to be infringing and ordered many of the works and the catalogue to be recovered and destroyed. The Second Circuit reversed the decision and held that most of the works could be sufficiently transformative to qualify as fair use and remanded to the district court to consider the remaining five. The parties ultimately settled the dispute in 2014. Another lawsuit brought by photographers against Richard Prince in 2015 and 2016 for his appropriation of their Instagram photos recently settled on the eve of trial after nearly nine years of litigation, with Prince reportedly paying the artists a sum smaller than the photographers requested and no admission that his actions constituted copyright infringement,

⁷⁹ In the case of *Fairey v. The Associated Press*, No. 09-cv-01123 (S.D.N.Y. Feb 2, 2009), the artist Shepard Fairey sued the Associated Press in 2009 as it began to accuse him of copyright infringement for using a photograph of Barack Obama taken by the A.P. photographer Mannie Garcia to create the "HOPE" poster featuring Obama's image. Fairey contended that his appropriation of the Obama image and sale of related merchandise featuring the image were transformative and thus fair use. The parties settled in 2011 without resolving the copyright issues, but notably, Fairey agreed in the settlement to obtain a license before using A.P. photographs in future work.

⁸⁰ After *Cariou*, some have argued that the Second Circuit Court of Appeals had gone too far in protecting appropriation art at the expense of the original artist, and that such deference to appropriation artists at the expense of the original artist may have motivated the Supreme Court to agree to decide the *Warhol* case.

the release of *Purple Rain* and Prince's rise in popularity, Vanity Fair paid Lynn Goldsmith \$400 for a one-time license to use one of her photographs of Prince (previously unpublished) as an "artist reference" for an illustration to be used only once. Vanity Fair hired Warhol to create a colored illustration based on Goldsmith's photo, which he used to create a purple silkscreen, but in addition, he used the image to create a series of 16 other silk screens. When the Orange Prince appeared in the magazine upon Prince's death in 2016, Goldsmith first became aware that Warhol had created the additional silk screens without permission. She notified the Warhol Foundation that she believed her work had been infringed and the Warhol Foundation sued her to establish that the use was non-infringing and permitted under fair use.

The district court for the Southern District of New York found that the Warhol Foundation's use qualified as a fair use, but the decision was reversed two years later by the Second Circuit Court of Appeals, which retreated from its broad view of transformative use in its previous decision in *Cariou v. Prince*. In May 2023, the Supreme Court held 7-2 that the specific use of the Orange Prince in dispute (i.e., a license to Conde Nast in 2016 for a \$10,000 fee) was not sufficiently distinct from the purpose of Lynn Goldsmith's original photograph (licensed to Vanity Fair in 1981 to highlight the artist Prince) to qualify as a transformative use under the first fair use factor, particularly given its commercial use. Importantly, the Supreme Court was not asked to decide, and thus did not decide, whether the Orange Prince and additional silkscreens themselves were transformative works and thus eligible for independent copyright protection; rather, it only decided whether the specific use by the Warhol Foundation constituted a fair use and found that it did not.⁸¹ In this respect, the decision was narrow and highly fact-specific, but it raises a number of questions for museums seeking to display and use these works.

⁸¹ There are several possible reasons why the courts were not asked to decide whether the Orange Prince itself was eligible for copyright protection, including legal concerns such as whether the statute of limitations to challenge

Perhaps the greatest impact of the Supreme Court’s decision will be felt by appropriation artists who now must consider whether they will need a license to incorporate the copyrighted works of others in their works, particularly if the appropriation artists intend to pursue commercial uses or similar uses employed by the artist of the underlying work.⁸² Beyond the impact on appropriation artists, the *Warhol* decision raises both legal and practical issues for museums that display and reproduce appropriation art. For the reasons explained below, museum display is likely to be the safest use of appropriation art. Other uses, also, might fall under fair use but careful risk assessments are advised.

