

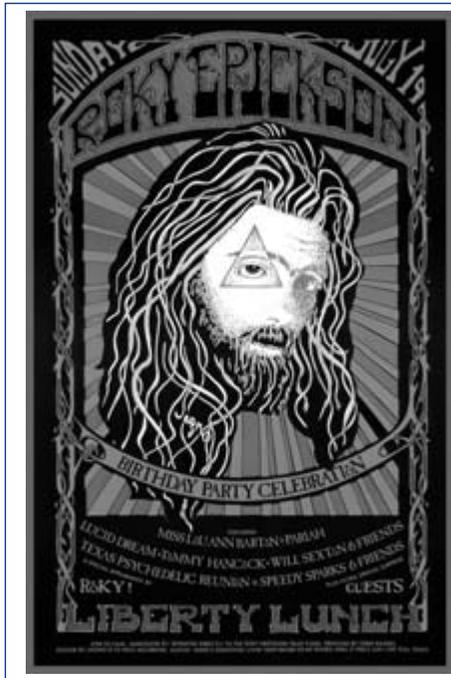
# Rock Music Posters and the Law

By Nels Jacobson

**R**ock bands have used posters to advertise their upcoming performances for about as long as rock and roll has been around. In fact, since at least the 1960s, some of these posters have been considered works of art in their own right, not unlike the 19th century posters of Chéret and Toulouse-Lautrec. Only lately, however, have the legal issues raised by this method of advertising begun to generate much interest.

Today's unprecedented scrutiny has brought an end to the carefree innocence of the halcyon days of poster making.

While a career as a rock poster artist may never have been particularly lucrative, at least until recently it could be artistically fulfilling and it was fairly risk free. But all that has changed. Now more than ever before, poster artists, bands and concert promoters, among others, should be mindful of the legal rights, possibilities and pitfalls associated with rock posters.



Poster created by the author to advertise a benefit concert for 13th Floor Elevators' lead singer Roky Erickson. Jagmo © 1992 Nels Jacobson.

The recent increase in attention paid to these posters and related trademark, copyright, right of publicity and contract rights, can be attributed to a couple factors. First of all, there is a thriving market for rock posters today. Among the most popular poster series are those created in San Francisco in the '60s for Bill Graham's Fillmore locations and for the Family Dog dances organized by Chet Helms, those created for the Armadillo World Headquarters in Austin, Texas, during the '70s and those created for Detroit's Grande Ballroom.

Some of the individual posters distributed for free during the psychedelic '60s — posters promoting shows by Janis, Jimi, the Jefferson Airplane and the 13th Floor Elevators, for instance — sell today for thousands of dollars.

Collectors are asking as much as three quarters of a million dollars for collections of numbered sets of Family Dog and Fillmore posters — posters that artists typically were paid no more than \$100 a piece to design.

Somewhat ironically, increased attention to this ink-on-paper art form has been fueled by digital technology. The proliferation of poster images on the Internet has generated increased interest in the physical posters themselves. Also, computer-design programs such as Photoshop, Quark, Illustrator and Painter have made it easier for neophytes to try their hand at designing posters themselves. It is not uncommon for posters designed on computers and offered in signed and numbered limited editions by today's most popular rock artists to fetch almost as much as vintage posters from the '60s.

That posters can command such prices is understandable: Some rock posters are almost 40 years old; some have become cultural icons; some were created to promote appearances by now-deceased performers at long-gone legendary venues; and some are simply beautiful or fascinating to look at.

The question is, who has a right to control the creation and sale of these posters? Not posters that are clearly improper works — bootlegged, counterfeit or pirated posters, unauthorized copies of authorized designs, posters created for fictitious performances or designed after-the-fact for performances that happened but for which a different poster or no poster at all was created. But legitimate posters that were actually commissioned to promote a scheduled performance — original works authorized by the band, the performance location or promoter.

For many years, the system generally worked as follows: A local concert promoter or club owner would book a band and then hire an artist to create a poster to advertise the show. Often the band would provide photographs or logos to the promoter who in turn would give them to the artist to aid in creation of the poster. There may have been a written live personal appearance agreement between the band and the promoter regarding the show but only in rare cases was there a written agreement between the artist and the promoter or the band.

In exchange for a relatively modest amount of money and a free pass to the event, the artist was expected to create an original work of art — a poster design. The promoter would cover the cost of printing the posters. Because most poster designs were created to advertise specific engagements, the vast majority of posters were distributed before the event they advertised. (One notable exception is The Fillmore in San Francisco where, at those shows for which a poster is created, each audience member is given one on the night of the show as they leave.)

If there were posters left over after the event, they were usually in the possession of the promoter, who sometimes would sell them. In cases of particularly popular and sought-after designs, a promoter might reprint them specifically for sale. It's been said that at one point the Family Dog operation was financed almost entirely by poster revenue. Popular posters also were bootlegged by unscrupulous profiteers and there are stories of printers keeping secret stashes of the posters they printed. Well-heeled dealers acquired large stocks of posters by legitimate or sometimes questionable means. Dealing in posters became a viable business.

Sometimes the artist was allowed a few courtesy copies of a poster he or she designed, which the artist usually gave away to friends and family or sold for next to nothing long before they appreciated in value. Eventually, some artists began to accept additional copies of their posters as partial payment for their design services with the hope that they could recoup some of their costs and the value of their time by selling them for more money somewhere down the line.

A number of years ago, an alternative to the promoter-commissioning-the-artist paradigm emerged. Some artists began approaching promoters and offering to supply posters for a show at no cost. The artists offered to design the posters, pay for the printing and provide a certain number of posters to the promoters and bands in exchange for permission to sell the remaining posters — which could be as few as a handful or as many as several hundred. As long as the posters weren't sold before the show or in or around the site on the night of the show, this arrange-

ment was apparently acceptable to most bands and quite attractive to promoters.

Another variation of this scenario was where enterprising poster dealers would act as brokers between the artists and the promoters and bands. By special arrangement with the locations and bands, the prominent poster store ArtRock, for example, often hired artists to create designs for signed and numbered promotional prints that it would sell for years after the advertised events.

