

**“You Be The Judge”: An Analysis of the College Art
Association’s Code of Best Practices in Fair Use for the Visual
Arts**

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*Dieter is working on an installation that will feature, among other things, a display featuring current websites of top news sources in different countries. He’s also got a loop playing below it of headline news from the week before. Does he need to ask permission from anyone to build this material into his art?*¹

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1. *Fair Use: You Be the Judge*, COLL. ART ASS’N, <https://perma.cc/XD4R-A7Z6>.

I. INTRODUCTION

Dieter's hypothetical conundrum is one posed by the College Art Association's website on "Fair Use in the Visual Arts" with the invitation "You Be The Judge."² The hypothetical is one of several that ask readers to determine whether the scenario is one in which the user of copyrighted material can claim fair use as an affirmative defense to a charge of infringement. The College Art Association ("CAA") challenges visitors to the website to use its Code of Best Practices in Fair Use for the Visual Arts, promulgated in 2015, to determine whether such a use is fair.

Developed at common law and later codified in the Copyright Act of 1976,³ fair use has been called a "mega standard"⁴ for its role in carving out a significant exception to copyright's monopoly. Justified as furthering copyright's original purpose of "promot[ing] the Progress of Science and useful Arts,"⁵ the doctrine of fair use limits the monopoly created by the exclusive rights, allowing for certain exceptions.⁶ The statute provides four factors for determining whether a use is fair; courts use the factors to engage in a fact-intensive inquiry on a case-specific basis. Fair use has been criticized as too unpredictable,⁷ it has also been defended by scholars who have identified patterns in fair use outcomes.⁸ Recent divergences between the Courts of Appeals point to an assessment that the doctrine is at least a little uncertain.⁹ The lack of clarity surrounding fair use has led some groups—both government-affiliated and otherwise—to attempt to codify fair use into

2. *Id.*

3. Copyright Act of 1976, 17 U.S.C. § 107 (2012).

4. Niva Elkin-Koren & Orit Fischman-Afori, *Taking Users' Rights to the Next Level: A Pragmatist Approach to Fair Use*, 33 CARDOZO ARTS & ENT. L.J. 1, 7 (2015).

5. U.S. CONST. Art. I, § 8, cl. 8. Kenneth Crews has noted this originalist basis of fair use: "The framers of the U.S. Constitution clearly intended that the law of copyright—including fair use—would be tailored to serve the advancement of knowledge." Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*, 62 OHIO ST. L.J. 599, 607 (2001).

6. A non-inclusive list of such uses excuses "purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." 17 U.S.C. § 107.

7. See David Nimmer, "*Fairest of Them All*" and *Other Fairy Tales of Fair Use*, 66 LAW & CONTEMP. PROBS. 263, 287 (2003); Jessica Litman, *Billowing White Goo*, 31 COLUM. J.L. & ARTS 587, 596 (2008).

8. See Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549 (2007-2008); Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47, 49 (2012); Neil Netanel, *Making Sense of Fair Use*, 5 LEWIS & CLARK L. REV. 715 (2011). Sag has noted that the "uncertainty critique" is somewhat overblown and specific sub-factors correlate to significant statistical shifts in the outcome of fair use cases. See Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47, 49 (2012). See also Gwen Hinze, Peter A. Jaszi & Matthew Sag, *The Fair Use Doctrine in the United States—A Response to the Kernochan Report*, July 27, 2013, at 3, SSRN 2298833, <https://ssrn.com/abstract=2298833> (claiming that case law provides "a fairly coherent set of principles that lend themselves to forward-looking application").

9. *Compare Cariou v. Prince*, 714 F.3d 694 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 618 (2013) (finding that transformative use constitutes fair use), *with Kienitz v. Sconnie Nation LLC*, 766 F.3d 756 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1555 (2015) ("We're skeptical of *Cariou's* approach, because asking exclusively whether something is 'transformative' not only replaces the list in § 107 but also could override 17 U.S.C. § 106(2) . . .").

“guidelines,” “statements,” or “best practices” for industry- or community-specific uses.¹⁰ Most recently, the College Art Association asked Patricia Aufderheide and Peter Jaszi, Professors at American University’s Center for Media & Social Impact, to develop guidelines in Fair Use for the Visual Arts. The resulting Code of Best Practices includes an introduction and five sections of “Best Practices” for five types of uses: *Analytic Writing*, *Teaching about Art*, *Making Art*, *Museum Uses*, and *Online Access to Archival and Special Collections*. Each Best Practices section includes a description of the use, a principle, and limiting considerations.¹¹

This Note will aim to assess the workability of this Code of Best Practices, with a specific focus on the Principle and Limitations—which I call “Considerations”—set forward for *Making Art*. I will first look at the existing doctrine as it has developed over the last forty years, with specific attention to recent similarities and differences between decisions from the Second, Ninth, and Seventh Circuit Courts of Appeals. I will then turn to the CAA’s Code of Best Practices, contextualizing the project within the history of fair use statements and attempting to summarize relevant objections and defenses to such efforts. Finally, I will evaluate the Code, analyzing it as a descriptive and aspirational document, and presenting findings from interviews with artists applying the Code to Dieter’s hypothetical scenario. This Note argues that the Code of Best Practices is a problematic hybrid of descriptive and aspirational recommendations, instructive for artists only in terms of compliance with community norms, not with legal doctrine. Rather than offering recommendations for a better Code, I will suggest that none is needed for visual artists, in part because of their unique disposition as copyright users.

II. BACKGROUND: THE LAW

Section 107 of the Copyright Act of 1976 provides:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

10. While there is no agreed-upon definition for these terms within the field, I use “guidelines” to refer to government-led or government-affiliated initiatives to provide interpretive guidance to the application of fair use doctrine. “Statements” most often refers to industry-led initiatives (such as the *Statement of Best Practices in Fair Use of Dance-related Materials* produced by Dance Heritage Coalition). The CAA writes that their Code of Best Practices “describes common situations in which there is consensus within the visual arts community about practices to which this copyright doctrine should apply and provides a practical and reliable way of applying it.” COLL. ART ASS’N, CODE OF BEST PRACTICES IN FAIR USE FOR THE VISUAL ARTS (Feb. 2015), <https://perma.cc/87VW-T597> [Hereinafter CODE OF BEST PRACTICES].

11. *Id.*

- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.¹²

The section contains three parts:¹³ the preamble, which lists specific uses that may be considered fair; the four factors, which codify fair use considerations that originated in an 1841 opinion by Justice Story;¹⁴ and a more recent addendum for unpublished work.¹⁵ The four-factor test has become the cornerstone of fair use analysis since the implementation of the Copyright Act in 1976.¹⁶ Courts consider each factor in turn, balancing outcomes in favor of or against a finding of fair use.¹⁷ Professor Barton Beebe has found that courts allow some inconsistency in the results of each factor, refusing to “stampede” factors to justify antecedent findings.¹⁸ Decisions made using the four-factor test are the result of fact-intensive inquiries that often “refrain from drawing any paradigmatic lines.”¹⁹

Over time, courts have elaborated on the statutory factors. The first factor, the “purpose and character of the use,” looks to whether the allegedly infringing use was commercial, parodical in nature, a result of bad faith, and—perhaps most importantly—transformative.²⁰ The second factor, the “nature of the copyrighted work,” considers whether the original was factual or creative and whether the original work was published or unpublished.²¹ The third factor, the “amount and substantiality of the portion used,” is both a quantitative and qualitative analysis that looks to how much of the original was used and whether that portion was the most “expressive” part of the original.²² The fourth factor, the effect on the

12. Copyright Act of 1976, 17 U.S.C. § 107.

13. See Beebe, *supra* note 8, at 558. See also Michael D. Murray, *What is Transformative? An Explanatory Synthesis of the Convergence of Transformation and Predominant Purpose in Copyright Fair Use Law*, 11 CHI.-KENT J. INTELL. PROP. 260 (2012).

14. *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. Oct. 1841).

15. Act of Oct. 24, 1992, Pub. L. No. 102-492, 106 Stat. 3145 (codified as amended at 17 U.S.C. § 107 (1992)).

16. See Beebe, *supra* note 8, at 623.

17. “Rather than a sequence of four rigid tests, the fair use analysis consists of a ‘sensitive balancing of interests.’” *Fin. Info., Inc. v. Moody’s Investors Serv., Inc.*, 751 F.2d 501, 508 (2d Cir. 1984) (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n.40 (1984)).

18. Beebe, *supra* note 8, at 589-91. However, Beebe’s Article is based on cases before 2008, and therefore does not account for more recent cases decided primarily on the “transformative use” factor.

19. Elkin-Koren, *supra* note 4, at 8.

20. *Rogers v. Koons*, 960 F.2d 301, 309 (2d Cir. 1992); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

21. Beebe, *supra* note 8, at 610-14. A recent opinion from the Second Circuit, however, suggests that these distinctions may not be dispositive in deciding the second factor. See *Authors Guild, Inc. v. Google Inc.*, 804 F.3d 202, 221 (2d Cir. 2015).

22. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564-66 (1985).

“market for or value of the original,” looks to the market effect of the allegedly infringing work on the original work. This factor has been called the “most important, and indeed, central fair use factor,”²³ though the majority of opinions in the last twenty years would call this superlative into question.²⁴ The focus of analysis has historically been placed on the profit motive of the alleged infringer and whether there was any prejudice to the original copyright owner’s market.²⁵

Since the Copyright Act of 1976 became effective on January 1, 1978, courts have diligently used these four factors in determining whether a use is fair. A comprehensive analysis of the weight given to each factor and the interrelation between the factor outcomes and a final fair use determination is beyond the scope of this paper.²⁶ In the last forty years of precedent, two factors have emerged to be most important for a successful fair use defense: the first and the fourth. A historical look at the dynamic between these predominant factors will be most relevant for an analysis of the role that a code of best practices might play.

Following the passage of the Copyright Act, the Supreme Court issued a landmark fair use decision in *Harper & Row, Publishers, Inc. v. Nation Enterprises*.²⁷ In assessing whether *The Nation* magazine had infringed on publisher Harper & Row’s copyright in an unpublished memoir of former President Gerald Ford, the Court held that the fourth factor was “undoubtedly the single most important element of fair use.”²⁸ This statement—arguably dictum—profoundly influenced district and appeals court decisions for the next decade.²⁹

In 1994, the Supreme Court shifted course.³⁰ In *Campbell v. Acuff-Rose Music, Inc.*, the Court adjusted the weight of the analysis away from the fourth factor towards the first factor,³¹ ultimately making a claim for infringement much more difficult to win. Acuff-Rose Music, owner of the copyright in a popular Roy Orbison song, “Oh, Pretty Woman,” brought an infringement claim against musical group 2 Live Crew for a song that parodied Orbison’s original. In its first factor

23. *Stewart v. Abend*, 495 U.S. 207, 238 (1990) (quoting MELVILLE NIMMER, NIMMER ON COPYRIGHT § 13.05[A]).

24. Netanel, *supra* note 8, at 723 (“Henceforth, fair use would be a true multi-factor test in which factors two, three, and four would be assessed and weighed in line with the degree of transformativeness of the use, rather than the market-centered presumptions set out in *Sony* and *Harper & Row*.”); Sag, *supra* note 8, at 55 (“The phrase ‘transformative use’ has loomed large in fair use jurisprudence ever since the Supreme Court embraced transformativeness as the heart of fair use in its 1994 *Campbell* decision.”).

25. *See Rogers*, 960 F.2d at 311-12 (1992).

26. For a comprehensive analysis, *see* Beebe, *supra* note 8.

27. *Harper & Row*, 471 U.S. 539.

28. *Id.* at 566.

