Watkins (*Art & Architecture Librarian*) University of Colorado Boulder [Boulder, CO]

TEACHING THE LAW & ETHICS OF IMAGE USE IN AN AGE OF APPROPRIATION & PIRACY

ALEXANDER WATKINS

INTRODUCTION

The legal & ethical implications of image use are a key and often overlooked part of visual literacy. Many students see it as their right to use images and artistic works as source material, regardless of the law. To these students copyright is outdated, as pirating and torrenting have consistently outpaced attempts to police them. Learning the bounds of copyright and the power of fair use will equip students with the skills they need to explore and challenge the limits of legal image use. However, what's legal under fair use might not always be ethical, especially as it pertains to the appropriation of visuals from disempowered groups or individuals. There is a tendency to conflate the two issues, and students need to be able to separate them; understanding the various effects that image use has and the power structures implicated is a key skill for visual literacy. Experts understand that use has consequences, but students often do not consider the idea that their image use potentially has many ramifications both legally as well as beyond the law. It is vital to get students to engage in discussion about the relationship between the law, ethics, and their image use.

THE CURRENT CULTURE OF IMAGE USE

Appropriation and remix have become a major part of our visual culture. Fueled by almost unlimited source material on the internet, students can create new pieces out of other works. Although reinterpreting previous works is as old as art itself, the trend has accelerated recently. Pop and Post-Modernist art relentlessly appropriated, but with the previously unimaginable abundance of images, video and sound online, along with the proliferation of tools to remix, appropriation has become one of the dominant modes of visual production today. For many of our students:

Recycling imagery [feels] comfortable and commonplace. If one lives in a forest, wood will likely become one's medium for creative play. If one grows up in a world filled with cheap, disposable images, they easily become the stuff of one's own creative expression (Gude, 2004, p. 9).

To many students, the legal implications of this practice may not register, let along the ethical. They see it as their right to use other artistic works as source material. Or they might not even consider that there is a person creating the photographs found on Google Images. It seems that the methods that students employ to subvert copyright means that they may not see copyright as an issue that affects them.

COPYRIGHT & FAIR USE

One of the primary hurdles in teaching students about using images is misconceptions of copyright. Instead of a punitive system, copyright really exists to promote the creation of culture by rewarding creators with a limited monopoly. The law is not simply about making people money but about advancing the arts and sciences, and about balancing that need with cultural creation. Students can be surprised to learn that almost any fixed expression from the last 90 years is copyrighted. But it is essential when teaching students to not simply do a copyright "scare." Students may then just ignore copyright or abandon worthwhile projects. This is where highlighting the fair use exemption comes in. Fair use is the legal, unauthorized use of copyrighted material. It exists for several reasons: to protect free speech, to provide a space for creativity, and because the value created is more important than the copyright holder's monopoly.

The most challenging part about the fair use exemption is that there is no bright line of legal or not-legal, but rather a weighing of several factors. There are four factors that are analyzed to make a fair use determination:

- Purpose and character of the use

- The nature of the copyrighted work

- The amount and substantiality of the portion taken

- The effect of the use upon the potential market

One of the key issues in fair use is the transformative nature of the use: that is, was it used for a new purpose, new context, new audience, or to draw new insight? Was it transformed by adding new expression or meaning, or was value added to the original by creating new information, new aesthetics, new insights, and understandings? A legal decision about fair use will often come down to whether the image user is "good" or "bad," whether the court sees them essentially as a value creator: are you an educator or are you a pirate and taking away a potential market from the copyright holder? Are you exercising your free speech rights of criticism or parody?

TEACHING COPYRIGHT & FAIR USE

Fair use and copyright are very complicated topics, and when exactly use becomes infringement is often unclear. However, conducting a fair use test is just the kind of critical thinking that students should be doing. Students can learn the skill of crafting a story about why and how they use source material. In order to justify image use, they need to be able to articulate why it was necessary to use copyrighted material in the amount and image quality that they did in order to make their artistic or intellectual point. Constructing such a narrative makes students think critically about the purpose of their appropriations and about what their remix means. Learning the bounds of copyright and the power of fair use will equip students with the skills that give them the freedom to explore and challenge the limits of digital art remixes. Students who can craft a fair use argument can use images responsibility and defensibly, a skill with many applications, since the digital realm is especially prone to charges of infringement. Indeed, image use that closely mirrors the mass media it appropriates is more vulnerable to legal challenges because while the handcrafted quality of traditional art techniques that involve appropriation, such as collage and printmaking, build in transformation, this is not necessarily so for digital art (Buskirk, 1992).

Students flout copyright in their everyday lives, so it can be a challenge to get them to appreciate its importance. Once again we cannot default to scaring students about copyright, but rather we must get students to engage with copyright law and fair use. The open ended nature of fair use cases is a great starting point for discussion and debate. Fair use scenarios can be made accessible and interesting, especially with so many recent examples in the news. In my classes, students enjoy discussing artists like Shepard Fairey or Richard Prince. Students have to analyze case studies, and then present their point of view. Discussion and often debate will follow as other students present their opinions. Since there is often no right answer, and questions of intellectual property and appropriation raise so many contentious issues, debates often get quite fierce. A good method I use is to simply guide the discussion, using misunderstanding of the law as teaching moments. Artists especially have strong opinions about fair use and the work of other artists. An easy and engaging way to have students work with copyright is to have them present a fair-use narrative for their own work. In class, they explain how and why they used copyrighted material, and come to the conclusion of whether or not their work was fair. The rest of the class then discusses their fair use analysis. This authentic learning experience (which is much more preferable to an actual court case) helps students see how fair use and copyright apply to them.

