

A Summary on the Workshop: Guidelines to the Best Practices for Accessing Visual Images from Japan, AAS Panel #61: Friday March 26, 2009 10:45-12:45 Sheraton Chicago Hotel Ballroom 10, Level 4

Panelists: Theodore C. Bestor, Professor and Chair of the Department of Anthropology, Harvard University; Rachelle Browne, Associate General Counsel, Smithsonian Institution; Patricia Crosby, Executive Editor, University of Hawaii Press; Izumi Koide, Director of the Resource Center, Eiichi Shibusawa Memorial Foundation; Satoshi Tarashima, Senior Manager of Loans, Tokyo National Museum; and Reiko Yoshimura, Director of the Library, Freer and Sackler Galleries of Art

Theodore C. Bestor, Professor and Chair of the Department of Anthropology, Harvard University welcomed the audience and introduced the panel. He thanked the funders of the IUP Project; Japan Foundation, Toshiba International Foundation, the Japan-US Friendship Commission, the Shibusawa Eiichi Memorial Foundation, University of Toronto Libraries, and International House of Japan. He also thanked the volunteer members of the NCC's Image Use Protocol Task Force who have donated great amounts of time to realizing the IUP's goal of launching its Website.

Workshop Objectives: The IUP Workshop was held at AAS to present the Image Use Protocol Website and to encourage members of the field to use it broadly in their teaching, research and publications. This project was prompted by faculty demand and the ongoing input of users is vital. He spoke briefly about the increased use of visual images by faculty in the field and the past challenges he had faced in gaining permission to use images in his publications.

Reiko Yoshimura, Director of the Library, Freer and Sackler Galleries of Art noted that locating images from Japan has become much easier because of the Internet and the development of new technology. Use of images as supporting material has been common in many academic fields for sometime. With increased access to visual materials and the growing visual orientation of students the need of images has increased markedly and faculty in all fields want to use visual images. However, there exists a great deal of confusion and misunderstanding about the proper use of images, that is, the appropriate application of copyright and fair use principles.

In 2007 the NCC formed the Image Use Protocol (IUP) Task Force to better understand the needs of academic users of visual images and to provide guidelines to help them obtain permission for image use. To achieve these objectives the IUP set out to: (1) conduct an online survey internationally; (2) clarify differences in publishing environments in US and Japan; and (3) establish guidelines for the best practice for image access and use.

NCC's online survey received 120 responses, from faculty, researchers, students, and others; and found a lack of both proper legal knowledge of where to find such information, and misunderstandings of cultural/social differences between US and Japan.

To help alleviate those information gaps a conference was held in Tokyo in June 2008 to promote mutual understanding among researchers, publishers, museums, temple and shrine groups, manga, anime and content industries, and image rights owners in both the US and Japan. Participants at the conference provided advice and input helping NCC to develop the best practices for obtaining permission to use visual images contained on the new website.

Izumi Koide, Director of the Resource Center, Eiichi Shibusawa Memorial Foundation first reported on the daylong Conference in Tokyo on June 23, 2008. The conference presented the IUP survey results, provided a forum for faculty and other researchers from the US and Western Europe to present their experience in attempting to use Japanese visual images, and raised questions with Japanese researchers about problems they may face.

Conference findings included: (1) in Japan permission for the use of images may be exempted from permission requirements by the provisions allowing the “quotation” of text or images when used in support of a scholarly argument; (2) the copyright law of the country of publication should be observed, not necessarily Japanese copyright law; (3) Japanese publishers generally obtain permission on behalf of authors where as in the West that responsibility and its expense is left to the author; (4) locating right holders in Japan is often difficult as it may involve various types of rights and potentially more than one owner of such rights; and (5) communication in either English or Japanese alone presents problems, thus the IUP decided to develop bilingual permissions letters and other materials for its Website.

Articles about the conference appeared in several journals including specialized publications for publishers, editors, librarians, museum curators, and documentation specialists in Japan to promote understanding of the current situation of international image use. (PDF versions of those articles can be found on the IUP Website).

Patricia Crosby, Executive Editor, University of Hawaii Press noted that in the US, publishers universally require written permission when publishing visual images. In using images, the technology is simple but the process of using an image is not easy. US copyright laws have been greatly extended, driven by commercial interests. In 1998 the Copyright Term Extension Act (CTEA) pejoratively known as the Mickey Mouse Protection Act, extended US copyright to the lifetime of an author plus 70 years and for works of corporate authorship to 120 years or 95 years after publication. This act has delayed or frozen the advancement of many works into the public domain.

When an author is seeking rights to images, publishers ideally want rights to publication in all formats and all future editions of the resulting work. These include rights to electronic publication, worldwide publication, and rights to publish in all languages. It is also essential for US publishers that the permissions forms outline the rights granted clearly in English.