With respect to museum display, and as noted earlier, Section 109 of the Copyright Act allows works “lawfully made” to be exhibited by the owner or any person authorized by such owner (e.g. a borrowing institution) where the work (or copy) is located. Assuming a work of appropriation art is lawfully made (and non-infringing), display is expressly authorized by the Copyright Act⁸³. Even if there might be a question whether a work of appropriation art has been “lawfully made”, Justice Gorsuch sought to reassure museums in his concurrence that display of the Orange Prince in a non-profit museum “might well point to fair use” under the first factor. Further, in evaluating the risk of display, museums with such works that have been in collections and on display for years, may wish to consider whether any possible infringement claims could be

Warhol’s work had run or practical concerns, such as whether Goldsmith was more likely to prevail on a narrow claim related to Warhol’s specific commercial use as distinct from a broader challenge to Warhol’s appropriation art itself.

⁸² Museums do not typically license works to third parties for commercial uses without obtaining a license from the copyright owner so a museum is unlikely to confront the precise issue faced by the Warhol Foundation, but the decision’s deference to the rights of the artist of the underlying work has implications for a broad range of other museum activities.

⁸³ Generally, museums do not merely assume works that they acquire are lawfully made; the accession process typically requires the artist to make representations that the work is lawfully made, non-infringing and that any third party materials was used with a license or under fair use. When the donor or transferor to the museum is not the artist, it can be more difficult to obtain such warranties, so certain assumptions may be necessary.

barred by relevant statute of limitations⁸⁴. While some comfort may be provided due to passage of time to assert claims, less comfort is provided for museums seeking to display works of appropriation art when there is an active legal challenge that the work is an unlawful infringement of an underlying work. In such cases, a museum might consider removing the work from display until the litigation is resolved or until it has obtained permission from both the artist of the underlying work and the appropriation artist to display the work.⁸⁵

After *Warhol*, museums face an additional quandary over whether they can reproduce works of appropriation art for some or all of the types of uses set forth in these Guidelines. Justice Gorsuch provided some reassuring language here as well when he observed in *Warhol* that use of the Orange Prince in a for-profit book commenting on 20th century art might well fall within fair use. If use in a for-profit book commenting on 20th century art could pass the fair use test, museums seeking to reproduce works of appropriation art in on-site digital displays, digital collection databases, on websites, in exhibition catalogues, or other media for non-commercial purposes and with clear contextual information should have a good faith basis to rely on fair use. Nevertheless, museums would be wise to consider the specific use of the appropriation work and exercise particular caution if the museum's proposed use might serve a similar purpose as the underlying work. This analysis can be difficult, if not impossible, to undertake particularly if a museum does not know the specific source of the underlying work used by the appropriation artist. Further, the museum may not be able to determine the uses made by the artist of the underlying work so it can't assess whether its own use is similar. This uncertainty may discourage museums from reproducing

⁸⁴ Courts and circuits can differ on applying the statute of limitations especially when infringements may be deemed to be ongoing, so reliance solely on the possibility of a time-barred claim is not advised.

⁸⁵ Museums should proceed with caution here, as well, because appropriation artists may not want museums to reach out to the artist of the underlying work and doing so might jeopardize important relationships.

appropriation works entirely. At minimum, it may be prudent for museums to conduct two distinct fair use analyses with respect to its use of both the underlying work and the appropriation work.⁸⁶

In sum, the *Warhol* decision has left many questions unanswered about the status and use of appropriation art, which understandably has caused concern among museums that own, display and reproduce these works. As with many important court decisions, it will take some time for the full implications of the decision to be understood and for practices to be adopted to mitigate risk. Notwithstanding the foregoing, if the museum adopts protections such as those discussed in other sections of these Guidelines, for example, thumbnail size reproductions, low resolution images, partial images, as appropriate, educational context, and possibly download restrictions, a good faith fair use argument can be made for museum use of both the appropriation work and the underlying work for display and reproduction in connection with many of the types of uses discussed in these Guidelines.⁸⁷

Post-Script

Since the *Warhol* decision, according to the Copyright Alliance, there have been at least 18 copyright cases, including ongoing cases, that have applied the Supreme Court's test for fair use.⁸⁸ Some of the cases have been decided as they likely would have been prior to *Warhol*, while others were likely decided differently. Emerging from these cases, however, are some important take-aways:

⁸⁶ For museums that prefer not to rely on fair use and would typically license works of appropriation art for museum uses, those museums should consider whether to also license the underlying work.

