Getting Past No: Working Toward a Model of
Sharing within the Educational Community
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The following is the text of the talk given by the author on March 30, 2007, as part of a
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We have spent the last couple of hours talking about how we "get past no" within our
own institutions when copyright seems to be an undue impediment. I thought we could
now step back and explore together how we might get past the "broader no." And by that
I mean, how can we work together, across institutions, to share visual arts images for
teaching and study, and – equally importantly – how could we engage the "content
owning" community in this effort.

Let me start out with a few observations:

First, if you look at the community at large, the idea of being connected to others through
the Web and of being able to access significant amounts of content online has moved
from the novel to the norm. As one technology report noted, if you crammed Tokyo,
Seoul, New York City, Mexico City and Mumbai together into one single megalopolis,
its population would still be smaller than that of MySpace.[1] Sharing content online is
equally popular: Flickr is said to have over 1 billion photos, with more than 11,000
images "served" per second on busy days.[2] These sites and others utilize Web 2.0
technological developments to facilitate broader sharing by allowing you to repackage
and repurpose online content with much greater ease.

Of course, this is not to say that there aren't challenges, and especially legal challenges,
to the sharing that is going on through the Web. Viacom's decision to sue Google for
over $1 billion for copyright infringement on YouTube is just the latest example of this.
But even with these challenges, it seems likely that these trends toward sharing over the
Web will continue.

In contrast to this culture of online sharing among the community at large, educational
institutions continue to be hesitant about sharing their online collections of visual arts
images with other institutions, even if that sharing is only with other universities and
colleges for teaching and study. One of the main reasons for this is the fear of copyright
infringement, and the uncertainty surrounding fair use in the online environment.

Now, some might argue that the current "silo-ed" system of each educational institution
trying to meet the needs of its own users is preferable given the potential legal risks of
sharing. After all, the existing copystand practice where a given institution copies images
from books and similar sources to meet its faculty's teaching needs has been in place for

decades, and although never tested in the courts, it's pretty widely assumed that it's consistent with the US legal doctrine of fair use. Moreover, such practices seem to have been generally tolerated if not accepted by creators and other content owners of visual arts images. So, if you can rely on fair use to build your own collections and make them accessible to your institution's own users, why risk sharing?

I would suggest that there are several disadvantages to not moving towards a more shared environment. And here I'm not talking about sharing through ARTstor *per se*, but of sharing more broadly, where ARTstor would be one node of a broader network aimed toward sharing visual arts content solely for teaching and study.

First, by not sharing digital image collections with other educational institutions, there is the obvious problem that some collections – and even some unique collections – will remain locked within one institution's walls. Lack of access to some collections could adversely impact the richness of scholarship and educational discourse in the arts.

Another obvious disadvantage to not sharing is the issue of duplication of efforts across institutions. ARTstor's usage statistics indicate that many users from a wide array of institutions want to use the same core images for teaching. Of course, ARTstor and other resources aim to provide those images, but obviously we'll never have all the content that everyone needs, and so some greater degree of sharing across the educational community would seem to make sense.

Third, an institution's own collection of copystand images may not be of particularly high quality or have completely correct attributions. While scanners have dramatically improved in recent years, sharing images across the educational community might allow educational users to access the best quality images available within that larger pool of content, and to access richer data associated with those images. If we could convince content owners to participate in this shared effort, we might dramatically improve the quality of many images and their data.

Additionally, the reluctance to share because of potential legal risks may also have some inadvertent consequences for our ability to rely on fair use in a shared setting. I think it stands to reason that if every educational institution in the United States is making their own collections of copystand images for teaching and relying on fair use to do so, then sharing those same copystand images across the same institutions for the same limited purposes should also be fair use. After all, it's the same practice, but just done in a more networked, shared manner.

By making decisions to not share collections with other educational institutions, we may be by default suggesting to courts that such sharing is not fair use. Courts sometimes look to community practices in making a legal determination of what constitutes fair use. If those community practices don't accommodate sharing, a court might believe that this was a reasonable limitation of that doctrine.

Now I'm not saying that we should share every image in every collection. As the Digital Image Rights Computator (DIRC) teaches us, if we shared those images that one institution purchased from a photographer who markets his images to the educational community, we would be unfairly impacting the livelihood of that photographer. But by being unwilling to share other images, even those that were created from books because it was the only source for those images, we may be doing ourselves a disservice.

