

Hilary Ballon et Mariët Westermann, *Art History and Its Publications in the Electronic Age: Report on a Study Funded by the Andrew W. Mellon Foundation* (extraits), 2006.

The Economy of the Image in the Age of Its Electronic Reproducibility

In 2006, we considered the state of U.S. copyright law on images in the context of a much broader study on the state of scholarly publication in art history, conducted with a grant of the Andrew W. Mellon Foundation. Our full report *Art History and Its Publications in the Electronic Age* was published online by Rice University Press, and can be accessed freely at <http://cnx.org/content/col10376/latest/>

Attached are the executive summary of the report, its primary recommendations, and the section on “The Image Economy”.

In the past few years, and especially the past few months, there has been encouraging movement in the museum world in the direction of limited copyright release and fee reduction for the publication of images of works of art for scholarly purposes. Much work remains to be done, but the INHA panel on *Le droit aux images et l'information scientifique* offers a welcome opportunity to report on new image publication initiatives by museums in the U.S. and the U.K and by organizations such as the College Art Association, the Society of Architectural Historians, and ARTstor. We shall also address rights issues in the use of images in educational settings.

Hilary Ballon and Mariët Westermann, *Art History and Its Publications in the Electronic Age: Report on a Study Funded by the Andrew W. Mellon Foundation*. Houston: Rice University Press, 2006.

Excerpts

EXECUTIVE SUMMARY

Over the past two decades, the expansion of art history graduate programs and the emergence of new fields of inquiry into the visual world have resulted in steady growth in the population of scholars of art and architecture. In the same period, economic pressures on academic publishers have caused thematic shifts and numerical reductions in the publication of the types of monographs that have traditionally nurtured the discipline. Since the 1960s, such monographs, often based on dissertations, have served as the primary criterion for academic tenure and promotion in North America. These field conditions have led to considerable concern in the art historical community about the professional advancement of younger scholars and the long-term vitality of the discipline.

It should be noted, however, that several still-recent developments have given art history new alternatives for rigorous and creative publication and dialogue. The rapidly improving quality of digital images and modes of electronic publication offer expanded publishing opportunities to scholars and potential economic benefits to academic publishers, in print as well as electronic media. The remarkable and continuing growth of museum exhibitions with large audiences and handsomely produced catalogues presents a singular resource for art historians and their publishers. Thus far, these assets have not been exploited to their full potential—not because of an a priori resistance on the part of scholars, but because electronic and museum publication poses several challenges, particularly in the domains of high-quality image (re)production, copyright claims, and academic credentialing.

This report maps these circumstances of scholarly publication in the history of art and architecture and is supported by quantitative analysis of publishing and educational trends. The report makes recommendations of actions that address obstacles to vigorous scholarly communication and mobilize more optimally the special resources and instruments of the discipline, while also benefiting the wide range of fields that involve illustrated publication.

Primary Recommendations

1. Organize a campaign to break down barriers to access and distribution of images, in all media and at affordable prices, for scholarly research and publication.
2. Launch electronic extensions of the scholarly journals of record (Art Bulletin and Journal of the Society of Architectural Historians) to take advantage of innovations in digital research and publication, to issue extended versions of articles, and to publish electronic alternatives to the printed scholarly monograph.
3. Form a consortium for the publication of art and architectural history online sponsored by the College Art Association and the Society of Architectural Historians, to leverage resources, seek appropriate partners with image expertise, bundle journals in a subscription package, and eventually host third-party journals in art history and visual culture.
4. Develop the benefits of electronic publication for museum publications so that they may become even more productive sites of scholarly collaboration.

II. THE IMAGE ECONOMY

Scholarly publications in art history are fundamentally dependent on high-quality images for effective documentation and argument. Copyright law, permission procedures and fees, and the labor-intensive processes of color separation and high-quality printing have long formed obstacles to cost-effective and timely publication. As of yet, these challenges have not been mitigated by the advent of digital image (re)production. Initial prospects of easier, cheaper, and global circulation of images, expectations of fee reductions and widening fair use practices, and hopes of de facto deregulation of copyright restrictions have faded. It is a paradox of the digital revolution that it has never been easier to produce and circulate a reproductive image, and never harder to publish one.¹

Scholars and editors consistently identified mounting costs of permissions to reproduce images and escalating costs of printing them as constraining factors in the publishing of scholarly books with the kinds of illustrations required for clear communication in art history. Authors, publishers, librarians, and owners of copyrighted works of art and reproductive images also registered considerable confusion about copyright law and fair use. Some publishers, copyright owners, distributors, and users of images have begun to devise solutions posed by the current image economy.² Below, the issues are separated into sections on copyright ownership, fair use, permissions and fees, image quality and access, costs to publishers, responses to the challenges posed by art history's need for good illustrations, and print-on-demand.

Copyright Ownership in Works of Art and Images

It has always been possible to copy a work of art. For millennia, the right to produce and use images of the works of others for religious, political, commercial, or decorative purposes was rarely challenged. The advent of copyright restrictions on images coincides with the invention of the technologies that made faster, more economical reproduction of them possible—the printing press and efficient papermaking—and with the early capitalist transformation of European cities that spurred those technologies. As soon as multiple printmaking techniques were cost-effective, artists began to challenge unauthorized print copies of their inventions on commercial grounds, and thus generate case law that would lead to the codification of copyright in works of art and images. Causes célèbres in the history of the copyrighted work of art include Albrecht Dürer's partly successful challenge to Marcantonio Raimondi's bootlegging of his prints, Claude Lorrain's effort to protect his compositions against forgery by recording them in drawings in a *Liber Veritatis*, Peter Paul Rubens's elaborate privilege applications, and William Hogarth's lobbying for the first English Copyright Act, passed by Parliament in 1735.³ The current difficulties faced by scholars and their publishers in obtaining—and paying for—copyright permissions stand in this tradition of artists' assertions over the potential commercial value of their creative endeavors.

¹ The perception was phrased in this way by a scholarly editor, and it was echoed throughout the study by senior scholars, junior scholars, and academic and commercial publishers.

² "The image economy" is Susan M. Bielstein's insightful term to encompass the range of issues precipitated by art history's dependence on high-quality reproductions.

