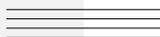


W H O O W N S T H E A R T ?



R U T H B E R N A R D Y E A Z E L L

When I first began to write about pictures two decades ago, I used to joke that the pain of acquiring reproduction rights, like that of giving birth, could be undergone twice only by someone who'd forgotten how much it hurt the first time. I still think there's something to the analogy, but these days I'm more inclined to think about the costs of the operation and the arbitrary system that underlies them.

The New York Times recently ran a series about medicine in the United States that documented, among other things, the vast discrepancies in charges for a variety of standard procedures not just in different regions but within the same area: the cost of an echocardiogram in Philadelphia ranges from \$700 to \$12,000, for instance, while a minimally invasive gallbladder surgery will set you back \$40,000 at one Florida hospital and \$91,000 at another. Nor do such differences appear to have any discernible relation to measures of quality: the piece on echocardiograms told of a retired professor of mathematics in New Jersey who had two versions of the procedure, one at a local community hospital that lasted less than thirty minutes and cost \$5,500, and a second at a teaching

hospital in Boston that included a cardiologist, took three times as long, and was billed at a relatively modest \$1,400.

Acquiring images for a forthcoming book is hardly a matter of life and death, of course – though it can sometimes feel that way – and the individual sums involved are far smaller. But navigating what a recent report to the College Art Association calls “permissions culture” can be almost as challenging as figuring out what you’re likely to be charged for an uneventful delivery in a country without a National Health Service. And when the artists in question are covered by copyright, the total bills can mount into the tens of thousands more quickly than you might think.

What both “markets” have in common is that they’re not really governed by competition and that the consumer is pretty much at the mercy of whoever sets the price. As many commentators on the U.S. scene have noted, a person in need of serious medical care is in no position to shop around, even if the comparative data were far more accessible than they are. Your local hospital may not have a monopoly on gallbladder operations, but for all intents and purposes it might as well be the only show in town. In the case of paintings, reproductions of some famous works are available from more than one licensing agent – Art Resource in New York, the Bridgeman Art Library in the United Kingdom, and Scala in Italy are the most prominent – but many others are under the control of a single vendor, whether one of these image banks or the museum that owns the original. If you’ve just written several pages (or an entire chapter) on a particular painting by J. M. W. Turner, it does you no good at all to learn that you can acquire the rights to another Turner more cheaply from a different source. And even when the same image can be purchased from more than one source, comparison pricing is complicated by the fact that vendors don’t necessarily calculate costs in the same way. Some distinguish between color reproduction and black and white, or price according to the size of the image on the page, while others charge a flat fee no matter how the image will appear; there are different prices for different print runs, but not everyone agrees on where to draw the line between scholarship and commerce. Generally speaking, however, two thousand copies seems to mark the outer limit of a scholar’s purity: anticipate any more, and you’re apparently in it for the money.

Digital copies, of course, threaten to make the whole business of print runs obsolete. Since I last wrote about pictures, this has produced a new line in the contracts, seeking to contain the damage by limiting e-book rights to five or ten years. (At the end of which time, it's implied, the author and publisher will either negotiate all fees anew or frantically attempt to delete the offending images from the still circulating text.) Such contracts also specify the maximum dpi (dots per inch) at which images can be electronically reproduced, presumably in order to ensure that no pirate will be able to download and publish them for free. That no one knows whether e-books in their present form will even exist by the time these contracts have expired is almost beside the point: the real fear is lest digitization mean the rights-holder's ultimate loss of control over the image.

But what rights are we talking about in the first place? Here things get tricky. Most paintings produced before the twentieth century are in the public domain and not subject to copyright. When you order an image of such a painting from the museum that owns it, or from one of the image banks, what you're really paying for is the convenience of having someone else supply a publishable copy of the original. Before the millennium, this usually took the form of a photograph or a color transparency available on loan for a limited period; nowadays, almost everything is a digital download, though some smaller museums still prefer to ship images on a CD. There's no denying that the image banks in particular offer a real service, especially for heavily illustrated books whose originals hang in collections all over the world. Whether any provider can claim exclusive rights in the images it sends is another matter, however.