⁸⁷ Beyond display and limited reproduction in educational materials, museum use of appropriation art for social media, marketing and promotion, fundraising and other uses of a more commercial nature present meaningful risk and museums are advised to seek licenses for such uses or consider not using the work at all.

⁸⁸ Madigan, Kevin, *Fair Use in a Post-Warhol World: Part I* (February 27, 2024) and *Part II* (February 29, 2024), Copyright Alliance, <https://copyrightalliance.org/fair-use-post-warhol-world-part-i/>, <https://copyrightalliance.org/fair-use-post-warhol-world-part-ii/>.

1. *Warhol* reined in the power and weight of the transformative use test, such that it is no longer the controlling factor under either Factor 1 or the full fair use analysis;
2. The central question under Factor 1 is whether and to what extent the use at issue has a different purpose or character than the original work, which requires a more expansive analysis than mere transformativeness;
3. Whether the purpose and character of a secondary use weighs in favor of fair use is an “objective” inquiry into what use was made of the original work;
4. Because the transformative test is no longer overtaking all other factors in weight, courts are now making a more balanced analysis of all four fair use factors; and
5. Transformative, non-commercial uses that would have qualified as fair use pre-*Warhol* are likely to continue to meet the fair use test;

In certain types of cases, the impact of *Warhol* has been significant. For example, in a few cases involving media reproduction of photographs used: (a) to comment on the subject of the photos rather than the photos themselves; (b) without any or minimal modification; and (c) for a commercial purpose, the courts repeatedly have rejected the fair use defense of the media companies.⁸⁹ In two cases involving Richard Prince, the appropriation artist who, previously to *Warhol*, had successfully relied on fair use to defend challenges to his works, the district court initially denied summary judgment for Prince based on fair use noting the pendency of the Supreme Court case.⁹⁰ After the *Warhol* decision and on the eve of trial in *Graham*, the judge issued final judgments against Prince in both cases for willful infringement and awarded damages to the photographers in the amount of five times the sales price of Prince’s infringing works (these

⁸⁹ See, e.g., *Philpot v. Indep. J. Rev.*, 92 F.4th 252 (4th Cir. 2024) (district court granted summary judgment to IJR on fair use grounds, but on appeal after *Warhol*, the Court of Appeals determined that use of Ted Nugent photo in an article about Ted Nugent had a similar purpose and use to the original photograph, so not fair use).

⁹⁰ *Graham v. Prince*, 1:15-cv-10160 (S.D.N.Y. 2024), and *McNatt v. Prince*, 1:16-cv-08896 (S.D.N.Y. 2024)

penalties were far greater than the retail prices of Prince’s pieces). These cases confirm that post-*Warhol*, the copyright landscape for appropriation artists has become considerably more perilous. In other post-*Warhol* cases, where the purpose and character of the uses differed and the new use was found to be transformative, the courts have continued to find in favor of fair use even though the use was commercial.⁹¹

In sum, although *Warhol* has shifted the focus of Factor 1 and, perhaps, the full fair use analysis to a more balanced approach less focused primarily on transformative use, the uses that have come to represent paradigmatic fair use – those uses typically employed by museums (i.e., different character and use, addition of new meaning and purpose through commentary and context, and non-commercial) appear to remain secure in a post-*Warhol* world.

⁹¹ See, e.g., *Cramer v. Netflix*, Civil 3:22-cv-131, 2023 WL 6130030, (W.D. Pa. Sep. 18, 2023) and *Kelley v. Morning Bee*, 1:21-cv-8420-GHW, 2023 WL 6276690, (S.D.N.Y. Sep. 26, 2023) upholding fair use in connection with two documentaries, where uses of images served unquestionably different purposes and, rather than supplanting the original, added new purpose and character.

ANNEX A

Set forth below is a brief analysis of the four factors to be considered when evaluating whether the use of copyrighted materials and works or art is fair use under Section 107 of the United States Copyright Act of 1976. In evaluating any particular use, the museum should consider seeking qualified legal advice.