29. Beebe, *supra* note 8, at 616-17. Barton Beebe found “59.0% of the opinions following *Harper & Row* (but preceding *Campbell*) explicitly cited this proposition.”

30. Scholars have noted the inconsistency of the *Sony*, *Harper & Row*, and *Campbell* tests. *See* Litman, *supra* note 7, at 589 (“These tests differ from each other in meaningful ways, and don’t yield the same results on similar facts.”). Beebe, *supra* note 8, at 556, notes the results of self-refinement—rather than reversal—of Supreme Court decisions (“[T]he indiscipline of the lower courts [to systematically resist the authority of the Supreme Court] is largely the fault of the Supreme Court itself and its repeated unwillingness explicitly to correct its own past mistakes in its fair use opinions.”).

31. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

analysis, the Supreme Court adopted language coined by Court of Appeals Judge Pierre Leval in an influential law review commentary³² that inquired whether the secondary work was “transformative” in communicating a “new expression, meaning or message.”³³ In canonizing Leval’s language, the *Campbell* court forever changed the course of fair use analysis, making the critical consideration whether the purpose and character of the use was “transformative.”

Post-*Campbell* interpretation of the fair use test in visual arts cases demonstrates this shift toward a more “transformative” focused analysis. In *Blanch v. Koons*, the Second Circuit used language from *Campbell* to find that visual artist Jeff Koons had added something new to photographer Andrea Blanch’s original image by using it as “raw material . . . in the furtherance of distinct creative or communicative objectives.”³⁴ The court also diminished the focus on the fourth factor, finding no evidence that there had been any “deleterious effect” upon the potential market for or value of the copyrighted work.³⁵ The Second Circuit went further in *Bill Graham Archives v. Dorling Kindersley Ltd.*, employing the “transformative” analysis in all four factors.³⁶ The court found publisher Dorling Kindersley’s purpose in using Grateful Dead posters in a historical book chronicling the band’s fame to be “historical” rather than “creative”—and therefore transformative.³⁷ The size of the photos as reproduced—much smaller than the original posters—“strengthened” the conclusion that the use was transformative.³⁸ The court went on to hold that, while the second factor weighed against a finding of fair use, when a work is transformative the second factor is of “limited usefulness” in the fair use analysis.³⁹ Similarly, in looking at the third factor—also typically weighing against a finding of fair use—the court claimed that the entirety of the work needed to be used in order to accomplish the transformative—and therefore fair—purpose.⁴⁰ Lastly, the court incorporated the “transformative” inquiry into the fourth factor analysis, claiming that when a transformative use occurred there could be no damage to the market of the original because the secondary use did not serve as a substitute.⁴¹

Two recent decisions from the Second and Ninth Circuits may come to be considered the high water mark for the transformative standard in fair use. The Ninth Circuit, in *Seltzer v. Green Day, Inc.*, engaged in a transformativeness

32. Pierre N. Leval, Commentary, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

33. *Campbell*, 510 U.S. at 579.

34. *Blanch v. Koons*, 467 F.3d 244, 252 (2d Cir. 2006) (internal quotation marks and citation omitted).

35. *Id.* at 258 (internal quotation marks and citation omitted).

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

37. *Id.* at 611.

38. *Id.*

39. *Id.* at 612.

40. *Id.* at 613.

41. *Id.* at 614 (“[T]he fourth factor disfavors a finding of fair use only when the market is impaired because the . . . material serves the consumer as a substitute, or . . . supersedes the use of the original”) (internal quotation marks omitted) (alteration in original) (quoting Leval, *supra* note 32, at 1125).

inquiry during application of the fourth factor, finding that the difference between the purpose of the original and the purpose of the secondary work indicated that the secondary work was no substitute for the original.⁴² The Second Circuit, in *Cariou v. Prince*, embraced the *Campbell* court’s focus on the weight of the transformativeness in the first factor inquiry: “[t]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.”⁴³ With regard to the fourth factor, the *Cariou* decision accords with the Ninth Circuit’s recent *Seltzer* opinion: the more transformative the work, the less likely it is to substitute, and therefore affect market value.⁴⁴

Barton Beebe has noted the relative influence of the Second and Ninth Circuit courts.⁴⁵ Opinions from these two Circuits, including District Court and Court of Appeals decisions, contributed the bulk of opinions to his empirical study of all fair use cases from 1978–2005.⁴⁶ He also notes that fair use opinions from the Second and Ninth Circuit courts “exerted a great deal of influence—much more than is generally thought—on fair use opinions outside of those circuits.”⁴⁷ The extra attention paid to the transformative purpose test in these Circuits therefore may be particularly instructive for developing an understanding of the doctrine as a whole.

A recent decision from the Seventh Circuit complicates this generalization slightly. The Seventh Circuit Court of Appeals, in *Kienitz v. Sconnie Nation LLC*, addressed whether a T-shirt design depicting Madison, Wisconsin’s mayor infringed an original photograph used to develop the design.⁴⁸ In conducting the fair use analysis, Judge Easterbrook lambasted the Second Circuit for overemphasizing the importance of whether a work was “transformative.”⁴⁹ Easterbrook insisted that a fair use inquiry confine itself to the statutory factors as given in § 107, “of which the most important usually is the fourth (market effect).”⁵⁰ In the relatively brief opinion, the court went so far as to omit statutory factors it found irrelevant for the analysis—skipping the first factor and dismissing the second factor as “unilluminating.”⁵¹ As discussed above, the Seventh Circuit is empirically not the most influential in how federal courts analyze the fair use

42. *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1179 (9th Cir. 2013).

43. *Cariou v. Prince*, 714 F.3d 694, 710 (2d Cir. 2013) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

44. *Id.* at 709.

45. Beebe, *supra* note 8, at 567.

46. *Id.* (“Second Circuit courts accounted for 38.6% of the circuit court opinions and 35.1% of the district court opinions, while Ninth Circuit courts were responsible for 28.4% of the circuit court opinions and 18.0% of the district court opinions. Percentages for all other circuits, even the Seventh, were in the single digits. At the district court level, the Southern District of New York (S.D.N.Y.) alone accounted for 31.3% of the district court opinions, with the Northern District of California next at 7.6%.”).

47. *Id.*

48. *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1555, 191 L. Ed. 2d 638 (2015).

49. *Id.* at 758.

50. *Id.*

51. *Id.* at 759.

defense. It has, however, made a distinct break with the current thinking in the Second and Ninth Circuits and creates some ambiguity as to whether a “transformative purpose” is sufficient—or even necessary—for a fair use finding.

Understanding the current state of the law is important for an inquiry into the CAA’s Code of Best Practices. As discussed, the prevailing question post-*Campbell*, amplified in *Seltzer* and *Cariou*, seems to be whether a secondary work has a “transformative” purpose.⁵² However, *Kienitz* has created some uncertainty as to whether the market-effect inquiry should not predominate. I will now turn to a brief background of attempts to create fair use guidance documents with a discussion of various objections to and defenses of such efforts.

III. BACKGROUND: THE CODE IN CONTEXT

Due to the ambiguity of the fair use doctrine, and most potential users’ lack of familiarity with it, various entities have made efforts to develop instructive statements for applying the fair use doctrine in practice. For the purpose of understanding the relative authority of the authors, it is worthwhile to distinguish between government-sponsored guidelines and independently-developed “best practices.”

Efforts endorsed by federal government entities may be understood as the most persuasive to courts making a fair use determination, but within these efforts there is a further spectrum of authority. Kenneth Crews, a former director of the Copyright Advisory Office at Columbia University and copyright scholar, describes three categories of such efforts: “(1) privately developed guidelines that have congressional recognition in legislative history of the copyright law; (2) guidelines developed by a duly authorized governmental commission; and (3) privately developed guidelines that have been endorsed or supported by administrative agencies.”⁵³ There are several takeaways from Crews’ categories that inform an analysis of the relative value of independently-developed statements such as the CAA’s Code of Best Practices. First, when Congress has authorized and recognized guidelines for fair use that are a departure from the statute, the guidelines effectively “displace the law.”⁵⁴ The primary example of such guidelines is the Classroom Guidelines, developed in 1976.⁵⁵ Second, when guidelines are the result of forced consensus imposed by artificial time constraints,

52. Matthew Sag has suggested that the historical trend away from market-effect to transformative purpose is nothing more than “mere rhetoric.” Netanel, *supra* note 8, at 742 (discussing Sag’s manuscript for *Predicting Fair Use*, 73 OHIO ST. L.J. 47 (2012)). I would argue that regardless of whether this is the case, a Code of Best Practices purporting to apply the fair use doctrine for communities of users would be useless if it failed to use the same rhetoric as potential litigants and decision-makers.

53. Crews, *supra* note 5, at 635-36.

54. *Id.* at 618.

55. H.R. REP. NO. 94-1476, Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals, at 68 (1976). This text was intended to describe the conditions under which institutions could safely claim fair use in copying educational materials.

they have less authority.⁵⁶ Several examples of this type of preliminary proposed guidelines were the result of the 1998 Conference on Fair Use, an “informal gathering of interested parties, convening at the behest and encouragement of government officials.”⁵⁷ Lastly, the most successful efforts may be considered those that are developed by a government-authorized body for a specific community of users with relatively static technology.⁵⁸ Two early examples are the Music Guidelines and the Off-Air Guidelines, developed in 1976 and 1982 respectively.⁵⁹

Independent groups of interested organizations, academics, lawyers, copyright owners and users have also made efforts to develop community-specific statements of best practices. These “voluntary guidance documents” are distinct from state-sponsored efforts in that they are capable of emerging organically, reflecting balanced interests of copyright owners and users, and being widely accepted and incorporated into community practice.⁶⁰ The most successful effort, some argue, has been the Documentary Filmmakers’ Statement of Best Practices in Fair Use.⁶¹ Concrete evidence of the Statement’s success has been the recognition by distribution insurance companies who issue Errors & Omissions Insurance in instances where filmmakers can demonstrate they complied with the Statement.⁶² The Center for Media and Social Impact at American University has been a central nexus for development of such Codes of Best Practices. There are now codes available for Journalism, Poetry, Orphan Works, Dance-Related Material, Open Courseware, Academic and Research Libraries, Media Literacy Education, Online Video, and Scholarly Research in Communication.⁶³ The College Art Association’s Code of Best Practices in Fair Use for the Visual Arts is among these Codes.

56. See Gregory K. Klingsporn, Note, *The Conference on Fair Use (CONFU) and the Future of Fair Use Guidelines*, 23 COLUM.-VLA J.L. & ARTS 101, 118 (1999).

57. Crews, *supra* note 5, at 626.

58. Cf. Klingsporn, *supra* note 56, at 120.

59. H.R. REP. NO. 94-1476, Guidelines for Educational Uses of Music, at 70 (1976); H.R. REP. NO. 97-495, Guidelines for Off-Air Recordings of Broadcast Programming for Educational Purposes, at 8 (1982) (explaining the appropriate application of fair use to television programs in educational settings).

60. Hinze et al., *supra* note 8, at 6-7 (“[V]oluntary guidance documents have proven most useful when they have (i) evolved organically (rather than being developed in the context of a legislative reference or government facilitation), (ii) been perceived as being balanced (rather than, for instance, reflective of only one side of the copyright balance), (iii) been widely accepted by the copyright user community, and (iv) been widely adopted in that communities’ [sic] actual practice.”).

61. Anthony Falzone & Jennifer Urban, *Demystifying Fair Use: The Gift of the Center for Social Media Statements of Best Practices*, 57 J. COPYRIGHT SOC’Y U.S.A. 337, 349 (2009-2010).

