Copyright Issues and the Creation of a Digital Resource: Artists' Books Collection at the Frick Fine Arts Library, University of Pittsburgh

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Introduction

Copyright, intellectual property rights (IPR), and fair use are complex issues, especially for educational institutions increasingly utilizing more digital resources. Much literature documents issues of copyright, fair use, and the Digital Millennium Copyright Act of 1998 as they affect visual resources for education and research. However, these issues are further compounded in art libraries and visual resource collections by the creation and use of digital image collections, and image databases and archives for access, education, research, and management. Guidelines have never been set for copyright, IPR, and fair use in regard to creating image archives (slide collections) or other visual resources because to date these resources have been available primarily in slide (analog) format, and not readily available or duplicated. The gray area around the issues of copyright and fair use for images (both analog and digital) has become more complex with the advent of electronic and online course materials and digital image collections. Now many rights holders are concerned that digital representations of their art, and thus the intellectual or visible creative content, will be mass produced because they are hosted in a digital format in image databases and Web sites. Institutions fear legal actions in response to the fair use digital resources they create to support student coursework. Since there are no strong rules from the recent past on which to base any new judgments or rules for copyright, IPR, and fair use for digital image resources (based on the long-standing, parallel use of slide images in educational settings), the debate over copyright, IPR, and fair use remains contentious and slippery for many creators, managers, and users of digital image databases. Users and rights-holders are at odds with each other, and educational institutions are caught in the middle, struggling with technological capabilities, the law, and expectations of faculty, students, and researchers to make more and more information and resources available in digital format. Furthermore, how an institution plans on using digital representations is crucial to securing the proper type of permission, if it needs to be obtained at all. Fair use is not always a catch-all defense, and rights holders and institutions are not always aware of the nuances of copyright law and infringing actions. With slide catalogs, an institution could best judge how to appropriately manage that resource at the institutional level for its particular needs. Online catalogs and databases for image collections, however, must be managed at a global level, and control of image assets becomes more complicated, technical, and expensive.

This article will examine the complex issues of copyright law, IPR, and fair use for digital resources in order to shed light on the factors involved in the creation of a digital image resource and Web site for the collection of artists' books at the Frick Fine Arts Library at the University of Pittsburgh. The planning, development, and outcome of the student project will be explained as well. The Artists' Books Web site is a good example of how the hindrances, murky laws, and complications of copyright law affect access, education, resource management, and the planning of digital image projects by art libraries and non-profit institutions. In addition to the complications of copyright law and digital image projects, this paper will also review the complex nature of artists' books and explain why that particular artistic medium further complicates issues of copyright law and IPR when artists' books are represented in a digital format.

Artists' books emerge from a complex creative process which makes securing copyright permission for them challenging and time consuming, since the rules that apply to books, artistic creations, analog images, and digital representations differ one from another. A review of the format and medium of the artists' books genre, as well as an analysis of issues facing copyright and fair use in the context of digital images, will shed some light on exactly why it is nearly impossible to clear copyright for a digital resource reproducing artists' books. Questions in regard to fair use may also exist. This is not so much the fault of the creators, the institution, the artists' books (or any other arts) genre, or the digital format, as it is a result of the vague and sweeping guidelines that comprise copyright law. Some examples of how other institutions have dealt with online catalogs and digital representations of artists' books on their Web sites will be reviewed.

The Project

Begun as a student exercise to learn about the management and creation of an image database and Web site, the project emerged as a viable resource for management, preservation, and access for the art library. The Artists' Books Web site combines many facets of a digital image project: increased management of item inventory through representative images; increased levels of preservation and access for fragile or one-of-a-kind objects through digital surrogates; and increased awareness of the collection for education and research. In addition, issues regarding the
possible violation of copyright and fair use arose in the context of my project, the goal of which was to obtain the skill set for creating, managing, and preserving a Web site and database comprised of digital images and informational metadata. My goals for working on the Artists’ Books Web site were to learn about major issues involved in the creation and management of a digital image Web site. However, for this project one could say that I had to break copyright law in order to learn about copyright law, or perhaps plead fair use in order to have fair use.

