

**Predella** journal of visual arts, n°39-40, 2016 - [www.predella.it](http://www.predella.it) - Miscellanea / *Miscellany* ■

[www.predella.it](http://www.predella.it) / [predella.cfs.unipi.it](http://predella.cfs.unipi.it)

**Direzione scientifica e proprietà** / *Scholarly Editors-in-Chief and owners:*  
**Gerardo de Simone, Emanuele Pellegrini** - [predella@predella.it](mailto:predella@predella.it)

*Predella pubblica ogni anno due numeri online e due numeri monografici a stampa /*  
*Predella publishes two online issues and two monographic print issues each year*

*Tutti gli articoli sono sottoposti alla peer-review anonima / All articles are subject to anonymous peer-review*

**Comitato scientifico** / *Editorial Advisory Board:* Diane Bodart, Maria Luisa Catoni, Michele Dantini, Annamaria Ducci, Fabio Marcelli, Linda Pisanit, Francesco Solinas

**Coordinamento editoriale** / *Editorial Assistants:* Paolo di Simone, Michela Morelli

**Impaginazione** / *Layout:* Nikhil Das, Giulia Del Francia, Vittorio Proietti

**Predella** journal of visual arts - ISSN 1827-8655

## **Protecting Creativity and Research through Fair Use. An Art Historian's Reflections on the Unsustainable Costs of Image Reproduction Fees**

*This text reflects upon the complexities of image copyright laws and their implications for the art community. I highlight the double-sided effects of such laws on the protection of authors' rights. On the one hand, copyright provides authors with monetary recognition for their work. On the other hand, it limits the circulation of such work and its opportunity to generate new discourse. The absence of shared international policies and the high costs of image reproduction rights can compromise the quality of art historical research and affect the very existence of art history as we know it.*

Authors deserve recognition for their creative work. The submission of fees by those who reproduce an author's work is intended as a way to provide such recognition. However, according to legal scholar Julie E. Cohen using market value to capture and defend something as ineffable and multifaceted as creative capital may be reductive<sup>1</sup>, and laws should be able to define more nuanced parameters for the protection of artistic and intellectual rights. It is clear that legislators behind copyright laws are in good faith, and that such laws have many important merits. Yet the current rules remain problematic if embraced without flexibility.

In theory, copyright laws are meant to warrant authors' rights and foster creative production by providing authors with income opportunities. In practice, rigidly applied copyright laws may damage an author's interests, limit creative expression and curb intellectual production.

This is particularly evident in the realm of art and art history. The often stellar fees for the reproduction of artistic work negatively affect both art historians – given that their research practice depends on access to images – and the artists who should be protected by copyright laws – in that their work may remain under-discussed. Unfortunately, the costs of reproduction fees have become unsustainable. This does not only concern image reproduction in the context of for-profit publications, but it also extends to scholarly journals, museum and exhibition catalogs, and other publications with limited circulation and creative or research goals. The cost of reproducing one image in a peer-reviewed journal can easily amount to over 100,00 euros; thus the reproduction fees of each published essay may be around 600,00 euros or more, depending on the number of illustrations that a scholar may afford to include. The publication of an entire illustrated book comes with even more daunting price-tags, to the extent that several arts and humanities associations generously offer grants for the acquisition of image

reproduction rights. In the absence of funding, scholars sometimes opt for smaller or black and white images in order to contain their expenses; other times they are forced to omit images altogether. In some cases, art historians will even choose to delve into a research topic only if reproducing the related artists' work is reasonably priced or offered for free<sup>11</sup>. There is a possibility that the friendly relationship with a copyright owner or the latter's open-minded approach to copyright issues may lead to the granting of free reproduction permissions. Alternatively, at the cost of limiting the range of accessible visual sources, art historians turn to public domain images, such as those available through Creative Commons ([creativecommons.org](http://creativecommons.org)) and Wikipedia ([commons.wikimedia.org/wiki/Main\\_Page](http://commons.wikimedia.org/wiki/Main_Page)). For European heritage: Europeana that is also a repository of a number of images available for re-use ([www.europeana.eu/portal/en](http://www.europeana.eu/portal/en))

Art historians' choice of self-imposed iconoclasm is explained by the fact that, in the present scenario, they frequently work independently, support their own research, and are underpaid. More often than not, it is impossible for them to face the costs of high image reproduction fees. The same applies to a number of excellent research journals that operate at very minimal if not non-existent budgets, mostly thanks to the volunteer work of motivated professionals.

Renouncing the inclusion of pertinently selected illustrations is a big loss in the context of the arts. In the realm of art historical texts specifically, images are the spine of critical analysis. One states the obvious by saying that art historical arguments are mostly built on the interpretation of artworks. Thus it is essential that an art historical text be complemented by images that demonstrate the author's points. The absence of related images jeopardizes the very intelligibility of the written text. Art historians – as well as critics, curators, and artists themselves – build new knowledge by incorporating references to the art of the past. Given that they are authors themselves, their ability to contribute to their field should be safeguarded, just as much as the interests of the artists whose work is being reproduced.