62. See Patricia Aufderheide & Peter Jaszi, *Fair Use and Best Practices: Surprising Successes*, INTELL. PROP. TODAY, (October 2007); see also Sarah Sklar-Heyn, Note, *Battling Clearance Culture Shock: Comparing U.S. Fair Use and Canadian Fair Dealing in Advancing Freedom of Expression in Non-Fiction Film*, 20 CARDOZO J. INT’L & COMP. L. 233, 252 (2011).

63. *Codes of Best Practices*, CENTER FOR MEDIA & SOCIAL IMPACT AT AMERICAN UNIVERSITY, <http://perma.cc/QN42-DRT5>.

A. VIRTUES OF FAIR USE STATEMENTS

Proponents of fair use statements describe them as educative and therefore empowering, facilitating an ongoing conversation about fair use, and corrective of an ineffective clearance culture. Jennifer Rothman, a copyright scholar who has questioned the use of best practices statements, even recognizes their informative value: “The statements . . . serve to educate communities about fair use and copyright law so that members of those communities can feel more qualified and emboldened to assert fair use.”⁶⁴ Anthony Falzone, founder of the Fair Use Project at Stanford Law School’s Center for Internet and Society, has described the Statement of Best Practices for Documentary Filmmakers as a translation of the fair use principles into the “vocabulary and experience of [the] community.”⁶⁵ Patricia Aufderheide and Peter Jaszi, creators of that Statement, have described one of the major benefits of the document as giving users the knowledge they need to make on-the-spot decisions in their practice.⁶⁶ They claim that this knowledge is then empowering, giving users “confidence in [their] decision making . . . a proven, workable method for people to reclaim the constitutional and human rights they have as creators under copyright.”⁶⁷ Furthermore, when the documents are conceived as evolving, the creation of “bottom-up norms”—legal rules generated by users rather than judges—may serve to facilitate evolving legal standards, shaped by the communities that are most affected.⁶⁸

Perhaps the most persuasive argument in favor of these statements is that they may serve as a corrective means for creating a more efficient market for intellectual property. Scholars have written broadly of “a pervasive copyright ‘clearance culture,’ in which a combination of copyright industry overreaching and user, publisher, and insurance-carrier risk aversion causes potential users of copyrighted material systematically to obtain licenses or desist from use even when they would likely prevail on a fair use defense if litigated.”⁶⁹ James Gibson, Professor at Richmond School of Law, has described the gradual accretion of intellectual property rights—particularly copyright—in gray areas of doctrine where risk-averse users of copyrighted material forego a fair use defense, allowing owners to

64. Jennifer E. Rothman, *Best Intentions: Reconsidering Best Practices Statements in the Context of Fair Use and Copyright Law*, 57 J. COPYRIGHT SOC’Y U.S.A. 371, 375 (2010).

65. Falzone, *supra* note 61, at 342-43.

66. See PATRICIA AUFDERHEIDE & PETER JASZI, RECLAIMING FAIR USE: HOW TO PUT BALANCE BACK IN COPYRIGHT 5 (2011), comparing use of fair use defense to the use of physical self-defense (“If you are attacked on a dark street, you don’t stop to call a lawyer to see if you have the right to self-defense.”) [hereinafter RECLAIMING FAIR USE].

67. *Id.* at x.

68. Elkin-Koren, *supra* note 4, at 7 (“[B]ottom-up norms may facilitate ongoing participation in lawmaking by relevant communities of users and authors . . .”).

69. Netanel, *supra* note 8, at 733 (citing generally Patricia Aufderheide & Peter Jaszi, *Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers*, CENTER FOR MEDIA & SOCIAL IMPACT AT AMERICAN UNIVERSITY (2004); LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 187 (2004); James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882 (2007).

retain their exclusive rights.⁷⁰ The dissemination of information about fair use may make the defense easier to use, thereby diminishing the friction in the marketplace.⁷¹ If one assumes that fair uses are otherwise disallowed by an expensive and time-consuming licensing market,⁷² a statement that eliminates uncertainty could be enormously valuable.

B. OBJECTIONS TO FAIR USE STATEMENTS

Critics of fair use statements attack the aspirational nature of the statements,⁷³ the imbalance of interests in favor of copyright users rather than owners, and more general problems with the use of custom within the law. Aspirational statements—statements that describe how a community would like the fair use doctrine to be applied—may be problematic in two ways. First, statements that are aspirational rather than descriptive undercut their function as a useful document for users.⁷⁴ Niva Elkin-Koren and Orit Fischman-Afori, Professors of Law at University of Haifa and Haim Striks School of Law, respectively, have described this as a failure of the document’s “legitimacy.”⁷⁵ Readers and critics, unwilling to doubt the statements’ value to a community, may fail to provide critical feedback on these aspirational documents.⁷⁶ Alternatively, statements that are descriptive of existing

70. Gibson, *supra* note 69, at 882-83 (describing how “the practice of licensing within gray areas eventually makes those areas less gray, as the licensing itself becomes the proof that the entitlement covers the use. Over time, public privilege recedes, and the reach of copyright expands; this moves the ubiquitous gray areas farther into what used to be virgin territory, which in turn creates more licensing markets, which in turn pushes the gray areas even farther afield, and so on.”).

71. Aufderheide and Jaszi have called this “more culture . . . created with less fuss.” RECLAIMING FAIR USE, *supra* note 66, at 126.

72. PATRICIA AUFDERHEIDE, PETER JASZI, BRYAN BELLO, & TIJANA MILOSEVIC, COPYRIGHT, PERMISSIONS, AND FAIR USE AMONG VISUAL ARTISTS AND THE ACADEMIC AND MUSEUM VISUAL ARTS COMMUNITIES: AN ISSUES REPORT 8 (February 2014), <http://perma.cc/P6EW-8UGS> [hereinafter ISSUES REPORT] (“Many interviewees indicated that the monetary and opportunity costs of seeking permissions, including not only fees but also salaries and volunteer time, were significant to their institutions.”).

73. See Crews, *supra* note 5, at 667, 672 (claiming that guidelines are not an accurate statement of the law, and even congressional guidelines have no more influence than persuasive “legislative history.”). See also JUNE M. BESEK, JANE C. GINSBURG, PHILIPPA LOENGARD & YAFIT LEV-ARETZ, COPYRIGHT EXCEPTIONS IN THE UNITED STATES FOR EDUCATIONAL USES OF COPYRIGHTED WORK, 33 (2013) [hereinafter THE KERNOCHAN REPORT] (“However, some commentators suggest that these best practices are in fact more normative than descriptive, expressing an ideal (from the perspective of copyright users) rather than reflecting the current reality of copyright law.”). Alternatively, Jennifer Rothman has suggested that statements can function as a measure of “reasonable” behavior within a community and describe current practice rather than attempt to shape it. Jennifer Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899, 1923 (2007) (“Although these best practices statements suggest that they present the ‘best’ possible practices for the use of others’ IP, the statements do not purport to set forth the ideal or even a preferable set of rules to govern fair uses. Instead, the statements try to use industry-established guidelines to establish what are ‘reasonable’ uses of others’ IP in the hopes that these industry statements will be adopted by courts when evaluating fair use defenses.”).

74. See Elkin-Koren, *supra* note 4, at 19, 22 (“Codes of Best Practices do not objectively state the principles of fair use, but instead state what the drafters wish fair use was.”).

75. See generally *id.*

76. See Crews, *supra* note 5, at 691 (“The appearance of normative qualities leads to bestowal of positive traits; the appearance of positive qualities makes the guidelines more compelling for the

norms may unnecessarily lead to a narrower conception of fair use than is required by law. Jennifer Rothman has argued that norm-based best practices statements reinforce the value of custom in fair use determinations and likely result in a “shor[ing] up [of] the influence of the dominant and pervasive customary practices, such as licensing norms and restrictive fair use guidelines.”⁷⁷

The second major critique of community-driven fair use statements is that they inadequately balance the interests of copyright users and owners.⁷⁸ Prior to development of a fair use statement, the group most motivated to make the doctrine more user-friendly is copyright users themselves.⁷⁹ Elkin-Koren and Fischman-Afori have described this as a “property” objection, when best practices are produced by a “homogenous interest group” and serve that group’s property interests.⁸⁰ Without delving into the methodology of development for each specific best practices statement, this criticism is difficult to assess. After development, the group most motivated to employ the statements is, again, the *users* of copyrighted material, not the *owners* of that material. When community statements are descriptive of a “widely-accepted practice developed by consensus within the relevant user community,”⁸¹ they may not function as an agreement between copyright owners and users but rather as a gauge for what sort of use that users think is reasonable.

Both of the objections discussed thus far relate in large part to the role users expect fair use statements to play. If the statements are aspirational, a serious question may be raised as to what role they serve.⁸² If the statements are descriptive, what do they describe? Statements that describe the law—such as the Documentary Filmmakers’ Statement of Best Practices in Fair Use—are intended to articulate a safe harbor, but there are doubts about whether it ultimately backfires to limit fair use to a minimum “zone of safety.”⁸³ Statements that describe custom raise questions about how custom is—or should be—used in a fair use defense. Scholars have puzzled over whether the incorporation of custom into law is a circular proposition that lacks serious theoretical justification.⁸⁴ Rather than

academic community and more widely adopted. Expanded adoption reinforces the normative aspects.”). This problem of aspirational statements is closely related to the role of custom, discussed *infra*.

77. Rothman, *supra* note 73, at 1980.

78. See Jay Rosenthal, *Best Practices*, 57 J. COPYRIGHT SOC’Y U.S.A. 389, 390 (2009-2010) (“One fundamental concern is that the idea of ‘best practices’ pre-supposes consensus among stakeholders, both when creating the respective ‘best practices’ and when applying them.”).

79. THE KERNOCHAN REPORT, *supra* note 73, at 33 (“Although some of the guidelines have been developed with input from content owners, in other cases the best practices were drafted and endorsed exclusively by copyright users, and as a result the best practices are skewed to their interests.”).

80. See Elkin-Koren, *supra* note 4, at 23.

81. Hinze et al., *supra* note 8, at 9.

82. See Rothman, *supra* note 64, at 382 (“[T]he best practices statements might lead to more consideration of industry practices and community norms, but not the ones that the proponents of best practices statements want.”).

83. Crews, *supra* note 5, at 670 (“Until the prospective plaintiffs—particularly the commercial publishers and authors—unequivocally give the guidelines an identity as a zone of safety, the guidelines may never attain the degree of assurance necessary to attract broad-based consensus for the standards.”).

84. See Elkin-Koren, *supra* note 4, at 21 (“[i]ncorporating custom into the law . . . is circular”); see also Rothman, *supra* note 73, at 1946 (“As courts incorporate more and more customary practices

importing community-driven fair use statements in toto into the legal standard, Jennifer Rothman has suggested that the best use may be as *evidence* of what is reasonable.⁸⁵ She cautions, however, that users of fair use statements should not be misled about the role the documents on which they are relying will play in case of litigation.⁸⁶

Given these objections and defenses, a fair assessment of a fair use statement should attend to the process for its development and whether multiple perspectives and interests were expressed, the accuracy with which it describes the law or custom, and the function it serves for users and courts.

IV. UNDERSTANDING THE CODE

The College Art Association’s efforts to create a Code of Best Practices in Fair Use for the Visual Arts was led by American University Professors Patricia Aufderheide and Peter Jaszi.⁸⁷ In 2012, Aufderheide and Jaszi began conducting research into community-driven practices in five areas of the visual arts: *Analytic Writing*, *Teaching about Art*, *Making Art*, *Museum Uses*, and *Online Access*.⁸⁸ This was not their first attempt at codifying fair use best practices; as previously mentioned, they have spearheaded numerous efforts to create statements and codes for specific communities of copyright users.⁸⁹ Aufderheide and Jaszi have written extensively on fair use and best practices, and an understanding of their theoretical approach to creating a fair use statement is instructive for reading the final product created for the College Art Association.