The project emerged from Library and Information Science coursework in Digital Image Collections (LIS 2653 Spring 2003) at the University of Pittsburgh.4 Students were to select a project as near to a real professional experience as possible. The head librarian in the Frick Fine Arts Library requested assistance with documenting and inventorying the artists’ books collection in a digital format to aid preservation and access to the collection. The project consisted of two phases: digitally photographing half the collection and creating a prototype Web site in the spring semester; and completing the digital photography and redesign of the Web site in the summer semester. All digital image work was done with the highest possible standards achievable with the resources available to the library. All methodology for managing the digital images after capture followed proper archival and access procedures, and records and backups were kept of all images. The Web site is meant to be an educational tool with information about the history of artists’ books, and with detailed data about the creators and the books themselves. All information connected to the images is based on the University of Pittsburgh’s library catalog, as well as on other Internet and library catalog resources. Originally there was to be only one Web site with both thumbnails and viewable images. However, to enable the site to fall into what we believe is fair use and be posted online, the project now has two Web sites. One site is viewable only in the library because it has viewing images up to 150 ppi at approximately 2.5” - 3.0” on the longest side, and the other is viewable online (intranet or Internet) with only thumbnail images at 72 ppi and at approximately 1.0” - 2.0” on the longest side. Both Web sites have exactly the same factual information. Master sets of archival images and viewing images are stored on CD-ROM disks at the Frick Fine Arts Library. We believe that this Web resource falls under the conditions of fair use since all the metadata and information held on the Web site is fact and public record; all images hosted online are of a low resolution and act as reference images with notation and source documentation;6 and the site is primarily intended for education and access. However, things may not be quite this simple, and the simultaneously vague and complex rules for copyright law have many layers, which will be discussed below.

Artists’ Books and Copyright

How do we define the term “artists’ books”? Artists’ books are essentially conceptual objects of art. Some more closely resemble the strict format of books than others; some are one of a kind; and some are produced in numbered and signed series by artists, creators, or printers. Artists’ books express an idea; they are complicated objects of art, which can have more than one creator, artist, author, printer, typesetter, binder, or producer. This fact in and of itself makes cataloging artists’ books challenging and difficult, and often different cataloging records for the same artist’s book will vary greatly.7 Use of the term “book” in artists’ books is also misleading and can cause some confusion as far as copyright law, because these items might not be in traditional book format, but rather might present themselves as three-dimensional objects of art intended to be handled, manipulated, and experienced by the viewer. Thus, to create an entire Web site on the genre of artists’ books is to create a Web site of many different types of objects of art, including actual books. An examination of the various complexities of copyright and fair use is necessary to understand why the broad genre of artists’ books is a monumental copyright challenge. Objects of art and literary works fall into different copyright categories, and the digitization of either changes the nature of those rights.8 Concerns regarding the complex rights of this medium, individual creators, digital representations of the art work, and issues of Web sites as educational media require further analysis.

Copyright and Fair Use

Copyright law, IPR, and fair use are complex in the context of digital images and online resources. “There is no clear road under existing law for collecting the works proposed for a digital archive and placing them on a publicly accessible network.”9 Guidelines for whether a digital image falls under fair use, or for identifying the individual rights-holder can be misleading, especially in regard to the history of the image: copyright can exist for the current image, the previous version of the image (if it was captured from a book), the original image (that was placed in the book), and for the item itself in its original manifestation. The creator(s) of the object and/or the artist(s) could be deceased or could have signed rights over to another individual. In the case of artists’ books, some have one or more creators, and a single work can have up to thirty-eight individual parts, each signed by a different printer or artist.10 Securing copyrights for an object such as that would be prohibitively expensive and time consuming. For exactly that reason, fair use was designed to aid in educational endeavors. In her article on intellectual property rights, Macie Hall states:

The doctrine of fair use evolved from a recognition that the public should be allowed a limited use of copyrighted materials in a socially beneficial manner without the rights holder’s permission….In guidance, the law offers that purposes such as comment, criticism, news reporting, teaching, scholarship and research may be considered fair uses and sets out four factors to be considered in determining if a use is fair. These are:

1. purpose and character of the use;
2. nature of the copyrighted work;
3. amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of use on the potential market.11

Yet fair use is not always a solid defense when the rights holder seeks damages against the infringing institution for not properly obtaining copyright permission. Also important is the fact that even if an item is marked with copyright, legal action for restitution against the infringing party can be taken only if the copyrighted item was registered by the creator with the United States Copyright Office. If an institution violates
copyright by capturing an image of a copyrighted object, no damages can be claimed unless the rights holder has already registered that item. However, the fact that the item has not been officially registered will not necessarily protect the infringing party from violating copyright law. This is a complex idea—an institution can in good faith claim fair use of educational materials in a digital format; the item represented in digital form may not be registered but still be copyrighted; and in either case the institution has violated copyright. The combined power and weakness of fair use has made conditions in which institutions disregard obtaining proper copyright permission and create digital resources anyway, or conversely become paralyzed from fear of legal action and create few if any digital resources at all. Either way, educational resources are put in jeopardy when institutions do not attempt to create stronger arguments for fair use in digital media. Until more court cases are tried or the guidelines are revised, the laws regarding copyright and fair use of digital image resources will not be clear.

Classification and Determining Rights

According to Georgia Harper, official general counsel at the University of Texas and an expert in copyright and fair use who has developed many guidelines to aid with understanding and using copyright and fair use, “Most copyrighted cases involve literary works, music or software, and there are no cases directly addressing educational fair use or transmission of images.” This simple statement actually belies a more complicated issue regarding digital images, especially the representations of artists’ books. The classification of an item for copyright is an essential part of the process of determining rights because each class has slightly different rules. Many categories of classification for copyright exist, including literary works, musical works, dramatic works, and artistic works (including images). Literary works are important because they contain the vast majority of copyrighted materials, such as books, letters, journals, and all other handwritten materials. Most copyright rules apply to legal cases based on literary, not artistic works. However, there are some other slightly surprising materials that fall into the class of literary works, including “everything in machine-readable digital form, including: digitised images, everything on the Internet, and software.” Where a digitized image falls becomes a concern, because it appears for all useful purposes to act as an image, but being a digitized form, it is a literary work. Furthermore, artistic works include graphic works, photographs (with their own special set of rules), sculptures, overhead projector slides, and PowerPoint® materials. We may conclude that artists’ books could fall into the category for either literary works or artistic works. However, Catherine Grout states in the book Creating Digital Resources for the Visual Arts:

As is the case with literary works, there is no implication of artistic merit. There is, however, some confusion about the status of works and which classification scheme they came under, and this is a really important issue that has to be understood. A photograph, for instance, is classified as an artistic work, but when this has been digitised [sic] (and thus becomes machine readable code), the digital image is then classified as a literary work. If this digital image is then printed out, it becomes an artistic work again. As there are different rules for artistic and literary classes, this can make copyright hard to keep track of.

Fair Use – Analog or Digital?

This situation of categories in copyright law further compounds any earnest efforts at either attempting to secure permission to photograph or digitize artists’ books, or knowing how to manage that copyright information. Since artists’ books can be both literary works and artistic works, and any representation of them in digital form adds to the confusion, there is little hope that current copyright rules will aid in resolving these discrepancies. The easiest solution would be to class artists’ books as literary works from the beginning, thereby creating a chain reaction from its class status, regardless of whether items were artistic works or not. If display of artists’ books on a secure Web site is intended primarily for educational use, not for printing, then copyright fair use would apply as to a literary work. However, any collection of analog slides of artists’ books would send the scenario in the other direction. Since analog slides are photographs, and thus artistic works, artists’ books would be better off classed as artistic works, thereby allowing copyright management to be consistent throughout the treatment of the individual item. In either case, any real solution for dealing with rights permission or fair use for artists’ books, as well as for a digital resource for them, is not easily solved with current copyright guidelines. That does not even cover issues concerning use of those perhaps illegally gained images for what would otherwise be constituted as a fair use educational Web site, that itself might be copyrighted.