Some years ago, I ordered a transparency of a painting by Jean-Léon Gérôme from the Museum of Fine Arts in Boston. Our multi-page contract committed me not only to pay for use of this "Authorized Image" and to supply the museum with two copies of the book in which it would eventually appear (still a standard requirement of many such agreements), but to reproduce the Authorized Image in full and to submit color proofs for approval before printing. Viewed sympathetically, all this concern for the final product might be understood as following from the museum's commitment to the integrity of the works in its care, what-

ever the additional burdens thereby imposed on authors and publishers. A closer look, however, suggests that the MFA's immediate concern was not Gérôme's painting but its own photograph of the picture – a photograph that it chose to treat as deserving protection apart from the object for which it stood. “The photographic images referenced in and provided to you under this invoice,” the fine print announced, “depict objects from the MFA's collection in a manner expressing the scholarly and aesthetic views of the MFA. The Images are not simple reproductions of the works depicted and are protected by copyright.” The paragraphs that followed went on to warn that there might be other rights in the images about which the museum made no claims, invoked “the laws of The Commonwealth of Massachusetts” by which I agreed to be bound, and spoke ominously of all the legal fees and related costs (including those of “expert witnesses and other consulting professionals”) for which I might be liable should the museum find it necessary to file a claim against me in connection with this license.

I don't know whether the MFA still issues such warnings, since I haven't had occasion to use one of its images since the turn of the present century. But it happens that a judgment issued a year before I signed that contract might have already raised serious doubts about the museum's position. According to the ruling in *Bridgeman Art Library v. Corel Corp* (1999), “exact reproductions” of public domain images are not subject to copyright. Bridgeman had sued when it discovered that the Canadian-based software company was selling a CD-ROM with digitized images of paintings that looked suspiciously like those in its own collection. In dismissing the suit, Judge Lewis A. Kaplan of the United States District Court for the Southern District of New York didn't deny that most photographs were copyrightable – only that Bridgeman's effort to produce faithful copies of the originals argued against it. (The Library's testifying to the use of color bars for greater accuracy didn't help its case, nor did the fact that both copies and originals were two-dimensional objects, the implication being that photographs of sculpture or other three-dimensional artworks would necessarily entail more by way of creative interpretation.) The suit was actually litigated twice, at the plaintiff's request: the first time round, Kaplan had drawn on both U.K. and U.S. law in arriving at his decision, while on the second occasion he confined himself to U.S. law only, even as he

registered his conviction that the same result would have obtained had the governing law been that of the United Kingdom. Bridgeman predictably disagrees; and according to Wikipedia, it is on record as looking for “a similar test case in the U.K. or Europe” in order to strengthen its position. In the meantime, few subsequent cases on either side of the Atlantic have helped clarify the issue. The authors of the College Art Association report may claim that *Bridgeman* has become the “de facto industry standard” in the years since it was litigated, but they spend most of their time describing the culture of risk aversion that still dominates the field. As they make clear, it’s fear rather than any particular ruling that typically constrains scholarly practice. Even if you sensibly recognize that the threat of a lawsuit is overblown, you may nonetheless worry that a museum or image library will simply refuse all future requests unless you follow protocol now. Better to seek permissions, pay the fees – assuming you can afford them, that is – and not rock the boat.

At least the MFA had the only plausible claim on that Authorized Image of Gérôme. Start writing on Picasso or Jackson Pollock, and you quickly learn that acquiring a good reproduction is not the only thing you need worry about. Most paintings produced over the past hundred years are still protected by copyright, and “ownership of a copyright,” as the Artists Rights Society informs us, “is distinct from ownership of any material object in which the work is embedded.” Founded in 1987 and apparently the largest such licensing agency in the United States, the ARS claims on its Web site to represent “the intellectual property rights interests of over 50,000 visual artists and their estates from around the world.”