Whatever the exact details surrounding the creation of any particular poster, generally the arrangement between the poster artist and the promoter or performer has been a very loose one for 40 years. Until recently, it was unusual for there to be any discussion at all of intellectual property rights. Today, it remains that way for the most part.

Yet things are changing. Many bands have become more aggressive about controlling their trademarks and the look of the advertising used to promote their shows. Some bands have begun to view posters more as merchandise than advertising and have begun to try to capture any revenue generated by their sale. In some cases, bands and concert halls have begun to insist on work-for-hire agreements with their poster artists.

All of these changes have brought an increased level of complexity and potential risk to the poster artist's humble calling. In light of the increasing value of rock posters and the way the business has been steadily evolving, it behooves conscientious artists, as well as concert promoters, bands, dealers, collectors and third-party assignees of the rights in posters, to be aware of the legal issues and competing interests involved. For discussion purposes, those issues and interests may be separated into two broad categories: (1) ownership of preexisting elements of the poster; and (2) ownership of the poster design itself.

### Ownership of preexisting elements

Most poster designs include at least some elements that exist prior to and independent of the poster. The most common kinds of legal issues that arise in this regard are those involving trademark, copyright and the right of publicity.

### Trademark

Posters advertising performances by musicians generally include trademarks. At a minimum, the name of the musician or bands performing and the name of the club will appear on a poster, for obvious reasons. To the extent that these are trademarks, their use should be authorized only by the trademark owners. If the poster was commissioned by the band and the club, use of these marks may be reasonably understood to have been authorized.

Presumably, a poster that brings an audience to a concert benefits both the band and the club and that is why they commissioned it in the first place; a poster would be considerably less effective without the name of the band performing or the location of the performance. It is generally not advisable, however, to include other trademarks, unless of course the trademark owners are sponsors of the event, in which case they would likely not only authorize but insist on use of their marks.



Popularly known as “Uncle Spam,” this Danny Garrett poster is a portrait of Spamorama organizer David Arnsberger. © 1982 Danny Garrett.

An anecdote involving a popular luncheon-meat festival may provide a helpful illustration. For many years, one of the most colorful annual celebrations held in Texas was Spamorama. Each

year, posters advertised the event and its accompanying band performances. At the event itself, between perennial highlights such as the Spam Olympics and the Spam Cook-Off (featuring daring flights of culinary fancy and tempting concoctions such as the Spam Daiquiri), revelers giddy on alcohol and pork products purchased T-shirts featuring Spamorama poster designs.

Eventually and somewhat predictably, the organizer of this event and one of the poster artists he'd hired — in this case Jim Franklin — received cease and desist letters from Hormel Foods, the makers of Spam luncheon meat and owners of the Spam trademark. Hormel apparently took particular exception to a poster design depicting a squashed can of Spam above the caption “Paté Passé?” To prove trademark infringement, of course, Hormel would have needed to show that use of its mark in connection with Spamorama was likely to cause consumer confusion. If the Spamorama use was defended as a parody, a court would have factored the parody angle into its likelihood-of-confusion analysis.

Parody aside, the organizer of Spamorama also might have raised the doctrine of nominative fair use as a defense. As articulated in *New Kids on the Block v. News America Publishing Inc.*, unauthorized use of a trademark may be a noninfringing nominative fair use if it meets a three-part test: (1) the product in question must be one not readily identifiable without use of the trademark; (2) only as much of the mark may be used as is reasonably necessary to identify the product; and (3) the use must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark owner. 971 F.2d 302, 308 (9th Cir. 1992).

The Spamorama use may have met the first two parts of the test, but probably would not have satisfied the third part. In the absence of any notice on the Spamorama posters to the contrary, it's likely many people seeing them may have believed Hormel sponsored or endorsed the event.



Detail from 1990 Spamorama poster by Jim Franklin that prompted a cease and desist letter. © 1990 Jim Franklin.

For its part, Hormel also might have alleged trademark dilution. Hormel actually claimed that both the depiction of its product in the “Paté Passé?” illustration and the caption placed its product in a bad light and disparaged its mark. Hormel might

## Spamorama brought a huge spike to Hormel’s sales.

have filed suit under the Texas anti-dilution statute and, if filing after January 1996, it probably would have asserted a federal dilution claim as well.

If the court determined that the

Spamorama use was a parody, however, Hormel’s federal dilution claim may have failed. Under the Federal Trademark Dilution Act (15 U.S.C. § 1125(c)), noncommercial use of a mark is nonactionable and some courts have treated parody as per se noncommercial. See *Dr. Seuss Enters. v. Penguin Books U.S.A.*, 924 F. Supp. 1559, 1573-74 (S.D. Cal. 1996), *aff’d*, 109 F.3d 1394 (9th Cir.), *cert. dismissed*, 521 U.S. 1146 (1997).

Ultimately, the Spamorama saga had a happy ending because the two sides came to an understanding and ever since then Spamorama has continued to flourish with the blessing and cooperation of Hormel. Of course, it’s possible that the consequences for the organizer and poster artist might have been considerably less benign had Spamorama not been responsible for such a large spike in Texas Spam sales each year.



Alton Kelley and Stanley Mouse poster, popularly known as “Zig Zag Man,” advertising a show by Big Brother and Quicksilver Messenger Service. © 1966 Chet Helms DBA Family Dog Productions.

Similarly, the unauthorized use of a cigarette-paper trademark in the 1960s may have been forgiven because it was good for business. It appears that the Zig Zag cigarette paper company, despite its obligation

to police its marks, made a business decision not to challenge the unauthorized use of the Zig Zag mark on a 1966 Family Dog poster for Big Brother & the Holding Company and Quicksilver Messenger Service. It’s possible Zig Zag saw the mark’s use on the poster as enhancing the cachet of its product among a significant segment of the ‘60s rolling-paper purchasing public.

It should be cautioned, however, that the foregoing two examples may be colorful but are not necessarily typical. Notwithstanding what happened in those cases, the best course for poster artists (and event organizers) is to steer clear of trademarks that they are not authorized to use. Ordinarily, it simply isn’t smart to include a trademark on a poster without permission.

