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Copyright Clearance: A Publisher's Perspective

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Asking Permission: When Does It End?

“When does asking permission end?” The short answer is: It doesn't.

As everyone reading these pages knows, we live in a world of permissions, today more than ever, as the creative and commercial possibilities of the Internet make us increasingly preoccupied with access and control.

In fact, the ritual of asking—and granting or withholding—permission has become so deeply embedded in our “cyberpsyche” as to put forth a neural glow and, like a widening gyre, has created large-scale disturbances in what the Stanford law professor Lawrence Lessig calls the “ecosystem of creativity.” As another pundit put it, “Life in our licensed culture has begun to feel natural.”¹

To ask permission to publish an image, or not? That is the question that torments authors. Some editors will urge you to err on the side of caution, to seek every conceivable kind of permission for every little thing. But as anyone who has had to clear permissions knows, caution is not always the safer course. By asking someone for permission to publish an image, you are granting them the right to say “no,” although what rights owners are more likely to say these days is: “Sure, but it's gonna cost you.”

Every day we receive alarming reports from the field: \$8,000 spent in fees for a narrowly conceived book about illuminated manuscripts, even more for studies situated in the twentieth century. Hideous sums invested in books that will likely sell fewer than 1,500 copies. An art historian I know who is writing a specialized study of one of the collections at the British Museum was invoiced £5,000—not dollars—by the museum for reproduction rights alone, not counting the cost of actual photographs. Of course, such high fees are not unique to the museum world. To publish a photo of the 9/11 disaster, a New Yorker cartoon, or a dead shark by the artist Damien Hirst will very likely cost an author or publisher even more (on a unit basis). Why so expensive?

The answer, put simply, is: nobody has any money anymore. Cultural and educational funding has diminished in the U.S., the U.K., and Europe, and we must all rely increasingly on our own schemes and assets to generate the

income needed to keep programs running and the doors open. At American museums, this takes many forms: from the mounting of exhibitions and the loan of important artworks to a range of fundraising efforts, such as wine tastings and adventure trips up the Nile.

Another income-generating source involves licensing and reproducing images for publication. Depending on the size of the institution and the range of its collection, this can vary from an assistant processing a handful of requests each week to a full-blown rights-and-permissions department headed, more often than not these days, by a merchandising expert who may earn more than the curators. At some financially strapped museums this income stream is a lifeline; for others the income may be only modest. But as sources of images proliferate, we increasingly find that this activity is becoming less about the provision of actual images and more about the brisk trade in the abstract commodity of permission.

I'd like to tackle just one piece of this pie: the current crisis surrounding works in the public domain, that cornucopia of intellectual material that is no longer protected by copyright. Between the recent extensions of copyright terms and all the "extralegal" trappings linked to claims to legal entitlement, the public domain has become so severely compromised that, as a legal category, it is now seriously endangered and could very well outpace the silvery minnow in its rush to extinction.

How, one might reasonably ask, could such an assertion be true? After all, the public domain is huge. Technically, anything in the public domain is yours to publish, and, from the standpoint of copyright, you don't need anyone's consent to do it. Either the term of protection has expired or the work may never have been in copyright in the first place.

All sorts of things are in the public domain: the oeuvre of Eugène Delacroix, for example, because the French painter has been dead for many more than seventy years and no longer has an active estate; certainly the *Mona Lisa*, whose creator lived five hundred years ago, long before copyright was invented

A common principle used to hold that once something was released into the public domain it could not be taken back. In the past thirty years or so, however, several laws have restored copyrights in some formerly public-domain works. Premised on alleged injustices in earlier copyright laws, such moves are very often prompted, in America at least, by efforts to appease powerful content providers.

Not only can we no longer be assured that just because something enters the public domain it won't come back into copyright, but in consequence the whole Enlightenment idea of a public domain is also becoming obsolete. And while nobody owns the public domain per se, there is nonetheless a struggle intensifying over who among us actually controls it. This disagreement is more than a pleasing tension between two intelligent points of view. Everywhere roadblocks are being erected, the domain walled off behind a barrier of secondary ownership and noncreative entitlements.

In the art world, many institutions and individuals who own public-domain objects are working to change the basis of copyright protection altogether by asserting coverage for precise, photographic copies of two-dimensional materials in their collections. I am not referring to new prints pulled from old plates or negatives, such as etchings or fine-art photographs. Nor am I talking about photographs of three-dimensional artworks like sculpture or installations. Those are a different matter.

But with paintings, drawings, and the like, institutions are claiming copyright to the reproductions themselves and forcing others to assert that claim for them (usually in a published caption or credits section) in exchange for permission to publish. In essence, they are claiming to copyright a copy. To do this is to ignore some recent case law where courts have ruled that slavish copies of two-dimensional artworks do not qualify for copyright protection because they do not exhibit a minimum amount of originality.