³ David Landau and Peter Parshall, *The Renaissance Print, 1470-1550* (New Haven: Yale University Press, 1994); Rebecca Zorach and Elizabeth Rodini, *Paper Museums: The Reproductive Print in Europe, 1500-1800* (exh. cat., Chicago: David and Alfred Smart Museum of Art, University of Chicago, 2005).

The following discussion of the current state of copyright practice is limited to copyright in works of visual art and architecture and in images that reproduce them.⁴ In the United States, copyright law protects makers of artistic works against the unauthorized copying, that is, reproduction, of their works. It is a form of intellectual property law in that copyright protects the expression of an idea (visual or otherwise) rather than the idea *per se*, and in that it is meant to safeguard the actual and potential commercial value of an artistic work for its creator, for a legally specified period. Ever since the adoption of the 1976 U.S. Copyright Act, which took effect in 1978, the law has tended to strengthen copyright protection for the makers of works of art and images and for their heirs, at the increasing expense of the right of freedom of expression, which would seem to authorize critical and expressive re-use and interpretation of creative works. Under the 1976 Copyright Act, copyright extends from the moment of the work's creation through the author's lifetime plus fifty years. In 1998, the Sonny Bono Copyright Term Extension Act increased that term by twenty years.⁵ The Digital Millennium Copyright Act, also passed in 1998, offers further protections of copyright holders in the digital realm.⁶

The 1976 and 1998 copyright acts yield a few rules of thumb: any work of art made after 1978 is in copyright for the life of the author plus seventy years; any work of art that was made before 1978 *and* never published is copyrighted for the life of the author plus seventy years; any work of art that was published before 1923 is in the public domain; and many works published between 1923 and 1978 remain in copyright today.⁷ When the copyright owners of works are hard or impossible to identify and locate, as is the case for the vast majority of works published before 1978, they are referred to as "orphan works." The convolution of these rules and terms, here presented in simplified form, is the result of the continuing force of the central provisions of the Copyright Act of 1909, which was not fully superseded by the later acts; the 1909 law defined copyright in a creative work from the moment of its properly registered *publication* rather than creation.⁸

The complexity of U.S. copyright law, and its partial incommensurability with copyright law in other countries, is especially onerous for scholars who publish images of twentieth- and twenty-first-century art. Nevertheless, a gradually expanding definition in practice (rather than by law) of the "artistic work" that is protected by copyright has created analogous difficulties for scholars who study works of art that have long been in the public domain. Authorized photographers of those works, or the owners for whom they make them, usually claim copyright in those reproductions, with the same temporal extensions granted artists and their heirs.

Thus, most museums now explicitly or implicitly claim copyright over images of all works in their collection, whether in the public domain or not. The same copyright ownership is implied by for-profit collections of images of public domain works, in digital as well as traditional photographic forms. Such collections include stock image providers geared exclusively to commercial applications (such as Corbis, a company founded in 1989 by Bill Gates, which describes itself as a "visual solutions provider" of all manner of images, not limited to works of art) and image collections focused on reproductions of works of art for commercial as well as scholarly applications (such as the Bridgeman Art Library and Art Resource, which present themselves as "archives" or "libraries" of art images, many of which are licensed to these providers by major museums as well as private collectors). For museums and other owners of art in the public domain, granting non-exclusive licenses to for-profit art image providers extends the commercial value of works of art in their collections.

Our study found that the efforts of owners of works of art in the public domain to claim copyright over plainly reproductive images of them is meeting with growing criticism and with legal and practical attempts at remediation. Such critiques usually argue for a distinction between "artistic" or obviously "interpretative" images of works of art and architecture on the one hand, and, on the other, "slavish copies" or "exact records" of such works.

⁴ The following discussion of copyright is greatly indebted to the information provided by the United States Copyright Office at <http://www.copyright.gov/> and to discussions with Susan M. Bielstein, Carol Mandel, James Neal, and Eve Sinaiko. The best survey of the topic is Susan M. Bielstein, *Permissions, A Survival Guide: Blunt Talk about Art as Intellectual Property* (Chicago and London: University of Chicago Press, 2006).

⁵ It is worth noting that the temporal extension of copyright in artistic works for two or three generations of heirs stands in marked contrast to the more limited span of patents. Patent duration remains commensurate with the original goal of intellectual property law, which was to encourage inventors to continue to develop productive inventions while they enjoyed protection of their initial ideas for a reasonable period.

⁶ There is, however, growing recognition in the U.S. Congress that copyright law may in certain circumstances have an excessively discouraging effect on the use of copyrighted material for productive and creative purposes. In 2005, Senators Orrin Hatch and Patrick Leahy, Chairman and Member of the Subcommittee on Intellectual Property of the Senate Judiciary Committee, requested that the U.S. Copyright Office conduct an inquiry into the problem of "orphan works," works known or believed to be in copyright whose owners or representatives cannot be located even after diligent effort. The Copyright Office submitted its *Report on Orphan Works* on January 31, 2006. The full report is available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>. The detailed contents of the Copyright Office report go beyond the scope of this study, but it should be noted that its recommendations advocate the facilitation of the reasonable use of orphan works, propose measures of copyright liability protection for users of orphan works, and place limitations on monetary and injunctive relief for copyright claimants who appear after use has begun.

⁷ Because of the complex layering of older and more recent copyright statutes, works published in or after 1923 have a total copyright term of 95 years; this means that the terminus ante quem for published works to enter the public domain will remain fixed at 1923 until 2018; in that year it will become a rolling date, so that in 2019 the ante quem year will be 1924; the next year it will be 1925, and so on.

⁸ For a convenient summary of copyright laws in the U.S., including a helpful chart by Lolly Gasaway of the University of North Carolina, see Bielstein, *Permissions*, 16-33, esp. 27.

At first sight, this distinction appears problematic on philosophical as well as pragmatic grounds.⁹ It seems easier to make for works of architecture, sculpture, performance art, and installations than for paintings, drawings, and prints, because viewing angles, lighting, and the presence of figures matter that much more in images of spatially and temporally extensive works.¹⁰ Yet as superior photographers of “flat” works will claim, translating an oil painting—especially one with fine-grained brushwork or heavy impasto, subtle colorism or complex perspective—into an image that will evoke its aesthetic effects in print or on screen is a creative endeavor in its own right, whose commercial value should be protected by copyright. Many contemporary artists would use different arguments to challenge the claim that imaginative yet nearly exact reproductions of flat images cannot be copyrighted. Various forms of appropriation of “flat” images, some of which may appear “exact,” “slavish,” and “unoriginal,” have been central to art production for several decades now, and their philosophical status has been the subject of sophisticated art criticism.¹¹ The argument that reproductive images of “flat” works lack the modicum of creativity required for copyright production may be appealing to scholars of paintings, drawings, prints, and photographs in the public domain, but it seems difficult to make and harder to adjudicate.