### Copyright

Since at least the 1960s, rock poster artists have been fond of using familiar images in their posters. Over the years, photographs and illustrations have been appropriated and used, less in conscious defiance of copyright law than out of convenience or as cultural statements. Persistently popular, for instance, are famous cartoon characters; artists are fond of posing them in scandalously salacious or violent tableaux. For most original works of authorship, however, the copyright owner has the exclusive right to make or authorize such a use. Therefore, a poster artist should stay away from any copyright-protected work he does not have permission to use.

Traditionally, where the performer or promoter provides the artist with the performer’s photograph or an illustration, it has been understood that the artist is authorized to use it in the poster design — either because the copyright is owned by the performer as a work-for-hire or by assignment or the photographer, for instance, has licensed the performer to make and authorize such a use.

The use of other images not controlled by the performer is a different story. Ordinarily, exercising any of the rights exclusively reserved to the copyright owner without permission is copyright infringement.



Silkscreen poster created by Scott Benge to advertise a concert for the band Leftover Salmon. © 2002 Scott Benge (FGX).

In a recently published book featuring more than 1,800 rock posters — the *Art of Modern Rock* by Paul Grushkin and Dennis King — one of the most eye-catching among them includes the illustration of a skeleton holding a wreath of roses. Rather than a skull, the skeleton is topped by the head of a grinning simpleton wearing a rose tiara. This poster was created by recently deceased artist Scott Benge in 2002 for a performance by the band “Leftover Salmon.”

No doubt many viewers will find that the design looks vaguely familiar and for good reason. The skeleton illustration is one of the most recognizable rock images of the last 40 years. It’s been closely identified with the Grateful Dead since it appeared in 1966 on a Family Dog poster by Alton Kelley and Stanley Mouse. Similarly recognizable in its own right is the grinning simpleton’s face, which conjures up goofy *Mad Magazine* cover boy Alfred E. Neuman.

But where did these images come from? The skeleton was not original with Kelley and Mouse; it was drawn by Edmund Joseph Sullivan, a late 19th and early 20th century artist, as one of the 76 illustrations he did for the *Rubáiyát of Omar Khayyám*. In 1967, just a little more than a year after Kelley and

Mouse created their famous “Skull and Roses” poster, they created a poster advertising a Denver concert by the bands the Other Half and the Sons of Champlin. This poster features a smiling visage similar to the grinning simpleton’s noggin Benge would prop on top of the skeleton in his own poster three decades later.

The Neumanesque face used by Kelley and Mouse is one of the many variations of that mug that were circulating long before *Mad Magazine* adopted young Alfred E. as its spokesmodel. In fact, the widow of an artist who had created a caricature featuring a grinning boy (and known as “Me worry?”) brought an infringement suit against the publisher of *Mad Magazine* in 1965. *Stuff v. E.C. Publications*, 342 F.2d 143 (2d Cir. 1965), cert. denied, 382 U.S. 822. The “Me-Worry?” artist had been issued a copyright in 1914, but over the years he allowed many unauthorized copies of the print to circulate unchallenged, including many without a copyright notice. Finding that the copyright owner had thereby effectively dedicated his caricature to the public, the 2nd Circuit affirmed dismissal of the complaint against *Mad*.



Grateful Dead poster popularly known as “Skull and Roses” by Alton Kelley and Stanley Mouse. © 1966 Chet Helms DBA Family Dog Productions.



Alton Kelley and Stanley Mouse poster popularly known as “Expansion,” advertising a Family Dog show in Denver. © 1967 Chet Helms DBA Family Dog Productions.

In cases where an image appropriated for a poster is not in the public domain, it’s not uncommon for the poster artist to defend against a charge of infringement by claiming that the unauthorized inclusion of the image is a fair use — particularly a parody fair use. Parody is not included among the examples of fair use listed in the 1976 Copyright Act, but it is specifically mentioned as a possible fair use in the House Report (H.R. Rep. No. 1476, 94th Cong., 2d Sess. 65-66 (1976)).

The Supreme Court has recognized that parody may qualify as a fair use and has noted that a use which advances the arts by transforming a previous work serves the purpose for which copyright was created. *Campbell v. Acuff-Rose*, 510 U.S. 569 (1994). A use is transformative when, in the words of Judge Pierre Leval, it “adds value to the original [and enriches society with] new aesthetics, new insights and understandings . . . .” “Toward a Fair Use Standard,” 103 *Harv. L. Rev.* 1105, 1111 (1990). Parody is by its very nature transformative.

Yet many poster artists labor under a fundamental misconception regarding parody: the mistaken assumption that every clever, thought-provoking or humorous use of a work will qualify as a parody for copyright purposes. To be

considered a fair use, a parody must target the underlying work and not merely use that work as a vehicle.

Two movie-poster cases, both coincidentally involving people with the surname "Moore," may help illustrate this point. In *Leibovitz v. Paramount Pictures Corp.*, the 2nd Circuit held that it was a fair use for a movie ad to spoof a 1991 *Vanity Fair* cover featuring a nude photograph of Demi Moore taken by Annie Leibovitz when Moore was eight months pregnant. 137 F.3d 109 (2nd Cir.

## The safest course for a poster artist is to avoid using any copyrighted material without permission.

1998). The movie poster, which was for "The Naked Gun: The Final Insult 33 1/3," featured actor Leslie Nielsen's face atop the photo of a nude eight-month pregnant model. The court determined that the poster clearly took satiric aim directly at Leibovitz's photo.

A different result was reached, however, in a case involving the popular film "Men in Black" and a film by Michael Moore titled "The Big One." *Columbia Pictures Indus. v. Miramax Films Corp.*, 11 F. Supp. 2d 1179 (C.D. Cal. 1998). In this case, the trial court found that the doctrine of fair use was unavailable to Miramax as a defense. Reminiscent of Will Smith and Tommy Lee Jones wearing black suits and sunglasses and holding over-sized weapons in front of the New York skyline beneath the tag line "Protecting the earth from the scum of the universe," the Miramax poster featured

Michael Moore in a black suit and sunglasses, holding an oversized microphone in front of the New York skyline beneath the words "Protecting the earth from the scum of corporate America."

The Michael Moore poster may have been clever and humorous, but the court enjoined Miramax from using it because it wasn't transformative; it did not target the "Men in Black" ads but merely used Columbia's copyrighted work as a vehicle to poke fun at corporate America.