Moreover, I think it is important to note that the decisions being made about whether to share or not may not be informed decisions, but rather knee jerk reactions of risk aversion. In my own experience, decision-makers sometimes have a limited understanding of copyright, other than what they have read about in the newspapers regarding the Napster and Grokster disputes. For example, at ARTstor, we have sometimes had to provide assurances that we would take all the legal risks of sharing particular collections before institutional counsel would agree to share them with the larger community, even when those collections consisted of images of older, historical works with little possibility of an infringement claim. This general tendency towards risk aversion means that many collections that would be of interest to the broader educational community, and that bear little risk of copyright infringement, may simply not be accessible.

In addition to the disadvantages of not sharing image collections with the broader community, I also want to talk about some of the implications of the lack of dialogue between educational users and content owners about the use of visual arts images for teaching.

The absence of meaningful dialogue between the two halves of this community has created some adverse consequences. And I would not count the CONFU discussions as meaningful dialogue since they were government generated, and therefore caused what I would call the "turtle effect" – in other words, they made everyone retreat into their shells to protect their interests the most and give the least, which resulted in a not particularly fruitful outcome.

One disadvantage of not engaging in dialogue with content owners is that their understanding of copyright is being informed only by the Napster, Grokster and Google disputes. In discussions I have had with artists and estates, for example, many of them do not distinguish between educational and commercial users when it comes to fears that images of their works will be used inappropriately. And they note, of course, that the same students that are accessing images of their works are also the ones downloading music illegally.

But the market for the educational use of visual arts images is not the same as the commercial market for popular music. This is not to say that there is no educational market in the visual arts. But the reality is that, for better or worse, the sale or license of fine art images for educational use does not fill pockets in the way that the sale of music does, and it's very unlikely that it is ever going to do so. As any teenager will tell you, the occasional poster in a dorm room just can't compete with rock and roll when it comes

to spending their few dollars: after all, beer goes better with Bob Dylan or the Kinks than it does with Bonnard or Kandinsky. In other words, there is not the mass appetite for visual arts images that there is for popular music.

Moreover, what many of those same artists and estates do not realize is that librarians and visual resource professionals can serve an educational role, informing end users about the permitted uses and restrictions associated with different resources. The librarians and visual resource professionals I have met care profoundly about copyright and are interested in abiding by the rules. Indeed, at ARTstor, we periodically get calls from visual resource professionals asking about whether a particular use of an image in ARTstor is permitted. But the role that these individuals play, and their interest in abiding by copyright and in guiding end users, is often not communicated to the content owning community.

Another disadvantage of not engaging in dialogue is that content owners often have unique, unpublished content that would be of tremendous scholarly and educational value. For example, it took ARTstor over a year of discussions with one major artist foundation before they were comfortable enough with the idea of sharing content with us, and for better or worse it was only because we had technological protections in place that could limit the size of downloaded images from ARTstor that we were able to eventually to obtain their content. But, now, having gotten past those hurdles, the foundation has given us very high quality images of their works, and is now talking about sharing some never before published works as well. If educational institutions and content owners could engage in dialogue regarding the educational use of images, the amount of important, previously inaccessible content made available for teaching and scholarship could potentially increase significantly.

I also believe that if we don't engage in this dialogue now, it may be more difficult to do so later. Copyright is increasingly being seen as a divide between copyright owners and users. With the big copyright disputes in the entertainment and commercial sectors, copyright discourse has almost taken on a moral dimension, with users of copyrighted materials being labeled as pirates and therefore of shady repute, and with users – including many users in the educational community – increasingly equating copyright owners with members of the former Politburo trying to oppress the legitimate needs of users. And as this polarization continues, the likelihood of being able to initiate constructive dialogue seems increasingly challenging.

Now, aside from the disadvantages of not engaging in this broader dialogue, let me suggest some reasons why I think collaboration between the two sides of this community could work.

First of all, every artist, estate, photographer and museum that ARTstor has talked to has been supportive of the educational use of digital images of their works. And we've talked with over 50 museums, with a number of photographers, and with significant artists and their estates, such as the Warhol, Lichtenstein and Pollock Foundations. They

want their works to become part of, or to remain in, the teaching canon. And they want more recognition and exposure for lesser known works.