Nevertheless, it was precisely on distinctions between creative and slavish reproductions that the U.S. District Court judge in the 1998 case *Bridgeman Art Library v. Corel Corporation* rejected the plaintiff’s claim that Corel had infringed its copyright in color images of paintings in the public domain. Corel had digitized several transparencies made and owned by Bridgeman of the works in question. The judge ruled: “There is little doubt that many photographs, probably the overwhelming majority, reflect at least the modest amount of originality required for copyright protection. . . . But ‘slavish copying,’ although doubtless requiring technical skill and effort, does not qualify.” Significantly, the judge ruled that the technical change in medium, from oil to transparency, did not constitute such originality.¹² The section below on Responses to Copyright, Access, and Cost Challenges outlines the positive implications of the *Bridgeman* decision for art history publications.

Fair Use

In copyright law, the doctrine of fair use limits the exclusive rights of copyright holders by circumscribing certain conditions under which copyrighted material may be used without permission. Fair use offsets to some extent limitations to freedom of expression inherent in copyright. The doctrine was developed over the years in case law, and eventually codified in the 1976 Copyright Act.¹³ According to the act, fair use purposes include “teaching (including multiple copies for classroom use), scholarship, or research.” The terms of fair use are highly generalized, including “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes,” “the nature of the copyrighted work,” “the amount and substantiality of the portion used in relation to the copyrighted work as a whole,” and “the effect of the use upon the potential market for or value of the copyrighted work.” Under the provisions of the act, one of the purposes that may qualify for fair use of copyrighted works is “criticism.” It is on that ground, along with the potentially positive impact of wide circulation on the commercial value of the copyrighted work, that art historians might claim fair use.

Fair use is not a challenge to copyright claims in specific works, in the way that the *Bridgeman v. Corel* decision is. The doctrine keeps copyright in an image intact, but facilitates educational and scholarly uses of such images, whether they reproduce works in the public domain or in copyright. Universities and libraries argue fair use effectively to provide scholarly content to their communities for research and study, limited in extent and duration, and, in the digital era, behind firewalls of usernames and passwords. Such content includes image collections as well as written materials.

In art history publishing, fair use may be more applicable to scholarly articles than to monograph publication, where the publisher and author have commercial stakes, however tiny, in the publication of the images. For several years, the College Art Association has advocated an aggressive stance, arguing that many reproductions of images in art historical scholarship

⁹ This important extension of the notion of the artistic work protected by copyright is discussed fully by Bielstein, *Permissions*, 35-47. Bielstein argues that the distinction is particularly clear in the case of images of two-dimensional works of art such as paintings and works on paper, and that “these photographs do not qualify for protection under either U.S. or British law because they do not exhibit a minimum amount of originality” (40).

¹⁰ According to the Architectural Works Copyright Protection Act of 1990, architectural drawings and visual models can be copyrighted as “pictorial or graphic works.” The act specifies, however, that built architecture in publicly accessible locations may be freely photographed. Such photographs by others are copyrightable by the photographer rather than the architect. William S. Strong, *The Copyright Book*, 5th ed. (Cambridge, Mass.: MIT Press, 1999), 19.

¹¹ See, for example, Nelson Goodman, *Languages of Art* (Indianapolis: Bobbs-Merrill, 1968); Arthur Danto, “The End of Art,” in [Arthur Danto, *The Philosophical Disenfranchisement of Art* \(New York, 1986\), 81-115.](#)

¹² The case was argued and decided in the same court, by the same judge, twice, with the same outcome: first in 1998, applying U.K. law (the plaintiff is a U.K. company), and again in 1999, applying U.S. law (the alleged infringement took place in the U.S.). For the 1999 ruling, see http://www.law.cornell.edu/copyright/cases/36_FSupp2d_191.htm.

¹³ Section 107; for a basic factsheet on fair use, with link to the section, <http://www.copyright.gov/fls/fl102.html>.

should be qualified as supportive of “criticism,” that many such reproductions should thus not require copyright permission, and that fair use offers a compelling line of defense against alleged copyright infractions by scholars who can show critical use.¹⁴ Publishers and authors have been hesitant to accept this untried guideline, however, and CAA is in the process of revising the statement. A recent, wide-ranging review of the current state of fair use law and policy by the Brennan Center for Justice at New York University makes clear that the doctrine has not yielded the kind of creative and critical exemptions to copyright law for which it was intended.¹⁵ As unauthorized uses of copyrighted images in scholarly publications rarely constitute a sufficient financial threat to incur legal challenges, there is insufficient case law to establish the purview of the doctrine’s applicability to scholarship.¹⁶

For all of these reasons, claims of fair use currently promise only limited relief from problems of publishing images in print or digital form with worldwide access. The doctrine is of considerable value, however, in facilitating access to digital publications within educational and scholarly communities, where works with copyrighted images may be made available in password-protected environments.

Permissions and Fees

The trends toward temporal and conceptual copyright extension have made it more difficult for scholars to take their own publishable photographs of works of art (once a quite standard practice, but now virtually unheard of in museums), and they have caused increases in permissions fees even for non-profit, scholarly publications of limited public reach. Permission fees have traditionally been based on several factors, including character of the publication and press (academic or commercial), color or black-and-white, size of image relative to page, placement inside or on cover, geographic and linguistic range of distribution, and size of print run. With digital images, color vs. black-and-white and size are no longer crucial considerations, and with online publication, internet marketing, and the globalization of book sales, geographic and linguistic range of distribution has also become less relevant. Most publishers now require their authors to obtain worldwide reproduction rights for all images in a publication.