The safest course for a poster artist is to avoid any use of copyright-protected material unless permission from the copyright owner is undisputed. Where the artist feels inexorably compelled to use without permission another party's work to make a point, he should be sure that the parodic character of his design is reasonably obvious and that the work he is using without authorization is clearly a target of his criticism or comment.

### Right of publicity

In addition to trademark and copyright concerns, a poster artist should avoid violating a performer's right of publicity. A creature of state law, the right of publicity is an outgrowth of the right of privacy. Typically it authorizes recovery of damages when an individual's name, photo or likeness is used for commercial purposes without his or her consent. Some poster artists prefer to include illustrations of the featured performers on the posters they create.

But even if the performer's image does not appear, a poster might still violate the performer's right of publicity if his or her name is included on the poster without permission. Again, where the poster is commissioned by the performer or by the concert hall acting on behalf of the performer, it may be reasonable to believe that the poster artist is authorized to use the performer's name, photo and likeness.

When a dispute does arise regarding the right of publicity, this right is often seen to be in tension with rights guaranteed by the First Amendment. In one case where a publisher was marketing a limited-edition art print of Tiger Woods made without the golfer's permission from a painting, the 6th Circuit concluded

that Woods' right of publicity was outweighed by the First Amendment and society's interest in freedom of artistic expression. *ETW Corp. v. Jireh Publishing Inc.*, 332 F.3d 915 (6th Cir. 2003).

In reaching this decision, the court reviewed a number of cases where the right of publicity was at issue, including a California case involving the unauthorized use of the images of the Three Stooges, *Comedy III Prods. Inc. v. Gary Saderup Inc.*, 25 Cal. 4th 387 (2001), cert. denied, 534 U.S. 1078 (2002). In the *Comedy III* case, artist Gary Saderup had created a drawing of the famous comedy team and reproduced the drawing as lithographic prints and on T-shirts.

In balancing Woods' right of publicity against the First Amendment, the California Supreme Court borrowed part of the fair use analysis from copyright law, stating that the transformative nature of a work could weigh against the work being in violation of the right of publicity. The court held, however, that Saderup's rendition of the Three Stooges was in violation of California's right of publicity because his likenesses of the Three Stooges were not so transforming that they were primarily creative and artistic expression; they were merely literal images of the subjects, deriving economic value from the fame of Three Stooges.

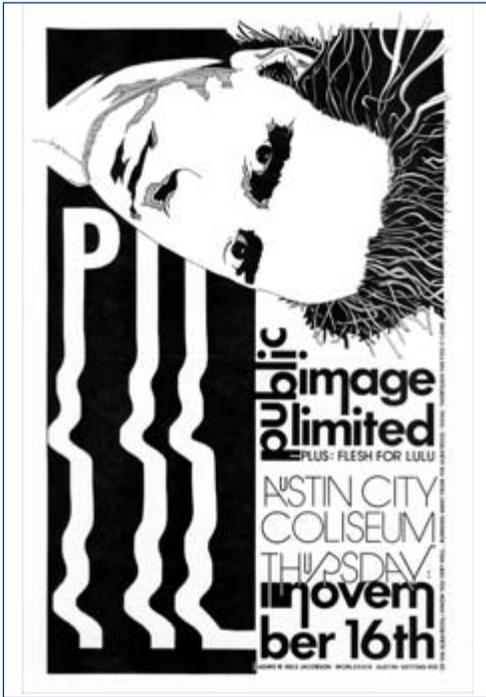
The right of publicity, in addition to whatever trademark rights subsist in a band or performer's name, should give any poster artist pause about creating a poster that includes a performer's name, photo or likeness without authorization. This is particularly true if many of the posters are intended to be sold after the event rather than distributed as ads ahead of time.

### Can a commissioned poster be infringing?

For 30 years, the rock poster system seemed to work well. A concert promoter or in rare cases a band itself would hire an artist to create a poster to generate interest in a show. If there were posters left over after the event, promoters or club owners sold them.

Sometimes the posters were sold one at a time directly to the public, sometimes in bulk to dealers. If a poster artist were lucky enough to end up with any copies of the poster, he or she usually

would give some away but also might try to sell a few to augment the generally minimal payment received for designing the piece.



As has been industry practice for many years, this poster, created by the author for a concert by Public Image Limited (PIL) was commissioned by the concert promoter. Jagmo © 1989 Nels Jacobson.

Mark Arminski is one of the poster artists who has tried to cover his expenses by selling his posters. He began designing rock posters in Detroit in the mid-'80s and soon became one of the country's most popular and prolific poster artists. Arminski typically would cover all costs himself. At the behest of a concert promoter, he would design a poster and print several hundred copies. In lieu of any payment from the promoter or band, however, he would keep half of the posters to sell after the event in hopes of covering his expenses and the value of his time and talent.

This routine worked well for Arminski, as it had in various permutations for other artists for decades. It worked well, that is, until August 1997.

Two of the bands Arminski was commissioned to create posters for were the Dave Matthews Band and Phish. The poster for the Dave Matthews Band advertised a 1995 concert in Cleveland and the Phish piece advertised a 1996

show in Pittsburgh. The members of both bands were pleased enough by the posters that they autographed copies for Arminski and the members of Phish even wrote "good work" on the one they signed.

Nonetheless, shortly thereafter, a lawsuit was brought against Arminski on behalf of the bands. Filed in the Southern District of New York, it alleged trademark infringement, dilution, violation of the New York right of publicity and assorted other claims. *Bama Rags Inc. v. Arminski*, No. 97 Civ. 5932 (S.D.N.Y. filed Aug. 11, 1997); *Phish Inc. v. Cushway*, No. 97 Civ. 5933 (S.D.N.Y. filed Aug. 11, 1997).

Arminski had been commissioned to do the posters not directly by the bands themselves but by the promoters, the same sort of arrangement used by countless rock poster artists and promoters and bands for decades. In this case, the fact that some of the Phish and Dave Matthews Band posters were being offered for sale on the Web site of popular poster dealer ArtRock may have made Arminski seem like an obvious or tempting target.

Although irrelevant to the underlying issues in the case, it is interesting to note that Arminski was quoted at the time as revealing his annual income was approximately \$18,000; Phish reportedly grossed more than \$20 million on one tour at about that same time.

