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Cases of Note -- Tripping Over Fair Use

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Questions & Answers
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many times in various texts? Is it infringement to reproduce it?

ANSWER: The first question is whether the assessment tool is protected by copyright or whether it is in the public domain. If it were published in 1960, the copyright would have expired in 1988 (28 years after the date of publication). The copyright would have had to be renewed in 1988; if it were renewed, then the work would have received an additional 47 years of copyright protection. Another 20 years was tacked on in 1998. Assuming the renewal occurred in a timely fashion, copyright protection would last until 2055. If it were not renewed in 1988 then the work is now in the public domain.

If the work is still under copyright, whether permission is required depends on the use that will be made of the reproduction of the assessment tool. Reproducing it or a portion of it for scholarship or research is likely to be fair use. Reproducing it for use in teaching in a nonprofit educational institution may be fair use. Making copies for other purposes probably requires permission. The fact that the assessment tool has been reproduced many times in textbooks does not necessarily mean that it was done without permission or paying royalties.

2. Nature of the Copyrighted Work
Poster art is right at the core of protected creative expression. This would weigh in favor of the copyright holder. But when you’ve got a transformed work, the second factor is not “likely to help much in separating the fair use sheep from the infringing goats.” See Campbell, 510 U.S. at 586.

It is established that fair use can protect the use of copyrighted material in biographies and other forms of historic scholarship, criticism and comments require original source material to properly treat their subjects. “Much of our fair use case law has been generated by the use of quotation in biographies...” Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 932 (2d Cir. 1994).


The district court found the posters were originally ... well ... posters. But Illustrated Trip is a biographical work. Placing images in chronological order on a 30-year timeline is transformatively different from tacking them on a telephone pole to advertise a concert.

Curiously, the poster images of this famous era were themselves extremely transformative, using out of copyright images of Franz Stuck, Alphonse Mucha, L’Assiette au Beurre, and the Jugend School. Which is to say, almost none of them were actually original art.

BGArchive of course challenged this, arguing that the images were not transformed unless each was accompanied by comment or criticism. See 17 U.S.C. § 107 (stating that fair use of a copyrighted work “for purposes such as criticism, comment ...[or] scholarship ... is not an infringement of copyright”).

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Just as I’m doing here.


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Biz of Acq — Quick Tips for Media Selection and Acquisitions

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3. Amount and Substantiality of the Portion Used

Interestingly, the reference is to the amount of the copyrighted work taken. New Era Publ’ns Int’l v. Carol Publ’g Group, 904 F.2d 152, 159 (2d Cir. 1990). So smothering seven posters in 480 pages doesn’t help DK. And of course, each of the seven was taken in its entirety.

All the same, it is sometimes necessary to copy the entire work to make a fair use of it. Kelly v. Arriba Soft Corp., 336 F.3d 811, 821 (9th Cir. 2003) (images used for a search engine data base must be copied entirely to be recognized). So factor 3. turns on a reference back to factor 1. purpose and character of the use. Campbell, 510 U.S. at 586-87.

And back there, the court concluded the images were historical artifacts and by reducing the size, DK displayed the minimal image necessary to ensure they were recognized as historic artifacts.

4. Effect of the Use upon the Market for or Value of the Original

You look not just at market harm, but harm that could result from widespread use in Illustrated Trip fashion. Harper, 471 U.S. at 568.

Yes, as your mom said, what if everyone did it?

And just to make it more complicated, we balance public benefit from the use with “personal gain the copyright owner will receive if the use denied.” MCA, Inc. v. Wilson, 677 F.2d 180, 183 (2d Cir. 1981).

There was no effect on poster sales, BGArche’s primary market. But what about a derivative market in licensing the images for use in books?

“[I]t is given in every fair use case that plaintiff suffers a loss of a potential market if that potential is defined as the theoretical market for licensing the very use at bar.” Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 13.05[A][4] (2005). But what is to be considered the loss of potential licensing revenues for “traditional, reasonable, or likely to be developed markets.” Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 930 (2d Cir. 1994).

And then, the Second Circuit again goes back to factor 1. and says DK’s use is a transformative one. The market is a transformative market (collage type books) and not a traditional one (poster reproduction). A copyright owner cannot bar others from a fair use market “by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work.” Castle Rock Entm’t, Inc. v. Carol Publ’g Group, 150 F.3d 132, 146 (2d Cir. 1998).

So BGArchive does not suffer market harm from the loss of license fees.