Research into image and permission costs for reproductions of works of art in museums, libraries, and image banks suggest that most non-profit institutions are mindful of the difference between scholarly and commercial purpose, and discount licensing fees accordingly. Image banks tend to be less generous in this regard. (It is well known to scholars that most commercial institutions that own copyrights, such as magazines and newspapers, are not set up to grant special dispensations for scholarly publication, however well-intended they may be, and these special cases are left out of consideration here.¹⁷)

Most non-profit institutions appear to aim their fees at cost recovery, but it is unclear to what extent institutions have analyzed the full costs of maintaining rights and reproduction departments or of the fulfillment of scholars’ requests. Although prices of scholarly publication licenses are often finely matched to different genres, media, and audiences of publication, there appear to be enormous inconsistencies in fee structures between institutions. Aware of these discrepancies, the Registrars Committee of the American Association of Museums in 2004 produced a wide-ranging survey of rights and reproductions practices among 111 of its member organizations, the vast majority of them art museums.¹⁸ The survey was intended to help member institutions clarify and develop reasonable policies in murky terrain. Review of its raw data as well as research into the image license policies of ten major museums and four commercial image purveyors in the United States and Europe yielded the following results.¹⁹

Museum discounts of scholarly reproduction fees for various purposes—book cover, book interior, periodical, website—vary widely, running from minimal at the low end of commercial fees to as much as 75 percent toward the higher end. A small minority of institutions waives scholarly fees routinely. Still, the higher-end scholarly fees reported by at least eight museums surprise: \$100.00 to \$260.00 for color inside a book; \$60.00 to \$150.00 and up for black and white inside a book. The majority of reported prices range from \$35.00 to \$75.00 for color inside a book, and \$20.00 to \$50.00 for black and

¹⁴ For the well-crafted 2002 CAA Guidelines on Copyrights and Permissions in Scholarly and Educational Publishing, drawn up by Phyllis Pray Bober, see <http://www.collegeart.org/guidelines/reprorights.html>. A note attached to the webpage states that the document is currently under review and expected to be revised and updated soon.

¹⁵ <http://www.fepproject.org/policyreports/WillFairUseSurvive.pdf>.

¹⁶ Susan M. Bielstein, lecture presented at the Humanities Center at New York University, April 22, 2006.

¹⁷ In one telling, recent case, an author seeking to reproduce a vintage magazine cover in black-and-white was charged \$800 even after congenial and sympathetic negotiations. Stories at the other extreme, of free passes and encouragements, also abound.

¹⁸ For the Draft Report of the *AAM Member Museums Rights & Reproductions Survey 2003-4 Results*, see the pdf at <http://www.panix.com/~squake/rarin/RCAAMSsurvey2003-4.pdf>. The survey was sponsored by the Rights and Reproductions Information Network (RARIN) of the Registrars Committee of the American Association of Museums, with the support of the Indianapolis Museum of Art.

¹⁹ Research assistance for this aspect of the study was provided by Eric Ramírez-Weaver.

white. A monograph with 100 illustrations might well cost its author \$5,000.00 or more in permissions costs after the images are purchased. For books on modern and contemporary art, that number is likely to be considerably higher.

Fees for reproductions in scholarly journals are not markedly cheaper than for books, running from a rare low of \$10.00 to a high of about \$250.00. Most fall in the \$25.00 to \$75.00 range. For an article with 20 illustrations, some of which are presumably reproduced at no cost, the budget could easily reach upward of \$500.00.

Price policies for website uses are still young and thus less well defined; as opposed to permission policies for print, many institutions claim to set prices for any electronic publication case by case. Traditional license restrictions of language, geographic range, print runs, and even numbers of editions no longer apply. Time restrictions have taken the place of edition limitations, and this new model raises a thorny problem of publication preservation. Digital licenses frequently limit the time the image may be posted, and prices go up for longer-term licenses. The range is from about one to five years, infinitely shorter than the theoretically endless preservation of an image in a book once it has been printed. The few reported and posted prices for electronic publication fall predominantly in the \$60.00 to \$150.00+ range, comparable to those for print. Anecdotal reports from scholars and publishers indicate, however, that specific negotiations for high-quality digital image permissions tend to result in fees higher than those for print.

The reasons for the opaque but generally high pricing structure for digital images in this transitional moment are understandable. With the adoption of digital image delivery as standard procedure, many image providers have begun to relinquish the former separation between selling images for personal use and granting permission for publication. The loss of this distinction appears to have driven prices upward. The potential of unauthorized worldwide distribution of images at the click of a mouse, and the risk of unpalatable image uses resulting from such distribution, appear to motivate higher digital image fees. The instability and general restrictiveness of the permissions regime for digital uses are serious impediments to the productive development of electronic publications for art history.

In sum, our quantitative research suggests that editors and scholars rightly perceive total permissions expenses for books to have gone up considerably over the past few years.²⁰ Even commercial publishers that could traditionally shoulder the costs of the finest illustration program permissions for survey books by leading scholars are now feeling the squeeze.²¹ This state of affairs has several negative consequences for scholarly publication in art history, where scholars have usually borne the weight of permission costs, either through institutional subventions and grants or at personal expense. As costs of illustrations have gone up, authors frequently have to consider illustration cuts that hamper arguments. And as sales have declined, scholarly books that need extensive illustration programs have a harder time getting published at all (see Costs to Publishers, below). Scholarly journals and their authors are experiencing the same pressures. At the *Art Bulletin*, for example, subventions for illustrations have not been able to keep pace with increasing costs. In its most recent year, authors on average could acquire fewer illustrations and licenses for their allocations, and the well-received color illustrations had to be scaled back considerably.

Scholars and editors also express grave concerns about the time and effort required to secure good images and permissions to reproduce them. It is difficult to find out from institutions how to acquire images and permissions and how much they will cost, if our experience trying to obtain such information is any guide.²² Although electronic communication has facilitated the process of finding images and contact addresses, most museums and image repositories have no standardized procedures or easily accessible fee schedules. Electronic or credit card payment to non-U.S. institutions is rarely available. Most institutional websites offer some guidance to the image licensing process, but other than a commercial organization such as Corbis or Getty Images, very few make it possible for the transaction to be handled through online price calculation and ordering without the intervention of a fees specialist.²³ The commercial vendors offer the user a range of categories to specify the character of the intended image use and audience, but none of these indicators correspond closely to scholarly

²⁰ The written responses to the Editors' Survey register this perception, as do consistent comments of scholars on their experiences. (For the Editors' Survey, see Lawrence T. McGill's data research report.)