In his defense, Arminski might have argued that he had a First Amendment right to create art using the bands' names, photos and likenesses à la *ETW Corp. v. Jireh Publishing Inc.* Based on the well-settled course of dealing in the industry and trade usage established over decades between artists, promoters and bands, Arminski also might have raised an apparent-agency defense or argued that he had an implied license to use the bands' trademarks, names, photos and likenesses. As another affirmative defense, Arminski might have invoked the doctrine of estoppel by acquiescence. He had relied on assurances by the promoter that the posters were authorized and that he had permission to sell the posters to cover his expenses.

If indeed Arminski's uses of the bands' trademarks were unauthorized as alleged in the bands' complaints, he

may have been able to argue he was misled by not only the conduct of the promoters and bands but also by the actions of the individual band members, including when they autographed copies of the posters and complimented him on them. Or the facts may have supported an unjust enrichment argument — that, if Arminski was estopped from making back his expenses and the value of his time spent creating posters that benefited Phish and the Dave Matthews Band, the bands would be unjustly enriched.

Regardless of which party had the stronger legal case, Arminski appeared to win in the court of public opinion. Trademarks and the performers' names, photos and likenesses are concededly valuable assets that they are obligated to protect; but suing a graphic artist for attempting to recoup what it cost him to produce an apparently authorized ad that necessarily included those marks, names, photos and likenesses struck many as cynical and overreaching. Some felt that a realistic appreciation of the relative values of the different intellectual properties at issue was lost in all the shouting about who was taking advantage of whom.

Taking a decidedly long-term view, rock-poster expert Eric King was of the opinion that well after the two bands were gone and forgotten people would still be enjoying Arminski's art. King may have summed up what fans familiar with art history reluctantly might concede when he suggested that suing Arminski on behalf of Phish or the Dave Matthews Band was "similar to suing Toulouse-Lautrec on behalf of a can-can dancer."

At the time, an official with the Dave Matthews Band's merchandising company apparently conceded to a newspaper columnist that he understood Arminski had believed the promoters were empowered to authorize him to use the bands' intellectual property. The cases settled soon thereafter, leaving in their wake no discernible details regarding resolution of the issues involved.

What did remain was a stark warning for poster artists that they were susceptible to being taken advantage of by the system they'd grown accustomed to — that they could no longer count on the collegial and mutually beneficial relationship they had enjoyed for

decades with the bands for whom they'd been creating posters.

But despite public opinion and regardless of why and on what terms the Arminski cases settled, it is indisputable that a trademark is valuable intellectual property that must be protected by its owner and, subject to balancing against the protections of the First Amendment, the right of publicity affords a performer exclusive control over his or her name, photo and likeness. Thus, the best course for any poster artist is to ensure that use of any trademark, name, photo or likeness is authorized by someone verifiably empowered to do so.



Photocopies of these Mark Arminski posters were included as exhibits to the complaints filed against the artist in 1997 by Phish and the Dave Matthews Band. © 1995, 1996 Mark Arminski.

### Ownership of the poster design

Rock posters, as has been noted, can be valuable commodities in their own right. One respected price guide lists the amounts received for single near-mint copies of certain posters at many thousands of dollars. The 1966 "Skull and Roses" poster by Kelley and Mouse and Rick Griffin's 1968 "Flying Eyeball" poster for the Jimi

Hendrix Experience are both listed at \$5,000; the 1966 Jefferson Airplane poster for The Fillmore, known to collectors as "BG1," is listed at \$7,500. One San Francisco area collector recently advertised his numbered sets of Family Dog (1966-1969) and Fillmore West (1966-1972) posters at \$250,000 and \$350,000, respectively; another is asking \$750,000 for both sets together.

Aside from what first-edition copies of posters may be worth, the rights held by their copyright owners can be quite valuable as well. Some of the most popular poster designs from the '60s have been endlessly exploited on album covers, T-shirts and elsewhere. Of course the Copyright Act vests in the copyright owner the exclusive right to make and sell copies of a work, to display the work publicly, to prepare derivative works and to allow others to do the same. Clearly, a poster design that strikes a chord with the public has the potential of becoming a cash cow for a copyright owner, assuming he or she can avoid intractable trademark or right-of-publicity issues with bands or concert halls.

Yet a little over a hundred years ago, it wasn't clear that advertising posters would even be accorded copyright protection. In a 1903 case involving the unauthorized copying of three circus posters, the Supreme Court reversed lower courts that had directed and sustained a verdict for the defendants on the ground that such posters were not within the protection of copyright law. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903).

In the words of Justice Holmes, vindicating the worth of posters and writing for the Supreme Court: "Certainly works are not the less connected with the fine arts because their pictorial quality attracts the crowd . . . A picture is none the less a picture and none the less the subject of copyright, that it is used for an advertisement. And if pictures may be used to advertise soap or the theatre or monthly magazines, as they are, they may be used to advertise a circus." *Id.* at 251. Or, for that matter, a rock concert.

### Contracts with concert halls and bands

Given that rock poster designs and the rights surrounding them can be very valuable, ownership of those rights occasionally has been contested. For the earliest rock posters, there generally were no written agreements regarding the respective rights and obligations of the poster artists relative to the clubs, promoters and bands. In fact, that has been true for the vast majority of posters produced from the '60s until today.

At some point, however, probably after it became apparent that posters could generate a revenue stream wholly apart from the door money that came in for the shows they advertised, promoters such as Bill Graham required poster artists to enter into written agreements. It appears that over the years these agreements have become less friendly to the artists.

When several of the poster artists challenged Family Dog owner Chet Helms' claimed ownership of the rights in the Family Dog posters created before Jan. 1, 1978, the effective date of the 1976 Copyright Act, the court ruled that the posters were works made for hire under the 1909 act and that Helms owned the rights.

Since 1978, savvy promoters and bands have included in their agreements either language that makes it clear the artist is assigning to the promoter or band all right, title and interest in the work or explicit work-for-hire language or both. As is common in recording-artist agreements, in case the work subsequently is deemed not to be a work made for hire, an assignment-of-copyright provision is included in addition to the work-made-for-hire language.