A. THEORETICAL APPROACH

In their book *Reclaiming Fair Use: How to Put Balance Back in Copyright*, Aufderheide and Jaszi chart the fall and rise of fair use before presenting a case for community-driven best practices and a template for creating your own.⁹⁰ Published in 2011, this book is helpful for understanding the theoretical approach that informed the methodology used in both their earlier projects and later in developing

into IP decisions, a feedback loop is created in which custom influences the law, the law reinforces the custom, and the custom then becomes further entrenched.”).

85. Cf. Rothman, *supra* note 73, at 1941-43 (statements that describe customary practices may provide “indicia” of reasonable, and therefore fair, uses).

86. Rothman, *supra* note 64, at 377-81.

87. Anne Collins Goodyear & Linda Downs, *Copyright, Permissions, and Fair Use among Visual Artists and the Academic and Museum Visual Arts Communities: An Open Letter from the College Art Association*, in ISSUES REPORT, *supra* note 72 [hereinafter *Open Letter from the CAA*]. Patricia Aufderheide is a Professor of Communication Studies in the School of Communication at American University. Peter Jaszi is a Professor of Law at American University Washington College of Law. Together they lead the Fair Use and Free Speech research project at the Center for Media & Social Impact at American University.

88. CODE OF BEST PRACTICES, *supra* note 10.

89. Many of them are collected online at the Center for Media & Social Impact website: *Fair Use*, CENTER FOR MEDIA & SOCIAL IMPACT AT AMERICAN UNIVERSITY, <http://perma.cc/VBM5-RQCZ>.

90. RECLAIMING FAIR USE, *supra* note 66.

the Code for Fair Use in the Visual Arts. They pose three main questions that distill, in their view, the fair use inquiry across disciplines:

- Was the use of copyrighted material for a different *purpose*, rather than just reuse for the original purpose and for the same audience? (If so, it probably adds something new to the cultural pool.)
- Was the *amount* of material taken appropriate to the purpose of the use? (Can the purpose be clearly articulated? Was the amount taken proportional? Or was it too much?)
- Was it *reasonable* within the field or discipline it was made in?⁹¹

The first question rephrases the first factor of the statutory fair use test, with an added emphasis on recent doctrine about transformativeness. The second question is a translation of the third statutory factor, with an added inflection of the transformative purpose. The third question is extraneous to the statutory inquiry and asks whether the use was reasonable. Presumably, Aufderheide and Jaszi intend this question to incorporate the prevailing custom of the industry or community. As I will argue in more detail below, if a code of best practices articulates a standard of reasonableness under prevailing custom, then its codification will further entrench the perceived status quo in a judicial fair use determination.⁹²

Notably absent from these foundational questions is any reference to the preferred uses stated in the preamble of § 107, including criticism and comment. Similarly, Aufderheide and Jaszi have omitted reference to the second factor of the fair use test, the nature of the copyrighted work. Perhaps most dramatically, there is no attention given to the market effect of the fourth statutory factor. A significant effect on the market value of the original may make a secondary use unreasonable under the third question; however, the omission of this statutory factor stands in contrast with historical fair use inquiry.⁹³ *Reclaiming Fair Use*'s framework sets aside the preamble as well as the second and fourth factors, which are considered—if not dispositively—by courts in fair use determinations. Focusing primarily on the transformative nature of the secondary use, the approach

91. *Id.* at 24 (emphasis added).

92. Compare these three questions to Neil Netanel's distillation of what courts ask when conducting a fair use inquiry: "Today, the key question for judicial determination . . . is . . . whether the defendant used the copyrighted work for a different expressive purpose from that for which the work was created." Netanel, *supra* note 8, at 768. Netanel continues to provide examples: "Does the defendant use the work for purposes of criticism, whether the criticism targets the work itself, the author or someone else associated with the work, or a general genre or social phenomenon?"; "Does the defendant use a work originally created for aesthetic, entertainment, or commercial advertising purposes for a different purpose, such as biographical or historical documentation?"; "Does the defendant use a work created originally as a gift for family and friends instead for aesthetic and entertainment purposes?"; "Does the defendant use the copyrighted work as raw material for a reference guide or information location tool?" *Id.*

93. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 568 (1985) ("More important, to negate fair use one need only show that if the challenged use 'should become widespread, it would adversely affect the *potential* market for the copyrighted work.'").

set forth in *Reclaiming Fair Use* incorporates custom (whether the use was “reasonable” within the field) at the expense of the other factors.

These three questions frame Aufderheide and Jaszi’s approach to the project of creating codes of best practices for fair use in various disciplines. The Issues Report authored by Aufderheide and Jaszi in connection with the development of the CAA’s Code reveals one additional theoretical assumption specific to visual arts communities. The Report describes a “permissions culture” that overwhelmingly stifles the field of visual arts.⁹⁴ In a permissions culture, creators ask for permission to use copyrighted material rather than rely on an affirmative defense of fair use.⁹⁵ Many scholars have discussed the phenomenon, including Lawrence Lessig in his tome *Free Culture*.⁹⁶ The Issues Report traces the growing trend towards permission-seeking: “Over the last thirty-five years, the permissions culture has grown until it has become the most common way to deal with managing third-party copyright issues in the visual arts, as it has in so many other fields of cultural practice.”⁹⁷ Belief in a problematic permissions culture is closely tied to a more general villainization of property rights. In *Reclaiming Fair Use*, Aufderheide and Jaszi describe the gradual ascendance of copyright protection: “Copyright became even longer and stronger, as well as generally meaner, during the last four decades”⁹⁸ The Issues Report notes that artists are the group of visual arts professionals least affected by the permissions culture;⁹⁹ but they are still concerned about copyright when confronting “public distribution.”¹⁰⁰ That is, artists feel obligated to ask permission when they want to share their work with the public. Because of the digital technology and our “new electronic environment,” the Issues Report states that the heavy-handed copyright regime where permissions culture reigns supreme still presents a major issue for artists.¹⁰¹

94. See ISSUES REPORT, *supra* note 72, at 24 (“To use a term employed by Susan Bielstein and others, there is a ‘permissions culture’ in visual arts communities around third-party copyrighted materials. The problem of permissions is ever present, because copyrighted work is ever present.”).

95. In one perturbing passage, Aufderheide and Jaszi compare the permissions culture to a “safe sex approach.” RECLAIMING FAIR USE, *supra* note 66, at 124. See also Gibson, *supra* note 69, at 884 (calling this prevailing philosophy “[b]etter safe than sued”).

96. Lessig, *supra* note 69. Lessig juxtaposes a permissions culture, “a culture in which creators get to create only with the permission of the powerful, or of creators from the past,” with a “free culture” that “supports and protects creators and innovators.” *Id.* at xiv.

97. ISSUES REPORT, *supra* note 72, at 28. See also Kenneth D. Crews, *Museum Policies and Art Images: Conflicting Objectives and Copyright Overreaching*, 22 FORDHAM. INTELL. PROP. MEDIA. & ENT. L.J. 795, 824-26 (2012).

98. RECLAIMING FAIR USE, *supra* note 66, at 34.

99. See ISSUES REPORT, *supra* note 72, at 28. (“Artists were by far the most likely professional group to report that they did not get permission for work they reused, and were by far the smallest group to always get permission. All other professions were much more likely to secure permission for use, although they did not report doing so invariably.”)

100. *Id.* at 26.

101. Quoting a scholar, the Issues Report reads: “The internet generation of artists isn’t thinking about their actions as appropriating. It is simply the way the internet is meant to be worked with. The legal questions built into work that draws from and reaggregates the phenomenon of a copyrighted culture nevertheless can arise when an artist or the artist’s representatives face choices about how to distribute his or her work.” *Id.* at 33 (internal quotation marks omitted).

The broader result of such a permissions culture is a “chilling effect” in which creators cannot or do not create because getting permission for copyrighted source material is too costly or impractical, according to Aufderheide and Jaszi. “Some artist respondents found themselves simply discouraged from particular lines of creative inquiry or entire artistic genres—and some even changed their entire approach in response to copyright concerns.”¹⁰² Framed to confirm this chilling effect, the CAA inquiry asked, “Have you ever avoided or abandoned a project due to your actual or perceived inability to obtain permission to use others’ copyrighted works?”¹⁰³ The Code relies on this underlying theory that a broken and overly restrictive “permissions culture” has stifled creative production, resulting in the chilling effect that effaces a cultural future.¹⁰⁴

B. METHODOLOGY

In developing the Code of Best Practices in Fair Use for the Visual Arts, the College Art Association used a four-phase process.¹⁰⁵ First, Aufderheide and Jaszi compiled an Issues Report after conducting interviews with 100 visual arts professionals and surveying over 2,000 CAA members from all constituency professions (art historian, artist, curator, other museum professional, designer, librarian, publisher/editor, gallerist, archivist, and others).¹⁰⁶ Of the 100 interviewees, 21% identified as artists, though some participated in the visual arts as educators as well.¹⁰⁷ Of the CAA survey respondents, 25% identified as artists.¹⁰⁸ Only 37% of all artists surveyed reported using the copyrighted work of others, markedly lower than all other professions surveyed (academics, editors/publishers, and museum professionals).¹⁰⁹ In Phase Two, the CAA hosted small group discussions led by facilitators in five cities to identify “areas of consensus” for the use of third-party materials and the “limits of those rationales.”¹¹⁰ In Phase Three, the CAA synthesized that consensus into a draft

102. *Id.* at 58. Note: Aufderheide and Jaszi make some suspect claims regarding chilling effects on other constituencies, for example: “[Professors] often do not discuss the work of contemporary artists, images of whose work are hard to get.” *Id.* at 54.

103. *Id.* at 70. Thirty-four percent of 2,231 respondents answered yes, but information is not available as to how many of those affirmative responses were from artists. These results are further complicated by the fact that they are self-reported instances by a self-selecting sample of participants.

104. See RECLAIMING FAIR USE, *supra* note 66, at 146 (“New creators and users need to unlock their mind-forged manacles, assert the rights they have, and understand the vital importance of limiting copyright holders’ rights. These limits are not a gift, but a requirement for the creation of tomorrow’s culture.”).

105. The CAA articulated this process in the *Open Letter from the CAA*. While the Code of Best Practices’ explanatory section “Appendix B: How the Code was Created” does not delineate the steps in an identical way, I assume the methodology was consistent throughout the project. See CODE OF BEST PRACTICES, *supra* note 10, at 18.

106. ISSUES REPORT, *supra* note 72, at 13.

107. *Id.*

108. *Id.*

109. *Id.* at 24.

110. CODE OF BEST PRACTICES, *supra* note 10, at 18.

code that was reviewed by legal scholars.¹¹¹ In the Final Phase (presumably ongoing), the CAA disseminates that code widely. Because the Issues Report forms the foundation of the research that led to the resulting Code of Best Practices, my analysis of the attitudes and findings contained within the Issues Report will inform an eventual reading of the Code.