²¹ These new pressures on permissions budgets were reported by the editors of top commercial presses who were present at the focused discussion during the College Art Association in Boston, February 2006; the Summit meeting at the Institute of Fine Arts, March 2006; and a colloquium of editors on Art History and Its Publishers organized by the Clark Art Institute, Williamstown, Massachusetts, with Ken Wissoker and Catherine Sousloff, March 31-April 1, 2006.

²² Research notes and correspondence with institutions by principal investigators and Eric Ramírez-Weaver, research assistant to this part of the study.

²³ For sample guidelines and electronic interfaces, all of which were used in the research, see the websites for Corbis <http://pro.corbis.com/>, Getty Images <http://creative.gettyimages.com/source/home/home.aspx>, Art Resource <http://www.artres.com>, Bridgeman Art Library <http://www.bridgeman.co.uk/>, the Metropolitan Museum of Art http://www.metmuseum.org/education/er_photo_lib.asp#4, the Museum of Fine Arts, Boston <http://www.mfa.org/about/index.asp?key=50>, the National Gallery of Art <http://www.nga.gov/resources/divsdesc.shtml>, and the Getty Foundation http://www.getty.edu/legal/image_request.html. (The Getty Museum and Getty Research Institute, both part of the Getty Foundation, are unrelated to the commercial venture Getty Images; the Getty website cited here notes explicitly that it "does not give permission for commercial use such as creating merchandise, promoting products, etc.") Among museums, the Frans Hals Museum in Haarlem has an unusually transparent and efficient interface for image orders online, with price quotes delivered by a specialist within 24 hours; see <http://fhm.imagedatabase.nl/>.

publication, with the result that fees from such organizations—from c. \$300 per image to over \$1000—tend to outstrip scholars' budgets. Nevertheless, the electronic request form developed by such organizations may well be modifiable for scholarly use by non-profit organizations, and such streamlining would be welcome. ARTstor is poised to launch one such form when it begins to manage scholarly reproduction requests for the Metropolitan Museum of Art in the fall of 2006. Its model should be reviewed for possible use as a new standard.

Image Quality and Reader Access

Art editors and art historians routinely refer to the discipline's need for high-resolution and true-color (or finely scaled black-and-white) illustrations on heavy-weight, pure white, smooth, yet minimally reflective paper—that is, high-grade, expensive stock.²⁴ This is not just a matter of attachment to a luxurious product that is evocative of the value of Art, as skeptics would have it, but also one of maximizing the function of illustrations to make manifest the author's argument. An author's description of a work is always an interpretive act, and its claims need to be verifiable in the image of the work. Many reconstructions and arguments in art and architectural history depend on the author's and reader's ability to re-imagine a work's aesthetic presence. Although no image on the printed page will ever prompt an aesthetic experience identical to one generated by the work reproduced, the finest illustrations should give the reader and viewer a sufficient approximation of the work to make the argument about its visual qualities susceptible to evaluation.²⁵ This requirement is doubled every time an author seeks to draw fine distinctions between one work and another, and multiplied again when the author charts filial affinities or differences among multiple works or their styles.

These requirements are not absolute, in that the image is always understood to be a surrogate for the work reproduced, and in that many descriptions and comparisons stand up even in fairly low-resolution black-and-white images. Comparisons of figure-ground relationships in portraits by Jean-Auguste-Dominique Ingres and Pierre-Auguste Renoir, say, may be fairly compelling—perhaps even more evident—in grainy black-and-white images. Other comparisons, however, are virtually impossible to sustain without high-quality reproductions. If an author wants to show how Gerard Dou, Rembrandt's first pupil, took up his master's palette and chiaroscuro while simultaneously miniaturizing his brushwork, high-resolution images are in order. And when that author then wants to argue that Dou's pupil Frans van Mieris outdid his teacher's painterly refinements by removing virtually the last visible signs of handiwork from his pictures, even finer reproduction standards are required. Although the correlation between effective reproductions and successful art historical argument and documentation cannot be quantified, it is direct, as scholarly reviews of books with either superior or poor illustrations point out routinely and with justification.

Many art publishers and scholars continue to doubt that the digital image on screen has, in its present state of development, reached the standards of reproductive value and stability of the finest offset printing, whether of analog images or digital files. This complaint is reminiscent of concerns over a feared loss of resolution and flexibility in the transition from analog slide projection to digital projection. Just as those fears have subsided with the development and increasing affordability of high-resolution digital capture and high-powered projection, so analogous concerns about the screen image as a supplement to or integral part of publication are likely to fade as more effective modes of delivering digital publication and images become available.

More serious is the absence, as of yet, of reliable standards of preservation for digital images and for the migration of their formats. To point out that digital instability may not be inherently worse than the chemical volatility of photographs is an insufficient argument for a full-blown switch to digitized visual documentation. Makers, collectors, users, and librarians of digital image collections are keenly aware that digital images will have to improve on the longevity of their analog counterparts, and several coordinated efforts are under way to develop industry standards.²⁶

Limited reader access may be the most serious current obstacle to the widespread use of illustrated scholarly publication in digital form. There are, as yet, no cost-effective digital publication models that protect the investments of scholarly publishers, hold them indemnified against copyright challenges, and yet make the publications as globally available as authors (and their home institutions) would like. Even digital texts without high-grade illustrations often restrict access to narrowly defined reader communities. Newsletters for scholarly societies, for example, tend to restrict the most significant

²⁴ Christopher Lyon makes this point well in "The Art Book's Last Stand?", forthcoming in *Art in America* (September 2006). We thank him for sending us advance copy.

²⁵ For a superb example of high-quality reproductions in a thoughtful layout making the author's point by heightening the viewer's perception, see the sequence of seven pages of color details of Velázquez's *The Spinners* in Svetlana Alpers, *Vexations of Art: Velázquez and Others* (New Haven and London: Yale University Press, 2005), 139-45. The effectiveness of the visual argument is enhanced by the absence of all captions on these pages.

²⁶ The literature on digital image quality standards and longevity management is extensive, and its review lies beyond the scope of this study. For an important introduction to the issues and their remediation, see Howard Besser et. al., *Preserving Digital Materials: Final Report of the Digital Preservation and Archive Committee*, University of California Systemwide Operations and Planning Advisory Group, October 18, 2001, <http://www.slp.ucop.edu/sopag/DPACFinalReport.pdf>.

parts of their websites to protect their dues base. Digital publications that would aim to match the high-quality output of the finest illustrated monographs are likely to find image copyrights for top-resolution illustrations an even greater constraint in the clickable medium than it is in print. Without such images, and without an ease of access matching that of pulling a copy off a shelf, digital publications in art history are unlikely to become attractive to authors or readers soon.