An artist may find that a written agreement commissioning the creation of a band poster is a handy thing to have when that band begins suing unauthorized artists, but more often than not the price for such freedom from infringement claims is ownership of his or her copyright in the work. Sophisticated bands and clubs typically want to own the copyright in the poster design, particularly if it's been created from scratch specifically for one of their events.

Nonetheless, it is common for the artist to retain ownership of the original art and the right to use the work in retrospectives. Sometimes, if the poster design incorporates a free-standing or pre-existing work, such as a painting to which text is later added, the artist grants only an exclusive license in the poster to the party commissioning it. The license would allow the commissioning party to use the poster design to promote the show or in any other way it chooses. To the artist, however, is reserved the right to license others to use the work itself as long as it isn't used for another poster.

One unreasonable and woefully overbroad provision sometimes found in poster contracts is the typical warranties and representations paragraph that presumes the artist is sole owner of all rights in the poster design. A poster is meant to advertise a specific concert at a particular club on a particular date. It is reasonable to expect that the poster artist would create an original design and thus that he or she could warrant that it does not infringe the copyright in something else.

But it makes no sense for the poster artist to warrant or guarantee, as he or she is routinely asked to do, that the design does not infringe any "other proprietary rights of third parties" or that the artist has "the power to grant all rights contemplated by the agreement, including, but not limited to, trademark rights, rights of privacy or publicity or any other proprietary rights owned by third parties."

The poster necessarily will include band and club trademarks that the artist has no rights to (except in those unfathomably rare instances where the poster artist is also the only performer advertised as well as the owner of the location and its trademarks). The party commissioning the poster and more than likely drafting the agreement (the club or band or possibly the record label), would be in a much better position than the artist to guarantee that the band and location trademarks weren't being infringed or the performers' rights of publicity transgressed.

Despite the trend to memorialize in writing agreements between poster artists and promoters, clubs and performers, such contracts remain the exception rather than the rule. It is like-

ly that in most cases, even today, when a poster artist is commissioned to create a poster, there is absolutely no discussion about who owns the rights in the design. Typically, by default, the artist as creator of the work would own the copyright. But no doubt some promoters and bands may erroneously assume that they own the copyright in any poster they commission, by virtue solely of paying for its design and printing.

For performers who wish to tightly control their images, it may make sense to find poster artists or studios they like and to use them exclusively for all of their concert posters. Some bands enter into exclusive agreements with artists or studios they are fans of, for all of the posters needed for an entire tour. One popular band has cut an exclusive deal for all of its 2005 poster needs with a design studio in Austin, Texas.

The studio creates a different design for each stop on the band's tour. Each design features the artists' interpretation

## The poster community generally shared a common love and appreciation for rock art.

of a specific lyric by the band. The simple agreement sets out how many posters will be printed for each show, who gets them and how the money is split. The agreement specifies that the poster runs are limited, but reportedly it doesn't address who owns the copyrights.

### Third party acquisition of rights

In addition to all of the other twists complicating the intricate and ever-evolving choreography between artists, bands and promoters, an interloper of sorts has now crashed their decades-old dance. There had always been poster collectors and dealers who made a

handsome profit selling posters, but rights in the poster art remained with the artists or the entities that had hired them to create the posters. Dealers were interested in the posters themselves and, except for the most unscrupulous among them, they were not interested in reprinting the posters or preventing anyone else from displaying them.

Despite the occasional squabble between an artist and promoter or dealer, the members of the poster community generally shared a common love and appreciation for rock art and a desire that the posters be seen by as many people as possible. That may no longer be true.

Legendary rock impresario Bill Graham put on thousands of shows and commissioned thousands of rock posters and handbills from the mid '60s on; and after his untimely death in 1991, the company he founded, Bill Graham Presents, continued to produce shows and commission original posters. Currently, however, the rights to almost all of those posters are owned neither by the poster artists who created them, nor by the musicians featured on them, nor by Bill Graham Presents.

Graham's estate sold his organization to a handful of Bill Graham Presents executives in 1995, who in turn sold it to a Wall Street banker from whom it was purchased by an enormous media conglomerate which, in 2002, sold to a Minnesota company for approximately \$5.5 million that portion of the business known as the Bill Graham Archives (BGA). The deal included what was in essence a quit claim deed for all of the copyrights in BGA posters created through the year 2000 and all copies of those posters in the Archives at that time.

The Minnesota company launched a Web site from which to sell its posters. It named the site Wolfgang's Vault as an esoteric reference to Bill Graham's real name, Wolfgang Grajonca and presumably to add a patina of poster bona fides.

So far, the organization behind Wolfgang's Vault (WV) has been injudiciously aggressive about asserting its newly acquired poster muscle. It has prohibited at least one independent rock-poster archive site, ClassicPosters.com, from displaying images of any BGA posters.

Accordingly, in place of each image of a BGA poster, ClassicPosters.com has posted a notice stating “Image forbidden — copyright holder requests that we not show image.”

Also, WV has sent cease-and-desist letters to collectors and dealers who’ve posted BGA posters for sale on eBay or elsewhere. Although Graham died before the widespread popularity of the Internet and eBay, reportedly he did not make it a practice to threaten collectors or dealers who circulated ads or catalogs featuring posters in which Bill Graham Presents owned the rights. Possibly because he felt that the more people saw those posters and understood there was a thriving market for them, the more the posters and his rights in them were worth.



“Image Forbidden” notice used by ClassicPosters.com in place of poster images owned by Wolfgang’s Vault.

By contrast, WV has threatened legal action against people attempting to sell posters on eBay based on the premise that the sellers have made copies of the posters and publicly displayed them, thus infringing exclusive rights owned by WV.

Of course, legitimate owners of individual posters are free to sell their posters according to the First Sale Doctrine. As codified in the Copyright Act, the First Sale Doctrine provides that the “owner of a particular copy or

phonorecord lawfully made under this title or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.” 17 U.S.C. § 109(a).

This doctrine attempts to strike a balance between assuring sufficient reward to the copyright owner and permitting unimpeded circulation of copies of the work. Whether the First Sale Doctrine offers any cover to the poster sellers in this particular instance has not yet been tested in the courts.