The CAA’s methodology is extremely similar to the procedures Aufderheide and Jaszi recommend in *Reclaiming Fair Use*. In the book, they encourage communities of copyright users to create their own best practices and outline a strategy for doing so:

- Find networks and organizations in the community of practice (not the gatekeepers, but the creators/users).
- Document the kinds of problems the community has with using copyrighted material; get good stories!
- Circulate the results of this documentation to the community; tell the stories.
- Host or cohost small-group conversations on interpreting fair use; use the stories to locate the problem areas and discuss how to apply fair use to those problem areas.
- Draft a code of best practices, using templates to the extent they are helpful.
- Have an advisory board of supportive lawyers review and revise the draft, to ensure that the code of best practices conforms to the law.
- Get endorsements from community organizations for the code.
- Circulate news through community networks and organizations.
- Document your successes.
- Publicize your successes.¹¹²

This methodology is notable for several reasons. It focuses almost exclusively on the user’s interest, with an emphasis on anecdotes as the means of identifying issues, and a lack of critical feedback. Excluding “gatekeepers”—such as publishers, university administrators, and movie studio executives¹¹³—from the community of practice necessarily limits the perspectives expressed in the conversation.¹¹⁴ In developing the Code of Best Practices for the Visual Arts, the CAA undertook interviews with fourteen of these “gatekeepers” in Phase One of their research, but limited the conversation to publishers and editors, rather than commercial artists or image license holders.¹¹⁵ Another question raised by the

111. *Id.*

112. RECLAIMING FAIR USE, *supra* note 66, at 127-28.

113. *See id.* at 3, 4, 128, 130.

114. Aufderheide and Jaszi don’t see this as such a bad thing: “What would be death to such meetings is inviting the gatekeepers or content holders to them.” *Id.* at 131,

115. Notably, less than 1% of respondents were categorized as publisher/editor. ISSUES REPORT, *supra* note 72, at 13.

methodology proposed in *Reclaiming Fair Use* regards the primacy of “stories” rather than quantifiable trends. The focus on anecdotal evidence increases visibility of individual experiences rather than accuracy. The Issues Report also concentrates on telling stories, frequently citing conversations with artists that describe personal rather than representative experiences.¹¹⁶ Short sound bites that encapsulate a user’s experience dealing with copyright tell a more relatable story, but fail to provide an objective means for measuring success when remedying the reported problems.¹¹⁷ Lastly, by only seeking feedback from “supportive lawyers” and endorsements from friendly community organizations, a critical voice may be lost. In failing to seek opposing viewpoints from legal experts, communities developing best practices may be seen as “attempt[ing] to oversell their hypotheses, assumptions, and biases.”¹¹⁸

The methodology, forged by Aufderheide and Jaszi and employed by the CAA, is ambitious in scope—most impressive is the number of people included in the CAA survey—but falls short in two major respects: it fails to ensure a balanced perspective is represented by the resultant code, and fails to provide an objective means for measuring the nature of the problem and any eventual success.

C. INTERIM FINDINGS

The findings contained within the Issues Report inform the resulting Code of Best Practices. Because I am limiting my analysis of the Code to the *Making Art* section, I will focus on the findings specific to artists rather than museum professionals, art historians, or professors. The Issues Report found that, generally, artists as users of copyrighted material were less affected by the permissions culture.¹¹⁹ Artists were “by far” the least likely to seek permission for copyrighted material they used in their own work.¹²⁰ The CAA report further found that artists as a demographic celebrated copying.¹²¹ They also “expressed impatience or disregard for the niceties of copyright,”¹²² with an artist in one instance claiming that becoming more educated about fair use “would hurt my work.”¹²³

Artists, as copyright owners, felt relaxed about the prospect of someone using their original work, though they strongly valued attribution “both for the benefits it may confer and as a mark of respect for their hard work and individual

116. The section “Polarized Copyright Attitudes” is a prime example of this approach; analysis of artists’ attitudes is primarily composed of quotations from interviews. *See id.* at 34-39.

117. This approach has been called a “qualitative” means for devising best practices. Ira Robbins critiques the best practices model that can emerge from such a study. *See* Ira Robbins, *Best Practices on “Best Practices:” Legal Education and Beyond*, 16 CLINICAL L. REV. 269, 287 (2009) (“The qualitative-best-practices model does not always present practices or means to achieve a goal. Rather, it recommends principles that may serve as suggestions, at worst, or guidelines, at best, but without objectively measurable verification.”).

118. *See id.* at 304.

119. ISSUES REPORT, *supra* note 72, at 28.

120. *Id.* Only 6.6% of 603 responding artists reported securing permission.

121. *Id.* at 37.

122. *Id.* at 38.

123. *Id.*

creativity.”¹²⁴ Some artists responded that they would want to assert their exclusive rights “to block use for a commercial project such as an advertising campaign, if the work was misrepresented in reproduction, or even if it was slavishly copied by another artist.”¹²⁵ Most importantly, the Issues Report notes time and again that artists were distinct from other categories of survey respondents,¹²⁶ less concerned with a permissions culture, and therefore less at risk for a chilling effect. As I discuss later during an evaluation of the Code, because artists as a group may be considered somewhat of an anomaly within the realm of copyright and fair use, they may be less natural candidates to benefit from a code of best practices.

D. THE CODE AND *MAKING ART*

In keeping with the format of the rest of the Code, the *Making Art* section contains three parts: (1) a “Description” of the historical basis for fair use in making art, (2) a “Principle” that lays out the basic premise of the defense, and (3) “Limitations” that qualify the availability of that defense, which I call “Considerations.” For *Making Art*, the Principle states: “Artists may invoke fair use to incorporate copyrighted material into new artworks in any medium, subject to certain limitations.”¹²⁷ The Considerations are:

- Artists should avoid uses of existing copyrighted material that do not generate new artistic meaning, being aware that a change of medium, without more, may not meet this standard.
- The use of a preexisting work, whether in part or in whole, should be justified by the artistic objective, and artists who deliberately repurpose copyrighted works should be prepared to explain their rationales both for doing so and for the extent of their uses.
- Artists should avoid suggesting that incorporated elements are original to them, unless that suggestion is integral to the meaning of the new work.
- 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.¹²⁸

124. *Id.*

125. *Id.* at 39. Notably, this concern may be most closely related to the fourth factor’s concern with “the effect of the use upon the potential market for or value of the copyrighted work.” *See* 17 U.S.C. § 107.

126. *See* ISSUES REPORT, *supra* note 72, at 28 (“Artists were by far the most likely professional group to report that they did not get permission for work they reused . . .”). *Id.* at 30 (“Nonartist professionals also identified significant gatekeepers on the staffs of their own institutions . . .”). *Id.* at 37 (“Artists we interviewed and surveyed were less committed to the permissions culture than members of any other professional category.”). *Id.* at 46 (“Artists were more likely than other visual arts professionals to identify fair use as a tool in their work process . . .”).

127. CODE OF BEST PRACTICES, *supra* note 10, at 11.

128. *Id.*

Before evaluating this Code for its descriptive and aspirational qualities, we may read the text for its internal consistency with the CAA's theoretical approach and findings.

Turning to the three questions that framed Aufderheide and Jaszi's initial research—whether the use was for a different purpose, whether the amount used was appropriate, and whether the use was reasonable—the Code does little by way of advancing a user's ability to apply the legal inquiry to his or her specific case. Rather than being a defect of the Code, this shortcoming may merely point back to the fact-specific nature of the inquiry. A fair use test, when understood to turn on the question of transformativeness, is impossible to mechanize without somehow categorizing the nature of the original and the purpose and character of the secondary work before creating some means for distinguishing when the two are different enough.¹²⁹ The *Making Art* Considerations neglect the second question: whether the amount used was appropriate. The third and fourth Considerations do relate to custom as found in the Issues Report, which may in some instances give rise to a presumption of reasonableness—the third question's primary concern. The *Making Art* section expresses some concerns articulated by artists in the Issues Report and omits others. Artists reported valuing attribution when a third party used their own copyrighted material,¹³⁰ and the last two Considerations reflect this. However, artists seemed concerned with the commercial ramifications of a secondary use of their own work,¹³¹ and the Considerations fail to address that concern.

As a self-contained universe, the Code then is only partially successful.¹³² It fails to translate the driving transformativeness inquiry with any specificity for the visual arts community. It also only addresses the attribution-related concerns that arose from the shared consensus of the Issues Report and leaves the commerciality concerns unresolved. I will now turn to an evaluation of the Code as it relates to the external legal universe, looking first to current fair use doctrine before turning to custom and users' responses.

V. EVALUATING *MAKING ART*

I have looked at whether the *Making Art* section is responsive to issues identified by the CAA. I will now turn to an evaluation of that section, first looking at its accuracy in describing the law before turning to its success in describing community norms and its utility in equipping artists to make fair use

129. Matthew Sag has attempted to do just this using the categories of “informational” and “creative” to develop a hypothesis that a “Creativity Shift makes a finding of fair use more likely.” Sag, *supra* note 8, at 58 (emphasis omitted).

130. ISSUES REPORT, *supra* note 72, at 38.

131. *See id.* at 39, demonstrating concerns that secondary uses may affect the market for artists to license their work to advertisers or serve as substitutes (“Some, however, said that they might use copyright to block use for a commercial project such as an advertising campaign, if the work was misrepresented in reproduction, or even if it was slavishly copied by another artist.”).

132. Unfortunately, without full access to findings in Phase Two, this critique is necessarily incomplete.

decisions. To understand the accuracy with which the Code describes community norms and its usefulness for artists, I conducted twenty-two interviews with artists who use copyrighted material in their artistic practice.¹³³ The interviews focused on decisions these artists made regarding their use of copyrighted work (whether they ask permission, how they choose sources, whether they think about copyright when creating). I asked artists to think through the hypothetical scenario posed by the CAA with which this Note began,¹³⁴ probing issues that seemed most important for their decision about whether they believed Dieter needed to ask for permission to build web content into his installation. I then asked them to read the Code on *Making Art* and asked how it changed their assessment, if at all. In addition to informing my understanding of community norms, and the ways the Code is useful for users, the interviews also suggested some questions left unanswered by the statement.

A. *MAKING ART AND LAW*

As discussed above, fair use documents—guidelines, statements, and codes—take up different projects. Some attempt to describe the law, translating it for individual communities of users.¹³⁵ The Code of Best Practices in Fair Use for the Visual Arts purports to do just that: “The Code describes common situations in which there is a consensus within the visual arts community about practices to which this copyright doctrine should apply and provides a practical and reliable way of applying it.”¹³⁶ We must first examine how accurately the Code describes the law—both statutory and common law—for artists.

The *Making Art* Principle establishes the availability of the fair use defense, in much the same way as the preamble of § 107, though it omits any examples of fair use purposes.¹³⁷ In three of the four remaining sections of the Code, the Principles speak with more specificity about whether one of the purposes listed in § 107’s preamble apply: criticism, comment, news reporting, teaching, scholarship, or research. The section for *Analytic Writing* describes an “analytic objective” (akin to criticism and comment), *Teaching about Art* avails copyright users of a fair use defense “for uses that extend such teaching and for reference collections that support it,” and *Museum Uses* are fair if “in furtherance of their core mission,”

133. Interviewees were solicited through online open calls, emails circulated through Masters programs for visual artists, and word of mouth.

134. The consent form for participation that participants signed is attached as Appendix A. The questionnaire that formed the basis of these interviews is attached as Appendix B. The document containing the Code of Best Practices that participants read during our conversation is attached as Appendix C.

135. Falzone, *supra* note 61, at 59.

136. CODE OF BEST PRACTICES, *supra* note 10, at 5.

137. 17 U.S.C. § 107 (2012) (“Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”) (emphasis added).

presumably teaching, scholarship, and research.¹³⁸ *Making Art* has not tailored the Principle to include the purposes in the Copyright Act's statutory preamble.