In partnership with university presses, university libraries may well prove effective leaders in the effort to develop digital publication involving high-quality illustrations. They have been at the forefront of the fair-use argument for access to copyrighted works; they have broad experience with effective digital delivery models; many now manage significant electronic collections of images and texts; and some have direct or indirect responsibility for their universities' academic presses and/or electronic publishing initiatives.

Costs to Publishers

In private conversations and in group sessions, editors consistently identified the high cost of illustration programs as the factor specific to art history publication that has adversely affected the volume of book publication in the field in recent years. Our detailed survey of 17 editors of art history books at leading university and commercial presses confirms that the costs of illustration programs are as onerous to publishers as they are to authors.²⁷ Without considering the costs of permissions (stray parts of which are also borne by many publishers), editors identified high average production cost differentials between art history books and books without illustrations. According to the survey, the cost of producing a typical art history book (c. 30 to over 150 illustrations) ranges from \$7,500 to \$75,000. The survey respondents reported the cost of producing an un-illustrated book to range from \$3,600 to \$45,000. More meaningfully, the survey shows that, for individual publishers, the production of an average un-illustrated book ranges from 10 percent to 66 percent of the production of an average art history book. When limiting the survey results to the university presses, the average cost of publishing an un-illustrated book is \$23,000 (in round numbers), and the cost of the average art history book is \$41,400, 80 percent more.

The primary costs of illustration programs are incurred in the design, layout, and offset printing processes. Although all books require design, layout, and printing, illustrated books necessarily go through more phases of layout review and correction, including time-consuming consultations between editors, designers, and authors. Particularly vital, and often contested, decisions include sizes of illustrations relative to the page and to each other and locations of illustrations in relation to argument and to overall design of the page. Black-and-white illustrations necessitate grayscale checks, sometimes by the image provider as well as the author. The accurate transfer of a color image onto the printed page involves an elaborate color separation process, and for color the offset result more typically requires the approval of the image supplier. Paper quality and finishing varnishes can have dramatic effects on image registration, and it is not unheard of for initial print runs to be rejected by the publisher because color calibration or paper quality turns out to be inadequate. Although such costs are borne in part by printers, changes of paper and delays in publication inevitably incur additional expenses for publishers.

The supervision and enforcement of the permissions regime generate another, and rarely analyzed, cost to art history publishers.²⁸ Thirteen of the 17 editors surveyed gave estimates of the staff time dedicated to image permissions management. While five cited almost no staff time and one found the answer entirely variable per author, seven estimated between 20 and 80 staff hours per book. In conversation, a university press editor noted that a well-illustrated book, defined as having at least 50 images, takes an average of 100 hours of permission management by her assistant.

In light of escalating production costs and declining sales, presses can ill afford to produce art historical monographs in the 1000+ print runs that were still standard only a decade ago. Such print runs yield undesirable inventory maintenance costs. As publishers seek to avoid high inventories, per-copy costs and prices go up, and so does the risk to authors and readers of books going out of print.

²⁷ For the Editors' Survey, see Lawrence T. McGill's data research report.

²⁸ For a fair description of the editors' active participation in the permissions clearing process, see Bielstein, *Permissions*, 121-22.

Responses to Copyright, Access, and Cost Challenges

The difficulties posed by image requirements in art historical publication have yielded various challenges to restrictive interpretations of copyright and permissions standards.²⁹ Publisher costs and access issues cannot be fully addressed by fair use practices and copyright waivers, but they may be further mitigated by rapidly developing print-on-demand technology. This section surveys these strategies and their potential for relieving pressures on scholarly publication.

Although the *Bridgeman v. Corel* decision was not widely noted in scholarly circles, it has yielded revisionist discussion in museum and publishing communities about the benefits, legality, and negative aspects of alleging or implying copyright over flat images of flat works of art, particularly when those works are in the public domain. Buoyed in part by the court decision, several editors and authors have taken modest practical initiatives in raising awareness of the hold of copyright law over the production and communication of scholarly and creative work. On occasion, for example, publishers include prominent notes announcing that permissions have been denied, substitute images have had to be used, or images have had to be dispensed with altogether. In 2006 the *Art Bulletin* began to note the public domain status of works of art in captions to illustrations of such objects. Although these statements call welcome attention to the questionable status of some copyright claims, they tend to have unfortunate effects on the appearance of publications and may not constitute long-term remediation of the hold of copyright law over scholarly, creative, and critical uses of images. It is imperative that scholars be informed of their rights, responsibilities, and liabilities in the uses of images, but extensive ownership listings and public domain specifications in captions may inadvertently appear to accept a contestable system of implicit copyright claims. It is ironic that such preemptive strikes against legal action should be mounted to protect scholarly publications that are unlikely to be subjected to such challenges in practice.

Some publishers have in recent years become more inclined to scan images from previous publications without copyright permission, particularly if the images are of works that have long been in the public domain and if they are of two-dimensional works of art. Although the *Bridgeman* decision seems to set a strong precedent for such use, publishers are likely to use this technique only as a last resort. Case law is not highly developed in this area, and, perhaps more crucially, a printed scan of a previously printed image invariably deteriorates that image and its approximation to the reproduced work.³⁰ (The moiré patterns that always result from the overlay of the offset printing screen and the pixelated image can be multiplied by secondary scanning and renewed offset printing. It must be noted, however, that digitization and scanning techniques have become so sophisticated that such patterns can now be corrected with relative ease.)

The American Association of Museums (AAM) immediately recognized the eroding effect of the ruling against *Bridgeman* on museum copyright claims.³¹ There is now lively debate within the museum community about the value and purposes of asserting copyright over images of works in the public domain. The debate has yielded new research into best practices. The 2004 AAM survey of rights policies among its member organizations registers the awareness that the *Bridgeman* case has placed museum copyright claims on thin ice.³² When asked if the permission-granting institution required the publisher to use a copyright notice in the caption or on the image, 33 of the 41 respondents answered no, frequently noting that the works were in the public domain; that it was not clear whether the museum, or indeed anyone, owned copyright in the reproductions; or that the issue was altogether “too touchy.” Almost all of the eight institutions requiring copyright notices qualified their answers, indicating uncertainty and/or flexibility about the copyright claim. The majority of survey participants chose not to respond to this question, in contrast to the forthcoming response rate to other queries.