Few poster dealers have the financial wherewithal to call WV’s bluff; and that’s even more true for ordinary folks interested in nothing more than selling that one dog-eared Dead poster they picked up in the ‘60s. While conceding that someone “may have the right to sell an original [poster]” on eBay, WV has nonetheless demanded that such a seller refrain from displaying any photographic images of the poster that’s for sale. In light of WV’s position on this issue, it’s interesting that WV displays on its own site, without authorization, the images of hundreds of posters in which it does *not* own the rights, including more than 300 Family Dog items.

Historically, few poster copyright owners have felt the need to withhold their works from the public. Generally the artists want their work seen by as many people as possible — and so do venues and promoters, because as long as they’re in business, even posters for past events function as a form of advertising.

Artists who’ve had the rights to their posters purchased by WV have found those images withheld not just from archive Web sites but also from influential books about poster art. The *Art of Modern Rock* includes posters by more than 375 of the world’s most popular rock poster artists. Published by Chronicle Books in 2004, it is arguably one of the most significant books ever produced on the subject. Yet some of the best work of a number of important poster artists was excluded because WV declined to allow the authors to use any of the posters in which it claims ownership.

In 2003, WV had sued another publisher that reproduced BGA posters without permission. *Bill Graham*

*Archives, LLC v. Dorling Kindersley Ltd.*, No. 03 Civ. 9507 (S.D.N.Y. May 11, 2005). In 2003, Dorling Kindersley (DK) published *Grateful Dead: The Illustrated Trip*. As the title suggests, the book contains a wealth of visual images — more than 2,000 photographs and reproductions of art work. Among those 2,000 images are a handful of reduced reproductions of posters the copyrights of which apparently were included in the BGA intellectual property purchased by WV.



Because this poster created by the author for a 2002 Los Lobos concert fell outside the range of Fillmore posters acquired by Wolfgang’s Vault, the latter was unable to contest its inclusion in the *Art of Modern Rock*. © 2002 Fillmore Corp.

It appears that before the book was published, the parties attempted to work out an agreement regarding licensing fees, but for some reason the deal fell apart. As explained by the court, Grateful Dead Productions, which was cooperating with DK, initially approached WV on DK’s behalf. While not rebuffing the Grateful Dead outright, WV said it would allow reproduction of the poster images in exchange for the band granting WV the right “to create CDs and DVDs out of [WV’s] archived audio and video recordings of Grateful Dead concerts.” *Id.* at 2.

Predictably, the Grateful Dead rejected that offer and from then on DK dealt with WV directly. By autumn 2003, a deal regarding six works had been reached but negotiations stalled over two additional works — a 1967 poster by Jim Blashfield advertising a Sept. 15 concert at the Hollywood Bowl featuring Jefferson Airplane, the Grateful Dead and Big Brother & the Holding Company and a 1966 Fillmore poster designed by Wes Wilson advertising Aug. 12 and 13 performances by Jefferson Airplane and the Grateful Dead. WV offered to license these images for \$2,500 each.

On Nov. 17, 2003, a representative of WV sent DK two e-mails. The first stated “you have included at least three, if not more, images that we own and have the copyright to.” The second threatened that “if we do not have an agreement by close of business tomorrow, I will instruct [our lawyers] to take the most aggressive action possible.” *Id.* at 3.

Approximately one week later, WV made good on its threat by filing suit against DK for copyright infringement; WV alleged that it owns the copyright in seven posters reproduced in the book and that DK included them without permission. For some reason, WV made no mention of the eighth poster in its complaint — Wes Wilson’s 1966 Jefferson Airplane/Grateful Dead poster. In addition to an injunction, WV sought \$1,050,000 in statutory damages. Cross motions for summary judgment were filed, with DK arguing that the inclusion of seven small poster images in its book about the Grateful Dead was a fair use.

The 1976 Copyright Act has set out four factors for courts to consider when dealing with fair use cases such as this: (1) the purpose and character of the use, including whether the use is commercial or nonprofit; (2) the nature of the underlying copyrighted work; (3) the amount and substantiality of the portion used in relation to the underlying work as a whole; and (4) the effect of the use on the potential market for the underlying work. 17 U.S.C. § 107.

After conducting its fair-use analysis, the court granted summary judgment in favor of DK. It found that the first factor weighed heavily in favor of finding fair use because the book is a biog-



**After seeking \$2,500 to license a thumbnail reproduction of this 1967 Jim Blashfield poster for a book about the Grateful Dead, the putative copyright owner brought a \$1.05 million infringement suit against the publisher when the Blashfield thumbnail and six others appeared in the book without permission. © 1967 Bill Graham.**

raphy of the band — a kind of criticism, comment or research — that fits among the uses listed in the preamble to § 107 as examples of possible fair use. Also, the court found that DK’s “thumbnail use” of the images in a timeline was “sufficiently transformative and different from the original purpose to advertise, draw attention to and solicit listeners to an event, such that the market is not one to be expected to be reserved to the copyright holder.” *BGA v. DK*, No. 03 Civ. 9507 at 7-8.

The second factor weighed slightly in favor of fair use because the posters are creative works. Although it was undisputed that DK had reproduced the posters in their entirety, the third factor weighed in favor of fair use because each image was reduced to approximately 15 percent of its original size and each occupied approximately one tenth of one page in a 480-page book.

Concluding that DK’s use had no substantial effect on the market for the original use because DK’s use was outside the ambit of lost licensing opportu-

nities, the court determined that the fourth factor also weighed in favor of fair use. Finally, the court noted that DK’s effort to license the images weighed in favor of fair use as well because it indicated good faith on DK’s part. Thus, on balance, the factors in favor of finding fair use were controlling and the court held that DK’s use was noninfringing.

Poster artists may be conflicted regarding the outcome of the DK case because, although it can and probably should be read quite narrowly, they nonetheless may find its implications for poster artists who own the rights to their own work troubling. It appears that artists almost universally disapprove of how WV has conducted itself. WV clearly values the posters it owns the rights to, but not, apparently, the dynamics of the community that created them. The consensus among artists seems to be that, for all WV’s tough tactics, it has done little to support them and actually has made it more difficult for the public to view and appreciate their work.