The *Making Art* Considerations, as a whole, place a strong emphasis on the "transformative use" test. The first Consideration incorporates Leval's language that requires "new artistic meaning," and cautions that a change in medium is not sufficient. However, this premise, likely taken from the Second Circuit's ruling in *Rogers v. Koons*,¹³⁹ was largely overturned fourteen years later in *Blanch v. Koons*.¹⁴⁰ This more recent precedent weakens the rationale for including the limitation about the insufficiency of a change in medium. The second Consideration reiterates the importance of the transformative use, encouraging artists to be prepared to articulate their intent. The third and fourth Considerations are related mandates calling for citation; copyrighted material should be attributed to its original creator unless there is a reason for not doing so. Troublingly, this premise is not part of the fair use doctrine.¹⁴¹ In considering whether a use is fair, courts are not required to look to whether the alleged infringer acknowledges the origin of their source material. As discussed below in a closer look at how the Code relates to custom, these Considerations more likely stem from community-based practices, as expressed by artist interviews conducted by the CAA. The first and second Considerations then may be deemed descriptive of at least a portion of the current fair use doctrine, while the third and fourth seem to describe a norm—either existing or aspirational—established by a hybrid of the Visual Artists Rights Act and custom.

Notably absent from the Considerations are the second, third, and fourth § 107 factors. No Considerations pertain to the nature of the original work or the amount used in the allegedly infringing work.¹⁴² As described by Beebe, however, these are not empirically the outcome-determinative factors in a fair use analysis.¹⁴³ The absence of any attention to the fourth factor, however, is puzzling. As discussed above in Part II, the market effect has at least historically been—and perhaps increasingly will be—an important factor.

138. CODE OF BEST PRACTICES, *supra* note 10, at 9-10, 12-13.

139. *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992) (holding that a translation of a photograph into a sculpture that nearly replicated the original composition was not transformative).

140. *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006) (holding that Koons's use of a "fashion photograph created for publication in a glossy American 'lifestyles' magazine . . . as part of a massive painting commissioned for exhibition in a German art-gallery space" was transformative).

141. This premise perhaps originates from a visual artist's "moral rights" codified in 17 U.S.C. § 106A (1990). In 1990, Congress modified the Copyright Act to include § 106A granting authors moral rights to attribution and integrity. This right to attribution is distinct from fair use and is available only for limited types of covered visual arts: paintings, sculptures, drawings, prints, and still photographs produced for exhibition produced as single copies or in editions less than 200.

142. During several of my interviews, artists pointed to the importance of the nature of the original and the amount used. Telephone Interview with Participant #12 (Jan. 20, 2016) ("It matters what the source is; it matters what work you're using"). Telephone Interview with Participant #17 (Jan. 26, 2016) ("I don't know whether [the word 'work' in the fourth limitation] means 'artwork'—I do sort of feel an obligation to cite when it's clear that the original maker sees the product as art.").

143. Beebe, *supra* note 8, at 582-86.

As a tool for users of copyrighted material, a descriptive fair use statement would be most successful if it articulated a safe harbor, like the Documentary Filmmakers’ Statement of Best Practices in Fair Use.¹⁴⁴ In fact, this function is exactly the one that Aufderheide and Jaszi have claimed their codes intend to serve: “The code makes it easy to understand where the center of gravity or safe harbor is; it should never discourage those who want to explore the wider, less-charted territory of fair use from doing so.”¹⁴⁵ If the first two Considerations accurately encapsulate the transformativeness inquiry, and correlations between judicial findings on § 107’s first factor and the ultimate fair use determination are as strong as Beebe and Sag describe them,¹⁴⁶ then perhaps *Making Art* does adequately articulate a safe harbor for uses which could be considered transformative. I have three qualms about such a conclusion.

First, the law of fair use is itself ambiguous. Any attempt to draw bright line rules encounters a problem of circularity: until a safe harbor is acknowledged by potential plaintiffs claiming infringement, there is no such safe harbor. The same issue is inherent in any Code that purports to offer compliant users peace of mind: until potential adversaries or gatekeepers agree as to the limits of a user’s liability, no Code is truly able to imbue such guidance with any authority. Crews, in his critique of fair use guidelines, has written, “Until the prospective plaintiffs . . . unequivocally give the guidelines an identity as a zone of safety, the guidelines may never attain the degree of assurance necessary to attract broad-based consensus for the standards.”¹⁴⁷ Community-driven attempts to draw clear bright lines for practice in gray areas of the law may be inherently futile.

Second, equating “best practices” with a safe harbor risks limiting the range of fair use—exactly what the authors hope to avoid. In *Reclaiming Fair Use*, Aufderheide and Jaszi write that they hope creators will continue experimenting with uses that “might fall beyond a code of best practices, but not necessarily beyond the doctrine of fair use.”¹⁴⁸ If the Code functions as a minimum threshold for fair use, then cases that might otherwise have been considered fair—though the authors did not include descriptions of those uses—become borderline, narrowing the scope of the defense.¹⁴⁹

Lastly, even if it is accurate, *Making Art* describes fair use at a level of abstraction that leaves too much room for error when users apply it. Fair use

144. Aufderheide & Jaszi, *supra* note 62, at a.

145. RECLAIMING FAIR USE, *supra* note 66, at 132.

146. Beebe, *supra* note 8, at 597 (“Indeed, 95.3% of the 148 opinions that found that factor one disfavored fair use eventually found no fair use, while 90.2% of the opinions that found that the factor favored fair use eventually found fair use.”). Sag, *supra* note 8, at 63 (commenting on such a dramatic finding: “Finding a 99% correlation in an empirical study is a bit like finding that 99% of Iraqis voted for Saddam Hussein—it is a statistic so impressive that it engenders disbelief.”).

147. Crews, *supra* note 5, at 670.

148. RECLAIMING FAIR USE, *supra* note 66, at 121.

149. An example of this scenario might be a use that has no effect on the market for or value of the original. In the Seventh Circuit, a Code of Best Practices that fails to address this factor may inaccurately describe the “safe harbor” and therefore limit a reader of the Code’s understanding of fair use.

determinations are fact-intensive inquiries, and artists “Make Art” in many different mediums. The Considerations accurately describe the transformative inquiry that overlays the statutory factors, but then require users to engage in an imprecise application. This failure of the Code to describe the law with particularity also impacts how informative it is for artists, a query to which I will return below.

B. *MAKING ART* AND CUSTOM

If *Making Art* is partially descriptive of the law, is it also descriptive of custom in the visual arts? The College Art Association claims the Code is a description of “common understandings,” “shared norms,” and “shared professional understandings.”¹⁵⁰ Descriptions of custom in a code of best practices may be problematic when combined with descriptions of the law. Michael Madison, Professor of intellectual property law at University of Pittsburgh School of Law, has described this issue when the custom of acceptable use is narrower than an interpretation of fair use may allow: “Some scholars have expressed concern that the Statements tend to lock in backward-looking, customary interpretations of law and practice and crowd out the radical creator who is untethered to community norms; in other words, the Statements blur the descriptive aspects of fair use with some versions of normative or aspirational aspects of fair use.”¹⁵¹ The conflation of law and custom here is problematic in a slightly different manner: *Making Art* does not articulate a narrower fair use defense, but adds a principle that is extraneous to the law (attribution) and omits others at the heart of the statutory basis (market effect, nature and amount of original).

The disparities between the law and the Code may be explained in two ways: novel elements in the Code are either based in custom as understood by the CAA from their research¹⁵² or they are aspirational norms that the CAA would like to foster as accepted fair use practices. While there are a few areas of difference between the law and the Code, I will limit my discussion to the Code’s inclusion of a new rule: cite your sources. The third and fourth Considerations of the Code strongly suggest that including a citation of any copyrighted source material strengthens an artist’s fair use defense.

This new rule seems to be an incorporation of artists’ responses presented in the Issues Report. Artists described a duty they felt to credit sources,¹⁵³ and saw the benefits of attribution from a copyright user and a copyright owner perspective.

150. CODE OF BEST PRACTICES, *supra* note 10, at 5.

151. Michael J. Madison, Article, *Madisonian Fair Use*, 30 CARDOZO ARTS & ENT. L.J. 39, 47 (2012).

152. For purposes of understanding custom as understood by the CAA here, I use the statements and findings of the Issue Report. I will balance this understanding of custom with descriptions of practice by artists from phone interviews.

153. The Visual Artists Rights Act (“VARA”), codified in 17 U.S.C. § 106A, mandates attribution but as an inalienable right of the author to have her *own* work attributed to herself. VARA has never been applied to a person’s right of attribution for use of her original work in someone else’s *new* work (e.g. appropriation art).

One reported advising fellow users of copyrighted material to “[a]lways give credit.”¹⁵⁴ Speaking from the other side of the copyright table, another recounted: “I benefit because often people put my name on the image and the location name. So then in the searches I show up more. It’s good at this point in my career.”¹⁵⁵ The prevailing pro attribution stance may be diminished slightly by a revealing statement in the report: “[m]any [artists] viewed the recognition [that others’ use of the work] promoted, even when it occurred without attribution, as a strong positive.”¹⁵⁶ It is possible, therefore, that interviewees appreciated the idea of someone using their work at all, regardless of attribution. This statement aside, the Issues Report largely indicates that the extra legal Considerations (numbers Three and Four) are descriptive of community-driven custom.

My interviews with artists about their own practices using copyrighted material in part confirm the custom of attribution.¹⁵⁷ Most interviewees emphasized that their visual arts practice was part of a larger culture of sharing among creators.¹⁵⁸ In discussing influence as distinct from copying, one interviewee paraphrased Picasso: “Good artists borrow, great artists steal.”¹⁵⁹ Several artists expressed the sentiment that borrowing from contemporaries was different than borrowing from a previous generation; the only appropriate way to borrow from a peer was to acknowledge the original source.¹⁶⁰ Furthermore, the sharing culture described by artists was hierarchical: it was acceptable for many artists to “borrow from above” (use images, characters, or concepts from artists with a larger market and more visibility) and less acceptable for artists to “borrow from below” (appropriate from someone lesser known than themselves).¹⁶¹ Some artists, however, based their decision to attribute on their assessment of the value of the work that they were using.¹⁶² Most artists were happy to share their work with others, but in every

154. ISSUES REPORT, *supra* note 72, at 26.

155. *Id.* at 38.

156. *Id.*

157. Note: My interviews did not confirm the existence of a dominant “permissions culture” among visual artists. While I do not make any formal attempt to dispute the existence of such a culture, many artists reported never asking for permission. In some instances, they did so intentionally as an act of defiance. Telephone Interview with Participant #22 (Feb. 13, 2016) (in response to “Do you ask for permission before using copyrighted material in your own work?” replied: “Never. Hard and fast rule. Because it plays into this idea that that should be necessary and that other people should control the images they generate.”).

158. Interview with Participant #2 in New York, N.Y. (Jan. 14, 2016) (“You have to be open to sharing ideas. In painting, everything has already been done.”).

159. Note that the actual quotation attributed to Pablo Picasso is “Good artists copy, great artists steal.”

160. Telephone Interview with Participant #10 (Jan. 15, 2016) (discussing a peer’s use of her own artistic technique: “It would have been better if he had sort of said ‘Wow I really like what you are doing, I’m going to be working with some ideas of yours.’ The gesture would have been nice.”).