Satoshi Tadashima, Senior Manager of Loans, Tokyo National Museum provided background from the perspective of Japanese rights owners. When seeking permission for image use, owners of artifacts are as important as copyright holders, and they are also key people to contact. Artifact owners include: Buddhist Temples and Shinto Shrines; private foundations (Kuge, Buke, art collectors); private collectors; and academic or governmental offices.

Thus far there is no uniform set of standard procedures available in Japan, and museums including the Tokyo National Museum play a vital role in providing images of artifacts held in all manner of collections. Tokyo National Museum has a large image archives in its Shiryokan, providing images and permissions for academic and commercial use. Those images can be used in publication, TV programs, movies, and websites. The image archives of TNM's Shiryokan are digitally available for searching online at <http://search.dnparchives.com>. Use for research purposes and for publication in academic journals is free of charge and commercial use is fee-based. Mr. Tarashima noted that since in Japan the difference between academic and commercial publishers is not clear, there is currently no difference in the charges for publication in a scholarly book versus one published by a commercial press.

Rachelle Browne, Associate General Counsel, The Smithsonian Institution thanked the NCC for inviting her to take part in the Workshop and noted that projects like the Image Use Protocol Website help to make her job and that of other intellectual property lawyers much easier.

During over 20-years experience in the General Counsel's office she has worked on many national and international projects including the Smithsonian Air and Space Museum's Annex at Dulles Airport at a cost of approximately \$300 million dollars and the world-wide traveling Smithsonian Jazz Masterworks Orchestra. Yet the hardest issues that she has confronted during this period are those pertaining to copyright.

She spoke briefly about ongoing efforts to develop provision for copyright and fair use that apply specifically to the digital environment and past efforts, such as the Conference on Fair Use (CONFU). The Conference on Fair Use was convened by the US Department of Commerce over ten years ago to come up with guidelines to try to make sense of the "fair use" concept as applied to the use of image, and other copyrighted works, in the digital context. Progress on such legislation stalled during the previous administration and there is a great hope that the Obama administration will soon move this process forward to create the needed legislation.

She concluded by outlining several important myths about copyright and fair use:

Myth #1 – "There is no name on it, so we can use it."

Just because there is no (copyright) notice, does not mean a work is not protected by copyright. Such notices were not required in the United States after 1989. A work may

be covered by a compilation's notice; or if it is a foreign work under the provisions of the Berne Convention of 1886, (Japan joined in 1899).

Myth #2 – “I got it from the Internet, so it is in the public domain”

Not true, ease of access does not mean a work is not protected by copyright.

Myth #3 – We own the object, so we own the copyright too!

You may own an object, but you do not own the copyright to it.

Myth #4 – “Even if the object is in the public domain, the picture of it is protected by copyright”

Using one of the lawyer's most famous words . . . Maybe?

Myth # 5 – “The United States is the only country that has a doctrine like “fair use”

Not really. Canada has “fair dealing” others have “fair practice” and in the case of Japan there are comparable statutory exceptions including a clause that allows for the free “quotation” of written text and visual images when they are used in support of a scholarly argument.

Myth # 6 – “A publisher required permission, thus it must be required by law”

That requirement may be solely a contractual requirement imposed by the publisher due to its own assessment of risk or other factors.

Izumi Koide Director of the Resource Center, Eiichi Shibusawa Memorial Foundation demonstrated the navigation and use of the NCC's **Image Use Protocol Website**, which is freely available at www.fas.harvard.edu/~ncc/imageuse/index.html.

The NCC's IUP Task Force created guidelines to best practices for obtaining permission to use visual images based on issues learned from the survey and the 2008 IUP Conference in Tokyo.

The IUP guide:

- 1 Helps potential users to identify which country's copyright law applies to a given publishing situation (found in the Image Use section).
- 2 Outlines fair use of images for scholarly and educational purposes (included under Rights Holders information),
- 3 Explains the concept of “quotations” in Japanese copyright law: because Japan does not require permission when written passages or visual images are included as appropriate “quotation” to bolster an academic argument, therefore, Japanese

- rights owners may not understand why they need to give written permission to researchers for US publication (found in the Copyright and Fair Use section),
- 4 Presents various cases including approaching individual copyright holders, organizations, and institutional holders (found in Sample Cases),
 - 5 Describes cases involving rights and privacy (found in the Right Holders section),
 - 6 Provides sample request letters and other documents (contained in the Templates),
 - 7 Assists communication with bilingual templates (contained in Templates section).

Questions and Comments from the Audience:

Q: A user wants to use an image of a scroll in Daigoji and wrote a permission letter to the temple. But the temple rejected the request. Can the Tokyo National Museum help the user to obtain permission?

A: Satoshi Tarashima of TNM assumes that there must be some reasons why Daigoji rejected the particular request. It may not be a copyright issue but a problem with the scroll itself. Possibly, the scroll contains materials considered sensitive, such as the depiction of homosexuality, or some other unknown or confidential issue may be involved. Generally, museums have images of artifacts from temples in their Shiryokan. The Tokyo National Museum does not act an agent or consultant between temples and users, but it may hold images of artifacts contained in temple collections that users may use in their publications.