The back of my ARS contract usefully cites excerpts from a variety of documents pertaining to the rights in question, including a solemn warning directed at art museums, lest they forget that ownership of a painting – even one purchased “at great expense” – by no means guarantees possession of the relevant copyright. “The museum may believe erroneously that ownership of the object includes ownership of the copyright and therefore the right to reproduce the work on a poster or postcard for sale in the museum shop,” but this “error” – all too common, the passage implies – results from a conceptual confusion. Unless the artist or artist’s estate has specified otherwise, the museum “no more owns

the copyright in the painting than if it were to acquire the copyright in a literary work by buying a paperback book at a bookstore.”

This last analogy certainly rings true to the history of copyright, but I expect that most painters would find it disturbing. Even artists unusually eager to control the dissemination of their work might think the equation of their painted canvas with a mass-produced paperback a high price to pay for the privilege. The problem, of course, is that the concept of intellectual property has no way of capturing what Nelson Goodman called the “autographic” character of the painter’s art – the fact that these particular brushstrokes are the product of an individual hand whose distinctive marks may be imitated but never replicated by the hand of another. For Goodman, the test of an autographic as opposed to an “allographic” art is its vulnerability to forgery: a vulnerability alien to literature or music, at least when known works are at issue, but one that always threatens the history of painting. We can imagine a forgery of Rembrandt’s *Lucretia*, to use Goodman’s example, but while someone could pretend to have discovered a missing poem by Thomas Gray, “there is no such thing as a forgery of Gray’s *Elegy*,” since any accurate copy of that poem “is as much the original work as any other.”

Indeed, it is precisely because the technology of print made the dissemination of originals in this sense so easy that England passed the first copyright law in 1710. Many subsequent battles have concerned the duration of its term, which has steadily expanded over the centuries: what began as a limited monopoly of fourteen years, renewable once by the author if still alive, now generally stands at seventy years after the author’s death. In a new book on the subject entitled *The Copyright Wars: Three Centuries of Trans-Atlantic Battle*, Peter Baldwin shows how pressure from Continental countries, with their long tradition of fetishizing the rights of authors, gradually overcame the British and American habit of balancing those rights against the interests of the public. I owe permission fees for two works by Jackson Pollock to the Sonny Bono Copyright Term Extension Act of 1998, which followed the European Union’s lead by expanding protection from fifty to seventy years after the artist’s death. (Pollock died in a car accident in 1956; the act was named after the former pop singer turned Republican

congressman and copyright zealot who had recently died in a skiing accident.)

There's a particular irony in seeing a visceral artist like Pollock protected by a law that effectively replicates the old hierarchies. Aesthetic theory once deemed the painter's handwork inferior to the mental labors of the poet; now the legal system grants "intellectual" property to both, but only by again treating the embodiment of such property as irrelevant. As far as copyright is concerned, nothing might have changed since Renaissance artists prided themselves on their *invenzione* and *designo*, while leaving the lowly business of execution to their workshops.

By successfully campaigning in 1735 for a copyright in engravings, William Hogarth and his colleagues may have inadvertently contributed to this tendency, since this first law to protect visual artists in Britain was precisely aimed at those who "invent or design" for an art of multiples. But it's easier to grasp why even a magnificent Hogarth print might be likened to the paperback edition of a book than it is to divorce the invention or design of Pollock's *Pasiphaë* from the canvas that now hangs in the Metropolitan Museum in New York. It's also easier to see why Hogarth feared that cheap imitations might threaten the market for his engravings than it is to see how a painter is injured when his or her own work is engraved or photographed. As Lord Fermoy argued during debate on the British Fine Art Copyright Act of 1862, such reproductions could only enhance the artist's reputation.