161. Telephone Interview with Participant #10 (Jan. 15, 2016).

162. Telephone Interview with Participant #17 (Jan. 26, 2016) (“Occasionally I’ve credited someone in the title if I thought that they deserved some credit. I made a painting of [graffiti]; I felt the graffiti was sophisticated and interesting on its own, so I wanted to give credit there.”).

instance qualified that willingness with the condition that they receive credit.¹⁶³ Those artists who were unwilling to share their work typically made a living from licensing use; granting permission without payment would undermine the value they command in their market.¹⁶⁴

In discussing their use of copyrighted materials, interviewees insisted that they never use work and attempt to claim it as their own original creation.¹⁶⁵ In discussing Dieter's hypothetical use of news websites,¹⁶⁶ most respondents' initial justification for stating that the use was fair was because he was not claiming any of it as his own work.¹⁶⁷ So long as the source would be obvious to a viewer, use of the material presented no legal issue. Many artists saw an attempt to attribute as a good faith effort to leave the rights of the original author intact.¹⁶⁸

Different types of copying made attribution less straightforward for some artistic practices—particularly those that relied on the use for conceptual reasons, rather than aesthetic ones. Collage artists using materials from multiple sources in a single work said attribution would be interesting but impractical.¹⁶⁹ They suggested that requiring some sort of “key” for citations would be most valuable as a tool for learning where other artists were sourcing their material. Some collage artists expressed concern that citing sources might overwhelm a viewer and detract from the aesthetic experience of their work.¹⁷⁰ Conversely, appropriation artists who were either referencing earlier work with a strong conceptual intent or copying verbatim another artist's practice in order to comment said that citation was central

163. I suggest this sharing culture is unique to visual artists; dance, documentary film and music communities have very different attitudes towards use. Dance choreographers and scholar-teachers quote dance materials for teaching and explanation but rarely for quotation in new, original dance. RECLAIMING FAIR USE, *supra* note 66, at 122-23. Filmmakers use copyrighted material for context and detail. *Id.* at 61. Music sampling emerged as a “countercultural badge” and is practiced by with copyleft intent, or otherwise subject to relatively evolved statutory licensing scheme. *Id.*

164. Telephone Interview with Participant #20 (Feb. 10, 2016) (“It depends on what it's for, I might be okay with it. But otherwise I try to turn them into a paying client if I can.”).

165. Telephone Interview with Participant #4 (Jan. 14, 2016) (“I never try to pass my work off as someone else's. I'm not a forger, not trying to defraud anyone.”).

166. Artists also frequently stated that because the work was on the Internet, it was free and fair to use. Telephone Interview with Participant #16 (Jan. 26, 2016) (“The Internet is this new kind of street, this new kind of public.”).

167. Telephone Interview with Participant #13 (Jan. 20, 2016) (“I think with that type of piece, it's not like someone's going to look at it and assume he has done all of those things.”); Telephone Interview with Participant #12 (Jan. 20, 2016) (“Even if [Dieter] put my website there in his installation and you could see it was my website, that's fine.”).

168. Telephone Interview with Participant #17 (Jan. 26, 2016) (“The intent is never to rip someone off. I'm never trying to take someone's hard work and make it look like my hard work.”).

169. Telephone Interview with Participant #9 (Jan. 11, 2016) (“I mean, personally, I've never seen a collage artist have a piece and have a little placard with this piece is from here and this year, and this piece is from here and this year, though that would be so interesting. For me, it would be totally impractical because I have so many cut pieces already, I would have no idea. I would think it would be really interesting to see the sources, but it shouldn't be part of making collage legally.”).

170. Telephone Interview with Participant #3 (Jan. 15, 2016) (“Sometimes it's bad to throw too much information at the viewer—let them just appreciate the image, they don't have to read a whole page of description about something.”); Telephone Interview with Participant #7 (Jan. 16, 2016) (“I would describe aesthetic experience more broadly to include the citation and whether it changes how a piece looks.”).

to their work.¹⁷¹ If the viewer were unaware of the source, the work would lose its conceptual meaning. Several artists recommended modifying the fourth Consideration to include a conceptual basis for omitting a citation.¹⁷² This dissimilarity among responses points to the variety of practices within the visual arts, diminishing the potency of a uniform custom of attribution.

Based on Aufderheide and Jaszi’s research as presented in the Issues Report and my own findings described here, a custom of attribution does exist—at least in some media. Artists using copyrighted material for conceptual reasons frequently claimed that attribution was the norm; without attribution, the work would lose its meaning. Collage artists and artists using copyrighted material for aesthetic purposes reported no custom of citation.¹⁷³ Professional photographers described the inadequacy of attribution without some financial remuneration.¹⁷⁴ Because of the variety of attitudes towards attribution, the value of its inclusion in the Code is questionable.

Jennifer Rothman offers a framework for assessing the merits of using custom as a “dispositive legal rule” in intellectual property law.¹⁷⁵ She suggests that custom may be valuable as evidence of “reasonable” behavior. If compliance with the attribution rule is ever meant to be used by a court as evidence of reasonable behavior, Rothman’s analysis may be applied to assess its success. Rothman names six vectors for assessing a custom’s validity: certainty of custom, motivation for the custom, representativeness of the custom, application of custom against whom, application of custom for what proposition, and finally implications of adopting the custom.¹⁷⁶ Applying these metrics to the custom of attribution in the visual arts reveals some inadequacies in using *Making Art* for fair use determinations. While Rothman does not suggest an exact science for balancing the six factors, several critical aspects of the attribution Considerations indicate they are not ideal articulations of custom for use as evidence in a fair use determination.

Rothman suggests that the more certain the custom, the more valuable it will be as evidence of reasonable behavior. Because of the variety of practices within the

171. Telephone Interview with Participant #4 (Jan. 14, 2016) (“My more recent work has been . . . more about choosing pieces where the artist has assistants generating the work or somehow questioning authorship and taking their hand out of the work. I’m playing with the idea of what artists own.”).

172. Telephone Interview with Participant #7 (Jan. 16, 2016) (discussing the “aesthetic basis” language used in the fourth Consideration: “I would put more onus on the basis for choosing not to cite. ‘Cite the source, when possible if it does not interfere with the intention of the work.’”).

173. Telephone Interview with Participant #16 (Jan. 26, 2016) (“The more you work sounds and media, the more they become more plastic. You give yourself permission to pick something up and play with it and stretch it and repurpose it.”).

174. Telephone Interview with Participant #21 (Feb. 11, 2016) (“Attribution is nice and should be done anyway. Whether it’s a substitute for paying for the use, no it’s not enough.”); Telephone Interview with Participant #22 (Feb. 13, 2016) (“I don’t know if enough thought has been given to the economics of it. People working along a licensing model have a very different attitude.”).

175. Rothman, *supra* note 73, at 1907. This targeted attack against the use of custom as law does not apply here, in large part because the Code purports to describe and “translate” the application of fair use law for visual artists, rather than describe custom intended to be transplanted into fair use law.

176. *Id.* at 1967-76.

field of “art-making,” custom regarding attribution is not always certain or even perceptible—diverse parties have loosely delineated norms that shift with new means of distribution and new technology. For example, attribution of a text excerpt incorporated into a two-dimensional mixed media assemblage on canvas may be accompanied by a wall label with ample space to describe the text’s source. The source of a snippet of code used in a work of interactive video art may be more difficult to attribute in a way meaningful for viewers.

Second, Rothman argues that custom is more valuable in defining the “optimal scope of fair use”¹⁷⁷ when drafters start from a “clean slate and consider what fair use should look like”¹⁷⁸ given a community’s needs. According to this metric, the attribution rule is valuable in part because it seeks to define what fair use should look like for a certain group. Unfortunately, the group included in the Code’s development is not inclusive of all relevant intellectual property stakeholders. Furthermore, the CAA’s project of creating a best practices statement may be motivated by factors that are entirely pragmatic, such as litigation avoidance and maintenance of relationships.¹⁷⁹ Aufderheide and Jaszi describe this mixed motivation in their Issues Report: “Overall, interviewees and survey respondents both indicated a desire to respect owners’ monopoly rights, whether it was to honor creativity or to maintain good relations with project partners.”¹⁸⁰ Because of these dual goals, compliance with the attribution custom may have limited value for judicial fair use determinations.

Third, a custom makes for better evidence if it represents all parties’ interests. The Code was developed through interviews with a sample of artists who were primarily IP *users* rather than *owners*,¹⁸¹ owners’ interests may not have been adequately represented.¹⁸² This lopsided demographic would result in an overvaluing of attribution as compensation for use, rather than an alternative of licensing or compensated use.¹⁸³

Fourth, a custom is more valuable as evidence of reasonableness if it is asserted against the same community from which it originated. *Making Art* is intended for

177. Rothman, *supra* note 64, at 383.

178. *Id.*

179. Rothman notes that use of custom as evidence should not be motivated by non-aspirational concerns, and is most valuable when it articulates aspirational goals. Rothman, *supra* note 73, at 1970-71.

180. ISSUES REPORT, *supra* note 72, at 39.

181. Several lawyers or artists’ representatives I spoke with reported attempting to engage in a critical dialogue surrounding the Code of Best Practices, and were disappointed that they were unable to engage with the authors.

182. Rothman, *supra* note 73, at 1973 (“Practices developed solely by users are likely to be just as bad at balancing IP rights as those developed solely by owners. Although it is true that the downside of an open access regime may be less than that of a closed access regime, both approaches will lead to allocations of IP that are suboptimal.”).

183. The only artist who mentioned compensation for use enjoyed a market for his work. Telephone Interview with Participant #4 (Jan. 14, 2016) (“The question should be: what is appropriate compensation? Should there be a right of refusal? I would like to see a scenario where you could use anything, don’t ask permission, but if you end up making money off of it there might be some compulsory licensing fee paid back to the original artist.”).

use by artists borrowing from other artists. This vector works in the Code’s favor; applying the custom of attribution against in-groups (as opposed to out-groups)¹⁸⁴ makes it more viable as evidence of an agreed upon norm.

Fifth, Rothman asks us to consider for what proposition the custom is asserted. “Norms that favor attribution, for example, have some value when analyzing unconsented uses of another’s intellectual property if such attribution practices are developed by a representative sample of owners and users, and therefore reflect some consensus as to what a reasonable or appropriate use is.”¹⁸⁵ The use of the Code fails here then for the same reason as above; copyright owners have different interests than copyright users, and there is serious doubt that the Issues Report adequately investigated owner’s interests. Artists interviewed for this Note who made their living off of licensing visual works strongly disagreed that attribution would be sufficient to constitute reasonable fair use.¹⁸⁶ The Code cannot then be construed as an *ex ante* agreement that best described parties’ expectations, because it was primarily developed with only one of the relevant perspectives.

Lastly, Rothman asks what consequences follow from the adoption of the custom. Her inquiry is: “If followed to its logical conclusion, will the custom in question result in a slippery slope, such that no uses will be allowed, or, alternatively, that too many uses will be allowed?”¹⁸⁷ Adoption of the attribution custom would not result in a grave “slippery slope” scenario. Rather, one has to ask whether owners and users alike benefit from fixing the doctrine of fair use in such a way. Many scholars have suggested that fair use’s flexibility is one of its features, not a bug.¹⁸⁸

Analyzing the custom of attribution under this rubric, we are left with a mixed understanding of whether adoption of the attribution custom as evidence of reasonableness in fair use would be beneficial. Based on the analysis above, the concerns outweigh the benefits, particularly the uncertainty of custom across a variety of art-making practices. It may be unreasonable for a collage or video artist to cite to his sources; it may be reasonable for a painter to do so. Because of this inconsistency, compliance with the attribution custom as articulated in the Code should not serve as evidence of reasonableness in a visual arts fair use dispute.

184. Rothman, *supra* note 73, at 1972 (“Accordingly, when customs are applied within the group or groups that developed the relevant custom, the custom is more deserving of incorporation.”).

185. *Id.* at 1975.

186. Telephone Interview with Participant #19 (Feb. 2, 2016) (“Couple of emails from people who wanted to make a painting from my photo, and there was nothing in it for me and no I didn’t give them permission at all.”).

187. Rothman, *supra* note 73, at 1976.

188. See, e.g., Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537, 2540 (2009) (“A well-recognized strength of the fair use doctrine is the considerable flexibility it provides in balancing the interests of copyright owners in controlling exploitations of their works and the interests of subsequent authors in drawing from earlier works when expressing themselves, as well as the interests of the public in having access to new works and making reasonable uses of them.”).