Kenneth Hamma, Executive Director for Digital Policy at the Getty Trust, has argued the case that museums may be better off relaxing claims to intellectual property in images of works of art in their collections, for financial, philosophical, and legal reasons.³³ The production of images in museums is usually subsidized by public funds, directly or indirectly. Public dissemination of high-quality images of works of art reduces costs of maintaining rights departments and enforcement services. The wide circulation of such images encourages museum attendance, and serves the fundamental museum missions of public education, art historical research, and support of creative effort.

²⁹ The College Art Association is actively pursuing remediation of restrictive copyright laws for scholarly purposes; we are grateful to Eve Sinaiko, Director of Publications at CAA, for sharing her extensive expertise in this area with us.

³⁰ For the pros and cons of scanning previously published images and reproducing them without copyright permission, see Bielstein, *Permissions*, 103, 140, who appears to take a more liberal view of the practice than most editors.

³¹ See the review statement of 1999 by Barry G. Szczesny, Government Affairs Counsel to the American Association of Museums at <http://www.panix.com/~squigle/rarin/corel2.html>.

³² For the Draft Report of the *AAM Member Museums Rights & Reproductions Survey 2003-4 Results*, see the pdf at <http://www.panix.com/~squigle/rarin/RCAAMSsurvey2003-4.pdf>.

³³ Kenneth Hamma, “Public Domain Art in an Age of Easier Mechanical Reproducibility,” *D-Lib Magazine*, vol. 11, no. 11 (November 2005), <http://www.dlib.org/dlib/november05/hamma/11hamma.html>.

Hamma's argument is bolstered in part by a 2002 cost-benefit analysis of the sale of digital and analog images by European collections of culturally significant artifacts. This study, commissioned from Simon Tanner and Marilyn Deegan by the Andrew W. Mellon Foundation, sought to test the hypothesis that "anxieties over reduced income [for digital images of works] in cultural institutions may actually be [attributable to] a perceived loss of the gate-keeping rights function, rather than actual loss of income for the medium, if measured against the pre-digital environment."³⁴ The study found much evidence to uphold the hypothesis. Participating institutions stressed the service mission of their image services and rarely analyzed the full costs to their organizations of making and distributing images. Digital images appeared neither more nor less cost-effective than analog; if anything, rapidly lowering digital production costs were perceived as making the digital image ever cheaper.³⁵ Even so, the study suggested that image services are not a vital source of revenue in relation to the real costs to the institution, and that the financial issues often cited by institution staff might be rationalizations for less concrete concerns. Worries about digital transformation appeared founded at least as much on "moral rights issues," such as the museum's curatorial duty to maintain high facsimile standards for works of art, and on loss of control over the instantly reproducible digital image.³⁶ These anxieties are likely to have subsided even in the few years since the study was conducted, as digital image capture has now replaced analog photography in virtually all American and European institutions of the kind surveyed in the study.

The lines of thinking suggested by these surveys and reports are beginning to yield new initiatives in museums toward regularizing and liberalizing permissions and fees for the scholarly and educational uses of images of works of art. The AAM survey of 2004 was meant at least in part to help rights and reproductions staff respond more effectively to user requests. The reported fee structures generally appeared to take into account the fewer resources and lesser commercial value of scholarly publication, and in qualitative answers to queries about fee reduction policies many respondents professed themselves quite open to negotiation and sympathetic to pleas of scholarly hardship.³⁷ In March 2006, the Metropolitan Museum of Art announced its intention to develop an online licensing system for images of all works in its collections, through an arrangement with ARTstor, the largest non-profit digital image provider. The Metropolitan Museum will seek to distinguish commercial applications from scholarly use, and radically reduce its use and permissions fees for scholarly purposes, perhaps removing all fees for reproduction of their works that are in the public domain. ARTstor will begin to serve as the scholarly license clearinghouse for the museum's images in the fall of 2006.

If the Metropolitan Museum's welcome lead is followed by other institutions, a more centralized rights-clearing organization could be established in due course, either by extension of the museum's arrangement with ARTstor to other institutions or by development of a system on its model. The Artists Rights Society (ARS) and Visual Artists and Galleries Association (VAGA) already serve as such clearinghouses for artists whose works are in copyright. These organizations have the goal of streamlining permissions while protecting the commercial interests of the artists they represent, however, rather than facilitating scholarly publication at minimized fees, as is the goal of the Metropolitan Museum-ARTstor initiative.³⁸

Print-on-Demand

The editorial community harbors considerable disagreement over the mitigating effects of digital technology on the costs of illustration programs and inventory. Quite apart from transitional anxieties about the loss of the book as artifact and the inability of the screen image to match the simulative power of the color print reproduction, editors point out that the costs of illustration programs depend in good part on the human labor costs of design, layout, permissions enforcement, and image checks and calibrations, and that electronic cost-savings in those domains have already been maximized over the past two decades. And yet, most editors agree that it is intuitively obvious that without the expenses of offset printing, paper stock, binding, inventory maintenance, and shipping, digital publication would almost certainly be more cost-effective than print publication.

³⁴ Simon Tanner and Marilyn Deegan, "Exploring Charging Models for Digital Cultural Heritage: Digital Image Resource Cost Efficiency and Income Generation Compared with Analog Resources. A HEDS Report on Behalf of the Andrew W. Mellon Foundation," Higher Education Digitisation Service, University of Hertfordshire, 2002; see http://heds.herts.ac.uk/mellon/HEDS_charging_models.pdf, esp. 2. The study surveyed 51 institutions and interviewed 15 of them in depth (eleven in the United Kingdom and four in continental Europe).

³⁵ The participants on balance considered digital image production cheaper and more cost-effective than analog, and charged 10.5 percent less for the supply of digital images than for analog; the more maturely digitized collections charged on average 22.2 percent less. The study hence concluded that "the gatekeeper function is no longer a reason to not provide services in digital formats or to overly restrict access to digital materials. The financial risk to income is relatively low." It noted, however, that the institutions tended to use permissions fees to recover costs and, for commercial applications, perhaps turn a profit. Tanner and Deegan, esp. 19-23.

³⁶ Tanner and Deegan, *passim*.