Additionally, there are signs that the content owning community is trying to respond to the needs of educational users. Earlier this year, the Victoria & Albert Museum announced that it would make public domain images from its collections available free of charge for scholarly publications. And about a year ago, the Metropolitan Museum of Art approached ARTstor and asked ARTstor to distribute images from the Met's collections on its behalf, also for scholarly publications free of charge. With the Met's support, we are now offering 'Images for Academic Publishing' -- a distribution mechanism that will make these images available to both ARTstor participants and non-participants. These efforts suggest that the time may be ripe for broader collaboration.

Now, if we all agreed that sharing visual arts materials among educational institutions were an important aim, and if we wanted to engage content owners in our collaborative efforts, let me sum up by suggesting ten initial steps we could take:

First, we have to articulate more clearly the needs of educational users, the difference between educational uses and commercial uses of visual materials, and why fair use has been and continues to be so important within this community.

Second, we need to provide more guidance to institutions that will help them evaluate the risks of sharing image collections with other institutions. ARTstor may be able to serve some role in providing such guidance. And to the extent that they feel comfortable doing so, we should encourage institutions that are sharing their collections with other institutions to talk about how they arrived at those decisions.

Third, we need to articulate the current, important roles of visual resource professionals, including the role that many of you play in helping to educate end users at educational institutions about permitted uses of images. And we need to figure out how those roles would evolve in an online, shared community so that we best make use of the expertise that visual resource professionals are developing.

Fourth, DIRC is a wonderful resource that represents the community practices among educational users of visual arts images. What I would like to see follow from it is a published paper that elaborates on these computational guidelines, and that describes our "accepted community practices" in more depth. In particular, we need to explain that the fair use guidelines may be broader than what we have articulated in DIRC, and explain why we draw certain distinctions between different uses. And these accepted community practices would carry even more weight, both with courts and with institutional counsel, if we could get some from the content owning community - artists, estates, museums and photographers - to adopt or agree to these practices.

Fifth, I believe we should make visible efforts to address to some of the issues that matter to creators and owners of content in this shared environment. For example, image quality and attributions are very important to artists, photographers, and museums. If we could

find ways to address some of those issues within a shared environment, we might gain greater support for these collaborative efforts.

Sixth, we would have to figure out some parameters that would help limit this shared environment to educational use. This does not mean locking content down for all purposes, but it means finding some mechanisms for meeting content owners' concerns about preventing commercial abuses of their works.

Seventh, it would be very helpful if we could find a few content owners, such as significant artists or photographers, who would openly support this effort. And, like Creative Commons, we would want to create easy mechanisms through which content owners could publicly support this effort.

Eighth, we would need to create mechanisms for ongoing dialogue between content owners and users. ARTstor could play a role in facilitating this dialogue. The VRA, the College Art Association, and similar groups could also be very important in this effort.

Ninth, we should get guidance from other communities, and from similar efforts. What are the lessons learned from Creative Commons, for example?

Finally, we need mechanisms to help those creators who want to contribute content to be able to do so easily. Creative Commons licenses might work. Also, the VRA's Intellectual Property Committee should soon have some model licenses and assignment agreements so that faculty members and others who want to donate their collections – either for use within an institution or, hopefully, for use by the larger community – could easily do so in a way that documents and records their intentions.

Of course, these steps are just initial ones, and I am sure that we would need to undertake other important efforts before adopting a more collaborative, networked approach to sharing visual arts materials. But the promise of such an initiative is not only its value in providing greater access to visual arts materials for teaching, but also the demonstrative benefit of being able to bring the two halves of this small community – content owners and educational users of visual arts images – together. Such a collaborative approach might also serve as a useful counterpoint to the ongoing and divisive copyright conflicts occurring in other contexts.

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[1] . Wade Roush, "Build Your Own Social Network," Technology (MIT Review: March 9, 2007), available at http://www.technologyreview.com/Infotech/18321/.

[2] . Stephen Shankland, "News.blog: Flickr outage highlights scale of site," (CNET.co.uk: February 21, 2007), available at http://www.cnet.co.uk/misc/print/0,39030763,49287908,00.htm.