Therefore a scenario is created either under the umbrella of copyright infringement or fair use for a variety of situations in which many of the seemingly impossible rules for obtaining copyright permission fail for artists’ books. First comes the determination of who holds the original rights to the item, a task that can take a prohibitively long time and impede educational fair use guidelines. Second is the capture of digital images of artists’ books, which falls under fair use or not, depending on a variety of situations. Is it a literary work or an artistic work? Who holds the original copyright? Does first right of sale apply to capture and dissemination of a reference image of the work? Will the institution take the chance on illegally capturing the digital representation of the item and then register copyright for the illegal picture of the item, since the image is copyrightable but the act of capturing the image is in violation? Is the creation of a digital image archive for management, access, and research a viable option under fair use? What is to be done with archival copies of the (perhaps) illegally obtained images? How can fair use informational metadata (facts) be weighed against the infringed-upon digital images when they are paired in an educational resource?

Third, we must ask whether the Web site created to support the digital images and informational metadata for the artists’ books is in an educational format. The Web site itself—a literary work as are the digital images—is copyrightable by the institution, even if the images contained on the Web site are an infringement. Use of thumbnail images under fair use comes into question here. If thumbnails fall into fair use, how does the institution circumvent the position that digitally photographing the item (surely at a higher resolution for a best practices preservation format) is infringing? If the images intended for the Web site are set at a much lower resolution, and original archival quality images are stored away for administrative purposes, does that fall into fair use?
Attempts at Guidelines

Conditional points that veer between fair use and copyright infringement can go on and on. There is no simple answer for the digital image copyright and fair use issue, especially in regard to digital documentation and creation of an image Web site of artists' books. Many attempts at guidelines for fair use and professional best practices have been undertaken in the last few years, including CONFU (Conference on Fair Use) Guidelines, Visual Resources Association (VRA) Guidelines, National Humanities Alliance (NHA) "Basic Principles for Managing Intellectual Property in the Digital Environment," NINCH (National Initiative for a Networked Cultural Heritage), and a host of professional petitions from many agencies, such as the American Association of Museums, American Society of Media Photographers, College Art Association, Art Libraries Society of North America, and Special Libraries Association, to name a few.19

Georgia Harper provides guidelines and rules of thumb to assist people with copyright and fair use decisions regarding digital image collections. [See Crash Course in Copyright, http://utsystem.edu/ogc/intellectualproperty/copypol2.html. Her helpful "Rules of Thumb" for fair use, and a "Fair Use Factor Test" are based on the conditions of fair use. When this test is applied to the Artists' Books Web site developed for the Frick Fine Arts Library, the Web site and the digital image resources appear to clear the fair use hurdle:

- What is the character of the use?
  Nonprofit and educational

- What is the nature of the work to be used?
  Fact, published, and a mixture of fact and imaginative

- How much of the work will you use?
  Small amount

- If this kind of use were widespread, what effect would it have on the market for the original or for permissions?
  It would have little effect on the market because the images are not exhaustively representative, and some items are unique. After evaluation of the first three factors, the proposed use is tipping toward fair use, and the original is out of print or otherwise unavailable; and the copyright owner is unidentifiable.21

However, when another suggested set of guidelines for determining fair use is followed, the Web site may fail the fair use test.