³⁷ *AAM Member Museums Rights & Reproductions Survey 2003-2004*, 12-14, 16-28.

³⁸ See www.arsny.com, www.vagarights.com. In the United Kingdom, the Design and Artists Copyright Society (DACS) serves the same functions; www.dacs.org.uk.

It appears that the cost savings of fully digital publication in art history have not been studied comprehensively by the publishing industry, in part because of considerable skepticism over the acceptability to authors, readers, and credentialing committees of purely digital delivery. When asked whether print-on-demand technology might offer a more acceptable spin-off product that would allow publishers to reduce print runs radically, control inventory costs, and maintain books in print indefinitely, most editors initially reacted with skepticism because the loss of image quality was felt to be too compromising and unlikely to be improved within the next few years.

This tepid response was surprising as print-on-demand products involving images are developing rapidly in the popular and trade domain. Such applications include newspaper kiosks in airports, where readers may print out tabloid editions of major international broadsheets, and albums of digital images ordered through the internet from a central printer. Companies such as Apple provide the album templates, the consumer composes the album—effectively acting as self-publisher—and orders it according to a menu of printing and binding specifications. The provider prints and ships the bound album to the consumer, often within two business days. Over the past decade, print-on-demand companies such as Lightning Resource have developed flexible and efficient reader fulfillment services for trade book publishers as well.³⁹

Scholarly publishers, with their small print runs and inventory headaches, stand to benefit even more from such outsourcing. As niche products, scholarly monographs on highly specialized topics are likely to recover their production costs more predictably if consistently available over many years, rather than relying on illusory blockbuster sales in the first year or two of publication. Print-on-demand technology may soon make this business model feasible for art history publication.⁴⁰ In a 2003 ACLS paper, Lynne Withey, Director of the University of California Press, already noted print-on-demand's advantages for scholars who hesitate to pursue digital publication because it lacks the high-quality print product expected by promotion and tenure committees.⁴¹ In 2006, PublicAffairs, an imprint founded and edited by Peter Osnos, announced the Caravan Project, under which six non-profit publishers (three are university presses) will simultaneously publish non-fiction titles in multiple formats: hardcopy, paperback, print-on-demand, digital download, per-chapter download, and audio.⁴² The 24 pilot books are due to be released early in 2007. The goal is to increase the commercial viability and lifetime of niche titles by removing obstacles to sales caused by limited print runs and poor inventory control. The project does not include illustrated titles, however.

More recently, art history editors have begun to discuss the positive impact of print-on-demand on inventory costs. They have also registered improvements in the technology to such an extent that a copy of an illustrated book printed on demand may soon be sufficiently close in quality to one printed in an editorially supervised print run. In 2006, the University of Chicago Press published John Hyman's *The Objective Eye: Color, Form, and Reality in the Theory of Art* (a smallish, handsome book with black and white figures as well as color plates) in a hardback run of 200 for libraries and a slightly larger paperback run, while simultaneously commissioning a trial print-on-demand version that may be released when the initial print runs are sold. While the print-on-demand paper is of a rougher texture and black and white illustrations look more obviously pixelated than their counterparts in the book produced by a traditional printer, the illustrations are clearly legible and make their points quite well. The press considers the proof product an impressive augury of improvements soon to come.⁴³

Recommendations on Images

It is clear that the current regime of images and permissions impedes scholarly publication in art history in its print as well as digital forms. We recommend an organized campaign to break down barriers to access and distribution of images, in all media and at affordable prices, for scholarly research and publication.

The specific recommendations below constitute such an effort. Its success will depend on the coordinated leadership of the professional organizations of art historians, museum professionals, scholarly editors, research libraries, and image

³⁹ <https://www.lightningsource.com/index.htm>. The books thus far appear to have few or no illustrations.

⁴⁰ For the statistical principle and its applications in the electronic age, see Chris Anderson, *The Long Tail: Why the Future of Business Is Selling More* (New York: Hyperion, 2006).

⁴¹ Lynne Withey, "Crises and Opportunities: The Futures of Scholarly Publishing" (2003), ACLS Occasional Paper No. 57, www.acls.org/op57.pdf. The University of California Press has implemented this publication model in several series of born-digital monographs with print copies available through print-on-demand technology. The press has not yet extended its dual electronic/print-on-demand model to art history, a field where it has historically had a strong commitment.

⁴² The program has been funded by the John D. and Catherine T. MacArthur Foundation. For the MacArthur Foundation's announcement, <http://www.macfound.org/atf/cf/%7BB0386CE3-8B29-4162-8098-E466FB856794%7D/Caravan.pdf>; for the founder's vision, Peter Osnos, "Good Books: When, Where, and How You Want Them" (5 April 2006), <http://www.tcf.org/list.asp?type=NC&pubid=1259>.

⁴³ We thank Susan M. Bielstein and Sylvia Hecimovich, Editor and Production Director at the University of Chicago Press, respectively, for sending us the two books for comparison and for sharing their impressions of them. The POD pages were printed by Integrated Book Technology (IBT).

purveyors, potentially including the College Art Association, Society of Architectural Historians, American Association of Museum Directors, American Association of Museums, American Association of Curators, American Association of University Presses, Council on Library and Information Resources, Research Library Group, and ARTstor.

Copyright Permissions and Fees

Work with museums to remove copyright restrictions on images of works currently in the public domain, on the grounds that public access to high-quality images of such works is appropriate to the public status and educational and scholarly missions of most museums.

Create a streamlined digital image licensing system with low- or no-cost pricing for scholarly use, and with an online order form. Review the new collaboration developed by the Metropolitan Museum of Art and ARTstor for possible expansion with other collections into a centralized rights-clearing entity, or as a model for one.

Develop a database that centralizes information on available subventions for images and permissions fees. Professional organizations such as the College Art Association, Society of Architectural Historians, and American Association of University Presses could collaborate on such a venture.

Fair Use

Support public and university libraries in their efforts to use the internet to make copyrighted and orphan works available at the lowest possible cost to the widest communities of readers, viewers, and listeners, whenever such use can reasonably be argued to be fair.

Print-on-Demand

Encourage university presses to leverage and develop the extant expertise of print-on-demand companies to pursue high-quality print-on-demand services for scholarly publications in art and architectural history. Such services need not be tied to individual publishers, but could be made available through publisher website interfaces that link to print-on-demand providers.