1. **First Factor: The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes.**

- **Analysis:** The case law has addressed this factor by evaluating the extent to which the particular use adds new value, purpose and character to the underlying work (insights, aesthetics, criticism, education or understandings) such that the use will be deemed transformative in nature, rather than merely supersede or copy the original.¹ The *Warhol* decision preserves the transformative test, but no longer elevates it above all other fair use factors.
 - At least one court² has established the significance and transformative nature of purely illustrative uses of copyrighted work when used as part of a larger work that is different than the original purpose of the work.
 - Courts have consistently reiterated that among “the best recognized justifications for copying from another’s work is to provide comment on it or criticism of it.”³
- **Level of significance:**

Transformation: Until the *Warhol* decision⁴ this first factor often established the context for the court’s overall fair-use analysis. As set forth in *Kelly*, “The more transformative the new work, *the less important the other factors*, including commercialism [*i.e.*, commercial use of the copyrighted material], become.”⁵ This does not mean that transformation negates the other factors nor can it, as

¹ *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2nd Cir. 2015) (“*Google*”); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (“*Campbell*”); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003) (“*Kelly*”), and *Marano v. The Metropolitan Museum of Art*, 844 F. App’x 436 (2d Cir. 2021) (“*Marano*”).

² *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2nd Cir. 2006) (“*Graham*”).

³ See *Google*.

⁴ *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023) (“*Warhol*”).

⁵ See *Kelly*, emphasis added.

one court commented, act to protect “lazy appropriators.”⁶ However, after *Warhol*, the transformative test has been reduced from the dominant consideration under Factor 1 to only one of multiple considerations, and the central issue now under Factor 1 is the objective question of what the user does with the original work and whether the secondary use adds a further purpose or character to the original.

- Commercial Nature:

Although it will be considered in a court’s evaluation of the purpose and character of the work, the commercial or nonprofit nature of the use is not the deciding element in a case.⁷

However, as the Supreme Court decided in *Warhol*, in the case of appropriation art, when the allegedly infringing use of the second work is similar to the use of the underlying work, and such use is commercial, the use is less likely to satisfy Factor 1.

Probably most uses by museums will meet the test of noncommercial and nonprofit activity, even if museums charge admission, although there are certainly activities of museums that could be construed as commercial. Even those activities can fall squarely within the definition of fair use and the commercial nature of activity alone should not preclude a fair use analysis. “Given that even the statutory examples of fair use are generally conducted for profit, courts often ‘do not make much of this point’.” Further, a museum’s “business model” of charging admission but making content free and publicly available through its website and welcoming millions of virtual visitors without charge “are not commercial purposes.”⁸

2. Second Factor: The nature of the copyrighted work.

- **Analysis:** This factor takes into account the type of work (factual/historical vs. creative/fictional) and whether the work has been previously published.
 - Courts have held that creative works “. . . are closer to the core of intended copyright protection than are most fact-based works,”⁹ therefore making fair use more difficult to establish when creative works are copied.

⁶ *Kienitz v. Scottie Nation LLC*, 766 F.3d 756 (7th Cir. 2014) (“*Kienitz*”). *Kienitz* also questioned whether “transformative” is actually one of the four factors; however, the Supreme Court put that argument to rest when it adopted “transformative use” as the criteria to evaluate Warhol’s use of the Orange Prince in *Warhol*.

⁷ See *Campbell*.

⁸ *Marano; Warner Bros. Entertainment Inc. v. RDR Books*, 575 F. Supp.2d 513 (SDNY 2008) quoting in part *Castle Rock Entertainment, Inc. v. Carol Publishing Group*, 150 F.3d 132 (2nd Cir. 1998).

⁹ See *Kelly* quoting *A&M Records v. Napster, Inc.*, 239 F. 3d 1004 (citing *Campbell*).