In order to infringe the copyright law, a person must have copied, etc., either the entire work or a 'substantial' part of the work. Substantial is not what one might think it is...The test for substantial is to imagine that if the proposed material to be copied was missing from the original, would this cause considerable annoyance. If so, then it is considered to be substantial...22

And

an example of non fair dealing: copying an article, putting it onto a floppy disk, and then putting it onto a Web site, i.e., electronically publishing infringed material.23

Both of these conditions, substantial part and electronic publishing, could fail fair use in context of the Artists’ Books Web site. The digital images documenting artists' books in the Frick Fine Arts Library might fail "substantial part" because in an object of art any removal of a portion of the item would cause significant intellectual damage, and it further becomes a question of whether posting a reference image online is actually publishing the item. Clearly there is no easy answer with copyright and fair use, especially regarding digital image collections and online educational resources. Since there are no clear guidelines to determine whether the Artists' Books Web site falls under fair use or might violate copyright, a comparison to other artists' books Web sites is important.

Artists’ Books on the Internet

To decide on a potential course for the Artists’ Books Web site, a variety of institutions and collections were chosen for a general comparison of how artists' books are represented on the Internet. The largest collection of artists' books is at the MOMA/Franklin Furnace/Artist Book Collection [http://franklinfurnace.org/moma.html]. This collection is searchable on MOMA’s Databse, but none of the records for artists' books contain visual images. Similarly, collections of artists' books at University of North Carolina Library [http://library.uncg.edu/depts/speccoll/artistbook/], Carnegie Mellon University Library [http://www.library.cmu.edu/Research/SpecialCollections/index.html], or the University of Pittsburgh Frick Fine Arts Library [http://www.library.pitt.edu/libraries/frick/fine_arts.html]24 show representations of their artists' books with item records.

One collection that shows only thumbnail size images along with abbreviated item records is the Joan Flasch Artists' Book Collection at The School of the Art Institute of Chicago [http://www.artic.edu/saic/art/flasch/index.html]. The Web site represents a sample of the items in the collection and presents easily viewed thumbnails. The Web site does not post information on copyrights that is readily viewable, but it is an example of how artists' books can be adequately represented using reference images that usually clear fair use guidelines.

Two collections were chosen that post thumbnails and larger viewing images of artists' books. These Web sites have no obvious copyright statements, as far as can be discerned, even though best practices for an image Web site require that a rights statement page be easily viewed on such Web sites. These Web sites are: The University of Delaware Library Special Collections Department (Artists' Books) [http://www.lib.udel.edu/ud/spec/exhibits/artistbooks/], and the Victoria and Albert Museum, London [http://www.nal.vam.ac.uk/artbook.html]. Both of these sites show thumbnails and informational metadata, but on both sites some, if not all, of the thumbnails can be clicked to reveal a larger viewing size of the image.
Even though the above examples are brief, the point is made that a variety of well known, large institutions have collections of artists’ books and provide access to those collections in several ways, including digital image display. It is reasonable to believe that all of these institutions are acting in a manner that supports fair use according to the purpose of that institution. Each institution posts representations of artists’ books, or not, depending on their resources, their purposes for access and education, and their own best judgment. There are many other commercial and artists’ Web sites on the Internet that display images of artists’ books, but being commercial, they make little comparison to the situation of copyright and fair use in a nonprofit educational setting. Web sites with images of artists’ books such as those mentioned above demonstrate that digital images function as reference images since they are not perfect representations of the artists’ books, nor are they complete renderings of the item. Many representations show only the cover, an inside page, or a particular view of an artist’s book, and rarely display explicit or perfectly reproduced views. Given this, a question arises that even if an image may fail the “substantial part” test, does a general representation of the book, not an exact likeness, fall into fair use if the image is meant as a visual reference for access to further location, research, education, and metadata? In the context of the Arts’ Books Web site developed for the Frick Fine Arts Library, fair use covers the creation of derivative works and electronic distribution of reference images for increased access, education, preservation, and management.