ETHICAL ISSUES IN IMAGE USE

Image use and visual appropriation have several ethical dimensions. A power differential exists whenever something is taken. The user of an image has power over the image creator or the subject of the image. Appropriation often reflects the dynamics of race, gender, or socioeconomic status. There is always a passive side to image use: those whose work, culture, or identity is taken and manipulated without consent. In some cases the results can be upsetting and painful for those whose image or identity has been misappropriated (Nelson, 2003).

When power differentials in appropriation reflect race and gender, image use treads into extremely fraught ethical territory. For example, when artist Richard Prince collages images of Rastafarians in his *Canal Zone* series, what are the racial implications? In an image like Richard Prince's there are several layers. There is the power differential between Prince and the photographer, Patrick Cariou, and between Cariou and the subject of the picture. It is indeed the man in picture who has the least agency or say over how his image is used. Appropriated images can "render the bodies of the powerless through the intellectual and ideological categories of the powerful in relation to a series of dynamic axes—race, gender, subjugation, and their social classifications" (Baselitz et al., 2012, p. 171). In another prominent example, Andy Warhol's *Flower* series appropriated a photograph taken by Patricia Caulfield. His supporters' defense of using this image marks a particularly ugly episode of sexism in appropriation. The early Warhol literature states "Warhol had found the original photo in a women's magazine; it had won second prize in a contest for the best snapshot taken by a housewife," (Crone, 1970, p. 30) when in fact she was the executive editor of *Modern Photography*, and the picture appeared on that magazine's cover (Buskirk, 2003).

When students have creative output they often think only of their own right to use the images of others, not what happens when their work is used by someone else without attribution. When students think of appropriation they often imagine themselves as Robin Hood, the unknown artist skewering the famous. However, the reality is much different. Famous artists often appropriate the skill and work of the lesser known, leveraging their own notoriety into large sale prices. Creative works have recently been appropriated for advertising; many of these appropriations avoid copyright infringement by copying "just" the idea of the artwork. Examples include Gillian

Wearing's *Signs,* which was used in a Volkswagon commercial, or Christian Marclay's *Hello* where his idea was then used in an Apple commercial (Fineman, 2008). There is an "emotional urge to be recognized as the creator or to protect a creation from perceived disfigurement," and it may be students who feel this most acutely (McClean & Schubert, 2002, p. 69). Using these case studies, the tables can be turned on students who might at first argue for the right to copy and appropriate, but then change their mind when faced with cases of their own work being appropriated by businesses or more well-known artists.

Image use can often imply that one purpose or form is better or more meaningful than another. An example of this perspective is the idea that painting or sculpture is an interpretative step beyond photography. We see certain patterns of appropriation repeated over and over, both following and partially constructing hierarchies of media. In the example of painting and photography there are many case studies: Warhol & Caulfield, Prince & Cariou, Fairey & Gracia, Rauschenburg & Beebe. As artists blithely incorporate photographs in their work, photography becomes the base upon which the artists start and is thought of as the raw material which they then elevate into works of high art. In this problematic construction photography becomes separated from its creator, and is almost authorless. Such a paradigm does not recognize that photography is never a neutral artifact—there are always visual choices made by the photographer that go into crafting just the right image

This tendency to dissociate photos from their authors has only been exacerbated by the web, where images without attribution run rampant. Tools like Google Images make it easy to never even see the original context of an image on the web. This makes it difficult for students to self-evaluate their use of photography and to understand when a reference has crossed the line into unacceptable copying. The issues of appropriation seem even more relevant in today's digital world, but are we also creating new hierarchies in digital art? Video games, movies, and music have all been the basis of digital art projects. Hacked video games, movies spliced together, musical remixes all are staples of digital art. Are digital artists contributing to a new digital hierarchy? Are these items, since they are meant for popular consumption less artful? Students should be cognizant of the ethical implications of these hierarchies that they may otherwise be participating in unknowingly.

TEACHING THE ETHICS OF IMAGE USE

Students need to be encouraged to consider these ethical issues and the questions they raise. In getting students to critically engage with these issues, we can teach them to question the nature of their image use. When a student appropriates images of "the other" or of those who do not or cannot consent to the use of their image, what are her/his ethical obligations? Even if student has a strong fair use case and can use an image, should they? There are plenty of examples of image appropriation that can be used as case studies to explain the ethical implications of image use or to spark debate. The practice goes back to the beginnings of art history, and

particularly useful examples include French academic orientalism or Gauguin's Tahiti paintings. But there is no shortage of contemporary case studies as well. By placing the original and the appropriated images on the screen and then asking open ended questions, we can begin to have students work through their own ideas on the ethical issues in image use. Discussion and debate are key, because the desired learning outcome is not rote knowledge, but rather critical thinking about the potential ethical implications of the student's own image use—an area even more grey than copyright. In my classes judicious use of hypothetical scenarios, leading questions, and playing devil's advocate can make sure discussion is lively and productive.

CONCLUSION

The legal and ethical implications of image use are a key and often overlooked part of visual literacy. By teaching about copyright, fair use, and the ethics of image use, we can give students the foundation to analyze their own uses of images. It is a critical thinking skill that can be exercised in an engaging and relevant ways, and is often a topic students are both concerned and confused about. The clarification that instruction provides is often welcomed by students, and for them, the discussions are both thought provoking and invaluable learning experiences.

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