- Whether the creative work that is copied has been previously published will also be taken into account (as a factor in favor of fair use).
- Although both published and unpublished works alike are subject to fair use, courts have sometimes been less ready to recognize fair use when evaluating works that have not been previously published.¹⁰
- **Level of significance:** This particular factor “...has rarely played a significant role in the determination of a fair use dispute.”¹¹

3. Third Factor: The amount and substantiality of the portion used in relation to the copyrighted work as a whole.

- **Analysis:** Case law applies a “reasonableness” standard to the evaluation of the amount and substantiality of the portion of the work used in the reproduction.
 - As the court held in *Campbell*, the extent of permissible copying depends on the purpose of the use, and the question to be asked is whether the amount and substantiality of the portion used “are *reasonable in relation to the purpose of the copying*.”¹² Another court in discussing the issue noted that so long as users copy only as much as is necessary for their intended uses, this factor will not weigh against them.¹³
 - Case law reflects the fact that the closer in size and appearance to the original the new use is, the greater is the risk that the copy is simply a substitute for the original.¹⁴
 - A number of cases have held that copying copyrighted works *in their entirety* is appropriate, and constitutes fair use, “when the copying was reasonably appropriate to achieve the copier’s transformative purpose *and was done in such a manner that it did not offer a competing substitute for the original*.”¹⁵ Therefore, the extent to which the amount of the original work reproduced is reasonable, in relation to the transformative purpose of the new use, will influence a court’s decision as to whether the new use represents a substitute for the original that

¹⁰ See *Kelly*.

¹¹ See *Google*.

¹² See *Campbell*, emphasis added.

¹³ See *Kelly*.

¹⁴ See *Marano, Graham and Kelly*.

¹⁵ See *Google*, emphasis added.

could harm the copyright holder's potential market (discussed below under the Fourth Factor).

- **Level of significance:** This factor is mostly important due to its interaction with:
 - the first factor, because the transformative nature and purpose of the use is taken into account when evaluating the “reasonableness” of the portion used; and
 - the fourth factor, because the size of the reproduction and the amount of work copied will influence a court's analysis of the extent to which the new use harms the market for the copyrighted work.

4. **Fourth Factor: The effect of the use upon the potential market for or value of the copyrighted work.**

- **Analysis:** “This last factor requires courts to consider ‘not only the extent of market harm caused by the particular actions of the alleged infringer, but also ‘whether unrestricted and widespread conduct of the sort engaged in by [the alleged infringer] . . . would result in a substantially adverse impact on the potential market for the original’.”¹⁶ Courts have been clear that when evaluating market harm, the relevant harm is not whether there has been any loss of licensing revenue or sales, but rather the harm resulting from a new use that offers a competing consumer a substitute for the original work, “...so as to deprive the rights holder of *significant* revenues because of the likelihood that potential purchasers may opt to acquire the copy in preference to the original.”¹⁷ In some cases, the courts have found that the copyright holder's practice of not licensing the work for uses similar to those employed by the alleged infringer weigh in favor of fair use.¹⁸
- **Level of significance:** This last factor has played a substantial role in the courts' analysis of fair use, because it measures the *harm that the new use can have on the copyright for the original work*. One court has suggested that the measurement of this factor is “. . . whether the contested use is a complement to the protected work (allowed) rather than a substitute for it (prohibited).”¹⁹
 - The transformative nature of the work will again be considered, as it will figure in the court's analysis of what harm, if any, is being caused to the original market. As one court stated, the

¹⁶ See *Kelly*, quoting in part *Campbell*, quoting Nimmer & D. Nimmer, *Nimmer on Copyright* (1993). In *Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014), the court discussed that the lack of a readily available license not only does not weigh against fair use, it weighs in favor of fair use.

¹⁷ See *Google*, emphasis added.

¹⁸ *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006).

¹⁹ See *Kienitz*.

adverse impact on the market of the original is *less certain* when the use of the copyrighted work is transformative, as such work is *less likely to serve as a substitute for the original work*.²⁰

- Furthermore, the third factor (portion and substantiality of portion used) will also figure in the court's analysis of this final factor.
- Even a reproduction or copy of an entire work will not necessarily be considered harmful to the market of the underlying work, particularly if the copies are substantially smaller in size than the original. Courts have been persuaded that the small size and lesser quality of the copied images were not harmful to the copyright owners' markets, as the copies were not adequate substitutes for the original works such that they could harm the copyright owners' ability to sell or license full-sized versions of the images.²¹

²⁰ See *Campbell*, emphasis added.

²¹ See *Marano, Kelly and Google*.