It is in light of similar concerns that the College Art Association developed the *Code of Best Practices in Fair Use for the Visual Arts*. The Code, which was first released on January 12th, 2015, is based on the copyright laws of the United States and incorporates the findings of discussion groups and surveys. One hundred arts professionals took part in the discussions, and twelve thousand CAA members participated in surveys (which are ongoing). The goal is to define a set of acceptable practices that empower art historians, artists, critics, educators, curators, museum staff members, archivists, and collectors to incorporate images into their published work without the legal need to ask for permission and sub-

mit reproduction rights fees. According to the Code, it is fair to use copyrighted images in an art historical or critical text as long as such images are thoroughly analyzed by the author. The number of images, as well as their size and quality, should «not exceed that appropriate to the analytical objective»<sup>III</sup>. Furthermore, the original work should be accurately reproduced and «the writing should provide attribution of the original work»<sup>IV</sup>. Artists should incorporate reproduction of other artists' original work into their own new work only if such appropriation generates new meaning and it is "transformative"; also, the appropriation should be justified by an artistic objective whose rationale the artist should be able to explain; and finally artists should not attribute to themselves the original work included in their new work; instead, they should cite the visual source unless the labelling or embedding of such information undermine the aesthetics of the new work. The Code provides more detail regarding each scenario, and also offers advice on Fair Use in the realm of art education, museums, and memory institutions such as archives and collections. In all cases, art professionals should be prepared to justify their decision not to ask for reproduction permissions, by being able to demonstrate that they acted according to the Fair Use doctrine.

The Code is a tool of great relevance for the art community today, yet it presents important limits, which are acknowledged by the Code itself. One of those limits is geographical; in fact, the Code defines practices that only apply to the United States of America. This does not mean that the Code can only be used by American authors; nor that it only concerns the reproduction of works created by American artists. Rather, it «applies to any copyrighted work used in the United States regardless of whether the work originated outside the United States»<sup>V</sup>.

In a world where the circulation of ideas (and images) frequently crosses national boundaries, it may be impossible and even undesirable to publish art historical writing, criticism and art that remains confined within one nation, despite its being an important producer of artistic discourse.

Notwithstanding its stated limits, the Code helps to shape a new culture around issues of image reproduction, because it fosters an improved awareness of Fair Use in the art community.

At the international level there is a rampant sensitivity towards the necessity to loosen up copyright laws, especially in light of the inevitable and widespread circulation of copyrighted material on the internet. As of 2015, forty-seven countries allowed forms of Fair Use, but the list will likely grow<sup>VI</sup>. While the term "Fair Use" is employed in the context of the United States exclusively, similar concepts and exceptions exist also outside of the U.S. For example, the Italian law on copyright (Law n. 633 of April 22nd 1941) includes article n. 70<sup>VII</sup>, which allows the free

reproduction of parts of copyrighted materials if such reproduction is for research-related or educational reasons and does not provide any economic gains. British regulations include the concept of Fair Dealing, that allows the reproduction of copyrighted material for reasons of «private study, research, criticism, review, or newspaper summary»<sup>viii</sup>. Yet some European States seem more restrictive, and the response to copyright violation varies, too. For example, the violation of France's *Loi sur le Droit d'Auteur et les Droits Voisins dans la Société de l'Information* (2006)<sup>ix</sup> and *Code de la propriété intellectuelle*<sup>x</sup> is a serious criminal offense<sup>xi</sup>. In Europe, getting oriented in the matter of image reproduction rights is not straightforward, given the fact that laws are specific to each country. Nonetheless, in recent years the European Union has tried to create a shared set of rules that will make copyright laws more flexible across member States<sup>xii</sup>, and international agreements on copyright attempt to create a common ground<sup>xiii</sup>.

Riding the wave of the moment, the art community should take initiatives in Europe as well as elsewhere. Art historians, critics, practicing artists, and other arts professionals have a peculiar relationship with copyright legislation that differs from the needs and claims of other groups. For this reason, it is important that the art community find ways to work collectively, in order to articulate its members' right to build new knowledge by critically analyzing or responding to the art of the past. The model of the College Art Association's *Code of Best Practices* may prove effective, and it may be worth exporting through the support of academic networks. Raising awareness about best practices, empowering new authors by informing them of their own rights, and offering mutual advice in case of unintended copyright violations would make the difficult untangling of legal materials less daunting. In addition, initiatives should be taken to make copyright holders part of the dialogue, as the quality of many a publication depends on their open-minded attitude. The role played by copyright holders continues to be particularly important, because often they remain the gatekeepers of art images.

Based on my experience as an art historian, most living visual artists find reward in knowing that new intellectual discourse and creativity originate from their pre-existing work, and are delighted to give permission to reproduce their art without the submission of any fee. Their approach contributes to support Julie E. Cohen's aforementioned argument that art production has value beyond its monetary weight; such value is enhanced by the sharing of images.

