

Visual Resources Association

February 5, 1999

To the Library of Congress Committee on the Promotion of Distance Education through Digital Technologies:

My name is Virginia M.G. Hall. I am the Senior Information Technology Specialist for the Humanities at Johns Hopkins University. I am here today as co-chair of the Visual Resources Association Intellectual Property Rights Committee to testify on the Promotion of Distance Education through Digital Technologies. The Visual Resources Association is an organization of professionals located in the United States and 20 foreign countries including slide and photograph curators, film and video librarians, media professionals, photo archivists, slide and microfilm producers, rights and reproduction officials, photographers, art historians and others concerned with visual materials.

It is generally agreed among intellectual property rights experts that the Copyright Act of 1976 was conceived primarily with textual models in mind and does not adequately cover the use of visual materials. As case in point I need only to refer to the discussion during testimony this morning about using portions of works. Teaching an art history or a science class where one can show only a small part of the Mona Lisa or a piece of a diagram of a molecular structure is certainly an exercise in futility. We need to see the whole work in order for it to be meaningful. As professionals associated with museums and educational institutions which utilize visual resources, we are extremely concerned about issues of copyright and fair use for teaching and scholarly research. In the past few years, we have begun to extend our utilization of these materials for didactic purposes into the digital realm. Educational institutions have long established and unchallenged practices of "analog" image use which we considered to be fair use. It has only been with the advent of new "digital" technologies that fair use has been questioned.

For those of you who may not be familiar with the world of the academic visual resources curator/librarian, scholarship in the disciplines of fine art and art history demands the use of large numbers of images. It is conservatively estimated that a semester long art history course may use 2000 images (at this time, primarily in the form of 35mm slides). At a mid-size institution where there are ten art history courses being taught each semester, professors will use 40,000 images a year.

Art-related courses generally rely on reproductions, or surrogates (slides, digital images, photographs) of the original works of art for instruction, not on

the works themselves, and that fact immensely complicates the issue of copyright and seeking permissions. Our images come from many different sources: commercial image vendors, public and private museums in this country, public and private foreign museums, private collections from around the world, journals, brochures, books in publication, books no longer in publication but still under copyright. While established copyright clearance mechanisms exist for use of other media such as text and music, there is no such entity for fine art images.

In the case of images, a reproduction may be several times removed from the original, underlying work of art, and rights accrue with each layer of remove. Take the case of a recently deceased artist, with a work of art in a foreign art museum, whose photographer has made a transparency for an author to use in a publication, and someone has used copy photography to make a slide from that publication for a professor to use in teaching an art history course. From whom do I seek permission? That the task becomes impossibly time consuming is illustrated by my own experience. Several years ago I did a free lance project for a professor at Johns Hopkins who was working on a book on a nineteenth century French artist. There were to be 300 illustrations in the book. My job was to secure the reproduction rights for the illustrations. It took two years. At that rate, based on the figure of 40,000 images a year, the average slide curator/librarian would need a lifetime to seek permissions for a single year's use of images.

Under the Copyright Act of 1976, distance education was defined according to the technology of the time: primarily closed circuit television broadcasts to overflow classrooms, with the requirement that such teaching be face-to-face or synchronous. Such restrictions make little sense for the technologies of the new millennium. In real-life digital practice, distance education is a term used broadly to include a range of instructional concepts from courses taught completely on-line, with little or no true face-to-face contact, to selected enhancement materials placed on a web site by a professor for students to view. Generally speaking, the term distance education as applied to digital media should cover any course related material that is intended to be accessed via computer.

While the representatives of commercial interests would do away with fair use and the traditional distance education exemptions in favor of pay per view licensing schemes, it is clear in our use and experience that these will not provide for our needs. Materials which we use in our professions on a regular basis include esoteric and little known images which typically have inconsequential commercial value and even less general market interest and are therefore unlikely to be targeted for licensed distribution. The licensed image databases currently available contain pictures which are suitable for commercial use, but are not appropriate for our needs. Quite simply put, the number of slides and digital images available commercially represents only a tiny percentage of the works of art and architecture in the world.

Further, we feel that the existence of licensed materials should not preclude a fair use of materials. Nor should fair use be restricted in any way for digital

media. We feel that guidelines which attempt to use enumeration methods for determining fair use (such as the CCUMC Multimedia Guidelines) in fact serve only to limit our rights under the law.

To seek to overly restrict our use of new technologies is to abrogate the advantages such technologies offer for educational use. The possibilities for interactivity and asynchronous use are just beginning to be explored and utilized. Our ability to reach students and deliver materials in efficient and innovative ways may revolutionize education. This is not to say that we do not, as individuals and professionals, and as an organization, respect and uphold the rights of intellectual property owners. Many of us, our colleagues and faculty, as well as our institutions, are also copyright holders. However, we feel strongly that the exemptions given in Section 110, must stand unchanged, and that the restriction that such teaching be "face-to-face" be amended to allow for asynchronous delivery.

We agree that it is reasonable to define the parties who should be entitled to the benefits of the distance education exemption as non-profit institutions serving the educational needs of all levels of students from pre-school through adult. A course may be any structured educational offering by the institution which is available to be taken for credit or non-credit by students. Availability of course materials may be limited to students registered at the institution and enrolled in the course. It is important that such definitions be broad, so as to include those who may be taking classes under special circumstances. It is fair to require some measure of security such as a PIN or password, if access is being given to course materials and those materials are protected by copyright. Students should have the same rights to access digital materials as they do in a traditional class situation.

I would like to remind everyone that although copyright law gives control to creators of works over the rights to reproduce, distribute, display or perform, and make derivative work, any discussion of fair use should note that "...the primary purpose of copyright legislation is to foster the creation and dissemination of intellectual works for the public welfare... ." {Marybeth Peters, *General Guide to the Copyright Act of 1976*, Washington, DC: Copyright Office, Library of Congress, 1977, 3:1.} As the representative of the Visual Resources Association and as an information technology specialist actively involved in distance education issues, I sincerely hope that the spirit behind the Copyright Act of 1976 is extended into the next millennium. We have unprecedented opportunities to expand our educational horizons. Let us not be left unable to utilize them because of unnecessary restrictions.

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