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March 12, 2015

Ms. Janet Landay
Program Manager, Fair Use Initiative
Project Director, CAA-Getty International Program
College Art Association
50 Broadway, 21st Floor
New York, N.Y. 10004

RE: Comments on CAA “Code of Best Practices in Fair Use for the Visual Arts”

Dear Ms. Landay,

It was a pleasure meeting you after my participation on the Columbia University panel discussion, “Research without Borders.” As we discussed, I appreciate your willingness to address the serious concerns of visual artists regarding CAA’s recently published “Code of Best Practices in Fair Use for the Visual Arts” (the *Code*).

The undersigned represent the interests of a significant number of graphic artists, illustrators, photographers and other visual artists working professionally in the United States. We affirm that scholars and the public need to have the freedom to create new works and, that frequently, these derivative and new works are based on existing images through the application of the fair use doctrine. But it should also be recognized that professional visual artists create part of their income stream through licensing of their creative labors and that there must be proper balance between the needs of these various communities. Fair use is intended to provide that balance, and should not be used as an excuse to avoid paying a license, where appropriate, because it is perceived to be either difficult to obtain or too expensive.

One of the unfortunate conclusions of the *Code* in its current form is that copyright acts primarily as a barrier, encouraging self-censorship; and that artists are in an adversarial relationship with the marketplace. Nothing could be further from the truth. Visual artists want their works used and only seek fair and reasonable compensation for that use. The *Code* fails to educate the academic arts community on when licensing is appropriate. Each of the undersigned associations provides educational content on their Web sites and/or programming for the education of their members and the general public regarding the full range of options under copyright law, including, but not limited to, fair use. We understand that the *Code* was crafted to deal with fair use specifically, but believe it does a disservice to your community by not further discussing licensing options.

We also have a major concern that the *Code* itself does not deal with commercial uses made by museums and other non-profits under the claim of fair use, in particular the production of useful articles and coffee table books created for the commercial benefit of those institutions. Additionally, if educators are permitted to claim fair use for all of their classroom materials, publishers may lack the incentive to produce those materials, thus undermining the entire educational publishing business and in turn decimating the market for visual image sales.

Last but not least, as partners with the academic community we would have warmly welcomed the opportunity to participate in the study groups had we been asked.

Our specific comments regarding the *Code of Best Practices*:

Analytical Writing

- The *Code* gives the impression that if one intends to write a book about a subject, and includes images that this favors fair use. This practice is in fact contrary to industry practice.
- While the use of a few selected images in a critical review of an artist's work, such as an exhibition review, would be an example of fair use; a general review of an artist's work in which the images are aesthetically used to enhance the text, even by an academic would require permission from the copyright owner.
- There is no automatic "educational" fair use exception, and all fair use factors must be taken into consideration, particularly harm to the potential market, where for many types of works and visual artists, the educational market is the only market.

Making Art

- We believe the recommendation to prepare an "artistic objective" statement for fair use is misplaced. An artistic objective statement is what an artist writes for a gallery, exhibit or retrospective and should not be a "substitute" for the four-factor fair use test.
- "When copying another's work, an artist should cite the source, whether in the new work or elsewhere (by means such as labeling or embedding), unless there is an articulable aesthetic basis for not doing so." This is already a fair use requirement for education/scholarship. And there is always some place to create a footnote.
- We assert that Appendix A, *Fair Use Today*, is personal opinion and should not be published side-by-side with the *Code* because it undermines the four-factor test in favor of an expansive fair use "two-key analytic question" test.
- The final bullet in the *Code's* "Limitations" regarding the creation of reference collections states that access should be for "legitimate purposes," yet that term is undefined.

- The *Code* does not recommend that an academic institution provide copyright education or information when using works that rely on fair use. We suggest that students should be educated about copyright and the need to seek permission in most instances.

Without participation from all of the stakeholders in the visual arts community there can be no consensus, let alone a set of “Best Practices in Fair Use for the Visual Arts.” As developed, rather than “providing a practical and reliable way of applying” copyright law and fair use, the document creates far more misconceptions than it resolves and encourages misappropriation of copyrighted work rather than the practice of due diligence and licensing. It is not helpful to the courts because it presents biased findings and in fact helps lead the professional community astray with regard to the best way to proceed when seeking to use the works of others.

We hope you accept our comments in the spirit of seeking to amicably resolve our differences and expressed concerns. We look forward to your response and suggestions for next steps in this process. Thank you.

Very truly yours,

Mickey H. Osterreicher

Mickey H. Osterreicher
General Counsel

On Behalf of:

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