Fair Use Too Often Goes Unused

By Noah Berlatsky May 10, 2017

W hen you are writing a book analyzing images from Kurosawa's *Rashomon,* you should include images from the classic 1950 film. The logic behind that seems straightforward — but the logistics can be less so.

For Blair Davis, an assistant professor of communications at DePaul University who edited *Rashomon Effects: Kurosawa, Rashomon and their Legacies,* published in 2015 by Routledge, getting permission to use the stills in the book turned out to be almost as difficult as ferreting out the truth in the film itself.

"I spent at least a year dealing with the Japanese corporation Kodansha, which owns the rights," Davis told me by email. He had to "hire someone who spoke Japanese to conduct face-to-face negotiations in Japan." Worse, in the end, Davis wasn't even allowed to use the images he had asked for. Kodansha insisted he choose from a small selection of publicity photos, rather than the scenes actually analyzed in the text.

Davis's acquisition process was more arduous than most, but the general predicament will be familiar to many academics who work with film, art, comics, or other visual materials. Many academic presses and journals require permission for the reprint of any images. For instance, Julia Round, a principal lecturer at Bournemouth University and editor of the journal *Studies in Comics*, told me that, at the request of its publisher (Intellect Books), "we always seek image permissions." Only if authors can't track down

permissions holders, Round said, does the journal consider printing small images under the legal doctrine of fair use.

But while publishers want authors to get permission, the law often does not require it. According to Kyle K. Courtney, copyright adviser for Harvard University in its Office for Scholarly Communication, copyright holders have certain rights — for instance, if you hold rights for a comic book, you determine when and by whom it can be reprinted, which is why I can't just go out and create my own edition of the first Wonder Woman comic. But notwithstanding those rights, fair use gives others the right to reprint materials in certain situations without consulting the author — or even, in some cases, if the author has refused permission.

Courtney explained that courts have used a four-factor test to decide whether or not the reproduction of artwork, or other elements, falls under fair use. Judges look first at the purpose of the use; then at the nature of the copyrighted work itself; then the amount of the work reproduced; and finally at the effect of the use upon the market. Thus, when you publish — for scholarly purposes — a single image from a feature-length film that will not affect the market of the film, you have a good chance of being covered under fair use.
In the last decade, courts have also used the concept of transformative use, Courtney said. If you are using an image for a different purpose than it was originally intended, and thereby transforming it, you have a strong fair-use argument. "So if a comic book at the time period was to entertain, but you're doing a critical/social analysis of what the comic means today," he said, "you're applying a new meaning, a new message — you're transforming the original for a new purpose."

In some recent court cases, judges have upheld fair use after the copyright holder had explicitly denied permission. In the early

2000s, DK publishing was refused permission to reprint Grateful Dead posters for an illustrated history of the band. The publisher reproduced the images anyway, and then defeated the lawsuit in court. Asking a copyright holder for permission does not mean that you vitiate your fair-use rights. (Courtney has created a handy explanatory comic about the case, available here.)

Betsy Phillips, sales and marketing manager at Vanderbilt University Press, said that it evaluates fair-use questions on a "case by case basis." In particular, Vanderbilt treats marketing images very differently from reproductions inside the book. "There's a difference between a film still on the inside of a book that's discussed in that book, and a page from a comic book on the cover," she said. The amount of material reproduced is also important: A black or white thumbnail of a detail of a painting would probably be fine, but a high-resolution, full-color image of an entire work might require permission.

Phillips also emphasized that the press tried to keep a clear paper trail of its use of images, including discussions about the rationale for fair use of each image, and why permission did or did not need to be sought. She noted that professional societies often have useful guidelines. For instance, the Society for Cinema and Media Studies discusses fair-use policies on its website.

Of course, some publishers may still prefer to ask for permission each and every time you want your book to reprint an image — it seems safer. If you get permission, you know for sure that you won't have legal struggles. Why mess about with fair use, where there is at least a small risk of unpleasantness?

Seeking permission may seem safe, but it can have serious ethical and practical downsides.

Consider the case of David W. Stowe, a professor at Michigan State

University who wrote *Swing Changes: Big-Band Jazz in New Deal America,* a 1994 book about the cultural milieu of big-band jazz. Stowe wanted to reproduce cartoons from *Down Beat* magazine to illustrate the racism and sexism of the era. *Down Beat* had approved reprint requests for such materials from other scholars. In this instance, however, according to a 2000 account by Lydia Pallas Loren in *Open Spaces Quarterly*, the magazine refused because "the drawings made the magazine 'look bad.'" Stowe feared a lawsuit, and so did not use the images. Asking for permission gave the magazine a chance to stifle criticism.

Copyright holders may also try to force a press or an author to cough up exorbitant fees for reprints. That can be a financial hardship for a scholar, or simply make it impossible to use the images — which isn't censorship per se but does damage scholarship.

As Julia Round explained, "Having to describe an image wastes so many words! And it simply doesn't substitute for seeing the image itself. It's so complicated trying to talk about complex page layouts, or attempting to explain a particular effect, or describing the idiosyncrasies of a font, or a precise shade of color."

Omitting the image also prevents readers from analyzing it for themselves. If a critic says a particular shade of green in the image is sickly and disturbing, the reader has no choice but to take the writer's word for it, unless the image is reproduced. Of course many images today are online and can be easily Googled, but many other comics, film stills, and paintings remain offline and inaccessible. If you can't show the image right in the text, Round concludes, "it makes it hard for any reader to fully understand and critically engage with what is being said."

Books and journal articles about visual culture need to be able to

engage with, analyze, and share visual culture. Fair use makes that possible — but only if authors and presses are willing to assert their rights. Presses may take on a small risk in asserting fair use. But in return they give readers an invaluable opportunity to see what scholars are talking about.

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