Nonetheless, as much as artists might like to see WV get its comeuppance, they should realize that any broadening of the *BGA v. DK* rationale might tend to undermine their own ability to control the use of works in which they still own the rights. It appears that WV will appeal to the 2nd Circuit. If it does, many poster artists may find it difficult to make a rational decision about whom to root for.

Creating rock posters has never been about what’s logical, rational or predictable — or about getting rich. Since the 1960s, the best posters have been born primarily out of the poster artists’ passion for the music. For not only does a poster invite the audience to attend an event, but after the concert is over, long after the last notes have faded and the stage lights have gone dark, that poster continues to provide a powerful physical link between the band and its audience — both the audience that actually attended the show and that broader audience of fans who wish they had.

Serious poster artists don’t take this responsibility lightly and their posters have contributed much to the rich culture surrounding popular music. Although change is inevitable and must be dealt with, it is to be hoped that the freedom traditionally given poster artists to express their passion for the music is

not extinguished by avarice and niggling over-control.

## Conclusion

Over the last 40 years, as with most things, the world of rock posters has grown significantly more complex — even fairly contentious. Gone are the days when a poster artist could rely on a concert promoter's assurances that a poster the artist created for a show wouldn't run afoul of the band's merchandizing or marketing machinery. Gone are the days when a promoter or club could assume that because it commissioned a poster it owned the copyright. Today, bands, clubs and poster artists all tend to pay much more attention than they did in the past to the intellectual property rights inherent in posters.

In addition to the function of rock posters as advertising, some posters also will enjoy lasting value as decorative art or as important historical artifacts. Some are worth a lot of money already; others will be. These days, vintage posters command ever higher prices among collectors and there is a growing appreciation for today's newly minted posters. For all of these reasons, now more than ever before, each party connected to the creation and dissemination of rock posters should be conscious of the legal issues involved.

It goes without saying that when concert promoters book bands, they should pay attention to the advertising and merchandise provisions in the bands' live personal appearance agreements. Promoters shouldn't mislead poster artists regarding what a band has authorized them to do; they shouldn't promise more than the band has granted them the authority to deliver. It can't be comfortable being caught in the middle of a dispute between a poster artist and a band that feels wronged and wants to make an example of someone.

Bands should jealously guard their trademarks and should exercise strict control over the names, photos and likenesses of their members. To the extent that they wish to own the artwork on their packaging and promotional materials, they should secure rights in it and they should enforce their copyrights. It may make sense, however, to appreciate the difference between a bootlegger and an artist actually hired to create a promo-

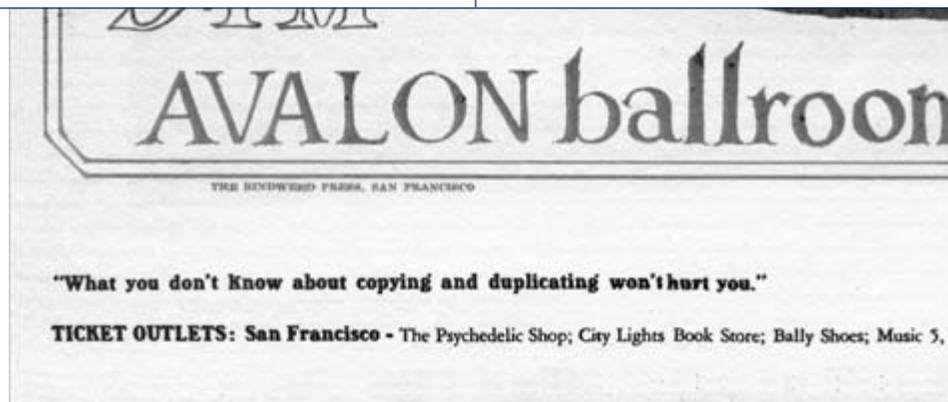
tional poster for one of their shows.

Bands can take an active interest in who is commissioned to design their posters: They may wish to establish some parameters and allow local promoters to oversee the process; or they may want to find studios they like and contract with them exclusively.

Whichever way they go, it is worth remembering that in terms of leaving a legacy, a brilliant poster design may provide as much of a lasting impression of a band as anything else. Although most any band would surely rather be remembered for its music than simply for the appearance of its name on a poster, being remembered *at all* is a good thing. Some of the bands mentioned on land-

der the immense reservoir of good will that has collected around rock poster art over the years.

Rock poster artists should be keenly aware of the ways in which copyright law protects them and the ways in which it protects others. When they are presented with a written agreement, they need to actually read it and seek legal advice regarding anything they either don't understand or are unsure of. An artist should fight for fair terms and should refuse to warrant or guarantee things over which he or she has no control — that the necessary inclusion of particular third-party trademarks, names, photos or likenesses in the design, for example, doesn't infringe the proprietary rights of third parties. Clearly, where the other party to the agreement is the



Detail showing the line added by Chet Helms to Kelley and Mouse's "Zig Zag Man" poster. © 1966 Chet Helms DBA Family Dog Productions.

mark Family Dog and Fillmore posters are as famous for being included on those posters as they are for their contribution to the history of rock music.

Copyright assignees should protect their valuable rights in the posters they control. To the extent that they have painstakingly sought out and purchased these posters and copyrights, they should be commended. Commended for recognizing the value in the posters and the underlying designs. Commended as well for whatever they do to preserve the physical posters in their possession.

It might be to their advantage, however, not to be overly aggressive or unreasonable when dealing with the artists who created the posters, collectors who may cherish them and dealers who have made selling rock posters a viable business. Aside from the equities involved, it would be a shame to squan-

band, club or promoter, that other party is in a much better position than the artist to make such a guarantee.

Where possible, artists should insist on written authorization to use marks, names, photos and likenesses and should clear with the bands and concert halls any arrangement for selling their posters themselves. To the extent that lawyers can make their legal services available to poster artists through lawyers-for-the-arts organizations, that might go a long way toward setting this perpetually impecunious group on the right track.

Ideally, every party benefiting from a rock poster or involved in its creation should understand and appreciate the interests at stake. The 1966 "Zig Zag Man" poster for Big Brother & the Holding Company famously includes the line "What you don't know about copying and duplicating won't hurt you." Notwithstanding Family Dog's experience, don't bet on that.

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