Still, the people and institutions who make and license these lowly copies push for their ennoblement, and on the face of it this seems harmless enough. In fact, it may come across as petty to deny a hard-working art photographer protection for his or her effort. (Though often the photographer works “for hire” for the institution, which holds the copyright.)

But what does it mean, in a larger sense, to claim one can copyright a copy? If the copyright of a work in the public domain has lapsed, why should reproductions of that work qualify for protection?

At stake is the very definition of copyright.

Much of the current legal flurry over the public domain revolves around the making of digital copies in cyberspace. As museums and collectors trade film for binary bits, they are joining far more powerful allies in hammering out the rights that attend the digital—and not just the mechanical—age.

Law related to the production and dissemination of intellectual property in this new environment is evolving rapidly, for today owners must consider what happens when their property is made available to whole franchises of users, not just the singular scholar or publisher. Electronic commerce offers all kinds of ways of doing business but, as we know, it has also created ingenious opportunities for theft, and on a very grand scale.

So much so that in 1998 the U.S. Congress passed into law the Digital Millennium Copyright Act (DMCA). Owners of electronic content, including images, have developed software to prevent it from being downloaded or copied, and the DMCA makes it illegal for anyone to circumvent that software or to “publish” software designed to do so. While the DMCA was intended to prevent illegal circumvention, it has also prompted a number of content providers to try to lock down objects in the public domain by batching them together with copyrighted materials and storing them in digital repositories with strictly controlled access.

Further, though the DMCA is minted with the jargon of a new frontier, it seems curiously vacant of language to balance the rights of content owners against a “public need” or “common good”—trace evidence of a natural generosity that we would like to think endures in modern communities. The

newest laws and international treaty discussions also reflect a general erosion of the test of originality—or any test, for that matter, to ascertain what material qualifies for copyright.²

As a book editor, I wonder: Does publication make intellectual property worth more or less? When it comes to art, at what point does mass duplication exhaust an image? Does it matter how an image is used?

Consider how many times people view a copy of the *Mona Lisa* immured in the fob of a key chain or impressed upon a tea tray, and then purchase a ticket to the Louvre. Those crowds huddled around Leonardo's masterpiece are as dense as ever. All those copies circulating through our culture have not diminished the lady a bit.

Make no mistake: *Les Demoiselles d'Avignon* is an enormous draw for the Museum of Modern Art. Seeing it featured in books—and thus constantly reinvigorated in cultural and intellectual life—keeps those admissions fees coming and the turnstiles clicking. Ditto Georges Seurat's *La Grande Jatte* at the Art Institute of Chicago. Double ditto the *Mona Lisa* at the Louvre.

Of course, after hundreds of years, the reputation of the *Mona Lisa* is well established. But culture is a shared activity, and many other artworks—in fact, the vast majority—need to be put forward regularly, over and over, through publication in print or online to reinforce their relevance to culture. Reproductions thus make art worth more, not less.

There is no question that the huge cost of acquiring illustrations and the permission to publish them has become such an impediment to art publishing that it exerts a profound drag on the field. Clearly scholars—including those at museums, which also develop publications—need some relief from the onerous burden of permissions. At the same time, the rights of individual creators must be protected. Both are crucial to a cultural environment that thrives on creative enterprise, but how to reconcile the two? In particular, what can scholars—as a collective—do?

First of all, in this consuming world, scholars need to remember that they, too, are members of the creative class—and also that as users, as customers, they possess enormous power. There are today countless purveyors of visual content, much of it identical, so why should it be a seller's market? Since duplicate images have remained such hot commodities in what must be acknowledged as a saturated field of industry, we should look to other markets that have been transformed by recent advances in technology: the book market, for example. Search engines like Amazon.com and Alibris transformed the book market, especially the used-book market, from one dominated by antiquarian booksellers to one easily exploited by buyers, which drove the prices of all but the rarest tomes down.

Could something of the sort work for images? Especially for those in the public domain? Authors hunting for illustrations could type a list of needs into a website search engine and have vendors return a range of prices and options to them, including formats and incentives for batch orders. As vendors start to compete for business, there might be online specials (“two images for the price of one if you order today!”), free shipping for orders over \$100, and so on.

Right now, it's easy to browse various photo archives online. But it's not so easy to figure out who might be offering the best deal. Many archives want you to place an order before they tell you how much it will cost. And some archives assert restrictions on use of images regardless of whether the works are in copyright or in the public domain by means of warning notices that may or may not reflect appropriate intellectual-property laws.

Granted, it wouldn't be easy to convince big players like Bridgeman Art Library and Corbis to compete online for your business, but small vendors seeking wider exposure and individuals who possess photos they have taken themselves or purchased without enforceable restrictions would at least get the project started. With time, this idea would gain momentum.