Q: Do American publishers have specific templates for seeking permission?

A: Patricia Crosby of UH Press answered that while other publishers may have such templates, the University of Hawaii Press does not. The UH Press seeks the best strategies to obtain images. Depending on the case and social appropriateness, an image may be transmitted via facsimile, by mail, or other means. If there is no answer from the rights owner, follow-up is required, and must be documented.

Q: A user spoke of a typical case they have experienced. First they find an image in a museum catalog and contact the museum to request permission. The museum refers them to the owner of the image, a temple. When the temple is contacted they refer the scholar back to the museum. Aren't there better ways to track down images and avoid this vicious circle?

A: Panelists noted that the best strategy is to make a copy of the image from the catalog as a reference of exactly which image is being requested. Sometimes for cultural reasons or because they are not in the habit of doing so, temples may not want to handle permissions directly. Nonetheless a user must contact the owner for permission. It is hoped that the IUP process will provide a means and a template that some temples will adopt. Panelists also suggested that this example would be a good entry for the new blog on the IUP site.

Q: An audience member asked if any of the panelists had experience with requesting permission regarding Japanese images from institutions in European countries?

A: No panelists had direct experience with European organizations. However it was noted that at the Tokyo conference, there were participants from Europe, and the conference stimulated participants to be more aware of the needs for developing similar strategies for their country to aid users. During 2009-10 there will be several IUP Workshops abroad. In July 2009 a workshop will take place at the Japanese Studies Association of Australia Conference at the University of New South Wales in Sydney, in September 2009 a workshop will take place in conjunction with the European Association of Japanese Resource Specialists (EAJRS) at the Sainsbury Institute in Norwich, England, and one is planned to take place in Toronto, Canada in the fall of 2009.

Q: Taking advantage of the presence of a legal specialist on the panel, Patricia Crosby of UH Press asked Rachelle Browne to clarify a point often raised. One of the myths included in Ms. Browne's presentation was "even if you own a copy of a book, you do not own the copyright to it." However, if the library holds a magazine, what rights does the library hold for that material?

A: This is a complex issue related to fair use and will be greatly impacted by the eventual legislation of CONFU (the Conference on Fair Use), which particularly deals with digital works, a growing part of all library's collections.

Q: If you do not know who holds copyright, how do you look for it? And how do we deal with so-called "orphan works" for which the holder cannot be found?

A: One has to do everything possible to track down the identity of a copyright holder. Check the office of copyright. Canada has a very good system. It is a matter of due diligence and how to demonstrate and document that one has fully searched for the rights owner. From the publisher's point of view, if the risk is high, it is better not to use the image.

Q: What laws apply to images in the public view?

A: Photographs taken by a user do not require copyright permission. Similarly, public gatherings do not require permission from each individual in a photograph. There may be exceptions in the case of minor children and famous individuals whose image is in some way protected.

Q: How does this apply to public architecture, and the use of images of individual buildings?

A: The IUP guidelines cannot cover all possible cases and architecture remains beyond the current scope of the IUP Website. Specific locations, especially famous ones, often have their own policies and potential users should investigate those.

Comments:

- It is easy to use images through the National Diet Library (NDL). You can order reproduction of images you find on their website. NDL also provides image reproduction services, including having photos of artifacts taken by a professional photographer. It was also noted that the current issue of the NCC Newsletter (Issue 22, Spring 2009) has a lead story on three visual image collections from NDL that are digitally available; NDL's Online Gallery, its Rare Books Image Database, and the Digital Library of the Meiji Era.
- Fees for permission are often very pricey and it is hoped that this project will help to explain the realities of academic book publishing to Japanese rights owners. Given the declining economic climate one panelist described US academic publishing as not "non-profit" but "sub-profit."
- Nihon Kindai Bungakukan also provides archive photographs and its requesting procedures are easy and clear. Links for that will be contained in the final IUP Website.
- Fees for permission are too high in general. The Japan side charges more than we can afford. But, the US also charges too much. Users wonder how negotiable the price really is.
- There is still need for clarification of the nature of foreign academic publishing, which is not yet well known in Japan. The current differentiation between commercial and academic publishing in Japan is too limited. If a publication is sold through the market – it is considered fee-based. If it is not sold through the market, including academic distribution, personal use, and academic grant publication, no permission fees should be charged. Therefore if a publication has a sale price whether published by a commercial or academic publisher, it is considered the same by the Japanese rights community.

The NCC Website contains a blog on which issues are raised and problems and solutions are discussed. The IUP Blog is found at <http://ncciuupblog.wordpress.com/experience/>. The IUP Website also contains a bilingual glossary of terms related to copyright and fair use. The homepage of the IUP Website also contains links to bilingual permission letter templates and other material <http://www.fas.harvard.edu/~ncc/imageuse/index.html>