Sometimes it is harder to obtain free reproduction authorization if the interface is not the artist herself, but her heirs, a foundation, a museum, a memory institution, or an artists' rights association. Copyright fees are a fundraising tool for such agencies. It goes without saying that the individuals and institutions that

take care of an authors' work also need economic support while they cover the irreplaceable role of conserving and archiving past knowledge. Yet it should be remembered that their role is also to promote past knowledge and keep it alive.

By losing sight of such principle in the midst of the intricate loopholes of laws, rights, and commonsense, the main victims are the arts, as well as art history as a discipline. There is no art history without images. And art's potential is undermined when it cannot trigger critical discourse.

- I J.E. Cohen, *Creativity and Culture in Copyright Theory*, in «UC Davis Law Review», 40, 2007, pp. 1151-1205.
- II Broader perspectives on this topic are offered by the book review: N. Harrison, *Copyfraud and Other Abuses of Intellectual Property Law* by J. Mazzone in «Visual Resources. An International Journal on Images and Their Uses», 30, 2014, pp. 99-105.
- III College Art Association, *Code of Best Practices in Fair Use for the Visual Arts*, New York, 2015, p. 9. See also: [www.collegeart.org/fair-use/](http://www.collegeart.org/fair-use/)
- IV College Art Association, *Code of Best Practices*, cit., p. 10.
- V *Ivi*, p. 6.
- VI J. Band and J. Jerafi, *The Fair Use/Fair Dealing Handbook*, Berkeley, 2015, accessed on January 6th, 2017, [infojustice.org/wp-content/uploads/2015/03/fair-use-handbook-march-2015.pdf](http://infojustice.org/wp-content/uploads/2015/03/fair-use-handbook-march-2015.pdf).
- VII It is worth citing article 70 of the Law n. 633 of April 22nd 1941 in full: «1. Il riassunto, la citazione o la riproduzione di brani o di parti di opera e la loro comunicazione al pubblico sono liberi se effettuati per uso di critica o di discussione, nei limiti giustificati da tali fini e purché non costituiscano concorrenza all'utilizzazione economica dell'opera; se effettuati a fini di insegnamento o di ricerca scientifica l'utilizzo deve inoltre avvenire per finalità illustrative e per fini non commerciali. 1-bis. È consentita la libera pubblicazione attraverso la rete internet, a titolo gratuito, di immagini e musiche a bassa risoluzione o degradate, per uso didattico o scientifico e solo nel caso in cui tale utilizzo non sia a scopo di lucro. Con decreto del Ministro per i beni e le attività culturali, sentiti il Ministro della pubblica istruzione e il Ministro dell'università e della ricerca, previo parere delle Commissioni parlamentari competenti, sono definiti i limiti all'uso didattico o scientifico di cui al presente comma. 2. Nelle antologie ad uso scolastico la riproduzione non può superare la misura determinata dal regolamento, il quale fissa la modalità per la determinazione dell'equo compenso. 3. Il riassunto, la citazione o la riproduzione debbono essere sempre accompagnati dalla menzione del titolo dell'opera, dei nomi dell'autore, dell'editore e, se si tratti di traduzione, del traduttore, qualora tali indicazioni figurino sull'opera riprodotta».
- VIII Band and Jerafi, *The Fair Use*, cit.
- IX *Loi sur le Droit d'Auteur et les Droits Voisins dans la Société de l'Information*, accessed on January 6th, 2017, [www.senat.fr/dossier-legislatif/pjl05-269.html](http://www.senat.fr/dossier-legislatif/pjl05-269.html)
- X *Code de la propriété intellectuelle*, accessed on January 6th, 2017, [www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000006278868&cidTexte=LEGITEXT000006069414](http://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000006278868&cidTexte=LEGITEXT000006069414)



- XI CAA, *Intellectual property and the arts. Copyright outside the United States*, accessed on January 6th, 2017, [www.collegeart.org/ip/ip\\_copyright\\_outside](http://www.collegeart.org/ip/ip_copyright_outside)
- XII B. Hugenholtz and M.R.F. Senftleben, *Fair Use in Europe. In Search for Flexibilities*, Amsterdam, 2011, accessed on January 6th, 2016, [www.ivir.nl/publicaties/download/Fair%20Use%20Report%20PUB.pdf](http://www.ivir.nl/publicaties/download/Fair%20Use%20Report%20PUB.pdf)
- XIII See, for example, the Berne Convention for the Protection of Literary and Artistic Works, the World Intellectual Property Organization (WIPO), and European Union's Copyright Directive (EUCD). For a more thorough list, see CAA, *Intellectual Property and the Arts*, accessed January 9th, 2017, [www.collegeart.org/ip/ip\\_copyright\\_outside](http://www.collegeart.org/ip/ip_copyright_outside)