And why should I require permission from an artist – let alone an estate – in order to reproduce an image of the artist's work for the purpose of commenting on it? According to the latest word from the College Art Association, I really shouldn't. In a welcome follow-up to its copyright report, the association has just issued *Code of Best Practices in Fair Use for the Visual Arts*, which seeks to dispel the culture of self-censorship the earlier report documented. From surveys of editors and publishers, museum staff, art historians, and artists themselves, the first report drew some damaging statistics: more than a third of all respondents and over half the editors and publishers testified to having abandoned a project because of permissions costs, for instance, while scholars who paid for such costs themselves estimated that they could range up to twenty thousand dollars per book. (See Patricia Aufderheide et al.,

Copyright, Permissions, and Fair Use Among Visual Artists and the Academic and Museum Visual Arts Communities: An Issues Report.) At my own university there are subventions and research funds to defray such expenses, but what about those at less well-endowed institutions – let alone independent scholars and critics?

Some authors reported devoting nearly a third of their time on a project to the business of acquiring permissions. Others spoke of settling for inferior images in order to avoid exorbitant fees, or of deliberately choosing not to work on modern art so as to minimize the problem of copyright. (Museums do this too.) And a number of people were understandably confused as to the difference between copyright and “access fees,” the report’s term for the service charges levied on reproductions whether or not the originals have entered the public domain. Interestingly, most museum professionals thought such fees didn’t represent an important source of income for their own institutions but imagined the situation might be different for others. Such uncertainty about what everyone else is up to appears to be characteristic of permissions culture.

Those of us who analyze or exhibit art rather than make it ourselves may be amused to learn that artists as a group were the least likely of the survey’s respondents to worry about the issue of copyright. An age of appropriation and mash-up seems to have heightened their readiness to use what they please. Though they, too, reported abandoning projects lest they run afoul of the law, most believed their creative re-purposing of others’ work trumped legal niceties. Most also took a relaxed attitude toward the prospect of having their work adapted by others. “The only original art is the first cave painting,” as one put it. What the report politely terms “willed ignorance” appears to provide some artists with a useful resource when it comes to permissions culture. “I shouldn’t have to know everything about this,” said one. “It would hurt my work.” Editors and publishers, on the hand, turn out to be the group most knowledgeable about copyright law – and also, discouragingly, the most risk averse.

Offering to provide more information under these circumstances might seem quixotic, but the new code seeks to change the culture by assuring everyone involved that they have less to fear than they might think. Despite the confusions documented in the first report, most of us apparently agree on what should constitute

Fair Use. According to “Analytic Writing” – the section to which I turn – much of the permission I’ve been seeking has been superfluous. (The copyright permission, anyway: as the code acknowledges, those access fees will remain a problem until most museums join the enlightened trend of making their entire collections freely available online.) Generally speaking, the doctrine of Fair Use requires that you transform a work in some way, but that doesn’t mean that I need to cut up the Pollock and incorporate the bits into a painting of my own – only that I give it new context and purpose by writing about it. The sparse case law also suggests that judges want you to have an explanation for what you’ve done, and I have plenty of those. Of course, the point is not to spend time preparing for my day in court, but to proceed with the confidence that I’m using an image fairly. The more writers and editors choose to act on that assumption, the code implies, the sooner we will see the end of permissions culture.

It’s a sensible solution, and I’m all for implementing it. But Fair Use is an American doctrine – the British equivalent, “fair dealing,” tends to operate more restrictively – and it’s by no means obvious that judges in the United Kingdom are going to be bound by the precedents the code cites. And then there is France, where as recently as 1999 a television station was successfully sued for royalties when it briefly showed some paintings by Maurice Utrillo in the course of reporting on an exhibit. According to *The Copyright Wars*, an exception has since been carved out for “snippets” of works shown in news reports, but its tales from the Continent are still disheartening. One of the reasons the United States has a robust doctrine of Fair Use is that we started out with little culture of our own and thus took to adapting – or stealing – from others. Their medical systems may now put ours to shame, but there’s something to be said for having once been a nation of pirates.