Obviously, this model cannot apply to copyrighted artworks, nor should it. Those still need to be cleared with artists or their agents—but such a system would reduce charges and help to put paid to the notorious “repro” fees that some institutions assess when you publish objects in their collections. Repro fees are the fees you may be required to pay over and above the cost of the actual scans or photos of the artworks; their effect is to claim a copyrightlike right to restrict and control use, often asserted through clauses in the image rental contract. Sometimes that claim is warranted, but other times it's not.

What else can we do to turn the market for visual intellectual property around, short of drafting a Supplicant's Manifesto and nailing it to the front doors of image lenders?

Point 1 is obvious: If you don't need illustrations to make your case, don't use them. Be sure that every image that goes into your book is essential to the argument.

Point 2: If you *must* use certain images, never do anything that would encourage property owners to increase their fees. Always negotiate. If you get a bill for £5,000 from a museum, offer £2,500.

Point 3: Offer lenders the chance to invest in your project. Suggest a fee scheme scaled to profits. Silly? Yes. But it's silliness with a point. Tell the lender you are prepared to set aside a significant chunk of your income from sales of the book to be shared by everyone who contributes to the project. Let's say your book will be two hundred printed pages. If the lender's image appears in a full page in color, she or he would be entitled to 1/200th of your royalties. For most books this would amount to the princely sum of maybe \$5.00 over the life of the book. The return on investment for a quarter-page image in black and white would, of course, be far more modest.

Point 4: If you are working with a university press in the U.S., encourage private holders of copyright to file for a tax deduction in exchange for a waiver of fees. If your publisher enjoys a nonprofit status, the waiver might qualify as a charitable contribution. (Be sure to discuss the pros and cons of this strategy with your publisher before you make such an offer.)

Point 5: When lenders of images assert copyrightlike restrictions and fees on public-domain works, they are infringing the public domain. Establish a “copyright police” for infringement, especially regarding copyright claims for reproductions of two-dimensional artworks. Perhaps we need a bulletin board on

the Web where we can discuss prices for images from various lenders and note restrictive or beneficial practices by them.

Point 6: Be flexible about your illustration program. Ask your publisher to give you a list of image lenders who charge reasonable or exorbitant fees. Sometimes one French Gothic spire will serve as well as another.

It's important to describe the nature of your project up front to lenders. Many of them do consider whether the permission you seek is for a scholarly book or a more commercial project when they calculate a fee. And most are aware of the erosion in the market for art books, but you should take every occasion to remind them of it. Here, I must say, there are already signs of a thaw. The British Museum, I'm told, has decided to waive reproduction fees for images that will appear in books with print runs of fewer than 750 copies. Of course, it's the rare publisher who fires up the press to print so few copies. This move by the British Museum is in some ways ineffective, but at least it means fees are headed in the right direction: down!

Other institutions are also revisiting their rights and permissions programs: Kenneth Hamma at the J. Paul Getty Museum has proposed placing its public-domain holdings on the Web in high-resolution scans suitable for downloading and printing—for free, on the grounds that the public domain is the public domain.³ If you want to reproduce François Boucher's *Fountain of Love* on a tote bag and sell it, that's your business. Taking an image of the painting out of the museum and copying it—despite Walter Benjamin's admonition—doesn't make the original work any less valuable or interesting. In short: the painting is not being used up. It is simply being used.

The theologian Mark Taylor said recently, "Money and markets do not exist in a vacuum but grow in a profoundly cultural medium, reflecting and in turn shaping their world."⁴ Nowhere is this more evident than in the culture of permission. We have reached a moment in research and in scholarly publishing when it's absolutely crucial to consider why, given the surfeit of visual content on offer, the image continues to be a pawn in a seller's market.

It's time for this to change. Or, at least, it's time to make some adjustments and rebalance the values that drive us as a creative class to make work that we hope deeply, as people, will contribute to our common good.

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1. Virginia Rutledge, "Fare Use," *Bookforum* 12, no. 1 (April/May 2005): 33.
2. See "Revised Consolidated Text for a Treaty on the Protection of Broadcasting Organizations," prepared by the Chairman of the Standing Committee on Copyright and Related Rights in cooperation with the Secretariat, World Intellectual Property Organization, SCCR/12/2, October 4, 2004. See also commentary by Wendy Grossman, "Broadcast Treaty Battle Rages On," *Wired News*, August 28, 2004: <http://www.wired.com/news/culture/0,1284,64696,00.html>
3. See <http://www.cni.org/tfms/2005a.spring/abstracts/PB-hamma>

-public.html and http://www.cni.org/tfms/2005a.spring/abstracts/handouts/CNI_hamma_public.doc. Kenneth Hamma is executive director for digital policy and initiatives at the J. Paul Getty Trust.

4. Mark Taylor, *Confidence Games: Money and Markets in a World without Redemption* (Chicago: University of Chicago Press, 2004), 156.