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Cases of Note — Tripping Over Fair Use

by Bruce Strauch (The Citadel) <strauchb@citadel.edu>

Bill Graham Archives v. Dorling Kindersley and RR Donnelley & Sons, United States Court of Appeals for the Second Circuit, 448 F.3d 605; 2006 U.S. App. LEXIS 11593 (2006).

In 2003, **Dorling Kindersley (DK)** published *Grateful Dead: The Illustrated Trip (Illustrated Trip)*, a cultural history of — you guessed it — **The Grateful Dead** with a double-entendre on LSD.

Incredibly, this is a 480-page coffee table book! I'll pause while you let that sink in. And then of course you'll naturally ask, do Deadheads own coffee tables?

No, of course not. They live in VW vans. This is for all those Bourgeois Bohemians of the Boomer generation who are tort lawyers and software moguls but still live in memory of a romanticized rebellious past.

Anyhow, there are 2,000 images in the book. A typical page is a collage of images and graphic art with explanatory text.

Bill Graham is — can you guess? **Bill Graham** and the Family Dog? Does that ring any bells? Of course it does. **Bill (né Wolfgang Grajonca)** was the acid rock concert promoter who hosted the non-stop 1965-70 party at the **Fillmore Theatres** (East and West) and Winterland — the church of rock 'n roll. And that means all that poster art for the **Paul Butterfield Blues Band, Jefferson Airplane, Buffalo Springfield, Big Brother and the Holding Company, et al.** **Bill** has now passed on to that psychedelic party in the sky, but **Bill Graham Archives (BGArchives)**, presumably belonging to his heirs, continues to make money off the sale of posters, original concert tickets, and of course, T-shirts.

It's America after all. As a software mogul, you'll want to decorate your summer McMansion in Vermont with this stuff. And of course wear one of the shirts when you drive the Range Rover to Starbucks.

BGArchives claims copyright in seven of the concert posters in *Illustrated Trip*. **DK** tried to negotiate a license, but there was no meeting of the minds. **DK** went forward with publication. Note, that the seven posters are significantly reduced in size and have captions describing the concerts in question.

BGArchives made post-publication demands which were rejected, and then sued under the **Copyright Act** of 1976, 17 U.S.C. § 101 et seq. Each side moved for summary judgment on the issue of fair use, that statutory exception to copyright infringement. **BGA** lost in the district court, and hence this appeal. So let's look at those fair use factors.

Fair or What?

1. Purpose and Character of Use

The key to this one is whether the new work is “transformative.” See **Pierre N. Leval, Toward a Fair Use Standard**, 103 Harv. L. Rev. 1105, 1111 (1990). Does it merely supersede the original, or add something new in the way of character, expression, meaning or message? **Campbell v. Acuff-Rose Music, Inc.**, 510 U.S. 569, 579 (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”).

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).

Just as I'm doing here.

And that goes for pop culture — the glory days of the **Fillmore** — as well as a biography of — *chortle* — **Millard Fillmore**. See **Twin Peaks Prods., Inc. v. Publ'ns Int'l. Ltd.**, 996 F.2d 1366, 1374 (2d Cir. 1993). (noting that a work that comments about “pop culture” is not removed from the scope of Section 107 simply because it is not erudite).

The Second Circuit found that the posters originally had a dual purpose of artistic expression and promotion. In *Illustrated Trip*, the images are historic artifacts marking particular concerts where ... well, who can remember exactly what went on at a **Dead** concert. But this is separate and distinct from the original purpose and thus is transformative. See **Elvis Presley Enters., Inc. v. Passport Video**, 349 F.3d 622, 628-29 (9th Cir. 2003) (find the use of short clips of **Elvis** performances are transformative when they are short and a voice-over discusses **Elvis**' career).

This holding is bolstered by the manner of **DK**'s display. The images were reduced in size so that a mere glimpse of their expressive value is discernible. And they were combined with text, timeline and original art work to form a blended collage, enriching the presentation of the cultural history and not exploiting the artwork for commercial gain. Plus, in a 480-page book, there are only seven contested images.

Yes, *Illustrated Trip* was published with the aim of making a profit. But the “crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.” **Harper & Row Publishers, Inc. v. Nation Enters.**, 471 U.S. 539, 562 (1985). Which is to say they weren't selling posters or a poster book.

So **DK** wins on that one.

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.



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many times in various texts? Is it infringing 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.

It 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.

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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, ApS 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, **BGArchives'** primary market. But what about a derivative market in licensing the images for use in books?

"[I]t is a 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.

So, Strauch, what was that Family Dog thing you mentioned back at the beginning?

And what an alert reader you are. The Family Dog was a loose partnership headed by super-hippie Chet Helms, a giant in the Bay Area music scene. Initially Chet partnered with Graham, but they split. Chet went on to mount near nightly shows at the Avalon Ballroom from 1965-70.

Helms began as manager for Big Brother and the Holding Company, bringing in his college pal Janis Joplin as their singer.

The first three rock dance concerts in history were Family Dog events at the Longshoreman's Hall in San Francisco in 1965. They were titled "A Tribute to Dr. Strange," "Tribute to Sparkle Plenty," and "Tribute to Ming the Merciless." They also featured the first light shows.

Do you catch that significant end year? 1970? Rock died hard when the Boomers finished college.

And how about some Bill Graham trivia? He had a lifelong dream of being a character actor and got his chance playing a promoter in Coppola's "Apocalypse Now" and Oliver Stone's "The Doors." He had a meatier role as Lucky Luciano in "Bugsy."

He died in a helicopter crash in 1991 after declining to take the limo with the drummer for Huey Lewis and the News. 🐾

Biz of Acq — Quick Tips for Media Selection and Acquisitions

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Column Editor's Note: *Specialty media collections, such as video collections, can be a challenge for collection management and acquisitions librarians who often have to work without a media librarian in-house and guess their way through genres and industries that they know little about. Even those working with a media librarian in-house, such as myself, will find new ideas in Matt Bailey's excellent article. I'm pleased to have a couple of new video vendors to try. — MF*

My job title, Media Resources Coordinator, means I am responsible for acting as the liaison

to all faculty, staff, and students for our media collection (currently about 7,400 titles on DVD and VHS). Faculty at **Carleton** have always taken an active role in collection development, and this holds true for media as well: faculty select about 70% of our media purchases. This makes my job somewhat easier, since I don't have to guess at what titles to buy to support the curriculum, but it can also make building a well-rounded collection a little tougher.

Any primarily faculty-selected collection will be, by nature, idiosyncratic and eclectic, so it's up to me to select titles to round out and balance the media collection. This — let's not

kid ourselves — is the fun part of my job. But I don't approach this selection without some careful thought. In selecting titles to complement those chosen by faculty, I try not to compete with our local video stores that stock all the newest and biggest releases or with the public library — located one block from campus — that provides access to popular movies and television series on DVD. The reasons for this are many. Firstly, our collection, despite its breadth, is meant primarily to support the curriculum of the college. Secondly, I feel it is essential to provide access to material

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