Conclusion

There are no easy answers to digital images and online resources when copyright law, IPR, and fair use are at stake. Users, rights holders, and institutions are at odds with each other, and “…issues involving dissemination are a major reason that ‘they’ [rights holders] are willing to ignore our analog/slide collection practices, but want assurances [over reproduction] when it comes to digital media.”28 If digital art resources and image collections are to be used in the same way that previous analog/slide collections have been used in educational contexts, then logic dictates that thumbnail reference images hosted on either educational intranet or Internet Web sites be treated in the same manner. Whether representations of literary works or artistic works, digital images need to be better classified in copyright laws, so that more effective use and management can occur for non-profit institutions. Students, faculty, researchers, and managers who are used to the traditional function and purpose of visual images in analog format should not be hindered because digital images are technically classed as coded documents and behave differently as resource materials. The purpose of a digital image Web site is to act as a surrogate or reference tool for the original item, and this cannot be forgotten when online support materials are conceptualized. The vague nature of copyright law for literary, artistic, and photographic works is a deterrent to art librarians and visual resource professionals when creating educational resources and following best practices guidelines.28 More time is necessary to allow emerging technologies and their effects, and the needs of students and scholars to help influence copyright legislation, and more legal cases regarding digital image resources, copyright, and fair use need to be tried. However, educational and non-profit institutions cannot wait forever for these decisions to be made, and technology and progress must be embraced in good faith of fair use to provide students and researchers with proper access to digitized items to which they might otherwise have access in analog format. Fair use must be seen as an asset to educational digital resources, not a liability. It is very important that institutions take a proactive stance on this because not doing so will create situations in which students and researchers will look elsewhere to less regulated Web sites and resources to find the information they require. Only through the creation of good policy (including best practices, secure Web sites, digital watermarks, and content management) moderated by attorneys and professionals familiar with copyright regulations and institutional objectives, will organizations be able to claim fair use as a viable defense and create digital image resources with more assurance.27

Notes

1. “...the Digital Millennium Copyright Act of 1998 was signed into law on October 28, 1998. This act, considered by many legislators to be the most important copyright legislation since 1976, amends the U.S. Copyright Act to conform to two international copyright treaties from the World Intellectual Property Organization,...which require enacting anti-piracy laws that prohibit the circumvention of copy blocking measures (such as encryption) that control access to copyrighted works.” Redlands Unified School District (RUSD), “Section #13: The Debate Over Copyright Protection in the Digital Age,” http://www.redlands.k12.ca.us/copyright/internet_resources.htm (accessed 2 August 2003).


4. Digital Image Collections (LIS 2653 Spring 2003) was taught by Dr. Edie Rasmussen, and the project continued as Independent Research supervised by Dr. David Robins (LIS 2901 Summer 2003).


7. The fact that many artists’ books have more than one contributor also makes copyright permission prohibitively challenging to secure.


10. The item, A Printer's Exquisite Corpse (1992) is primarily attributed to Pamela Barrie, but there are a significant number of individual printed cards and folded signatures, each signed by a different artist or printer who contributed to the "book."


15. Photographs can include prints and slides. Digitizing a slide falls under different rules than capturing an image of something directly in digital format. Born-digital images are not necessarily photographs because they are technically in binary code. Photographs also hold two different copyrights, one for the original object being photographed and one for the actual photograph. "... you can own the copyright in a photograph but you can't do anything with the photograph because you are infringing the copyright of the original object." See Grout et al., Creating Digital Resources, 15.


17. RUSD, "Section #13. The Debate Over Copyright Protection in the Digital Age."

18. Besek, Copyright Issues, 5-6.


21. Ibid. Also note that copyright and fair use for the images on the Artists' Books Web site are still under consideration.


23. Ibid., 12.

24. Even though the digital image Web site has been created for the artists' books at the Frick Fine Arts Library at the University of Pittsburgh, it is not yet available online. The Web site may be viewed in-library only.


27. Harper, "Copyright and Image Management."

Additional Works Consulted


