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VISUAL ARTS IN DIGITAL AND ONLINE ENVIRONMENTS: CHANGING COPYRIGHT AND FAIR USE PRACTICE AMONG INSTITUTIONS AND INDIVIDUALS

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Abstract

This study measures changes in behavior and attitudes about fair use among visual arts professionals, the future of whose field depends on advancing into online, digital environments that depend upon it. A survey of 2,394 visual arts professionals demonstrated broad awareness of and actions using a then-months-old Code of Best Practices in Fair Use for the Visual arts. It also shows some lack of confidence in understanding the law among those who are familiar with the code. As well, changes were less evident in the area most vulnerable to self-censorship: the digital and online realm.

Introduction

Fair use is an exception to copyright monopoly that has long served to maintain balance between rewards for existing creators and incentives for future creators. It enables new expression where existing material is employed not for substitution but in appropriate amounts for a new use (Leval, 1990).

U.S.-based visual arts professionals have long done their work under a widespread expectation (except among artists themselves) that all copyrighted material will be used with permission (Bielstein, 2006), but digital practices make such practices untenable. These crisis catalysts include:

- “Configurable” digital (Sinnreich, 2010) artistic practices;
- Teaching practices online and with online materials;
- Online museum collections and exhibitions;
- Online archives.

In an earlier field-wide study conducted via both survey and open-ended interviews (Aufderheide, Milosevic, & Bello, 2015), visual arts professionals demonstrated that while delays, higher costs, and deformation of projects all



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results from “permissions culture,” the most serious creative consequences result from self-censorship, especially in the digital arena.

The largest professional association in the field, the College Art Association (CAA), created a code of best practices in fair use in 2015, available at collegeart.org/fair-use, and widely publicized it with extensive web-based materials, social media, webinars and in-person appearances. It followed several other professional groups in doing so (Aufderheide & Jaszi, 2011).

Methods

How much have the attitudes and behaviors of visual arts professionals changed within the first year of the Code’s release? This question was addressed both with a discipline-wide survey and with interviews with members of key constituencies. Expectations were low, both because we had learned from earlier research that “permissions culture” was deeply entrenched and also because of the many obstacles to both individual and institutional change. We used as measures both changes in attitudes and changes in actions.

Discussion

Highlights from the paper:

The Code was familiar to 63% of respondents, and almost all had heard about it from multiple sources. Nearly half (47%) of those people had shared the Code, most often with multiple people, including colleagues, students and administrators. This act of sharing is a meaningful sign of trust in the Code’s utility.

Some 64% of respondents say they have relied upon fair use at some point, about half regularly. About 11% of fair users said they began adopting the policy since the Code’s publication. This suggests substantial immediate impact, contributing to changes in both awareness and behavior.

Not only individuals but institutions have changed. In the 2016 survey, 43% of respondents who work for institutions say that those institutions have updated their fair use policies in the past 5 years. Among those, more than half--57%--said that they had changed their policies in the months since the Code had been published. Thus, the Code has already contributed to broader adoption of fair use practices at both the individual and the institutional levels.



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Powerful institutions have changed their policies. Yale University Press crafted new guidelines for scholarly art publishing, grounded in the Code. The College Art Association, which publishes three major art publications, reversed its permissions-only policy. The Menil Collection in Houston, and the Houston Museum of Fine Arts (MFAH) both changed their internal policies on press use after consulting the Code. The MFAH and some other museums are also using the Code to make decisions about how large online images of artwork held in their collections can be. (Joseph Newland, Betty Leigh Hutchison, Janet Landay, personal communication, Feb. 3, 2016)

One artist's story of appropriative digital art: Prof. Rebekah Modrak, an artist and professor at the University of Michigan, spoofed the overexemplifying hipster-Brooklyn site Best Made Co. with an ironic website and side-by-side digital video featuring the imaginary company Re Made Co. After getting a cease-and-desist letter, she turned for advice to CAA, because she had attended a webinar about the Code. CAA steered her to her university's lawyers, who supported her fair uses. She then wrote about her experience for a Routledge art scholarly journal; editors first said she would need permission from Best Made for her appropriative uses of their images. She used the Code to successfully convince the Routledge editors that fair use would apply to reproduction of images of her own art. (Modrak, personal communication, Feb. 5, 2016)

CAA members' understanding and confidence in this area are still tentative. For instance, in assessing the net impact of fair use on the visual arts, although the majority (70%) ranked it as essential or useful, almost a quarter of respondents (23%) said they were "not sure." (Only 6 percent ranked it on the negative side of the spectrum.) There is also considerable interest in the visual arts community in further expanding access to fair use, with 44% of respondents saying they would change their practices if they were more confident of their fair use rights.

The full paper also discusses rates of delay and avoidance of work; use of public domain and Creative Commons material; types of work visual arts professionals wish they could do; legacy confusion and rejection of fair use by a minority; comparisons with the earlier survey; and differences among professional groups.

Conclusion



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The publication of a best-practices rubric by which to assess one's choices, and thus one's risk, related to fair use in the visual arts had an immediate effect on behaviors throughout the field.

But some doubt and confusion persists. Additionally, the boldest institutional changes have been made in the most traditional sector, print publishing. Some digital changes are evident, for instance in online access to museum images. But innovating digitally or launching new creative and digital-native projects widely may await a firmer, field-wide grasp of fair use.

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