C. *MAKING ART* AND USERS

An evaluation of the *Making Art* section of the CAA's Code of Best Practices would not be complete without an inquiry into how users read the statement. In conversations with artists, I asked "What is most helpful about the Code?" and "What is most confusing about the Code?" Artists found the fourth Consideration recommending attribution to be the easiest to apply, and the phrase "new artistic meaning" in the first limiting Consideration to be most confusing. After reading the Code,¹⁸⁹ artists frequently modified their response: Dieter did not need to ask permission, but if the source was not clear, he should make that information apparent on a wall label. Interviewees generally believed a website would have the name of the source visible, and so the indirect citation by logo or URL was acceptable. The fourth Consideration typically gave rise to concerns from artists about their own use of copyrighted material. After reading the Code, many asked if they should be citing their sources. This Consideration, the most readily applicable for most users, is unfortunately extraneous to a fair use defense.

Overwhelmingly, artists complained that the Code was too vague and asked for more examples. Most artists were confused by the first Consideration, complaining the phrase "new artistic meaning" was too vague.¹⁹⁰ During the interviews, they frequently asked for clarification.¹⁹¹ Artists also expressed frustration that someone else might be asked to assess their artistic expression and make a determination about whether it was sufficiently new.¹⁹² When asked what would be more helpful, artists always asked for specific examples. Artists appreciated that fair use was a gray area,¹⁹³ and so understood why the Considerations were vague, but some said that without more examples the Code could only be useful in "starting a conversation."¹⁹⁴ When probed for an evaluation of the *Making Art* section as a whole, however, many artists said they would not use the document in their own practice. The artists were either not concerned about fair use, felt they had a sufficient handle on the doctrine, or thought that becoming better informed would inhibit their practice.¹⁹⁵

189. Only one interviewee had any prior familiarity with the Code of Best Practices.

190. Telephone Interview with Participant #15 (Jan. 24, 2016) ("Where do you draw the line with 'new meaning'? What does that mean? It's just a gray area."); Telephone Interview with Participant #18 (Feb. 2, 2016) ("That's language only a lawyer can love because it's so open to interpretation.").

191. I made every effort to let the Code stand alone without clarification.

192. Telephone Interview with Participant #10 (Jan. 15, 2016) ("There're too many variables in interpretation to say that I agree with these limitations.").

193. Telephone Interview with Participant #4 (Jan. 14, 2016) ("The whole problem with fair use is that it's such a vague concept—in a way it has to be, because there are so many ways to make art. It would be very difficult to say, 'OK you can use up to 80% of an image and have it make up 40% of your image.' That's not how it works.").

194. Compare Telephone Interview with Participant #6 (Jan. 13, 2016) ("This might be helpful to use as an educator, this might be a good starting point as a conversation."); with Telephone Interview with Participant #10 (Jan. 15, 2016) ("You're an artist, you can't be limited by thoughts like this.").

195. Email Interview with Participant #14 (Jan. 22, 2016) ("I honestly don't worry about these kinds of problems."); Telephone Interview with Participant #12 (Jan. 20, 2016) ("Nobody really cares about what artists are doing. We don't make enough money, it's only when we start to make money that people care."); Telephone Interview with Participant #10 (Jan. 15, 2016) ("I don't quite understand what

VI. TOWARDS A BETTER BEST PRACTICES

The College Art Association’s Code of Best Practices for *Making Art* describes the law incompletely, incorporates a custom valid for only some visual artists, and gives rise to more questions than answers for most users of copyrighted material. One alternative strategy is a statement that presents specific examples of fair and unfair uses, giving users the tools they need to analogize.¹⁹⁶ Another approach is a less feeble, more streamlined statement of the law.¹⁹⁷ Neither of these alternatives would be devoid of problems: the former asks users to apply the intentionally ambiguous law to their own unique facts; the latter fails to accommodate ever-shifting doctrine.

Perhaps the better Best Practices is no Best Practices at all. There is little evidence that visual artists suffer the same chilling effect that the permissions culture has allegedly had on other areas of production. Notably, not a single interviewee reported asking for permission for use of copyrighted materials.¹⁹⁸ The question posed by the CAA’s hypothetical—whether Dieter needs to ask permission before incorporating copyrighted elements into his installation—seemed absurd to most visual artists interviewed: of course he does not.¹⁹⁹ If visual artists are already emboldened to take freely, a Code of Best Practices intended to educate and empower them is superfluous.

Furthermore, the very existence of a Code of Best Practices in the visual art-making culture of sharing runs contrary to custom. Artists do not want to think

the document is for. I think any artist who needs to read this is kind of stupid.”); Telephone Interview with Participant #16 (Jan. 26, 2016) (“This kind of document—the spirit of it—it doesn’t understand the profoundly important part of speaking in terms of a contemporary culture in a way that I would advocate to my students.”); Telephone Interview with Participant #22 (Feb. 13, 2016) (“It’s bad for creativity to shine a bright light into every dark corner. You can’t ask someone who is just beginning to work with ideas to instantaneously know the parameters of their ideas. This is basically saying you’re not allowed to tinker. It takes away the idea of the gray area, and the gray area is the space of creativity.”).

196. Neil Weinstock Netanel has inadvertently started this project: “The different expressive purposes that courts have recognized as transformative . . . have included replication of literary or graphic works to serve as an information tool; replication of artistic works to illustrate a biography; reproducing a fashion photograph originally made for a lifestyle magazine in a painting to make a comment about the mass media; copying and displaying a photographic portrait originally made as a gift item for the subject’s family and friends for purposes of entertainment and information; a football team’s display of artwork that the team previously used as its logo without the artist’s permission in a ‘museum-like setting’ in the lobby of the team’s corporate headquarters; copying a work to criticize its author; and, of course, copying a work to parody or criticize the work.” Netanel, *supra* note 8, at 748-49. For visual artists, I can also imagine a key that reproduces works side by side. The Kernochan Center for Law, Media and the Arts at Columbia Law School is currently working on such a database.

197. Michael Murray’s “Synthesized Principles” might serve as a model for such a statement. An example: “Artistic changes that allow the creative artistic expression of the original work to shine through, and merely work an embellishment of the original artistic virtues and expression, are not properly transformative and are not fair use.” Murray, *supra* note 13, at 288.

198. One artist reported having asked permission once and her request was rejected. Her solution was not to avoid making art, but to avoid asking permission. Interview with Participant #2 in New York, N.Y. (Jan. 14, 2016) (“My takeaway was I’m not going to ask permission anymore.”).

199. Only one artist interviewed responded that Dieter should ask for permission before incorporating the websites into his installation work. Interview with Participant #2 in New York, N.Y. (Jan. 14, 2016).

about copyright in their own practice, and so they are less likely to consult a code of best practices at all. The Issues Report recognized this strategy, calling it a “hear no evil” approach. “Students and artists sometimes ignored copyright and tried to maintain ignorance, in order to do their work uninhibited.”²⁰⁰ This attitude was reflected by many of the artists I spoke with, who claimed they did not care about copyright and fair use and were probably better off not knowing.

The artists who exercise their fair use right most widely and bravely are not necessarily the ones who understand the law most clearly; they are artists who are not scared of a cease and desist letter. In response to the “take now, apologize later” attitude that pervades the visual arts, a more useful tool would be a document that explains the appropriate way to respond to a claim of infringement, to assess potential liability in dollar amounts,²⁰¹ and when to consult a lawyer. Understanding their actual risks will help artists feel comfortable doodling in the gray area of copyright, without creating more confusion about the legal doctrine of fair use.

200. ISSUES REPORT, *supra* note 72, at 44.

201. One artist troublingly reported paying a fine demanded by a cease and desist letter. Telephone Interview with Participant #9 (Jan. 11, 2016).

APPENDIX A

Consent to Participate in Research

Research Procedures	<p>This study is conducted by Amy Lehrburger from Columbia Law School, under supervision of Philippa Loengard of the Kernochan Center for Law, Media and the Arts.</p> <p>This study will consist of interviews that will be recorded. The questions will focus on your use of copyrighted material in your own artistic practice and your understandings of fair use. The end of the interview will ask you to think through a hypothetical situation with no correct answer.</p>
Participation Requirements	<p>In order to participate, you must be a working visual artist with an active practice. You should have used or contemplated using copyrighted material (including digital images, text, video, music, etc.) in your work.</p>
Time Commitment	<p>The interview will last approximately thirty minutes.</p>
Confidentiality	<p>All information will be kept confidential, and your identity will be kept anonymous.</p>
Benefits of Participation	<p>This study will advance current understandings of how artists use existing copyright in their work. This study aims to move forward a scholarly debate on current customs surrounding fair use.</p>
Withdrawal of Participation	<p>You may withdraw from the study at any time, including before, during or after the phone interview. Your participation is entirely voluntary, and you can decline to answer any specific questions that make you uncomfortable.</p>
Questions or concerns?	<p>If you have questions or concerns about these research procedures, your participation in the study, or your rights as a research subject, please contact Amy Lehrburger at [redacted].</p>

I have read and understand the above descriptions governing my participation in this study. By signing below, I am indicating that I am at least eighteen years old, and that I voluntarily agree to participate in the study.

Signature of Participant

Name of Participant (Printed)

Date

APPENDIX B

INTERVIEW QUESTIONS

Time:**Date:****Place:**

Where do you live?	
How long have you practiced the visual arts, or considered yourself a visual artist?	
In addition to making art, do you have any other relationship to the visual arts? (e.g. educator, curator, critic)	
Have you ever had any formal education about copyright or fair use?	
Have you ever had any informal education about copyright or fair use?	
How would you describe your practice?	
Do you use the copyrighted work of others in your own work? What kind of media?	
Can you say a little bit more about your process for sourcing images/text?	
Do you ever ask permission for the use of copyrighted work? Why?	
Where do you primarily obtain the copyrighted work?	
Do you think about copyright when you're creating?	
Have you ever read any guidelines or best practices for copyright or fair use?	
Pre-CODE Hypothetical: What would you do? What other information would help you in making a decision?	
Post-CODE Hypothetical:	

What would you do?	
What's most helpful about the Code? What would be more helpful?	
What's most confusing about the Code?	
Would you find this document useful in your practice?	
Further thoughts/comments?	

APPENDIX C**Code of Best Practices in Fair Use for Visual Arts: *MAKING ART***

DESCRIPTION: For centuries, artists have incorporated the work of others as part of their creative practice. Today, many artists occasionally or routinely reference and incorporate artworks and other cultural productions in their own creations. Such quotation is part of the construction of new culture, which necessarily builds on existing culture. It often provides a new interpretation of existing works, and may (or may not) be deliberately confrontational. Increasingly, artists employ digital tools to incorporate existing (including digital) works into their own, making uses that range from pastiche and collage (remix), to the creation of new soundscapes and lightscapes. Sometimes this copying is of a kind that might infringe copyright, and sometimes not. But whatever the technique, and whatever may be used (from motifs or themes to specific images, text, or sounds), new art can be generated.

PRINCIPLE: Artists may invoke fair use to incorporate copyrighted material into new artworks in any medium, subject to certain limitations:

LIMITATIONS

- Artists should avoid uses of existing copyrighted material that do not generate new artistic meaning, being aware that a change of medium, without more, may not meet this standard.
- The use of a preexisting work, whether in part or in whole, should be justified by the artistic objective, and artists who deliberately repurpose copyrighted works should be prepared to explain their rationales both for doing so and for the extent of their uses.
- Artists should avoid suggesting that incorporated elements are original to them, unless that suggestion is integral to the meaning of the new work.
- 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.

HYPOTHETICAL:

“Dieter is working on an installation that will feature, among other things, a display featuring current websites of top news sources in different countries. He’s also got a loop playing below it of headline news from the week before. Does he need to ask permission from anyone to build this material into his art?”